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Legislation Review Committee

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987:*

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:
  (a) to consider any Bill introduced into Parliament, and
  (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    (i) trespasses unduly on personal rights and liberties, or
    (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    (iv) inappropriately delegates legislative powers, or
    (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

(1) The functions of the Committee with respect to regulations are:
  (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    (i) that the regulation trespasses unduly on personal rights and liberties,
    (ii) that the regulation may have an adverse impact on the business community,
    (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    (vii) that the form or intention of the regulation calls for elucidation, or
    (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are:
  (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page iii).

Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page iii).

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2008

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2008

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2008

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Board of Adult and Community Education Repeal Bill 2008

Issue: Denial of Compensation – Clause 4 (b) Members of Board to vacate office

6. While the Committee notes that the Board of Adult and Community Education agreed unanimously to the disbanding of the board, the Committee also notes that the proposed clause 4 (b) removes the right to remuneration or compensation as a result of the loss of office when the Bill repeals the Act and disbands the Board. Accordingly, the Committee considers this may unduly trespass on personal rights of Board members, and refers this to Parliament.

2. Clean Coal Administration Bill 2008

11. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

3. Consumer, Trader and Tenancy Tribunal Amendment Bill 2008

Issue: Retrospectivity – Schedule 1 [26] proposes to insert Schedule 6, Part 3, clause 11: Enforcement of orders - where section 43, as amended by the amending Act, extends to an order made before that amendment and to any recommencement of proceedings in relation to that order.

22. The Committee notes that inserting a time limit retrospectively for within which proceedings may be recommenced for failure to comply with a tribunal order could unduly trespass on a person's right to order his or her affairs in accordance with the current law when such orders or proceedings were made, and refers this to Parliament.

Issue: Commencement by proclamation - Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

24. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

4. Crimes (Administration of Sentences) Legislation Amendment Bill 2008

Issue: Excludes merits review – Schedule 1 – proposed sections 155 (4), 156 (3), 176 (4), 177 (2)

18. The Committee will be concerned when legislation seeks to exclude merits review, unless there is a strong public interest in doing so. However, the Committee notes that merit review is still available for grounds referred to in subsection (1) of the current Act with regard to the above respective sections. These reviewable grounds relate to allegations that the decision of the Parole Authority or that the order (periodic detention, home detention or parole order) has been made on the basis of false, misleading or irrelevant information. Accordingly, the Committee does not consider the proposed amendments unduly trespass individual rights and liberties.

5. Dividing Fences and Other Legislation Amendment Bill 2008

Issue: Commencement by proclamation - Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

16. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

6. Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*

5. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.

7. Higher Education Amendment Bill 2008

18. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

8. Justices of the Peace Amendment Bill 2008

6. The Committee has not identified any issues under section 8A(1)(b) of the Legislation Review Act 1987.

9. National Gas (New South Wales) Bill 2008

Issue: insufficient scrutiny of legislative powers

16.	**The need for national oversight and co-ordination on energy policy and practice provide, in the Committee's view, adequate justification for the legislative arrangements that have been developed. What appears remiss in the scheme is the absence of any realistic scrutiny role for the NSW Parliament. On the basis of the Minister's statements in his Agreement in Principle speech NSW involvement in the development of the scheme appears to have been limited to the Treasury and the Department of Energy and Water. Although the NSW Parliament has the present Bill before it there is no scope to debate the need for any modification of the National Gas Law as it has already been signed off by all parties including NSW. The Committee is of the opinion that it would be an advantage if the NSW Parliament could be given an earlier opportunity, possibly through an exposure draft, to express its views on future national scheme legislation rather than have it presented for adoption in a final form that has already been agreed to or implemented by the Commonwealth and the other Australian states.**

10. Port Macquarie-Hastings Council Election Bill 2008*

7.	**The Committee has not identified any issues under section 8A(1)(b) of the Legislation Review Act 1987.**

11. State Arms, Symbols and Emblems Amendment (Black Opal) Bill 2008

7.	**The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.**

12. State Emergency and Rescue Management Amendment (Botany Emergency Works) Bill 2008

Issue: Emergency powers

6.	**The Committee is satisfied that there is an overriding public interest justifying the emergency powers contained in this legislation and that this has been comprehensively recognised by all parties during the Parliamentary debates.**

13. Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*

Issue: Absolute Liability

Schedule 1 – Division 3 – Labelling of beverage containers: Proposed section 18E Beverage containers must be labelled as refundable; and proposed section 18F (2) Regulations may impose further labelling requirements

Schedule 1 – Division 5 - Refund Scheme: Proposed sections 18H (1) and (2) Collection depot to pay refund

Schedule 1 – Division 10 – Barcoding of beverage containers: Proposed section 18S Supply of barcode

19. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence, which does not allow for a defence or reasonable excuse. The Committee, therefore, considers the proposed sections 18E, 18F, 18H (2), and 18S, as creating absolute liability offences, with the absence of any defence of reasonable excuse, which may amount to an undue trespass on individual rights and liberties, and refers it to Parliament.

20. The Committee further considers that strict liability (with the availability of a reasonable excuse or defence), rather than absolute liability for the above provisions in the Bill may achieve the same aim of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance.

14. Workers Compensation Amendment Bill 2008

Issue: Absolute Liability

Schedule 1 [12] - proposed section 213 - Deposit required for self-insurers and former self-insurers; and Schedule 1 [16] - proposed section 215 (4) – Alternative method of giving security:

20. The Committee stresses that the presumption of innocence is a fundamental right. It highlights that the imposition of strict or absolute liability removes the requirement on the Authority to prove that the person intended to commit the offence. Therefore, the Authority is not required to prove that the person had the requisite criminal intent, merely that the act was committed and as the Bill is silent on the availability of any reasonable excuse or defence, the above amendments create absolute liability.

21. However, the Committee considers that given the maximum penalty that may be imposed is monetary (which does not involve imprisonment), and also the public interest in ensuring compliance with the proposed amendments to obtain deposits or securities from current and former self-insurers to ensure ongoing claim liabilities, (including for dust diseases), and that the amendments aim to assist in protecting the workers compensation scheme in the event that there is a shortfall in security and a self-insurer or former self-insurer is unable to fund their liabilities, the Committee concludes that personal rights and liberties are not unduly trespassed.

Issue: Reverse Onus of Proof – Schedule 1 [8] - proposed section 156B (4) Recovery from directors of corporation – insurance requirements:

24. The Committee concludes that a reversal of the onus of proof may be appropriate in these circumstances particularly where knowledge of the factual circumstances is in the possession of one party, and the person who is a director of a corporation could be in possession of knowledge of facts to establish the excuse or grounds as to not being culpable of a contravention by the corporation.

Issue: Retrospectivity – Schedule 1 [11] - proposed section 176 (3) and (4) Licences to be re-granted only to existing licensing holders:

26. The Committee will always be concerned to identify the retrospective effects of legislation, which may have an adverse impact on a person. The proposed amendments could have an adverse impact on licence applicants who have applied before the commencement of the section and also, have an adverse impact on those who have a licence granted under the current legislation except for the proposed section 176 (4) when after the date the Bill was introduced into the Legislative Assembly, yet before the passing of the Bill or commencement of the amendment Act, would make their licence ineffective through the retrospective application of the amending section.

27. The Committee considers this would cause loss and adverse impact to persons who have acted on the basis of the current legislation. The Committee notes the retrospective effect of revoking a licence duly made under current law trespasses on a person's right to order his or her affairs in accordance with the current law, and refers this to Parliament.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. BOARD OF ADULT AND COMMUNITY EDUCATION REPEAL BILL 2008

Date Introduced:	9 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Della Bosca MLC
Portfolio:	Education and Training

Purpose and Description

1. This Bill repeals the *Board of Adult and Community Education Act 1990*; and for related purposes.

Background

2. According to the Second Reading Speech:

> In late 2006, the Board of Adult and Community Education agreed that the board should be disbanded and replaced by an advisory committee. The term of the Board of Adult and Community Education was extended to allow a period of discussion and consultation with the adult education sector. On 23 June 2007 the Board of Adult and Community Education agreed unanimously to the disbanding of the board. On 14 July 2007 the Minister agreed, and this was minuted at the final meeting of the Board of Adult and Community Education on 23 July 2007. There is broad sector and community support for an advisory committee with wide representation from the sector and from government departments involved in adult and community education. The advisory committee is to meet for the first time later in April.

The Bill

3. The object of this Bill is to repeal the *Board of Adult and Community Education Act 1990* and to formally disband the Board of Adult and Community Education.

4. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 is a formal provision that repeals the *Board of Adult and Community Education Act 1990*.
Clause 4 provides that a person who, immediately before the repeal of the *Board of Adult and Community Education Act 1990*, held office as a member of the Board of Adult and Community Education:

(a) ceases to hold that office on that repeal, and

(b) is not entitled to any remuneration or compensation because of the loss of that office.

Schedule 1 Amendment of other Act and Regulation
Schedule 1.1 and 1.2 make consequential amendments to the *Freedom of Information Regulation 2005* and the *Technical and Further Education Commission Act 1990*.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issue: Denial of Compensation – Clause 4 (b) Members of Board to vacate office

5. Proposed clause 4 provides that a person who, immediately before the repeal of the *Board of Adult and Community Education Act 1990*, held office as a member of the Board of Adult and Community Education:

(a) ceases to hold that office on that repeal, and
(b) is not entitled to any remuneration or compensation because of the loss of that office.

6. **While the Committee notes that the Board of Adult and Community Education agreed unanimously to the disbanding of the board, the Committee also notes that the proposed clause 4 (b) removes the right to remuneration or compensation as a result of the loss of office when the Bill repeals the Act and disbands the Board. Accordingly, the Committee considers this may unduly trespass on personal rights of Board members, and refers this to Parliament.**

The Committee makes no further comment on this Bill.

2. CLEAN COAL ADMINISTRATION BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Nathan Rees MP
Portfolio:	Emergency Services, Water

Purpose and Description

1. This Bill seeks to establish the Clean Coal Fund to provide funding for clean coal technologies; and to establish the Clean Coal Council.

2. This Bill establishes a fund for research into, and development of, clean coal technologies, including demonstration projects. The fund will be able to be used to increase public awareness of clean coal technologies and for the commercialisation of clean coal technologies. The NSW Government will contribute to the fund. There is also provision for voluntary contributions to the fund. This means that the coal and electricity industries or other non-government organisations can contribute to reducing greenhouse emissions through the development of clean coal technologies.

3. It also establishes a Clean Coal Council. The council will make recommendations to the Minister for Mineral Resources on the funding of projects. The council can also make recommendations on policies to encourage the development and implementation of clean coal technologies. The Minister will report to Parliament annually detailing allocations of funds for specific projects and other activities. Members of the council will be drawn in equal numbers from the Government and from the coal industry.

Background

4. According to the Agreement in Principle speech:

> The industry has committed $1 billion over 10 years through the COAL21 Fund. Of this, $400 million will go towards projects in New South Wales. Industry will work together with Government to allocate the funds from both sectors. By working together, industry and government will be able to achieve much more than each sector working alone. The Clean Coal Administration Bill will ensure that funds are available and allocated for the best research into these important technologies. When established, these technologies will significantly reduce greenhouse gas emissions from the generation of electricity.

5. Further on, the Agreement in Principle speech stated:

> The 2006 Stern report on the economics of climate change has highlighted to the world the need to reduce global emissions. The report also talks of the necessity of taking action now to protect national economies in the future. The latest assessment report of the United Nations Intergovernmental Panel on Climate Change has confirmed that warming of the earth's climate system is unequivocal. The evidence shows clearly that global greenhouse gases are the major contributors to global warming. Further, due to human activity, greenhouse gases increased by 70 per cent

> between 1970 and 2004. The international panel's report is also clear that a country's capacity to mitigate greenhouse gases is closely tied to its social and economic development.
>
> Turning to the situation in New South Wales, it is well known that over 90 per cent of the State's energy needs are generated from coal. It is no secret that coal provides us with an abundant source of very cheap energy, but we must recognise that in 2004 New South Wales produced approximately 10 per cent of all Australian greenhouse gas emissions from its coal generated energy production. So the challenge for New South Wales is the issue highlighted in the report of the Intergovernmental Panel on Climate Change, that is, to mitigate greenhouse gases in ways which avoid conflict, to the greatest possible extent, with sustainable development. That is why the New South Wales Government has already set about cutting greenhouse gas emissions by 60 per cent by 2050 and returning to year 2000 levels by 2025.

6. The Commonwealth Government has also introduced a target of 20 per cent of Australia's electricity supply from renewable sources by 2020.

