

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

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TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Guide to the <i>Legislation Review Digest</i>	iv
Summary of Conclusions.....	vi
Part One – Bills.....	1
SECTION A: Comment on Bills.....	1
1. Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005.....	1
2. Farm Debt Mediation Amendment (Water Access Licences) Bill 2005	4
3. Luna Park Site Amendment (Noise Control) Bill 2005.....	6
4. Retail Leases Amendment Bill 2005.....	14
5. Royal Blind Society (Merger) Bill 2005	19
6. Vocational Education and Training Bill 2005.....	21
Part Two – Regulations	25
SECTION A: Regulations about which the Committee is Seeking Further Information.....	25
SECTION B: Copies of Correspondence on Regulations	26
1. Adoption Amendment (Adoption Service Providers) Regulation 2005.....	27
2. Legal Profession Amendment (Advertising) Regulation 2005.....	31
Appendix 1: Index of Bills Reported on in 2005.....	39
Appendix 2: Index of Ministerial Correspondence on Bills for 2005	43
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005.....	45
Appendix 4: Index of correspondence on regulations reported on in 2005.....	48
Appendix 5: Notice of Discussion Paper on the Right to Silence	49

* Denotes Private Member's Bill

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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 2005

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 2005

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 2005

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 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 2005

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. Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005

Retrospectivity: Schedule 2 [9]

8. The Committee notes that the Bill has the effect of altering the terms of existing contracts where the inclusion of all credit fees and interest charges in the calculation of the maximum annual percentage rate results in a maximum rate above that prescribed.
9. The Committee notes that the purpose of including fees and charges within the maximum annual percentage rate is to prevent fringe lenders from imposing fees and charges far in excess of reasonable costs.
10. The Committee refers to Parliament the question as to whether the retrospective effect of the Bill unduly trespasses on personal rights and liberties

2. Farm Debt Mediation Amendment (Water Access Licences) Bill 2005

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

3. Luna Park Site Amendment (Noise Control) Bill 2005

Denial of Compensation, Review rights: Schedule 1[3] (proposed s 19A)

20. The Committee refers to Parliament the question as to whether proposed section 19A unduly trespasses on personal rights and liberties by limiting action against Luna Park in respect of noise emissions only to noise that exceeds the new maximum level of 85 decibels.

Rule of law, Retrospectivity, Denial of compensation rights, Discrimination: Schedule 1[5] (proposed s 3)

35. The Committee notes that adherence to the rule of law is recognised as a key element in a democracy and is essential for the protection of human rights.
36. The Committee is also of the view that the rule of law requires compliance with a set of principles that includes avoiding retrospective legislation that adversely affects a person, ensuring consistency in the application of the law and respecting the separation of powers.
37. The Committee is of the view that Schedule 1[5] trespasses on personal rights by:
 - applying retrospectively in a way that may adversely affect some persons;

- rendering ineffective certain judicial decisions on which people may have relied;
 - preventing the final determination of legal proceedings that are still on foot.
38. The Committee refers to Parliament the question as to whether Schedule 1[5] unduly trespasses on a person's rights and liberties.

Right to Compensation: Schedule 1[5] (proposed section 3)

50. The Committee notes that Schedule 1[5] denies a person the right to seek compensation in relation to certain noise emissions from Luna Park during the relevant period.
51. The Committee is of the view that extinguishing compensation rights can be justified if, having regard to the overall context, there are compelling public interest reasons for extinguishing the right, and if the extinguishment is proportional to that public interest aim.
52. The Committee notes the Minister's explanation for the need for this provision to ensure that Luna Park is viable into the future at no cost to the taxpayer.
53. The Committee also notes that it is unclear to it that the trespass of personal rights resulting from the operation of proposed section 3 is necessary for the preservation of Luna Park or proportional to the public interest served in preserving Luna Park.
54. The Committee refers to Parliament the question as to whether the exclusion of claims for compensation constitutes an undue trespass on personal rights and liberties.

4. Retail Leases Amendment Bill 2005

15. Given the public interest in ensuring RailCorp is unimpeded in ensuring railway safety and security, the Committee does not consider that s 82A trespasses unduly on personal rights and liberties insofar as it applies to leases entered into after the Bill has been passed.
19. The Committee is of the view that the rule of law requires compliance with a set of principles that includes avoiding retrospective legislative provisions that adversely affect a person.
20. The Committee refers to Parliament the question of whether preventing existing RailCorp lessees from relying on a statutory entitlement to compensation that existed at the time they entered into their leases constitutes an undue trespass on personal rights and liberties.