7. The speech referred to the economic aspects of the coalmining industry:

> The coalmining industry provides significant revenues for Australia through exports and to New South Wales through the royalties it pays. The value of New South Wales coal production in 2006-2007 was $8.1 billion, and the industry paid royalties of $412 million. From anyone's perspective, this is a major contribution to both the national and State economy. At the same time the industry plays a significant role in regional economies where coal is mined. It does this through job creation, investment and regional development. The coalmining industry employs about 10,000 people in regional New South Wales and a further 30,000 people are employed indirectly. It also makes substantial contributions to local infrastructure and local communities. All of these factors, national, State and regional, show clearly the important role the coal industry plays in the economy of New South Wales.

8. The Agreement in Principle also referred to an interim report by Professor on climate change:

> He said that the development of low-emissions technology for the energy sector is of particular importance to assist "Australia's transition to an emission-constrained future". Clean coal technologies are already being researched and developed, both within Australia and internationally. These include combustion technologies, and capture and storage technologies.
>
> Capture and storage of carbon dioxide, or geosequestration, is already being successfully used in other industry applications. Well known examples include Sleipner off the Norwegian coast, Salah in Algeria, and Weyburn in Canada. Here in Australia, clean coal technologies are at various stages of development. Some of the technologies have been developed at a research or pilot project level. For example, at Munmorah on the New South Wales Central Coast, a pilot carbon capture plant is expected to be operational in the middle of this year. It will capture greenhouse gas emissions from the Munmorah power station using ammonia absorption technology. It is planned that the project will move to the demonstration phase by 2013. Another clean coal technology, carbon geosequestration, is being set up as a demonstration project off the coast of Victoria.

The Bill

9. The object of this Bill is to establish the Clean Coal Fund (to provide funding for clean coal technologies) and the Clean Coal Council (to give advice and make recommendations in relation to funding and clean coal technologies).

10. Outline of provisions

Part 1 Preliminary

Clause 3 defines certain words and expressions used in the proposed Act. ***Clean coal technologies*** is defined to mean technologies for facilitating reduction of greenhouse gas emissions from the use of coal.

Part 2 Clean Coal Fund

Clause 4 provides for the establishment of the Clean Coal Fund (***the Fund***) in the Special Deposits Account, to be administered by the Minister.

Clause 5 sets out the purposes of the Fund which include the provision of funding for the commercialisation and promotion of clean coal technologies and research and development relating to such technologies.

Clause 6 makes provision for payments into the Fund and allows a voluntary contribution to the Fund to be made on the condition that the contribution is to be used only for a specified purpose.

Clause 7 provides that payments approved by the Minister, administrative expenses and payments directed or authorised to be paid from the Fund by or under the proposed Act or any other Act or law are payable from the Fund. Any money paid into the Fund on the condition that it is to be used only for a specified purpose, including any proceeds of the investment of that money in the Fund, is only payable from the Fund for the specified purpose and a proportionate share of the administrative expenses payable from the Fund.

Clause 8 provides for the investment of money in the Fund.

Part 3 Clean Coal Council

Clause 9 provides for the establishment of the Clean Coal Council (***the Council***).

Clause 10 provides that the Council is to consist of 5 members who are employed in or by a government agency, another 5 members nominated jointly by the Australian Coal Association and the Minerals Council to represent the NSW black coal industry and any other suitable person that the Minister may appoint from time to time.

Clause 11 sets out the functions of the Council (including giving advice about funding and matters relating to clean coal technologies and making recommendations about funding and research opportunities).

Clause 12 gives the Council the power to do all things that are necessary or convenient to be done for or in connection with the exercise of its functions.

Clause 13 provides that the Council may establish committees for specified purposes to assist it in connection with the exercise of its functions.

Schedule 1 contains provisions relating to members and procedure of the Council.

Part 4 Miscellaneous

Clause 14 allows the Minister to delegate to an officer of the Government Service the exercise of any of the Minister's functions under the proposed Act or the regulations.

Clause 15 contains a general regulation-making power.

Clause 16 requires the proposed Act to be reviewed 5 years from the date of assent to the proposed Act.

Issues Considered by the Committee

11. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

3. CONSUMER, TRADER AND TENANCY TRIBUNAL AMENDMENT BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Linda Burney MP
Portfolio:	Fair Trading

Purpose and Description

1. This Bill amends the *Consumer, Trader and Tenancy Tribunal Act 2001* with respect to the constitution, jurisdiction, functions and procedure of the Consumer, Trader and Tenancy Tribunal and the functions, qualifications, education and review of members of that Tribunal; and for other purposes.

2. The Bill clarifies members' qualification requirements by providing that members are to have ability or experience in alternative dispute resolution. This will replace the current requirement to have an understanding of, and commitment to, alternative dispute resolution.

3. The tribunal chairperson is already required to be an Australian lawyer. The Bill extends this to apply to the Deputy Chairperson (Determinations), recognising that the position holder is required to act as chairperson from time to time.

4. The chairperson can currently give procedural directions to members about matters they are hearing. The amendment makes it clear that procedural directions can also be given for classes of proceedings. The chairperson will also be able to delegate certain powers of an administrative nature to the registrar and deputy registrars of the tribunal. These will include powers to adjourn proceedings, withdraw an application if requested by the applicant, give procedural directions, and make orders giving effect to a settlement. The specific powers will be prescribed in the regulations.

5. The Bill removes the tribunal's power to apprehend a person who has been served with a summons to appear before the tribunal.

6. There is currently no time limit for the renewal of proceedings after the other party has failed to comply. The review found that this was not appropriate and could lead to cases being renewed many years after the original order was made. The amendment limits the period in which this can be done to 12 months after the compliance date specified by the tribunal.

7. The Bill also introduces a right for parties to make a second application for a rehearing of a matter in limited circumstances. An application can be made if significant new evidence becomes available after the first refusal, and that evidence suggests a substantial injustice has occurred to one or more parties. The application will have to be made within the time period prescribed in the regulations. The chairperson will be able to delegate the power to consider rehearing applications to the Deputy

Chairperson (Determinations). An application for a rehearing of completed proceedings currently cannot be made where the amount in dispute was over $25,000, or another amount prescribed in the regulations. The Bill will remove the reference to a monetary amount from the Act and provide for the threshold to be prescribed in the regulations. It is proposed to increase the threshold to $30,000, in line with the increase to the tribunal's general jurisdiction from $25,000 to $30,000, which was implemented last September.

8. Another amendment will be the establishment of a Professional Practice and Review Committee for the tribunal. The Committee's role will be to review and provide advice on matters referred to it by the Minister, the Commissioner for Fair Trading, the chairperson or another person prescribed in the regulations. Matters that will be able to be considered by the committee include the education, training or professional development of members; performance management of members; complaints against members and remedial or disciplinary action to be taken; and performance and complaints trends.

Background

9. The tribunal came into being in February 2002, replacing the former Fair Trading and Residential Tribunals, and is established under the *Consumer, Trader and Tenancy Tribunal Act 2001*. The tribunal is headed by the chairperson, who is assisted by two deputy chairpersons. The Deputy Chairperson (Determinations) is responsible for the tribunal's adjudication function and assists the chairperson in managing members. The Deputy Chairperson (Registry and Administration) is a non-sitting member and is responsible for the tribunal's financial, administrative and registry functions.

10. This Bill implements the recommendations of the statutory review of the *Consumer, Trader and Tenancy Tribunal Act 2001* and the outcomes of an independent review of the tribunal's operations. The tribunal deals with matters under eight divisions: Tenancy, Home Building, Strata and Community Schemes, Retirement Villages, Residential Parks, Motor Vehicles, General and Commercial divisions.

11. The Bill arises as a result of the Government's consultation with interest groups and stakeholders during a statutory review of the Act's operation. An issues paper was prepared, which looked at areas such as jurisdiction, re-hearings, appeals, member performance and procedure. Forty formal submissions were received. The remaining submissions came from industry and consumer bodies, as well as individual traders, government agencies, and community and legal groups.

12. A report on the review was tabled in Parliament by the Hon. Diane Beamer. The review found that the policy objectives of the Act remain valid and that the terms of the Act are appropriate for serving its objectives. It also found that the legislation could be improved in some areas to better meet the Act's objectives and improve the tribunal's effectiveness. In the course of the statutory review a number of operational issues arose. To respond to these the then Minister for Fair Trading commissioned an independent review of the tribunal's operations. The report on the operational review was publicly released on 13 July 2007.

13. The current time for providing written reasons for decisions by the tribunal is seven days after a request is made by one of the parties to the matter. This issue generated comments in submissions to the review. Many submissions noted the tribunal rarely

provides written reasons within this period. Other comparable tribunals, such as the Administrative Decisions Tribunal, are not subject to seven-day time limits. The review concluded that a 28-day time frame would be more appropriate.

14. The Bill provides for all tribunal proceedings to be sound recorded, unless circumstances make it unreasonable to do so. The requirement for sound recording will increase the transparency of tribunal proceedings and ensure there is an accurate record that could be used to resolve any future complaints.

15. The Bill also creates a new Social Housing Division in the tribunal. The new division will deal with applications relating to social housing premises, which are defined in the *Residential Tenancies Act 1987* as premises leased by a social housing provider. Social housing providers include the Land and Housing Corporation, the Department of Housing, the Office of Community Housing, the Aboriginal Housing Office, and registered community housing organisations. According to the Agreement in Principle speech, tenancy applications make up the bulk of the tribunal's workload, comprising 77% of all applications received in the last financial year. Currently, around 25% of tenancy applications are social housing matters.

16. The Agreement in Principle speech stated that:

> Changes to the Residential Tenancies Act over the past few years have introduced specific social housing provisions, including additional grounds for termination; legal recognition of acceptable behaviour agreements for public housing tenants; and additional consideration tribunal members may give to the special circumstances of social housing tenants. Social housing matters, accordingly, require specialist member knowledge and can take longer to resolve than other tenancy matters. The creation of the Social Housing Division will allow tribunal members to deal with these matters expeditiously whilst not delaying mainstream tenancy matters. Currently, the Act provides for full-time members of the tribunal to be paid in accordance with the *Statutory and Other Offices Remuneration Act 1975*, while the pay of part-time members is determined by the Minister. The bill provides that remuneration of all members is to be determined in the same manner—that is, in accordance with the Statutory and Other Offices Remuneration Act.

17. The statutory review also recommended that the tribunal's maximum general jurisdiction of $25,000 be increased to $30,000. This recommendation was implemented on 1 September 2007 when the Consumer Claims Regulation was remade.

The Bill

18. The object of this Bill is to amend the Consumer, Trader and Tenancy Tribunal Act 2001:

(a) to include additional requirements as to the qualifications of members of the Consumer, Trader and Tenancy Tribunal (***the Tribunal***), and
(b) to clarify that the powers of the Chairperson of the Tribunal (***the Chairperson***) extend to giving procedural directions with respect to classes of proceedings, and
(c) to set out the circumstances in which the Registrar of the Tribunal (***the Registrar***) may exercise functions of a member of the Tribunal or of the Tribunal and to provide additional circumstances in which a Deputy Registrar may exercise functions of the Registrar, and

(d) to remove a power to apprehend witnesses, and
(e) to limit the period within which proceedings may be recommenced if an order of the Tribunal is not complied with, and
(f) to clarify the status of reserved decisions, and
(g) to increase the time (from 7 to 28 days) within which a statement of reasons for a decision must be given, and
(h) to limit applications for a rehearing of completed proceedings if the amount claimed or disputed is more than the amount prescribed by the regulations and to provide that, if an application is refused, a further application may only be made if significant new evidence suggests a substantial injustice to one or more parties to the proceedings has occurred, and
(i) to require sound recordings of proceedings of the Tribunal to be made and kept, and
(j) to establish the Social Housing Division of the Tribunal, and
(k) to provide that the remuneration of part-time members of the Tribunal is to be determined in the same manner as full-time members, and
(l) to establish the Professional Practice and Review Committee to replace the Peer Review Panel and to provide for the membership, functions and procedures of that Committee, and
(m) to replace and update certain references to the Director-General and clarify certain provisions.

19. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
Clause 3 is a formal provision that gives effect to the amendments to the *Consumer, Trader and Tenancy Tribunal Act 2001* set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.

Schedule 1 Amendments
Schedule 1 [1] inserts a definition of ***Commissioner for Fair Trading*** into the *Consumer, Trader and Tenancy Tribunal Act 2001* (***the Principal Act***) and updates the definition of ***Director-General*** in that Act.
Schedule 1 [2] provides that a person cannot be appointed as Chairperson or Deputy Chairperson (Determinations) of the Tribunal unless the person is an Australian lawyer.
Schedule 1 [3] provides that the Minister for Fair Trading (***the Minister***), in determining whether a person has qualifications and skills to be appointed as a member of the Tribunal, is to have regard to whether the person has ability or experience in alternative dispute resolution procedures.
Schedule 1 [4] clarifies that the Chairperson has power to give procedural directions to members of the Tribunal with respect to classes of proceedings.
Schedule 1 [5] replaces a number of references to the Director-General of the Department of Commerce with references to the Commissioner for Fair Trading within the Department of Commerce.
Schedule 1 [6] provides that the Registrar may exercise any prescribed function of a member of the Tribunal or of the Tribunal if the Registrar is authorised by the Chairperson to exercise that function.
Schedule 1 [7] provides that a Deputy Registrar of the Tribunal may exercise the functions of the Registrar as directed by the Chairperson.

Schedule 1 [8] omits a section that provided for the issuing of a warrant for the apprehension of a witness who had been summoned to attend before the Tribunal.
Schedule 1 [9] limits the period within which proceedings may be recommenced for failure to comply with an order. Any such proceedings must now be recommenced within 12 months after the end of the period specified by the Tribunal for compliance with the order.
Schedule 1 [10] clarifies that a reserved decision of the Tribunal is still a decision of the Tribunal and so other provisions of the Principal Act apply to such a decision in the same way as they apply to any other decision of the Tribunal.
Schedule 1 [11] extends, from 7 to 28 days, the period within which a statement of reasons for a decision of the Tribunal must be provided.
Schedule 1 [12] provides that if an application for a rehearing of completed proceedings has been refused, a second application for a rehearing may be made only if the application is made within the time prescribed by the regulations and if the Chairperson is satisfied that significant new evidence has arisen since the application was refused and that evidence suggests a substantial injustice to one or more parties to the proceedings has occurred.
Schedule 1 [13] provides that a person cannot make an application for a rehearing of completed proceedings under section 68 of the Principal Act if the amount claimed or disputed is more than the amount prescribed by the regulations.
Schedule 1 [14] provides that the Tribunal must ensure that, as far as is reasonably practicable, sound recordings of all proceedings of the Tribunal are made and kept.
Schedule 1 [18] establishes the Social Housing Division of the Tribunal.
Schedule 1 [15]–[17] make consequential amendments.
Schedule 1 [19] and [20] provide for the determination of remuneration of part-time members of the Tribunal in the same manner as full-time members.
Schedule 1 [23] omits a provision establishing the Peer Review Panel, establishes instead the Professional Practice and Review Committee and sets out the procedures for the Committee. The Committee comprises the Commissioner for Fair Trading, the Chairperson, the Deputy Chairperson (Registry and Administration), the Deputy Chairperson (Determinations) and 2 persons appointed by the Minister. The Committee has the functions of reviewing and providing advice on matters that are referred to it by the Minister, the Commissioner for Fair Trading, the Chairperson or any other person prescribed by the regulations. Those matters may relate to the education, training or professional development of members, the performance or management of members, complaints against members and remedial or disciplinary action to be taken in relation to any such complaint, trends in complaints or performance and any other matter prescribed by the regulations.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issue: Retrospectivity – Schedule 1 [26] proposes to insert Schedule 6, Part 3, clause 11: Enforcement of orders - where section 43, as amended by the amending Act, extends to an order made before that amendment and to any recommencement of proceedings in relation to that order.

20. Schedule 1 [9] proposes to amend section 43 (2) by limiting the period within which proceedings may be recommenced for failure to comply with an order. Any such proceedings must now be recommenced within 12 months after the end of the period specified by the Tribunal for compliance with the order. The above proposed clause

will provide that where section 43 is amended, it will extend to an order made before the amendment and to any recommencement of proceedings in relation to that order.

21. The Committee will always be concerned to identify the retrospective effects of legislation which may have an adverse impact on a person.

22. The Committee notes that inserting a time limit retrospectively for within which proceedings may be recommenced for failure to comply with a tribunal order could unduly trespass on a person's right to order his or her affairs in accordance with the current law when such orders or proceedings were made, and refers this to Parliament.

Delegation of legislative powers [s 8A(1)(b)(iv) *LRA*]

Issue: Commencement by proclamation - Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

23. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

24. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

4. CRIMES (ADMINISTRATION OF SENTENCES) LEGISLATION AMENDMENT BILL 2008

Date Introduced:	10 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Lands, Rural Affairs, Regional Development

Purpose and Description

1. This Bill makes miscellaneous amendments to the *Crimes (Administration of Sentences) Act 1999*, and to regulations under that Act, as a consequence of a statutory review carried out under section 273 of that Act.

2. This Bill includes amendments related to the Act to:

   - insert an objects clause into the Act,
   - enable the Commissioner of Corrective Services to make submissions with respect to the making of parole orders in exceptional circumstances,
   - modify the provisions of the Act with respect to the appointment and functions of official visitors,
   - formally remove the office of Inspector-General from the Act,
   - enable the Australian Capital Territory to make submissions to the Serious Offenders Review Council in relation to Australian Capital Territory offenders who are in custody in New South Wales,
   - insert introductory notes for all the major parts of the Act, and
   - make other miscellaneous amendments.

3. It also amends the *Crimes (Administration of Sentences) Regulation 2001* to:

   - ensure that the right to make telephone calls to exempt bodies cannot be withdrawn from inmates for the purposes of punishment,
   - ensure that inmates suspected of having committed offences cannot be confined to their cells for more than 48 hours, and
   - clarify that inmates who are confined to their cells due to a correctional centre lockdown do not need to be observed daily by Justice Health.

4. Schedule 1 [2] inserts proposed new section 2A into the Act which sets out four objects of the Act:

- to ensure that inmates in custody are removed from the general community and placed in a safe, secure and humane environment;
- to ensure that offenders who are required to be supervised are kept under supervision in a safe, secure and humane manner;
- that the safety of people whose work it is to supervise offenders is not endangered; and,
- to provide opportunities for the rehabilitation of offenders to re-integrate them back into the general community.
- In the pursuit of these objects due regard is to be had to the interests of victims.

5. The Bill specifies that nothing in the proposed section 2A can form the basis of civil litigation proceedings or be taken into account in any civil proceedings.

6. The remainder of Schedule 1 to the Bill includes consequential amendments, including an amendment to sections 155, 156, 176 and 177 of the Act to make it clear that the Supreme Court does not have the jurisdiction to review the merits of a decision by the Parole Authority otherwise than on the grounds referred to in subsection (1) of the current Act under their respective sections.

Background

7. The *Crimes (Administration of Sentences) Act 1999* is the consolidation of several Acts relating to the administration of sentences, such as the *Correctional Centres Act 1952*, the *Community Service Orders Act 1979*, the *Periodic Detention of Prisoners Act 1981*, the *Home Detention Act 1996*, and the parole provisions of the *Sentencing Act 1989*. The Bill proposes to add introductory notes under the major parts of the Act to assist in understanding the construction of the legislation.

8. The *Crimes (Administration of Sentences) Act 1999* is the principal Act that governs the administration of sentences in New South Wales. The object of this Bill is to make miscellaneous amendments to the *Crimes (Administration of Sentences) Act 1999,* and to regulations under that Act, as a consequence of a statutory review carried out by Ms Irene Moss, AO, under section 273 of the Act, which was tabled in both Houses of Parliament on 1 April 2008.

9. Existing section 160 of the *Crimes (Administration of Sentences) Act 1999* enables the State Parole Authority to make an order directing the release of an offender on parole who would not otherwise be eligible for release on parole if the offender is dying or, if the Parole Authority is satisfied that it is necessary because of exceptional extenuating circumstances.

10. Proposed new section 160AA allows the Commissioner of Corrective Services to make submissions with respect to the making of parole orders in exceptional circumstances, and provides that the Parole Authority must not make a decision without taking the commissioner's submission into account. This provision parallels existing section 141A of the Act, which covers submissions by the commissioner in relation to parole orders in ordinary circumstances.

11. Schedule 1 [21] inserts a new section 228, which deals with the appointment and functions of official visitors who are ministerially appointed community representatives to visit correctional centres and provide independent reports about the welfare of inmates. According to the Second Reading speech:

> the new section differs from the old section in that it changes the official visitor scheme to provide that the Minister for Justice approve the appointment of official visitors generally and not to a specific correctional centre; that the Department of Corrective Services administer the official visitors scheme on behalf of the Minister for Justice; that the Minister be compelled to appoint sufficient numbers of official visitors to cover absences and emergency situations; and that official visitors not be appointed to specific correctional centres, but that at least one official visitor be assigned to each correctional facility at all times. The new section also makes the important clarification that there are no investigative or general auditing functions assigned to official visitors.

12. The Office of the Inspector-General of Corrective Services closed in 2003. Therefore, the Bill removes all references in the Act and the regulation to the Inspector-General or the Inspector-General's Office.

13. The Bill also amends section 71 of the Act to provide that the Australian Capital Territory may make submissions in proceedings before the Serious Offenders Review Council with respect to the reduction in classification of serious offenders who are in custody in New South Wales under Australian Capital Territory law. This is similar to the power that the New South Wales has in relation to serious offenders being held in custody under New South Wales law.

The Bill

14. The object of this Bill is to amend the Crimes (Administration of Sentences) Act 1999 (**the Act**) so as:

(a) to insert an objects clause into the Act, and
(b) to enable the Commissioner of Corrective Services to make submissions with respect to the making of parole orders in exceptional circumstances, and
(c) to modify the provisions of the Act with respect to the appointment and functions of Official Visitors, and
(d) to abolish the office of Inspector-General, and
(e) to enable the ACT to intervene in proceedings before the Serious Offenders Review Council in relation to offenders who are in custody in NSW under ACT law, and
(f) to make other provision of a minor, consequential or ancillary nature.

15. This Bill also amends the Crimes (Administration of Sentences) Regulation 2001 so as:

(a) to ensure that the right to make telephone calls to exempt bodies (such as the Ombudsman) is not a right that can be withdrawn for the purposes of punishment, and
(b) to ensure that inmates suspected of having committed offences cannot be confined to their cells for more than 48 hours, and
(c) to ensure that inmates who are confined to their cells, or who are in segregated or protective custody, are not thereby deprived of essential medical care, and
(d) to omit references to the Inspector-General.

16. The amendments made by this Bill give effect to recommendations contained in a statutory review of the *Crimes (Administration of Sentences) Act 1999* that was tabled in both Houses of Parliament on 1 April 2008.

Schedule 1 Amendment of *Crimes (Administration of Sentences) Act 1999*
Objects clause

Schedule 1 [2] inserts proposed section 2A into the Act. The new section sets out the objects of the Act and the matters to which regard must be had in the pursuit of those objects. It is further provided that nothing in the new section gives rise to any civil cause of action or can be taken into account in any civil proceedings.

Commissioner's submission with respect to parole orders in exceptional circumstances

Schedule 1 [13] inserts proposed section 160AA into the Act. The new section enables the Commissioner to make submissions to the Parole Authority in relation to the release on parole of an offender under Division 4 of Part 6 (relating to parole orders in exceptional circumstances), and parallels existing section 141A (relating to submissions by the Commissioner in relation to parole orders made in ordinary circumstances).

Official Visitors

Schedule 1 [21] substitutes section 228 of the Act (which deals with the appointment and functions of Official Visitors). The new section differs from the old in the following respects:

(a) unlike the current section (which requires Official Visitors to be appointed to specific institutions), it provides for appointment of Official Visitors at large, leaving their assignment to specific institutions to be done by the Minister or in accordance with arrangements approved by the Minister,

(b) unlike the current section, it expressly precludes Official Visitors from conducting investigations and carrying out audits.

Abolition of office of Inspector-General

Schedule 1 [19] omits Part 10 of the Act (Part 10 establishes the office of Inspector-General and defines its functions).

Schedule 1 [3], [23] and [24] consequentially amend sections 3, 242 and 243 of the Act, and **Schedule 1 [27]** consequentially repeals Schedule 3 to the Act (which contains further provisions with respect to the office of Inspector-General). The office has been vacant since 2003.

ACT's right of intervention

Schedule 1 [5] amends section 71 of the Act so as to ensure that, in proceedings before the Serious Offenders Review Council with respect to the classification of serious offenders, the Australian Capital Territory has the same right of intervention in relation to offenders in custody in NSW under ACT law as the State of New South Wales has in relation to offenders in custody under NSW law.

Miscellaneous matters

Schedule 1 [11], [12], [15] and [16] amend sections 155, 156, 176 and 177 of the Act so as to ensure that the Supreme Court's jurisdiction to give directions under those sections with respect to decisions of the Parole Authority does not extend to a general review of the merits of those decisions.

Schedule 1 [1], [4], [6]–[10], [14], [17], [18], [20], [22], [25] and [26] insert introductory notes into each of the Parts of the Act. These notes give a brief indication as to the contents of each Part.

Schedule 1 [28] amends clause 1 of Schedule 5 to the Act so as to enable savings and transitional regulations to make provision consequent on the enactment of the proposed Act.

Schedule 1 [29] adds proposed Part 13 to Schedule 5. The new Part contains provisions that preserve the appointments of existing Official Visitors.