Prescribing by regulation those retail shops to which the Act is to apply: Schedule 1[4], [93].

24. The Committee will always be concerned to identify when the subject matter of an Act may be effectively expanded or contracted by a regulation that prescribes those matters that fall within a key definition.

Summary of Conclusions

25. The Committee notes, however, that providing for new types of retail shops outside of retail shopping centres to be covered by the Act without the need for its amendment offers regulatory flexibility and responsiveness.
26. Having regard to the fact that any regulations altering the retail shops that may fall within or outside the Act's ambit will be subject to disallowance by Parliament, the Committee considers that the proposed provisions do not constitute an inappropriate delegation of legislative power.

5. Royal Blind Society (Merger) Bill 2005

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

6. Vocational Education and Training Bill 2005

Procedural fairness, Right to be heard: Clauses 30(2) & 36(2)

14. The Committee notes that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her, but that this rule can be displaced by clear legislative intent.
15. The Committee is of the view that a decision to cancel or refuse accreditation of a vocational course could have a significant adverse impact on a person, which could be compounded if the decision is made with immediate effect.
16. The Committee notes the power is intended to be used in circumstances in which, for example, public safety is at stake.
17. The Committee has written to the Minister for advice as to why the legislation does not contain an inclusive or indicative list of the public interest circumstances that might warrant a decision of the Board to cancel or refuse accreditation to take immediate effect.
18. The Committee refers to Parliament the question as to whether clauses 30(2) and 36(2) unduly trespass on a person's right to be heard before an adverse decision is made against them.

Fees not reviewable by Parliament: Clauses 11(2), 13(3), 16(2), 18(9), 25(2), 27(2), 34(3) & (6) and 35(2)

22. The Committee notes that the Bill delegates to the Board the power to determine the level of fees to impose for a range of matters and that such fees are not reviewable or disallowable by the Parliament.
23. The Committee is of the view that the level of fees, particularly fees comprising part of a regulatory scheme rather than merely a fee for a service, should be reviewable and disallowable by Parliament.

24. The Committee has written to the Minister for advice as to why the level of fees is not disallowable by the Parliament.
25. The Committee refers to Parliament the question whether these clauses provide for an undue delegation of legislative power.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CONSUMER CREDIT (NEW SOUTH WALES) AMENDMENT (MAXIMUM ANNUAL PERCENTAGE RATE) BILL 2005

Date Introduced:	19 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Diane Beamer MP
Portfolio:	Fair Trading

Purpose and Description

1. The Bill amends the *Consumer Credit (New South Wales) Act 1995* (the Act) and related Regulation¹ to extend certain protections that currently apply to credit contracts of less than 62 days duration to all credit contracts covered by the *Consumer Credit (New South Wales) Code* (Code), as set out below.²

Background

2. Section 11 of the Act enables a maximum annual percentage rate to be prescribed for credit contracts or a certain class of credit contracts to which the Code applies.³
3. A rate of 48% has been prescribed for short-term credit contracts of less than 62 days, commonly known as payday loans (Regulation, cl 7).⁴ In relation to short-term credit contracts, s 10B of the Act requires that all interest charges and credit fees are to be included for the purposes of rates calculation and that those charges and fees, however described, be disclosed to potential borrowers.
4. The second reading speech stated:

There is recent evidence that the fringe lending market – a term used to describe credit providers who offer relatively small high-cost loans – has reinvented itself from

¹ Consumer Credit (New South Wales) Special Provisions Regulation 2002.

² The Consumer Credit Code is the nationally uniform State-based legislation that governs all personal, domestic and household credit transactions in Australia: Ms Diane Beamer MP, Minister for Fair Trading, Second Reading Speech, Legislative Assembly *Hansard*, 19 October 2005. A copy of the Code is available online at <www.creditcode.gov.au>.

³ The Code applies to credit contracts, both short-term and continuing, that take the form of personal loans, credit cards, mortgages, hire of goods and pay day loans: <www.creditcode.gov.au>. The Bill preserves the application of Division 2 of Part 2 of the Code to prescribed maximum annual percentage rates as if they had been prescribed under the Code. As the note under s 11(3) of the Bill states, the effect is that “a contract is void to the extent that it imposes a monetary liability [higher than such a rate] and... any amount paid under the contract may be recovered. In addition, the credit provider is guilty of an offence for entering into such a contract”.

⁴ Ms Diane Beamer MP, Minister for Fair Trading, Legislative Assembly *Hansard*, 19 October 2005.

“payday lending” by increasing the term of loan products to a period greater than 62 days. This has allowed fringe lenders to continue to impose fees and charges far in excess of reasonable costs...

This bill will address those predatory lending practices by closing a loophole and requiring all consumer credit loans regulated by the Consumer Credit Code, with the exception of certain products offered by authorised deposit-taking institutions, to include fees and charges in the calculation of the maximum annual percentage rate, regardless of the term of the loan.⁵

The Bill

5. Among other matters, the Bill amends the Act and Regulation to:
- enable the making of regulations to require maximum annual percentage rate calculations for all credit contracts covered by the Code to include interest charges and all credit fees and charges⁶ [Schedule 1(2), amended s 11];
 - extend the requirement of disclosure of the annual percentage rate, including any interest charges (however described) in pre-contractual and contractual documentation to all credit contracts covered by the Code [Schedule 1(1), amended s 10B]; and
 - provide for additional assumptions relating to the term of the contract, the amount of credit and the amount of repayments, which are to be applied when calculating the maximum annual percentage rate for continuing credit contracts [Schedule 2(5), proposed cl 8(6A)].

Issues Considered by the Committee

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

Retrospectivity: Schedule 2 [9]

6. Schedule 2 [9] applies the amendments to be made to the Consumer Credit (New South Wales) Special Provisions Regulation 2002 to existing contracts. In particular, it applies the inclusion of all credit fees and charges under a credit contract in the calculation of the maximum annual percentage rate.
7. As a result, the Bill will reduce the money payable under any existing contracts that exceed the maximum annual percentage rate according to the formula set out in the Bill to the maximum so provided.

- 8. The Committee notes that the Bill has the effect of altering the terms of existing contracts where the inclusion of all credit fees and interest charges in the calculation of the maximum annual percentage rate results in a maximum rate above that prescribed.**

⁵ Ms Diane Beamer MP, Minister for Fair Trading, Legislative Assembly *Hansard*, 19 October 2005.

⁶ This is with the exception of certain temporary credit facilities provided by authorised deposit-taking institutions [Schedule 2(1), new cls 7(4) and (5)].

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| <p>9. The Committee notes that the purpose of including fees and charges within the maximum annual percentage rate is to prevent fringe lenders from imposing fees and charges far in excess of reasonable costs.</p> <p>10. The Committee refers to Parliament the question as to whether the retrospective effect of the Bill unduly trespasses on personal rights and liberties</p> |
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The Committee makes no further comment on this Bill.

2. FARM DEBT MEDIATION AMENDMENT (WATER ACCESS LICENCES) BILL 2005

Date Introduced:	19 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Primary Industries

Purpose and Description

1. The Bill amends the *Farm Debt Mediation Act 1994* (the Act) to extend its application to a farm debt secured by an interest in a water access licence.

Background

2. The Act makes provision for mediation concerning *farm debts* to take place before a creditor under a farm mortgage may take enforcement action against a farmer who is in default under the farm mortgage.
3. By virtue of the definitions of *farm debt* and *farm property*, provision for mediation is limited to debts that flow from mortgages secured wholly or partly over farmland or farm machinery.⁷
4. The second reading speech stated:

Traditionally, farmland included any water licences attached to the land. However, changes introduced by the Water Management Act have created separate rights for water licences.

[A]ccess licences are now a separate asset of the farm, and, as a result, they are no longer within the strict definition of a "farm debt" under the Act. This means they are no longer covered by the mandatory debt mediation requirements under the Act. It also means that where water licences are used on farms, creditors may be able to take enforcement action for debts secured against the licence without going through the mediation process set up under the Act. The forced sale of an access licence to recoup a farm debt would have a significant impact on the continuing operation of a farm by removing the farmer's right to access water needed for farm production. To overcome the situation I have just described, the bill amends the Act to ensure that it defines "farm property" to include access licences used by farmers. This will mean that a creditor must offer mediation before commencing enforcement action against a farmer in relation to a debt secured by an access licence used in connection with the farm operation.⁸

⁷ See the definitions of *farm debt*, *farm mortgage* and *farm property* in s 4 of the *Farm Debt Mediation Act 1994*.

⁸ Ms Allison Megarrity MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 19 October 2005.

The Bill

5. The Bill amends the definition of *farm property* to include an access licence, within the meaning of the *Water Management Act 2000*, held by a farmer in connection with a farming operation [Schedule 1[1], amended s 4(1)].
6. The amending provisions of the Bill are to apply to an existing farm mortgage involving an interest in, or power over, an access licence, even if the farmer defaulted on this mortgage prior to the commencement of the amending provisions. However, the Bill provides that its amending provisions do not affect any enforcement action initiated by a creditor before they commence [Schedule 1[4], new cl 9].