Schedule 2 Amendment of *Crimes (Administration of Sentences) Regulation 2001*
Telephone calls to exempt bodies

Schedule 2 [3] amends clause 152 so as to ensure that telephone calls to exempt bodies (such as the Ombudsman) are excluded from the list of privileges that are declared to be withdrawable privileges for the purposes of the Act. Withdrawable privileges are privileges that can be withdrawn by way of punishment for certain offences.

Confinement to cell

Schedule 2 [4] amends clause 237 so as to ensure that offenders cannot be confined to their cells under that clause for more than 48 hours. That clause authorises an offender who is suspected of having committed an offence to be confined to cell pending further action being taken in relation to the suspected offence.

Medical care for inmates confined to cell

Schedule 2 [5] substitutes clause 255 so as to ensure that offenders who are confined to their cells, or who are in segregated or protective custody, receive essential medical treatment and, for that purpose, are kept under daily observation by Justice Health officers. Daily observation will not be required for offenders confined to cell as a consequence of a general "lock-down".

Removal of references to Inspector-General

Schedule 2 [1], [2] and [6] omit references to the Inspector-General from clauses 77 and 113 and from the Dictionary.

Issues Considered by the Committee

Non-reviewable decisions [s 8A(1)(b)(iii) *LRA*]

Issue: Excludes merits review – Schedule 1 – proposed sections 155 (4), 156 (3), 176 (4), 177 (2)

17. Schedule 1 to the Bill includes amendments to sections 155, 156, 176 and 177 of the Act to make it clear that the Supreme Court does not have the jurisdiction to review the merits of a decision by the Parole Authority otherwise than on the grounds referred to in subsection (1) of the current Act under their respective sections.

18. The Committee will be concerned when legislation seeks to exclude merits review, unless there is a strong public interest in doing so. However, the Committee notes that merit review is still available for grounds referred to in subsection (1) of the current Act with regard to the above respective sections. These reviewable grounds relate to allegations that the decision of the Parole Authority or that the order (periodic detention, home detention or parole order) has been made on the basis of false, misleading or irrelevant information. Accordingly, the Committee does not consider the proposed amendments unduly trespass individual rights and liberties.

The Committee makes no further comment on this Bill.

5. DIVIDING FENCES AND OTHER LEGISLATION AMENDMENT BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Verity Firth MP
Portfolio:	Climate Change and the Environment

Purpose and Description

1. This Bill amends the *Dividing Fences Act 1991* and the *Crown Lands Act 1989* to make further provision with respect to dividing fences and to amend the *Access to Neighbouring Land Act 2000* to make further provision with respect to costs of an application for an access order.

2. It seeks to achieve four aims. Three of the aims relate to the powers and jurisdiction of a Local Land Board and the Local Court concerning dividing fences. The final aim relates to the powers of the Local Court to award costs under the *Access to Neighbouring Land Act 2000*.

3. The proposed amendments to the *Dividing Fences Act 1991* relate to expanding the jurisdiction available under the Act. The changes include a power to make an order relating to a retaining wall and to vegetation. The proposed new power is limited in its scope to matters incidental to a dividing fence.

4. The first proposal is to permit a Local Land Board or the Local Court to make a fencing order requiring construction or maintenance work to be done on a new or existing retaining wall but only to the extent necessary for the settlement of a dividing fences dispute. It also relates to any tree or vegetation, but only to the extent necessary for settlement of a dividing fence dispute. It authorises an adjoining owner to include in a fencing notice matters relating to a retaining wall, tree or vegetation. A fencing notice under the Act allows an adjoining owner to claim a contribution for a share of fencing costs.

5. The first proposal also allows a Local Land Board and the Local Court to fix a fair contribution between adjoining owners for the cost of the fencing work carried out when this affects a retaining wall, tree or vegetation.

6. The second main purpose of the Bill is to allow a Local Land Board to make an order for the payment of a fixed amount by an adjoining owner under the *Dividing Fences Act 1991*. This new power adds to the existing power to make an order for a proportion of fencing costs to be paid by each adjoining owner. An order for the payment of a fixed amount, after being certified by a Local Land Board, may be enforced as a judgement debt in a court of competent jurisdiction.

7. The third main proposal is to allow the senior chairperson of the local land boards discretion to sit alone or to direct a chairperson of a Local Land Board to sit alone in a residential dividing fence hearing. This is in circumstance where the fence is located in

either the Sydney metropolitan area or in a residential area of a regional city or town. In general, the lack of complexity of the subject matter of such disputes means that only the chairperson is required to sit in order for the dispute to be dealt with.

8. The final proposal contained in the Bill relates to the *Access to Neighbouring Land Act 2000*. The purpose of the proposal is to provide that an applicant for an access to a land order must pay the legal costs of the landowner whose land is the subject of the access order. This will occur unless in the discretion of the Local Court the conduct of the parties to the application for access or any other relevant matter means that either another order or no order should be made. Amendments proposed in the Bill will require the court to consider any attempts by the parties to reach agreement before the proceedings, and whether the refusal to consent to access was unreasonable in the circumstances.

Background

9. The dividing fences proposals set out in the Bill have been developed in consultation with government agencies (Department of Local Government, the Department of Planning and the Attorney General's Department) responsible for legislation imposing requirements for tree preservation.

10. The definition section of the *Dividing Fences Act 1991*, section 3, currently excludes "a retaining wall" from the definition of a fence. This means that no order may be made affecting a retaining wall by a Local Land Board or the Local Court. The complete exemption of retaining walls from the operation of the Act means that in making orders about a sufficient dividing fence, a Local Land Board or the Local Court is often unable to fully resolve disputes between neighbours where a dividing fence consists of a fence constructed on or near a retaining wall.

11. It is also often difficult to settle a dividing fence dispute where a tree or substantial vegetation stands on or near the boundary and affects the subject fence. In those circumstances, the jurisdiction of the Local Land Board and of the court does not permit any fencing order for the removal or trimming of the relevant vegetation. The Bill will enable local land boards and the Local Court to have the power to make an order affecting a tree but only to the extent necessary for the settlement of a dividing fence dispute.

12. The Bill will not override other general laws applicable to the construction and maintenance of a retaining wall, including requirements for development approval. The proposal also will not override any legislation providing protection to vegetation, including trees. Legislation protecting vegetation includes the *Environmental Planning and Assessment Act 1979*. In the event that any relevant work on a retaining wall would require development approval under planning legislation, the Local Land Board or the Local Court will need to see any required development approval before a final order regarding a dividing fence is made.

13. According to the Agreement in Principle speech:

> A report entitled "Review of the NSW Access to Neighbouring Land Act 2000" was tabled in Parliament. Respondents to the review highlighted deficiencies in the operation of the legal costs recovery provisions of the Act. The current scheme governing recovery of the legal costs of an application for access to neighbouring

land, contained in section 27 of the Act, provides that a costs order may be made at the discretion of the Local Court. In determining if an order should be made, the court may consider in any attempts by the parties to reach agreement before the proceedings whether the refusal to consent to access was unreasonable in the circumstances, and any other matter it thinks fit. In practice, the costs orders made by the court usually require the costs of the application to be borne equally by the applicant for access and the owner of the land subject of the access order.

Submissions and anecdotal evidence received as part of the review indicate that it is more reasonable if there is a requirement for the applicant to pay the legal costs of the owner of the land subject to the access order. This is because usually only the applicant receives a benefit from an order for access. The proposed amendments will allow the Local Court to continue to have discretion to make any appropriate order for costs or no order based on an examination of all relevant circumstances.

The Bill

14. The objects of this Bill are as follows:

(a) to amend the *Dividing Fences Act 1991* (***the Principal Act***):

(i) to enable an adjoining owner to seek a contribution for the carrying out of work to a retaining wall, where the wall is necessary for the support and maintenance of a dividing fence, and to enable orders relating to that work to be made under the Principal Act, and
(ii) to clarify that an adjoining owner may seek a contribution for the preparation of land involving the trimming, lopping or removal of vegetation, for the purpose of the provision of a dividing fence, and that orders relating to that work may be made under the Principal Act, and
(iii) to ensure that an owner who desires to carry out such work for a purpose other than a sufficient dividing fence is liable for the expenses of carrying out the work that are attributable to work done for that other purpose, and
(iv) to enable a local land board to make an order specifying a fixed amount that an adjoining owner is required or liable to pay under the Principal Act, and
(v) to enable such an order, when its particulars are certified by a Chairperson of the local land board and the certificate is filed with a court of competent jurisdiction, to be enforced as a judgment of that court,

(b) to amend the *Access to Neighbouring Land Act 2000* to provide that the costs of an application for an access order under that Act are payable by the applicant for the order, subject to any contrary order of the Local Court,
(c) to amend the *Crown Lands Act 1989* to enable a Chairperson of a local land board alone to constitute a quorum for the purpose of dealing with an application under the Principal Act where the area to which the application relates is in the Metropolitan, Penrith, Picton or Windsor land district or a predominantly residential area.

Schedule 1 Amendment of *Dividing Fences Act 1991*

Schedule 1 [1] amends the definition of ***fence*** to provide for a retaining wall to be treated as part of a fence, for the purposes of the Principal Act, where the wall is necessary for the support and maintenance of the fence. As a result, such a retaining wall also becomes a ***dividing fence***, for the purposes of the Principal Act, where it separates the land of adjoining

owners. The proposed amendment gives effect to paragraph (a) (i) of the objects referred to in the Overview.

Schedule 1 [2] amends the definition of ***fencing work*** in the Principal Act to clarify that fencing work comprising the preparation of land for the purpose of the provision of a dividing fence includes the trimming, lopping or removal of vegetation. This gives effect to paragraph (a) (ii) of the objects referred to in the Overview.

Schedule 1 [3] inserts proposed section 7 (3) into the Principal Act. The proposed new subsection ensures that an adjoining owner who desires to carry out the preparation of land comprising the trimming, lopping or removal of vegetation for a purpose other than the provision of a sufficient dividing fence is liable for the expenses of carrying out the work to the extent that those expenses are attributable to work done for that other purpose.

Schedule 1 [4] amends section 14 of the Principal Act to enable a Local Court or local land board to make an order determining the amount of money that each adjoining owner must pay for fencing work as an alternative to an order determining the manner in which contributions for the work are to be apportioned.

Schedule 1 [5] amends section 24 of the Principal Act to enable a local land board to make an order, on the application of an adjoining owner, determining an amount that the other adjoining owner is required or liable to pay under that Act. The proposed amendment also enables such an order, when its particulars are certified by a Chairperson of the local land board and the certificate is filed with a court of competent jurisdiction, to be enforced as a judgment of that court.

Schedule 1 [6] clarifies that the provisions of the Principal Act do not override provisions of or under other Acts relating to fencing work. Examples of such provisions include provisions in Acts or instruments requiring development consent or another kind of authorisation for the carrying out of work relating to retaining walls or the trimming or removal of trees.

Schedule 2 Amendment of other Acts

Schedule 2.1 amends the *Access to Neighbouring Land Act 2000*.

Currently, section 27 of the *Access to Neighbouring Land Act 2000* provides that the costs of an application for an access order under that Act are payable at the Local Court's discretion.

Schedule 2.1 [1] and [2] amend section 27 of that Act:

(a) to provide that the costs of an application for an access order are payable by the applicant for the order, subject to any order of the Local Court to the contrary, and

(b) to clarify that when determining whether any costs of an application for an access order are payable by a party, the Court may consider the conduct of the parties.

Schedule 2.1 [3] and [4] enact savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 2.2 amends the *Crown Lands Act 1989*. In particular, **Schedule 2.2** amends Schedule 2 to that Act to enable a Chairperson of a local land board alone to constitute a quorum for the purpose of dealing with an application under the *Dividing Fences Act 1991* where the area to which the application relates is in the Metropolitan, Penrith, Picton or Windsor land district or a predominantly residential area.

Issues Considered by the Committee

Delegation of legislative powers [s 8A(1)(b)(iv) *LRA*]

Issue: Commencement by proclamation - Clause 2 - Provide the executive with unfettered control over the commencement of an Act.

15. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

16. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

6. FAIR TRADING AMENDMENT (MANDATORY FUNERAL INDUSTRY CODE) BILL 2008*

Date Introduced:	10 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Catherine Cusack MLC
Portfolio:	Shadow Minister for Fair Trading

Purpose and Description

1. The object of this Bill is to amend the Fair Trading Act 1987 to provide for the establishment by regulation of a mandatory code of conduct for the funeral industry.

Background

2. On 9 December 2005 the Standing Committee on Social issues tabled a report in the legislative Council on the funeral industry. The report contained 23 recommendations central of which was that a comprehensive mandatory code of practice be developed for the funeral industry.