Issues Considered by the Committee

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| <p>7. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

3. LUNA PARK SITE AMENDMENT (NOISE CONTROL) BILL 2005

Date Introduced:	12 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Sandra Nori MP
Portfolio:	Tourism, Sport and Recreation

The Bill passed all stages in the Legislative Assembly and the Legislative Council on 18 October 2005. It received Royal Assent on 19 October 2005. Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. This Bill amends the *Luna Park Site Act 1990* (the principal Act), in relation to noise emissions from the Luna Park site, so as:
 - (a) to set a maximum permissible noise level for future noise emissions; and
 - (b) to protect both past noise emissions, and future noise emissions not exceeding the maximum permissible noise level, from legal proceedings and other noise abatement action, and
 - (c) to provide that neither past noise emissions, nor future noise emissions not exceeding the maximum permissible noise level, are to be taken to constitute a public or private nuisance.

Background

2. In her second reading speech, the Minister stated:

...On 5 April 2005, four plaintiffs commenced action in the Supreme Court alleging that the operation of Luna Park constitutes a nuisance. The plaintiffs have sought orders to stop the operation of three permanent and two temporary outdoor rides at Luna Park and to seek damages from the operation of the rides. The core of the current action is directed at noise created by the patrons at Luna Park...

I am advised that Luna Park is operating within its conditions of development consent. No-one has claimed they are in breach of their development consent...

This Bill is consistent with action taken in March 2005 under the *Protection of the Environment Operations Act 1997*, which protected the operations of Luna Park against noise actions if the park was complying with its conditions of development consent. The Bill goes one step further than that regulation by effectively specifying a maximum noise level for the outdoor areas of Luna Park rather than relying on the provisions of the Luna Park Acoustic Plan of Management.⁹

⁹ The Hon Sandra Nori MP, Minister for Tourism, Sport & Recreation, Legislative Assembly *Hansard*, 12 October 2005.

The Bill

3. The Bill provides that:
 - a reference to “noise” from an authorised use includes a reference to noise arising from all persons involved in the use [Schedule 1[2]];
 - no criminal or civil proceedings or noise abatement action may be taken against any person in relation to noise from the Luna Park site, except in relation to noise that exceeds the permissible level (85 decibels)¹⁰ [Schedule 1[3] proposed s 19A]; and
 - maximum noise levels imposed by the conditions of any development consent for land within the Luna Park site under the *Environmental Planning and Assessment Act 1979* will still be effective and enforceable under that Act.
4. Proposed section 3 protects all noise emissions during the period between 30 March 2004 and the commencement of proposed section 19A from legal proceedings and other noise abatement action, regardless of the noise level of those emissions. It also provides that any such emission is not to be taken to have constituted a public or private nuisance [Schedule 1[5]].
5. This section does not apply to any existing final determination of any court or tribunal. However, such a final determination cannot be construed as limiting or restricting the use of land within the Luna Park site after the commencement of the proposed Act.

Issues Considered by the Committee

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

6. The doctrine of parliamentary supremacy provides that the legislative branch of government may make any laws it chooses to make (to the extent of its constitutional authority). This law-making supremacy extends to the enactment of legislation that either overturns the results of past litigation, or bars current, proposed or prospective litigation.
7. However, in a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the separation of powers, and the Rule of Law.
8. The Rule of Law embodies a set of principles for “legal restraint and fairness in the use of government power” (G Walker, *The Rule of Law* (1988), p 3). The Universal Declaration of Human Rights expressly recognizes the relationship between the Rule of Law and the protection of human rights (Preamble, para 3), and the Rule of Law is implicit in the Australian Constitution (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1).
9. The specific aspects of the Rule of Law with which the proposed Bill is arguably inconsistent are:
 - legislation should not be retroactive;

¹⁰ “**Maximum permissible noise level**” is defined in proposed 19A(5) as 85dB (A) (L_{A10²} 15 mins).

Luna Park Site Amendment (Noise Control) Bill 2005

- legal rules should be “sufficiently stable to allow people to be guided by their knowledge of the content of the rules”; and
- government decisions in specific situations should be guided by applicable legal rules that are relatively general, stable and prospective.¹¹

Denial of Compensation, Review rights: Schedule 1[3] (proposed s 19A)

10. Schedule 1[3] of the Bill proposes to insert section 19A into the *Luna Park Site Act 1990*. This addresses the issue of *selected aspects of future noise* emissions from the site.
11. It prevents the institution of any legal proceedings whether under legislation or common law (public and private nuisance) in relation to the emission of noise from Luna Park unless the noise exceeds “the maximum permissible noise level at the closest residential façade”, namely 85 decibels.
12. It also prevents regulatory agencies using tools (“noise abatement actions”) they possess to control this noise (eg, noise control notices issued by the “appropriate regulatory authority” and noise abatement directions issued by the police, among others).
13. However, these provisions do not apply to constraints on other aspects of noise from the site imposed by conditions of the development consent relating to Luna Park; these can still be enforced. In her second reading speech the Minister cites the example of noise emanating from internal spaces being restricted to 60dBA.
14. The common law torts of public and private nuisance have traditionally allowed the courts to act as arbiters between competing land users on neighbouring land, particularly in relation to air and noise pollution. Only to the extent that an occupier’s enjoyment of their land was protected by the balancing process that was the law of nuisance could it be said that occupiers had any right to peaceful enjoyment.
15. Many of the functions of public and private nuisance are now fulfilled by legislation that sets up administrative procedures to regulate pollution prospectively rather than after the event (eg. *Protection of the Environment Operations Act 1997*).
16. In essence, the Bill proposes to replace both the general statutory regime insofar as it relates to noise control, and the remnant common law rights protected by that regime, with a special statutory regime relating to Luna Park.
17. Clearly, the current NSW Parliament is entitled to replace the current legislative regime for dealing with noise pollution with an alternative one. However, the Committee notes that proposed section 19A might constitute an interference with individual rights and liberties because it will not operate generally throughout the community, but only in relation to noise generated by the operations at Luna Park. It protects a particular landholder from legal proceedings that might be brought successfully against other landholders. It even prevents the government’s own

¹¹ See J Finnis, *Natural Law and Natural Rights* (1980) pp 270-271.

regulatory agency from issuing a noise control notice fixing a level less than the maximum permissible noise level fixed by the Bill.

18. Whether this amounts to an *undue* trespass on individual rights and liberties depends on striking an appropriate balance between the public interest in protecting Luna Park from such proceedings, and the interests of its neighbours in having an equivalent level of amenity to that enjoyed by other members of the community.
19. In relation to the issue of amenity, the Committee is of the view that Parliament should consider the extent to which the proposed maximum permissible noise level under the Bill exceeds levels protected elsewhere by the law and agency practice. However, the primary consideration for Parliament in making a determination on this issue must necessarily be the extent to which the proposed maximum level of noise affects not simply the amenity, but also the health and welfare, of the neighbours of Luna Park.

20. The Committee refers to Parliament the question as to whether proposed section 19A unduly trespasses on personal rights and liberties by limiting action against Luna Park in respect of noise emissions only to noise that exceeds the new maximum level of 85 decibels.

Rule of law, Retrospectivity, Denial of compensation rights, Discrimination: Schedule 1[5] (proposed s 3)

21. Schedule 1[5] of the Bill operates retrospectively to legitimise any breaches of legislation or public or private nuisance at common law in relation to noise emissions which might have occurred during the “*relevant period*”, namely between 30 March 2004 and the commencement of proposed section 19A.
22. It does this by retrospectively authorising a higher level of noise emission from the Luna Park site during the *relevant period* than that allowed under the law as it applied during that period. It also declares that such noise cannot constitute a public nuisance regardless of its level.
23. The clause applies to any current civil, criminal or noise abatement actions in a court or tribunal in relation to noise emissions from Luna Park during the relevant period. This means that it is pointless for any such actions that have not been finally determined to proceed to a determination.
24. Further, any court or tribunal order made in relation to noise emissions during the relevant period that in any way inhibits the use of the Park is rendered void by this legislation. For example, if a court ordered that the Park was not to allow the emission of noise at certain times of the day, that order would no longer apply once this clause commences.
25. By retrospectively removing a right to bring legal proceedings for a breach of legislation or the common law, the Committee is of the view that the clause is inconsistent with the right of citizens in a constitutional democracy to expect that governments will act in accordance with the Rule of Law when taking actions that affect the interests of citizens. It also effectively extinguishes compensation rights.