3. The Hon Catherine Cusack MLC when introducing the present Bill said that it was necessary because a handful of unethical rogues were active in the funeral industry and that these persons should be called to account for unethical behaviour and ejected from the industry. She outlined a number of distressing cases that had occurred because of mismanagement in the funeral industry. She said the Bill gives effect to several of the 23 unanimous recommendations of the report of the Legislative Council.

The Bill

4. **Outline of provisions**

Clause 1 sets out the name of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent of the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the Fair Trading Act 1987 set out in Schedule 1.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.

Schedule 1 substitutes section 60ZA and inserts a new section 60ZAA. The proposed section 60ZA enables regulations to be made to establish a funeral industry code of conduct that prescribes rules that must be observed by suppliers of funeral goods and services. A funeral industry code of conduct may also establish a system of registration of suppliers of funeral goods and services and may provide that a person is prohibited from supplying funeral

goods and services unless registered in accordance with the regulations. A funeral industry code of conduct may also provide for the qualifications required for registration, the imposition of conditions on registration, the cancellation or suspension of registration and the review of decisions made in respect of registration. The proposed section makes it an offence for a person, in connection with a supply to a consumer of funeral goods and services to fail to comply with a funeral industry code of conduct. Proposed section 60ZAA provides for an action for damages under Part 6 of the Principal Act to be available to a person who has suffered loss or damage because of the supply of funeral goods and services in contravention of proposed section 60Z.

Issues Considered by the Committee

5. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.

The Committee makes no further comment on this Bill.

7. HIGHER EDUCATION AMENDMENT BILL 2008

Date Introduced:	9 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Della Bosca MLC
Portfolio:	Education and Training

Purpose and Description

1. This Bill amends the *Higher Education Act 2001* as a consequence of amendments to the *National Protocols for Higher Education Approval Processes* that have been approved by the Ministerial Council on Education, Employment, Training and Youth Affairs; and for other purposes.

2. It amends the *Higher Education Act 2001* in order to give effect to revised national protocols for higher education approval processes that have been agreed by all Australian jurisdictions.

3. The revised national protocols replace the protocols approved in 2000. The national protocols lay down the agreed national framework for regulating the approval and operation of higher education institutions, including universities.

4. Section 12 of the Higher Education Act, relating to the standards of offshore delivery by Australian universities, is not affected by the amendments. The Bill updates three definitions in section 3 of the Act to take account of the recent changes to the national protocols and to degree awards included in the Australian Qualifications Framework. Section 4 of the Act is replaced with a new section that allows education institutions to become Australian universities by including them in schedule 1 to the Act, either in part 1 or part 2.

5. The revised protocols require new universities to now generally operate for a period of up to five years with conditions on their use of the title "university". Such new universities will be recognised under part 2 of schedule 1. After the five year provisional period, it may then be considered appropriate for these universities to be recognised by an Act of Parliament and listed in part 1 of schedule 1 if they meet all the necessary requirements.

6. University colleges and specialised universities will be listed in part 2 of the schedule with the exact titles that they are approved to use. These titles are specific and underscore the conditions of their approval to operate for the provisional period.

7. Section 4 provides that the Minister may recommend to the Governor that, by proclamation, the name of an approved institution can be listed on part 2 of schedule 1 to the Act. The amended section 4 also provides for the name of the institution to be varied on the schedule, or removed from it, by the Governor on the Minister's recommendation. The effect of the amended section 4 is to provide a way of legislatively designating certain institutions as approved Australian universities that

have demonstrated that they satisfy all the essential quality criteria to be recognised as a "university" of whatever type.

8. Section 5 of the Act relates to the registration of other types of Australian and overseas higher education institutions and overseas universities in New South Wales, and section 7 to the accreditation processes required for their courses. The amendments to these sections ensure that the director general has regard to the requirements of the national protocols in deciding what, if any, conditions to impose on an institution's registration and accreditation. These amendments also provide that overseas universities can be registered to operate in New South Wales and provide courses accredited in their home country as long as they can demonstrate that they meet a comprehensive set of criteria detailed in the national protocols.

9. The amendments to section 7 provide that the director general may authorise an institution to self-accredit courses in approved fields and qualification levels if that is considered appropriate. This would occur where the institution has a very strong track record in the provision of higher education courses and an excellent record in meeting previous accreditation requirements and conditions placed upon it.

Background

10. All States and Territories have either amended their legislation to align with the revised national protocols, or are in the process of doing so. The amendments broaden the range of educational choice in the sector by providing for greater diversity in the types of higher education institution that can operate in New South Wales. The amendments maintain the regulatory framework established under the existing national protocols, with requirements on standards for the establishment of higher education institutions and accreditation of courses.

11. The existing protocols have allowed for three types of higher education institution to operate in Australia: Australian universities; overseas higher education institutions including universities; and non self-accrediting higher education institutions.

12. The revised protocols will allow for additional types of institution:

- universities that will specialise in one or two areas only, which involves the use of a specialised name that cannot be shortened;
- university colleges that aspire to university status but which have five years to meet the full requirements to use the title "university"; and
- institutions with authority to accredit their own courses although they are not universities. These must have a strong record in higher education.

13. The revised protocols also allow for overseas institutions to offer their own overseas qualifications in Australia subject to assessment to ensure the quality of the institutions and their courses.

14. The amendment has no effect on existing Australian universities, and their status continues to be recognised by their inclusion in part 1 of schedule 1. This is the mechanism by which New South Wales recognises the official status of all universities that are set up under their own specific Act of any Australian Parliament.

15. To gain access to the "university college" title, new 'universities' must conduct research and deliver courses at research doctorate level in at least one broad field of study, and they must deliver programs up to masters coursework degree level in at least three broad fields of study. Appropriate institutions will also be able to operate as "specialised universities" if they deliver research, masters and doctoral programs in one or two broad fields of study, and undertake research in these broad fields of study where research doctorates are offered.

16. According to the Second Reading Speech:

> The New South Wales higher education sector has been consulted extensively on the changes to the national protocols. The consultation process took place in two stages—the first focused on the changes to the protocols, and the second on the development of national guidelines that underpin this framework. The guidelines, which have been endorsed by Australian education Ministers, support the consistent implementation of the protocols by detailing the requirements and evidence that applicants must demonstrate to gain approval. A report on the operation of the Higher Education Act, in accordance with section 29, was tabled in December 2007. This report foreshadowed the introduction of these amendments. The Government is committed to ensuring that the State's regulatory requirements are in line with a modern higher education environment and that rigorous standards of accountability and quality are met. The bill sets out the necessary amendments to achieve this.

The Bill

17. The object of this Bill is to amend the *Higher Education Act 2001* (***the Act***), as a consequence of changes to the *National Protocols for Higher Education Approval Processes* (***the National Protocols***) that have been approved by the Ministerial Council on Education, Employment, Training and Youth Affairs, so as:

(a) to provide for the recognition of certain universities for a provisional period, and
(b) to require the National Protocols to be taken into account in connection with the registration of education institutions and accreditation of courses under the Act, and
(c) to remove the requirement for an education institution seeking registration as an overseas university or overseas higher education institution to obtain accreditation under the Act of at least one of its courses before it can be registered as such, and
(d) to enable certain education institutions to be allowed to accredit their own courses, and
(e) to make other provision of a minor, consequential or ancillary nature.

Schedule 1 Amendments
Recognition of universities
Schedule 1 [2] substitutes section 4 of the Act. The new section provides for education institutions to become Australian universities by inclusion in Part 1 or Part 2 of Schedule 1 to the Act. Part 1 will contain all universities that are currently listed in the Schedule. Other education institutions will only be capable of being included in Part 1 if they are established or recognised by an Act (rather than by or under an Act, as is presently the case). Part 2 will contain education institutions that, in accordance with the National Protocols, are to be recognised as universities for a provisional period.
Schedule 1 [11], [12], [14] and [17] make consequential amendments to sections 19 and 25 and Schedule 1.

Application of National Protocols
Schedule 1 [4] inserts proposed subsection (5A) into section 5 of the Act. The new subsection will require decisions with respect to the registration of an education institution to have regard to the National Protocols.
Schedule 1 [7] inserts proposed subsection (3A) into section 7 of the Act. The new subsection will require decisions with respect to the accreditation of courses to have regard to the National Protocols.

Accreditation of overseas courses
Schedule 1 [3] amends section 5 (4) of the Act, which requires an education institution to obtain accreditation for at least one of its courses, so as to restrict the application of that subsection to institutions seeking registration as an Australian higher education institution. **Schedule 1 [8] and [9]** make consequential amendments to sections 14 and 15.

Self-accreditation of courses
Schedule 1 [5] amends section 7 (1) of the Act so as to enable an education institution to be authorised to accredit its own courses. Courses currently have to be accredited by the Director-General of the Department of Education and Training.
Schedule 1 [6] and [10] make consequential amendments to sections 7 and 18.

Miscellaneous amendments
Schedule 1 [1] updates the definitions of ***Australian university***, ***degree*** and ***National Protocols*** in section 3 (1) of the Act.
Schedule 1 [13] corrects a typographical error in section 25 (1) (i) of the Act.
Schedule 1 [15] and [16] amend Schedule 1 to the Act so as to change Victoria University of Technology to Victoria University, and Northern Territory University to Charles Darwin University, to reflect recent changes of name.
Schedule 1 [18] amends clause 1 of Schedule 3 to the Act so as to enable savings and transitional regulations to be made in connection with the enactment of the proposed Act.

Issues Considered by the Committee

18. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

8. JUSTICES OF THE PEACE AMENDMENT BILL 2008

Date Introduced:	8 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos
Portfolio:	Attorney General

Purpose and Description

1. This Bill implements certain recommendations contained in a report on the statutory review of the Justices of the Peace Act 2002. That report was tabled on 6 December 2007. The Bill enables the Director - General of the Attorney General's Department to re-appoint a justice of the peace (JP). Currently the Act only allows the Governor to appoint and re-appoint a JP. The Bill provides that a person's appointment as a JP continues until a determination is made in respect of any duly made application for re-appointment. It provides that the guidelines issued by the Minister with respect to the exercise of specified functions by JPs is to incorporate relevant provisions of any code of conduct for justices of the peace that has been prescribed by the regulations.

Background

2. The purpose of the Justices of the Peace Act is to provide for the appointment of JPs and the renewal of their appointment every five years. It also sets out their functions and establishes a public registry of JP's.

3. The report made seven recommendations to improve the operation of the justices of the peace scheme. When tabling that report, the Minister advised that the government would embrace all the recommendations. A total of 21 submissions were received from members of Parliament, justices of the peace organizations, individual justices of the peace and former Justices of the peace.

4. The review recommended that the department publish an acceptable usage policy on the JP website designed to ensure that users of the register behave reasonably when seeking the services of a JP. It said that the JP register should be reconfigured to allow multi-sorting of information on the register and the inclusion of information about JPs who speak languages other than English so as to facilitate access to the register by people of non-English speaking backgrounds. The review recommended the making of a code of conduct for JPs to act as a guide regarding acceptable standards of conduct

The Bill

5. **Provisions**

Clause 1 sets out the name of the proposed act.

Clause 2 states that the Act commences on the date of assent.

Clause 3 provides that the Justices of the Peace Act 2002 is amended as set out Schedule 1.

Schedule 1 amendments authorise the re-appointment of JPs by the Director- General of the Attorney General's Department. The amendments state that if an application for re-appointment is duly made by a person, the person's appointment as a JP continues in force until a determination is made in respect of the application. In regard to the functions of JPs the amendments state that the guidelines are to incorporate relevant provisions of any code of conduct for JPs that has been prescribed by the regulations. Under the amendments the term of office of a JP will be vacated if he or she is not re-appointed after a term of office

Issues Considered by the Committee

6. The Committee has not identified any issues under section 8A(1)(b) of the Legislation Review Act 1987.

The Committee makes no further comment on this Bill.

9. NATIONAL GAS (NEW SOUTH WALES) BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Nathan Rees
Portfolio:	Emergency Services, Water

Purpose and Description

1. The purpose of this Bill is to establish a framework to enable third parties to gain access to certain natural gas pipeline services, to consequentially amend certain other Acts, to repeal the Gas Pipelines Access (New South Wales) Act 1998; and for other purposes.

Background

2. This Bill gives effect to the Council of Australian Governments (COAG) commitments ratified under the Australian Energy Market Agreement. Under the terms of the Agreement, the national energy legislation operates under a national co-operative legislative scheme in which South Australia is the lead legislator. New South Wales and the other States, Territories and the Commonwealth have agreed to apply the relevant schedules of the South Australian legislation as laws in their respective jurisdictions through application acts. The present Bill applies those laws. The national gas legislation is made up of the National Gas Law, the National Gas Rules and Regulations made under the National Gas Law and the Acts applying those laws in each jurisdiction.