Rights associated with the Rule of Law

26. As stated above, in a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the rule of law, notwithstanding Parliament's authority to make any laws it chooses.
27. The rule of law embodies a set of principles for "legal restraint and fairness in the use of government power",¹² including consistency in the application of the law and separation of powers.
28. Adherence to the rule of law is recognised as a key element in a democracy and for the protection of human rights. The rule of law has been held to be implicit in the Australian Constitution (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1).

Retrospectivity

29. The clause applies retrospectively and is contrary to the principle that a person is entitled to rely on the law. It applies a new law to a period of time that has elapsed. The effect on a person who relied on the law and who brought legal proceedings or obtained a judicial determination in legal proceedings, on the basis of the law as it stood prior to the commencement of this clause, is clearly adverse. The Committee is of the view that retrospective legislation that adversely affects a person trespasses on that person's rights.

Consistency in application of law; Non discrimination

30. The clause protects a particular landholder from legal proceedings that might be successfully brought against other landholders. This represents discrimination in favour of the interests of the Luna Park landholder in comparison with other landholders (except where they are similarly afforded special protection) and against the interests of neighbours of Luna Park in comparison with the neighbours of landholders carrying out similar operations elsewhere.
31. The Luna Park neighbours may legitimately claim that at the time they moved into the adjacent area they had an expectation that they would receive the same protection from noise as others in the State. They may legitimately claim that they have been denied equal protection under law, and that this has occurred retrospectively.
32. The Committee is of the view that the clause may trespass on the right to equal protection under law and may undermine the rule of law by making one law for one landholder and another law for others.

Instability/Uncertainty

33. Schedule 1[5] has the effect of rendering ineffective certain judicial determinations a person may have obtained in legal proceedings that have concluded and on which they and other people may have relied. It also has the effect of rendering ineffective

¹² G Walker, *The Rule of Law* (1988), p 3.

legal proceedings that are on foot, in relation to which people have relied on the law to the extent of bringing that legal action.

34. The Committee is of the view that Schedule 1[5] risks undermining confidence in the legal system by undermining the ability of citizens to rely on the law and on legal procedures established to protect rights.

35. The Committee notes that adherence to the rule of law is recognised as a key element in a democracy and is essential for the protection of human rights.

36. The Committee is also of the view that the rule of law requires compliance with a set of principles that includes avoiding retrospective legislation that adversely affects a person, ensuring consistency in the application of the law and respecting the separation of powers.

37. The Committee is of the view that Schedule 1[5] trespasses on personal rights by:

- **applying retrospectively in a way that may adversely affect some persons;**
- **rendering ineffective certain judicial decisions on which people may have relied;**
- **preventing the final determination of legal proceedings that are still on foot.**

38. The Committee refers to Parliament the question as to whether Schedule 1[5] unduly trespasses on a person's rights and liberties.

Right to Compensation: Schedule 1[5] (proposed section 3)

39. Schedule 1[5] denies a person the right to seek compensation for any loss or damage they may have suffered as a result of noise emissions from Luna Park during the relevant period.

40. The Committee notes that the High Court has treated the denial of compensation rights as akin to the acquisition of property within s 51(xxxi) of the Commonwealth Constitution.¹³

41. In relation to proceedings that have not been finalised, the overall effect of clause 3 is to prevent any current civil, criminal or noise abatement legal proceedings from continuing, regardless of the stage reached in those proceedings, and to render inoperative from the commencement date of the clause any judicial orders regarding future activity in the Park in relation to noise emissions from the Park during the relevant period.

42. The Committee is of the view that to deprive someone of a right to compensation that may already have accumulated is a significant interference with personal rights and liberties. This is accentuated when, as here, the legislation does not operate generally but focuses on protecting a particular landholder from legal proceedings that might be brought successfully against other landholders.

¹³ Section 51(xxxi) provides that the Commonwealth may make laws for "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