3. The Minister in his Agreement in Principal speech on the Bill on 10 April 2008 said that the objective of the National Gas Law is to promote efficient investment and use of gas services in the long-term interests of consumers. The Australian Energy Market Agreement commits States and Territories to transfer responsibility for the economic regulation of gas distribution pipelines from State based regulators to the Australian Energy Regulator (AER). The Minister said this Bill has the effect of transferring responsibility from the New South Wales Independent Pricing and Regulatory Tribunal to the AER. Responsibility for economic regulation of gas transmission pipelines in New South Wales has already been transferred to the Competition and Consumer Commission and that responsibility will now be moved to the AER. A single national body will now be responsible for the economic regulation of both gas transmission and distribution pipelines in New South Wales and in all other participating jurisdictions.

4. Under Clause 6.4 of the Agreement, each party is required to ensure its legislation is enacted in the form approved. The form approved is that of the lead legislator which is South Australia. Each party has agreed not to take any action that would limit, vary or alter the affect, scope or operation of the Australian Energy Market legislation without the agreement of the Ministerial Council on Energy.

The Bill

5. **Part 1** of the Bill deals with various preliminary matters, including the name of the proposed Act, its date of commencement and various interpretive provisions.

6. **Part 2** of the Bill applies as a law of New South Wales, the National Gas Law set out in the Schedule to the National Gas (South Australia) Act 2008 of South Australia as well as regulations made under that law. A copy of the National Gas Law is set out in a note at the end of the Bill.

7. **Part 3** of the Bill confers necessary functions and powers on the Commonwealth Minister and Commonwealth bodies including the AER and the Australian Competition Tribunal. It also confers functions and powers on State Ministers, including the New South Wales Minister for Energy, to do things where powers are conferred by the National Gas Legislation of other States or Territories.

8. **Part 4** of the Bill contains Miscellaneous Provisions. These provide for an exemption from State duties or taxes in relation to certain transfers of assets or liabilities that are made for the purpose of ensuring that a person does not carry on a business of producing, purchasing or selling natural gas in breach of any ring fencing requirements of the NGL. These exemptions ensure that the government makes no windfall gains from the ring fencing requirements in the NGL. Part 4 also enables the Governor to make regulations for the purposes of the proposed Act. Under clause 20 the Minister is to review the proposed Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. That review is to be undertaken within five years from the date of assent to the Act.

9. **Schedule 1** contains amendments to a number of Acts consequential on the commencement of the proposed Act.

Issues Considered by the Committee

Parliamentary scrutiny of legislative power [s 8A(1)(b)(v) *LRA*]

Issue: insufficient scrutiny of legislative powers

10. Under the legislative scheme adopted in this Bill, each State, Territory and the Commonwealth applies the National Gas Law, as in force for the time being, set out in the Schedule to the National Gas (South Australia) Act 2008 of South Australia, as well as regulations made under that law. This law is applied as a law of New South Wales. This scheme gives rise to the question of whether the applied law Is insufficiently subject to scrutiny by the New South Wales Parliament, particularly as any changes made by the South Australian legislature to this law automatically flow through and become part of the law of New South Wales.

11. To assist in forming a view on this question it is material to look at the background of the legislation.

12. The Recitals to the Australian Energy Market Agreement state that in June 2001 COAG recognised that effective operation of an open and competitive national energy

market would contribute to improved economic and environmental performance and deliver benefits to households, small business and industry. COAG then established the Ministerial Council on Energy (MCE) to provide national oversight and co-ordination of energy policy developments and to provide national leadership so that consideration of broader convergence issues and environmental impacts were effectively integrated into energy sector decision-making.

13. COAG also established a national energy policy framework to guide future energy policy decision-making by jurisdictions and to provide increased policy certainty for energy users and the energy sector. In response to the COAG review, the MCE provided a report to COAG entitled the *Reform of Energy Markets* on 11 December 2003. On 30 June 2004, the parties entered into the Australian Energy Market Agreement 2004 to give effect to the recommendations in the MCE report.

14. The reforms are modelled on the National Electricity Bill. The reforms are designed to ensure Australia wide consistency between gas and electricity regulation when appropriate. Clause 1.5 of the Australian Energy Market Agreement specifically states that the Agreement is not intended to give rise to legal obligations among the parties. Further, nothing in the Agreement affects the right of the parties is to develop implement and maintain policies relating to the environment, energy efficiency and planning within their own jurisdiction. Ministers will report to COAG on the operation of the Agreement and any proposed amendments.

15. As with the National Electricity Bill, judicial review in State Supreme Courts is provided for decisions of the Australian Energy Market Commission. The package also includes a mechanism for merits review by the Australian Competition Tribunal of specified regulatory decisions under the National Gas Law. Persons with a sufficient interest in the original decision are able to intervene, and user and consumer associations and interest groups with the leave of the Tribunal.

16. The need for national oversight and co-ordination on energy policy and practice provide, in the Committee's view, adequate justification for the legislative arrangements that have been developed. What appears remiss in the scheme is the absence of any realistic scrutiny role for the NSW Parliament. On the basis of the Minister's statements in his Agreement in Principle speech NSW involvement in the development of the scheme appears to have been limited to the Treasury and the Department of Energy and Water. Although the NSW Parliament has the present Bill before it there is no scope to debate the need for any modification of the National Gas Law as it has already been signed off by all parties including NSW. The Committee is of the opinion that it would be an advantage if the NSW Parliament could be given an earlier opportunity, possibly through an exposure draft, to express its views on future national scheme legislation rather than have it presented for adoption in a final form that has already been agreed to or implemented by the Commonwealth and the other Australian states.

The Committee makes no further comment on this Bill.

10. PORT MACQUARIE-HASTINGS COUNCIL ELECTION BILL 2008*

Date Introduced: 10 April 2008

House Introduced: Legislative Council

Minister Responsible: Hon R L Brown, MLC

Portfolio:

Purpose and Description

1. Pursuant to a proclamation dated 26 February 2008 an Administrator was appointed to the local Government area of Port Macquarie - Hastings. The Administrator's term of office commenced from that date and ceases on the date of the declaration of Port Macquarie-Hastings Council's fresh election to be held in conjunction with the ordinary council elections on the second Saturday in September 2012.

2. The object of this Bill is to ensure that a fresh council election is held for the local Government area of Port Macquarie-Hastings in conjunction with the next ordinary election of councillors in accordance with section 287 (1) of the Local Government Act 1993. Under that section the next ordinary election of councillors is to be held on the second Saturday in September 2008, that is, 13 September 2008.

3. Under this bill, the Administrator will cease to hold office immediately before the first meeting of Port Macquarie-Hastings Council held after the fresh council election unless the Administrator ceases to hold office under the Local Government Act 1993 before that time.

Background

4. The rationale for this private member's Bill was set out in the Second Reading speech of the Hon Robert Brown MLC in the Legislative Council on 10 April 2008. He argues that the Port Macquarie-Hastings Council was dismissed primarily because of cost overruns on a major cultural centre being built in the area commonly known as the Glasshouse project. He states there been no allegations of corruption or impropriety and that the inquiry into the Council found there is broad general support for the development of a facility for the performing and visual arts in the Port Macquarie-Hastings area. He says that the dismissal of Port Macquarie-Hastings Council is in no way similar to nor should it be compared to the dismissal of other councils in New South Wales. He states that if a majority of voters in the Port Macquarie Hastings Council area do not want the Glasshouse project or disagree with its location or costs. that they will welcome the opportunity as a result of this Bill to have their say at the ballot box on 13 September 2008.

The Bill

5. Clause 4 states that despite the Proclamation of 25 February 2008 declaring civic offices in relation to the Port Macquarie-Hastings Council to be vacant that a fresh council election is to be held for the local Government area of Port Macquarie-Hastings in conjunction with the next ordinary election of councillors in accordance with section 287(1) of the Local Government Act 1993.

6. Clause 5 states that despite the Proclamation, the Administrator ceases to hold office immediately before the first meeting of the council held after the fresh council election referred to in section 4 unless the Administrator ceases to hold office under the Local Government Act 1993 before that time.

Issues Considered by the Committee

7. The Committee has not identified any issues under section 8A(1)(b) of the Legislation Review Act 1987.

The Committee makes no further comment on this Bill.

11. STATE ARMS, SYMBOLS AND EMBLEMS AMENDMENT (BLACK OPAL) BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Morris Iemma MP
Portfolio:	Premier, Citizenship

Purpose and Description

1. This Bill amends the *State Arms, Symbols and Emblems Act 2004* to recognise the black opal as a State emblem.

2. The purpose of this Bill is to recognise the black opal as the gemstone emblem for New South Wales. While schedule 3 of the *State Arms, Symbols and Emblems Act 2004* lists the State's emblems, there is no gemstone emblem for the State.

Background

3. The Agreement in Principle speech indicated wide support for the proposal to recognise the black opal as the gemstone emblem for New South Wales, including support from the Australian Museum and the Lightning Ridge Opal and Fossil Centre.

4. According to the Agreement in Principle speech:

> Precious opal is usually classified on the basis of the background colour of the stone and the type of colour pattern. The background for the colour play can be colourless, milky white, pale to dark grey or black. Black opal is precious opal showing a play of spectral colours in a dark body colour that is usually black, blue, brown or grey. The dark colouring may be caused by impurities such as iron oxide. A very dark background accentuates the flashes of colour. Lightning Ridge is a source of the world's major commercial supply of black opal.
>
> It is the most sought after type of precious opal as the very dark body colour enhances the depth of colour and the colour play is seen to its best advantage. The black opal ranks with diamond, emerald, ruby and sapphire as one of the most valuable gemstones in the world.
>
> Black opal is a suitable gemstone emblem for the State as it is the only gemstone that is mined in New South Wales in a significant amount. The only other gemstone mined in New South Wales is the sapphire; however, only a small amount is mined. In addition, sapphire is already recognised as the gemstone emblem for Queensland.
>
> Internationally, the black opal is strongly associated with New South Wales, and in particular Lightning Ridge. Opal, in general, was discovered at Lightning Ridge in the late 1880s, with significant mining starting in the early 1900s. The opal industry in New South Wales is now largely based at Lightning Ridge, which has a population of about 1,200 people. This important regional centre also makes a large contribution to the tourism industry in New South Wales. The Australian Museum also advises that Lightning Ridge

is now the world's major commercial producer of black opal and is world famous for its high-quality black opal. Specifically, Lightning Ridge supplies 95 per cent of the world's supply of black opal. No other jurisdiction in Australia has the black opal as its gemstone emblem. While opal is already recognised as the gemstone emblem for Australia and South Australia, the black opal can be distinguished from opals generally due to its value.

The Bill

5. The object of this Bill is to amend the *State Arms, Symbols and Emblems Act 2004* to recognise the black opal as the gemstone emblem of New South Wales. Currently, the State emblems recognised under the *State Arms, Symbols and Emblems Act 2004* are as follows:

(a) the animal emblem of New South Wales is the platypus,
(b) the bird emblem of New South Wales is the kookaburra,
(c) the floral emblem of New South Wales is the waratah,
(d) the state fish of New South Wales is the blue groper.

6. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 amends the *State Arms, Symbols and Emblems Act 2004* as set out in the Overview.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Issues Considered by the Committee

7. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

12. STATE EMERGENCY AND RESCUE MANAGEMENT AMENDMENT (BOTANY EMERGENCY WORKS) BILL 2008

Date Introduced:	10 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Nathan Rees MP
Portfolio:	Minister for Emergency Services, Water

Purpose and Description

1. The object of this Bill is to amend the *State Emergency and Rescue Management Act 1999* to make special provision for carrying out of emergency works at a site in Botany Road, Alexandria

Background

2. The Minister in his Agreement in Principle speech in the Legislative Assembly on 10 April 2008 outlined the urgent need for this Bill. He advised that on 6 March 2008 a break in the main waterline under the Botany Road at Alexandria was detected. Around the same time subsidence was detected and a retaining wall on an adjacent construction site had moved and was unstable. The Minister states the retaining wall remains at risk of collapse with the potential to cause substantial damage to Botany Road and adjacent properties. He said the wall presents a risk to public safety and that action needs to be taken as quickly as possible to prevent further damage to the road and adjacent properties. He said repairs need to commence so that the road can reopen.

3. In view of the continuing risks at the site New South Wales Police required the Department of Commerce to enter the premises to undertake stabilisation work to prevent further damage to the road and adjacent property. The owner of the construction site thereupon commenced proceedings in the Supreme Court to prevent New South Wales Police, through the Department of Commerce, from entering the site and commencing the work required to prevent further damage. The property owner's application for an interim judgment was refused by the Supreme Court on Wednesday 9 April 2008. The Minister said that the court in its judgment recognised that the government was acting in this matter to represent the people of Sydney. He said the court recognised that the immediate safety concerns as to persons and property needed to be addressed. The hearing of the full case in the Supreme Court continues.