Luna Park Site Amendment (Noise Control) Bill 2005

43. Those who have already commenced proceedings are in a particularly invidious position. The result of this Bill, which has already received Assent, is that unless a final determination has been made in these proceedings, the litigants will be deprived of any compensation that may subsequently have been awarded by the court.
44. The Committee notes the public interest in preserving Luna Park and the Minister's explanation on the need for this provision in her second reading speech:
- This aspect of the legislation is necessary to ensure that the past operations of Luna Park and the uncertain state of the law do not jeopardise the park's future viability.
- The Bill is also consistent with the Government's commitment and actions to return a viable Luna Park to the people of Sydney for their ongoing enjoyment and at no cost to the New South Wales taxpayer.¹⁴
45. Whether the extinguishment of compensation rights comprises an *undue* trespass to personal rights depends on striking a fair balance between the demands of the general interest of the community, in this case preserving Luna Park at no cost to the taxpayer, and the requirements of the protection of an individual's fundamental rights, in this case to seek redress, including compensation, for loss or damage they suffer because of certain aspects of Luna Park's operation.¹⁵
46. In addition, the Committee is of the view that in considering whether removing a person's right to compensation is justified, it is necessary to consider, among other things:
- whether the extinguishment of the right is necessary to achieve the competing public interest and whether it is proportional; and
 - the context in which the right to compensation is being extinguished.
47. The Committee notes that extinguishing the right to compensation in this case compounds the overall adverse effect of clause 5 on personal rights and liberties.
48. Furthermore, as future operations at Luna Park are ensured by the setting of a maximum permissible noise level in proposed section 19A, it is not obvious to the Committee why it is necessary to deny neighbours' rights to compensation for damage already suffered which may have accumulated under the law as it then stood.
49. The removal of any rights to compensation that may have accumulated is a significant trespass on personal rights and liberties. It is not clear to the Committee that this trespass is necessary for the preservation of Luna Park or proportional to the public interest served in preserving Luna Park.

50. The Committee notes that Schedule 1[5] denies a person the right to seek compensation in relation to certain noise emissions from Luna Park during the relevant period.

¹⁴ The Hon Sandra Nori MP, Minister for Tourism, Sport & Recreation, Legislative Assembly *Hansard*, 12 October 2005.

¹⁵ This is the test used by the European Court of Human Rights when applying Article 1 of Protocol 1 to the *European Convention on Human Rights*, which permits a State to deprive a person of possessions, as long as it is done "in the public interest and subject to the conditions provided for by law and by the general principles of international law": *Sporrong and Lönnroth v Sweden* (1982) EHRR 35 at paragraph 69.

- 51. The Committee is of the view that extinguishing compensation rights can be justified if, having regard to the overall context, there are compelling public interest reasons for extinguishing the right, and if the extinguishment is proportional to that public interest aim.**
- 52. The Committee notes the Minister's explanation for the need for this provision to ensure that Luna Park is viable into the future at no cost to the taxpayer.**
- 53. The Committee also notes that it is unclear to it that the trespass of personal rights resulting from the operation of proposed section 3 is necessary for the preservation of Luna Park or proportional to the public interest served in preserving Luna Park.**
- 54. The Committee refers to Parliament the question as to whether the exclusion of claims for compensation constitutes an undue trespass on personal rights and liberties.**

The Committee makes no further comment on this Bill.

4. RETAIL LEASES AMENDMENT BILL 2005

Date Introduced:	19 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon David Campbell MP
Portfolio:	Small Business

Purpose and Description

1. This Bill amends the *Retail Leases Act 1994* (the Act) in relation to the rights and obligations of lessees and lessors under retail shop leases and related matters, as detailed below.

Background

2. In his second reading speech, the Minister stated:

The Government has developed these reforms to ensure that New South Wales retail tenancy legislation continue to provide a competitive environment for retail lease dealings – one that cuts red tape, provides greater certainty and reduces the need to engage in costly disputation...

There are five important aspects of this bill I would like to bring to the attention of the House. First, I am pleased to announce that we are introducing legislative protection for the collection, management and refund of cash security bonds... Second, we are giving retailers and landlords more certainty about their rights and obligations under a retail shop lease, before the lease starts... Third, we are further cutting red tape and improving dispute resolution in a number of areas... Fourthly, we are catching up with the market to bring new types of retailing within the Act and to recognise longstanding tenancies operating under short-term leases... Importantly, last but not least we are including misleading and deceptive conduct in the existing regime for dispute resolution and updating the monetary limit of the retail leases division of the [Administrative Decisions] tribunal established to deal with retail licensing disputes.¹⁶

The Bill

Extension of Act to new types of retail shops by regulation

3. The Bill extends the Act to new types of retail shops. Section 3 of the Act defines a **retail shop** to mean premises that are used for the carrying out of a business in a retail shopping centre or which are wholly or predominantly for the carrying out of one or more of the businesses specified in Schedule 1, whether or not in a retail shopping centre.¹⁷ The Bill replaces Schedule 1 so as to add new retail shop categories and remove others no longer needed as a result of being included in the new categories

¹⁶ Mr David Campbell MP, Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business, Legislative Assembly *Hansard*, 19 October 2005.

¹⁷ Section 5 of that *Retail Leases Act 1994* limits the retail shops to which the Act applies, excluding retail shops over 1000 square metres and those situated within cinemas, bowling alleys or skating rinks when owned by the operator of that entertainment complex.