4. The Minister in his speech said that there is a risk that if the court hands down its decision while Parliament is not sitting and concludes that there are insufficient powers under the current legislation to undertake the work then the current rectification work being undertaken by the Department of Commerce will need to cease. He said that in these circumstances, the Bill is intended to provide the Department of Commerce with

clear legislative authority and a clear obligation to undertake the required work on the construction site to prevent further damage to Botany Road and address immediate safety concerns. The Minister makes the point that the Bill does not in any way attempt to interfere with the legal proceedings which are under way.

5. The Bill was amended in the Legislative Council by the omission of proposed clause 13. This amendment was accepted in the Legislative Assembly. That clause stated that the costs of carrying out the emergency works are to be born by BBC Constructions and may be recovered in a court of competent jurisdiction. The clause preserved the right of BBC Constructions to proceed against any person liable for causing the damage required to be rectified.

The Bill

Clause 1 sets out the name of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent.
Clause 3 gives effect to the amendments set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.
Schedule 1 Amendments of *State Emergency and Rescue Management Act 1989*

Schedule1 [2] defines the site of the emergency works and the emergency works which are authorised to be carried out. That Schedule also specifically authorises and requires the emergency works to be carried out by the Director-General of the Department of Commerce. Schedule 1 authorises the Director-General, the contractors, police officers and any persons authorised by the Director- General to have access to the site to carry out the emergency works. It also enables the Director-General to obtain plans, drawings and other documents related to works on the site.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issue: Emergency powers

6. The Committee is satisfied that there is an overriding public interest justifying the emergency powers contained in this legislation and that this has been comprehensively recognised by all parties during the Parliamentary debates.

The Committee makes no further comment on this Bill.

13. WASTE AVOIDANCE AND RESOURCE RECOVERY (CONTAINER RECOVERY) BILL 2008*

Date Introduced:	10 April 2008
House Introduced:	Legislative Council
Minister Responsible:	Ian Cohen MLC
Portfolio:	Private Member – The Greens

Purpose and Description

1. This Bill amends the *Waste Avoidance and Resource Recovery Act 2001* to introduce a container deposit scheme in New South Wales if the targets of the latest National Packaging Covenant are not met after the mid-term review of the Covenant in 2008; and for other purposes.

2. This Bill sets out the provisions for a container deposit scheme. The financial and tax instruments funding the beverage container deposit scheme are contained in another Bill (the *Beverage Container Tax Bill 2008*).

3. The object of this Bill is to introduce a container deposit scheme in New South Wales if the targets of the latest National Packaging Covenant are not met after the mid-term review of the covenant in 2008. The proposed beverage container scheme as outlined in the proposed part 4A, will provide for the payment of a 10¢ refund on containers declared to be subject to the scheme.

4. Proposed section 18C sets out the conditions that would require the Minister to declare the operation of a container deposit scheme in relation to a specific material. If targets for recycling rates of specific materials—paper and cardboard 70 to 80%; glass, 50 to 60%; steel 60 to 65%; aluminium 80 to 85%; plastics 30 to 35%—are not substantially achieved, the Minister must make a declaration that a container deposit scheme comes into effect in relation to that material.

5. Proposed section 18D requires the Minister to make a declaration to implement a container deposit scheme in relation to a specific material if there is a failure to achieve recycling rate targets for specific material by July 2010 (the scheduled expiry date of the National Packaging Covenant).

Background

6. The National Packaging Covenant is a voluntary regime established by all government and industry to reduce the environmental effects of packaging on the environment. Industry and government signatories have committed to increase the amount of post-consumer packaging recycled from its current rate of 48% to 65% by 2010. The National Packaging Covenant 2005-06 annual report revealed that the current rate of recycling was 56%, which was 9% off the 2010 target.

7. South Australia has extended producer responsibility [EPR] from the packaging industry and maintained a container deposit scheme for the past 33 years. The South Australian *Beverage Container Act 1975* was enacted in 1975 and later incorporated into the South Australian *Environment Protection Act 1993*. According to the Second Reading speech, the container deposit legislation [CDL] in South Australia has helped to achieve a recycling rate of 70% in relation to beverage containers and provided a new income stream for community organisations and the State's disadvantaged groups.

8. The 2001 Independent Review of Container Deposit Legislation in New South Wales by Dr Stuart White suggested New South Wales could recover 80 to 90% under a container deposit scheme. This Bill aims to reach those targets. The Second Reading speech cited Dr Stuart White's independent review:

> Local Government would realise financial benefits from the introduction of CDL through reduced costs of kerbside collection and through the value of unredeemed deposits in the material collected at kerbside.

And further cited that:

> … while the system (CDS) would cost between $30 and $50 million a year to put in place, the net benefit would be in the order of $70 to $100 million annually.

9. According to the Second Reading speech:

> Flexibility in establishing collection depots ensures that entities, whether commercial or community, who do not have the capacity for efficient scheme participation in collection and refund efforts, are not forced into collection efforts. The bill encourages a variety of collection depots and points ranging from community-based facilities to drive-through recycling centres without dictating compulsory retailer collection. The mechanics of the scheme envisage a process whereby the return of an unbroken, empty beverage container to a collection depot requires the collection depot to return the scheduled deposit. These deposits are recorded by the collection depot and reported to the Minister. Based on the data provided to the Minister, the collection depots are reimbursed from a beverage container deposit scheme central account.
>
> In instances where beverage containers are not returned to a collection depot, unredeemed deposits will be applied and distributed to a variety of programs to support kerbside recycling, offset collection costs in the operation of the scheme and provide funds to drive product development in relation to recyclability and reusability. The proposed container deposit scheme would in no way detract from kerbside collection and would work hand-in-hand with council kerbside recycling to maximise recycling of packaging consumed both in the home and in public places.

10. The Second Reading speech also referred to concerns about the operation or legality of the scheme in the context of section 92 of the Commonwealth Constitution or the Commonwealth *Mutual Recognition Act 1992* and its State counterparts. Accordingly, it stated that advice has been received on this matter that neither section 92 of the Constitution nor the Mutual Recognition Act will automatically invalidate the scheme.

The Bill

11. The object of this Bill is to ensure that, if the targets for recycling of certain packaging established by the National Packaging Covenant (2005) are not met, a beverage

container deposit scheme that provides for the payment of refunds on certain beverage containers will come into force. The Bill sets out the details of that scheme, which is funded by a proposed beverage container tax (see the *Beverage Container Tax Bill 2008*).

Schedule 1 Amendment

Schedule 1 inserts a new Part establishing a beverage container deposit scheme, as follows:

Part 4A Beverage container deposit scheme

Division 1 Definitions

Proposed section 18A defines words and expressions used in the proposed Part.

Division 2 Introduction of beverage container deposit scheme

Proposed section 18B provides that the proposed Part applies to beverage containers made wholly or mainly of a relevant material (namely paper or cardboard, glass, steel, aluminium or plastic) only if the Minister has declared under proposed section 18C or 18D that the Part applies to containers made wholly or partly of that material.

Proposed section 18C sets out the circumstances in which the Minister, following the 2008 review required by the National Packaging Covenant, must make a declaration that the proposed Part applies to beverage containers made of a relevant material. The Minister must make the declaration if the target for recycling of the particular relevant material has not been substantially achieved (that is, at least 75% of the additional quantity of the material scheduled to be recycled under new targets is being recycled) or it appears to the Minister that the target will not be met by 2010.

Proposed section 18D sets out the circumstances in which, after the National Packaging Covenant expires on 30 June 2010, the Minister must make a declaration that the proposed Part applies to beverage containers made wholly or partly of a particular material. This will be the case if the target for recycling packaging of the particular material has not been met.

Division 3 Labelling of beverage containers

Proposed section 18E requires every beverage container to be labelled as refundable.

Proposed section 18F provides that the regulations may impose further requirements relating to the labelling of beverage containers.

Division 4 Establishment or approval of collection depots

Proposed section 18G provides that the Minister may establish, or approve the establishment of, collection depots for the collection of empty beverage containers, including council depots and community centres or community based facilities.

Division 5 Refund scheme

Proposed section 18H provides that a person who accepts the return of an unbroken empty beverage container at a collection depot must pay the person who returns it the amount of the refund value.

Proposed section 18I requires collection depots to report to the Minister on refunds paid.

Division 6 Reimbursement of collection depots

Proposed section 18J requires the Scheme Administrator to pay to each collection depot each month, from the Central Account, the sum of the total amount of refund value paid by the collection depot over the previous calendar month and the processing fee prescribed by the regulations.

Division 7 Distribution of unredeemed deposits

Proposed section 18K provides for the distribution and use of unredeemed deposits (that is, of beverage container tax that has not been paid out to reimburse collection depots for refunds paid).

Division 8 Administration and management of scheme
Proposed section 18L provides for the appointment of a Scheme Administrator to oversee the operation of the proposed Part and exercise other functions.
Proposed section 18M constitutes a Container Deposit Management Committee, the functions of which include the provision of advice to the Minister on the operation of the proposed Part.

Division 9 Central Account
Proposed section 18N establishes a fund to be known as the Beverage Container Deposit Scheme Central Account.
Proposed section 18O provides for the administration and management of that account.
Proposed section 18P provides for the making of payments into that account.
Proposed section 18Q provides for the making of payments from that account.
Proposed section 18R provides for the investment of money in that account.

Division 10 Barcoding of beverage containers
Proposed section 18S requires a person who imports or produces a beverage container to supply the Management Committee with details of any barcode affixed to the beverage container.

Division 11 Review of refund value
Proposed section 18T requires the Minister to review the amount of the refund value at least once every 5 years.

Division 12 Regulations
Proposed section 18U provides for the making of regulations concerning the beverage container deposit scheme established by the proposed Part.

Division 13 Exemptions from application of Part
Proposed section 18V provides that the regulations may exempt beverage containers from some or all of the provisions of the proposed Part.
Proposed section 18W provides that the proposed Part does not apply to beverage containers produced before it takes effect.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issue: Absolute Liability

Schedule 1 – Division 3 – Labelling of beverage containers: Proposed section 18E Beverage containers must be labelled as refundable; and proposed section 18F (2) Regulations may impose further labelling requirements

12. Proposed section 18E reads that:

A person must not sell a beverage container unless the container is labelled "10 cent refund payable at any authorised NSW collection depot". Maximum penalty: 100 penalty units.

13. Proposed section 18F (2) reads that:

A person must not sell a beverage in a beverage container unless the container is labelled in accordance with any such regulations. Maximum penalty: 100 units.

Schedule 1 – Division 5 - Refund Scheme: Proposed sections 18H (1) and (2) Collection depot to pay refund

14. Proposed section 18H (1) reads:

A person who accepts the return of an unbroken empty beverage container to which this Part applies at a collection depot must pay the person who returns it the amount of the refund value. Maximum penalty: 50 penalty units.

15. Proposed section 18H (2) reads:

The operator of a collection depot must not refuse to accept any unbroken empty beverage container to which this Part applies that is returned to the collection depot. Maximum penalty: 50 penalty units.

Schedule 1 – Division 10 – Barcoding of beverage containers: Proposed section 18S Supply of barcode

16. Proposed section 18S reads:

A person who imports or produces a beverage container must supply to the Management Committee, in accordance with the regulations, details of any barcode affixed to the beverage container. Maximum penalty: 20 penalty units.

17. The Committee notes that the above offences which attract monetary penalty units are of absolute liability, where the proposed sections do not include any defence or reasonable excuse. However, under Australian law, offences are generally considered to have 2 aspects: a physical aspect (guilty act) and a mental aspect (intent). With absolute or strict liability, the mental element (intent or knowledge) is not required to be proven.

18. The Committee notes that the imposition of strict liability (rather than absolute liability) may in some cases be considered reasonable. The factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences, reasonable excuse or safeguards.

19. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence, which does not allow for a defence or reasonable excuse. The Committee, therefore, considers the proposed sections 18E, 18F, 18H (2), and 18S, as creating absolute liability offences, with the absence of any defence of reasonable excuse, which may amount to an undue trespass on individual rights and liberties, and refers it to Parliament.

20. The Committee further considers that strict liability (with the availability of a reasonable excuse or defence), rather than absolute liability for the above provisions in the Bill may achieve the same aim of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance.

The Committee makes no further comment on this Bill.

14. WORKERS COMPENSATION AMENDMENT BILL 2008

Date Introduced:	11 April 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Watkins MP
Portfolio:	Deputy Premier, Finance

Purpose and Description

1. This Bill amends the *Workers Compensation Act 1987* to make further provision for workers compensation insurance and other matters.

2. It contains new provisions that modify the obligations of employers to take out workers compensation insurance. First, it exempts employers who pay wages below a threshold (initially $7,500), from the requirement to hold a workers compensation policy.

3. Another reform is to align the period for which records relating to wages must be kept with the record keeping requirements of Victoria and the Australian Taxation Office. Currently, the workers compensation legislation requires employers to retain all records relating to wages for seven years. Under the Bill, this will be reduced to five years.

4. The Bill also ensures that WorkCover has sufficient powers to obtain and manage securities from current and former self-insurers to ensure ongoing claim liabilities, including for dust diseases. New provisions extend the existing security arrangements to make it clear that they apply to former self-insurers who may be required to provide additional deposits or security. Interest earned may be applied to supplement any additional deposits that have not been made. These amendments will assist in protecting the scheme in the event that there is a shortfall in security and a self-insurer or former self-insurer is unable to fund their liabilities.

5. The Bill will provide for the closure of the class of specialised insurers to new entrants and it takes effect from the date of introduction into the House. The holders of existing specialised insurer licences will still operate under their licences and be able to apply for renewals when the term of a licence expires.

Background

6. Currently, around 200,000 householders take out workers compensation insurance. This reform will remove their need to do so and extend the same workers compensation coverage to around 2.4 million households in New South Wales. The exemption will not apply where an employer engages an apprentice or trainee, or is a member of a group for workers compensation purposes. Workers employed by these exempt employers will be covered for their compensable injuries by a "deemed" policy.

7. If a worker employed by an exempt employer is injured at work, the employer will be required to notify the Nominal Insurer and pay the Nominal Insurer a once-only fee for the administration of the claim. The Agreement in Principle speech described that this fee will be prescribed by regulation (to be around $175). This reform aligns New South Wales arrangements with Victoria, regarding the obligation to hold a workers compensation policy and achieves further harmonisation of workers compensation requirements between the States and Territories.

8. The Bill also corrects an anomaly that exists in relation to the recovery of compliance audit costs from certain employers. Compliance audits or inspections are currently undertaken by or on behalf of WorkCover to ensure that the correct premiums are paid. Under existing legislation, costs of these inspections may be recovered from employers who have workers compensation policies and who under-declare wages by 25% or more. However, there is no provision for recovery of these costs from employers who have failed to take out a policy. The Bill contains a new provision that will enable recovery of all audit and inspection costs incurred by WorkCover where the employer does not have a workers compensation insurance policy.

9. The Bill clarifies that an individual employer should hold only one workers compensation policy of insurance. While it is the intention of the existing section 155 of the *Workers Compensation Act 1987* to prevent employers from holding more than one workers compensation policy of insurance, there has been some questioning of this. However, the amendment will not prevent an employer in the coalmining industry from holding a policy under the Coal Industry Act, as well as holding a general workers compensation policy for any other employees.

10. The Bill also closes the class of specialised insurers. According to the Agreement in Principle speech, about 75% of employers are covered by the WorkCover Scheme, which is managed by the Workers Compensation Nominal Insurer. The Nominal Insurer administers the scheme funds, which are held in the Workers Compensation Insurance Fund. The WorkCover Scheme offers workers compensation cover to any eligible employer, regardless of risk or claims history.

11. Workers compensation insurance is also offered to employers in some industries by specialised insurers, which are licensed by WorkCover. Specialised insurers are generally responsible for specific industries or cover specific categories of employers, such as Catholic Church Insurance or StateCover, the local government scheme.

12. According to the Agreement in Principle speech:

> The WorkCover Board has been concerned that the potential growth in the numbers of specialised insurers could threaten the ongoing viability of the nominal insurer because, unlike the nominal insurer, specialised insurers can refuse proposals for workers compensation insurance. This capacity allows specialised insurers to offer cover to employers who have a good claims record, but reject proposals from high-risk employers. If the number of employers eligible for cover by specialised insurers were to increase, the nominal insurer could be left with high risk and/or poor performing employers, affecting the stability and viability of the nominal insurer scheme. Further, the WorkCover Board believed permitting the entry of new specialised workers compensation insurers would effectively involve the private underwriting of a significant section of the workers compensation system. The WorkCover Board accordingly recommended that the entry of new specialised insurers should cease immediately.

13. The Agreement in Principle speech further explained:

> Prohibiting the entry of new specialised insurers will reinforce the recent achievements in stabilising and enhancing the scheme, by ensuring that it maintains a size and industry mix that is sufficient to provide stable and affordable premiums and that will ensure its long-term viability.

The Bill

14. The object of this Bill is to amend the *Workers Compensation Act 1987* (***the 1987 Act***) as follows:

(a) to remove the need for employers paying wages of less than a certain amount ($7,500 or such other amount as may be fixed by an insurance premiums order) to obtain a workers compensation insurance policy,
(b) to make it clear that an employer must have a single workers compensation policy covering all the employer's workers,
(c) to align the period for which an employer must keep wages records with parallel Victorian and Australian Taxation Office requirements,
(d) to provide for the recovery of compliance audit costs from employers who fail to obtain workers compensation insurance,
(e) to ensure that WorkCover has sufficient power to obtain and manage security deposits by self-insurers and former self-insurers so that ongoing workers compensation liabilities (including for dust diseases) are provided for,
(f) to restrict new applications for licences endorsed with a specialised insurer endorsement.

15. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent.
Clause 3 is a formal provision that gives effect to the amendments to the *Workers Compensation Act 1987* set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Insurance arrangements

The 1987 Act requires all employers to take out workers compensation insurance to cover their liabilities to their workers.
Schedule 1 [1] prohibits an employer from having more than one workers compensation insurance policy in force at any one time, so that an employer will have to have just one policy covering all the employer's workers.
Schedule 1 [3]–[8] provide for the recovery by WorkCover from an employer of an amount equal to double the amount of premium that the employer has avoided by having more than one policy of insurance.
Schedule 1 [2] exempts an employer from the requirement to take out a workers compensation insurance policy if the employer is not going to be paying wages above a certain level (being $7,500 or such other amount as may be fixed by an insurance premiums order). Such an employer will be deemed to have been issued with a workers compensation insurance policy by the Nominal Insurer. If a claim is made, the employer will be required to

pay an administration fee for the claim. The new arrangements will not apply to employers who employ apprentices or to group employers.

Schedule 1 [9] decreases from 7 years to 5 years the period for which an employer must keep wages records (to align the requirement with Victorian and Australian Taxation Office requirements).

Schedule 1 [10] provides for the recovery from employers who fail to obtain workers compensation insurance of compliance inspection costs incurred by an insurer or WorkCover.

Security for self-insurer obligations

The 1987 Act provides for self-insurers to be required to place money on deposit with WorkCover to ensure that their ongoing workers compensation liabilities are provided for. Self-insurers can also be required to deposit additional funds from time to time.

Schedule 1 [12] extends the existing arrangements so that WorkCover will be able to require former self-insurers to place money or additional money on deposit. The amendment also makes it clear that the amount that a self-insurer or former self-insurer can be required to have on deposit is the amount required to adequately provide for all accrued, continuing, future and contingent self-insurer liabilities. The existing arrangements are also extended to cover self-insurer liabilities arising from dust diseases.

Schedule 1 [14] makes it clear that interest earned on deposited money (which would otherwise be required to be paid to the self-insurer or former self-insurer concerned) can instead be applied by WorkCover in payment of extra deposits required to be made that have not been made.

Miscellaneous amendments

Schedule 1 [11] provides that a licence may be granted under Division 3 of Part 7 of the 1987 Act only if the licence is endorsed with a specialised insurer endorsement and granted to an existing licence holder on the expiry of a licence granted to the existing licence holder under that Division. This proposed restriction extends to an application for a licence that was made, but not determined, before the commencement of the proposed section. Any licence granted after the date that the Bill for the proposed Act was introduced into the Legislative Assembly that could not have been granted had the proposed section been in force has no effect.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issue: Absolute Liability

Schedule 1 [12] - proposed section 213 - Deposit required for self-insurers and former self-insurers; and Schedule 1 [16] - proposed section 215 (4) – Alternative method of giving security:

16. The amendments in section 213 relate to a self-insurer or a former self-insurer, who *must* make a deposit with the Authority on the grant of licence. These differ from the existing provision where only current self-insurers *shall* (rather than *must*), deposit with the Authority on the grant of licence. The proposed maximum penalty under sections 213 (1) and (2) is 100 penalty units. The proposed maximum penalty under section 213 (5) is 50 penalty units for failure to comply with any written direction of the Authority to provide specified information for determining the self-insurer or former self-insurer's required deposit amount.

17. Proposed section 215 (4) reads: A person *must* comply with a requirement under subsection (3). Maximum penalty: 100 penalty units. Current subsection (3) refers to: if

the market value of any such securities is at any time below par, the Authority may require the self-insurer to deposit further securities to such an amount that the total market value of all the securities deposited by the self-insurer equals the amount of the deposit required to be made by the self-insurer.

18. The Committee notes that imposing absolute or strict liability is often seen as contrary to the fundamental right to be presumed innocent until proven guilty as a person is presumed to have committed the offence irrespective of their intention. Article 14(2) of the *International Covenant on Civil and Political Rights* provides that: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'.

19. However, the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.[1]

20. The Committee stresses that the presumption of innocence is a fundamental right. It highlights that the imposition of strict or absolute liability removes the requirement on the Authority to prove that the person intended to commit the offence. Therefore, the Authority is not required to prove that the person had the requisite criminal intent, merely that the act was committed and as the Bill is silent on the availability of any reasonable excuse or defence, the above amendments create absolute liability.

21. However, the Committee considers that given the maximum penalty that may be imposed is monetary (which does not involve imprisonment), and also the public interest in ensuring compliance with the proposed amendments to obtain deposits or securities from current and former self-insurers to ensure ongoing claim liabilities, (including for dust diseases), and that the amendments aim to assist in protecting the workers compensation scheme in the event that there is a shortfall in security and a self-insurer or former self-insurer is unable to fund their liabilities, the Committee concludes that personal rights and liberties are not unduly trespassed.

Issue: Reverse Onus of Proof – Schedule 1 [8] - proposed section 156B (4) Recovery from directors of corporation – insurance requirements:

22. The amendment effectively reverses the onus of proof that requires the Authority to prove all elements of an offence. This is inconsistent with a presumption of innocence.

23. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is peculiarly in the possession of one party. According to the Senate Standing Committee for the Scrutiny of Bills:

> Where legislation provides that a particular state of belief is to constitute an excuse for carrying out an action which would otherwise be a crime, and in that way allows a

[1] Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

defence to a person who is accused of committing one, the Committee will more readily accept the onus of proof being placed on him or her to prove that excuse.[2]

24. The Committee concludes that a reversal of the onus of proof may be appropriate in these circumstances particularly where knowledge of the factual circumstances is in the possession of one party, and the person who is a director of a corporation could be in possession of knowledge of facts to establish the excuse or grounds as to not being culpable of a contravention by the corporation.

Issue: Retrospectivity – Schedule 1 [11] - proposed section 176 (3) and (4) Licences to be re-granted only to existing licensing holders:

25. Proposed section 176 (3) reads: This section extends to an application for a licence that was made, but not determined, before the commencement of this section. Proposed section 176 (4) reads: Any licence granted under this Division after the date that the Bill for the *Workers Compensation Amendment Act 2008* was introduced into the Legislative Assembly that could not have been granted had this section been in force has no effect.

26. The Committee will always be concerned to identify the retrospective effects of legislation, which may have an adverse impact on a person. The proposed amendments could have an adverse impact on licence applicants who have applied before the commencement of the section and also, have an adverse impact on those who have a licence granted under the current legislation except for the proposed section 176 (4) when after the date the Bill was introduced into the Legislative Assembly, yet before the passing of the Bill or commencement of the amendment Act, would make their licence ineffective through the retrospective application of the amending section.

27. The Committee considers this would cause loss and adverse impact to persons who have acted on the basis of the current legislation. The Committee notes the retrospective effect of revoking a licence duly made under current law trespasses on a person's right to order his or her affairs in accordance with the current law, and refers this to Parliament.

The Committee makes no further comment on this Bill.

[2] Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 38th Parliament (May 1996 – August 1998)*, para 2.108.

Appendix 1: Index of Bills Reported on in 2008

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Conveyancing Amendment (Mortgages) Bill 2007*	1
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes (Administration of Sentences) Legislation Amendment Bill 2008	5
Criminal Case Conferencing Trial Bill 2008	4
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Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*	5
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Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
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Appendix 2: Index of Ministerial Correspondence on Bills

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Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
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Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
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Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Criminal Case Conferencing Trial Bill 2008	N, R				
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Mining Amendment Bill 2008	N				
National Gas (New South Wales) Bill 2008					N
Public Sector Employment and Management Amendment Bill 2008	R				
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
State Revenue Legislation Amendment Bill 2008	N, R				
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Workers Compensation Amendment Bill 2008	N, R				

Key
R Issue referred to Parliament
C Correspondence with Minister/Member
N Issue Note

Appendix 4: Index of correspondence on regulations reported on in 2007

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