[Schedule 1[90]].¹⁸ Provision is also made for the listed businesses in Schedule 1 to be amended by regulation and eventually moved to the regulations [Schedule 1[4], [6], [82] and [93]]. The Bill provides that a change to the list of businesses does not affect existing leases, except in so far as the regulations otherwise provide [Schedule 1[84]].

Extension of Act to successive, short-term leases

4. The Bill also extends the application of the Act to successive, short-term retail shop leases. Currently, s 6 of the Act provides that it does not apply to a retail shop lease with a term of less than 6 months in which the lessee has no right to renew.¹⁹ Whilst this exclusion remains, the Bill extends the operation of the Act to successive, extended or renewed leases which may each be less than six months duration, but whose total duration exceed 12 months without interruption [Schedule 1[9]]. This does not apply to existing leases [Schedule 1[93]].

Security bonds

5. The Bill inserts a new Part 2A into the Act to establish a system for the deposit of retail shop security bonds with the Director-General of the Department of State and Regional Development [Schedule 1[22]]. The new Part specifies when bonds are to be deposited, how they are to be paid and the amount available to be paid out.

Other amendments relating to retail lease arrangements

6. The Bill amends the rights and obligations of prospective parties to a retail shop lease. For example, before a lease is entered into, the Bill requires a lessor to give a prospective lessee a more detailed disclosure statement than at present (including in relation to outgoings) and a copy of the retail tenancy guide [Schedule 1[10]-[18] and [30]-[34]]. Other new provisions are designed to give greater certainty to the parties before a lease commences, for example in relation to the costs payable by a lessee or prospective lessee for fit-out works carried out by the lessor [Schedule 1[19]].
7. The Bill also amends provisions relating to rent and outgoings and the assignment and termination of leases. For example, the Bill amends provisions relating to rent reviews [Schedule 1[7], [23]-[28], [35]-[42] and [89]] and inserts new provisions to enable a party to a lease to apply to the Administrative Decisions Tribunal (the Tribunal) to appoint specialist retail valuers to review a market rent determination [Schedule 1[43] and [73]].²⁰

¹⁸ “New types of businesses, such as Internet cafes, pet grooming salons, toy and game repair shops, water filter shops, and travel agencies outside shopping centres, to name just a few, will soon be able to access the provisions of the Retail Leases Act”: Mr David Campbell MP, Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business, Second Reading Speech, Legislative Assembly *Hansard*, 19 October 2005.

¹⁹ The Bill does not alter other types of retail shop leases to which the *Residential Leases Act 1994* does not apply, including leases for a term of at least 25 years and leases of a class or description prescribed by the regulations as exempt (s 6).

²⁰ “By involving the tribunal in this process, valuers, tenants, and landlords will be given access to a dispute resolution system that reduces the likelihood that problems will escalate to the courts and all the expense and ill will that can go with those processes”: Mr David Campbell MP, Minister for Regional Development,

Exclusion of compensation for RailCorp activities addressing safety, security and regulatory requirements

8. Section 34(1) of the Act implies a term into a retail shop lease providing for a lessor to be liable to a lessee for loss or damage in certain circumstances where the lessee is disturbed. These circumstances are if the lessor acts or fails to act in any one of the ways described in section 34(1)(a)-(f) of the Act and fails to rectify the matter as soon as reasonably practicable after the lessee's written notice.²¹
9. The Bill provides that RailCorp is not liable under s 34 to its retail shop lessees for any disturbance resulting in loss or damage which is caused by anything done for railway or railway station safety, railway or railway station security or to satisfy regulatory requirements [Schedule 1[87], proposed new s 82A].

Expansion of Tribunal jurisdiction and functions

10. The Bill also expands the jurisdiction and functions of the Tribunal in connection with retail shop leases. For instance, the Bill provides for an injured party to make a claim to the Tribunal for compensation if another party to the lease has engaged in conduct that is misleading or deceptive or is likely to mislead or deceive [Schedule 1[60]-[62], [64] and [68]]. The Bill also provides for the Tribunal to grant a further 3-year extension of time to submit a claim to the Tribunal after the expiry of an initial 3-year period [Schedule 1[71]] and increases the monetary limit for Tribunal awards from \$300,000 to \$400,000 [Schedule 1[74]-[76]].

Issues Considered by the Committee

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

Denial of compensation; Retrospectivity: Schedule 1[87], proposed s 82A

11. Proposed s 82A of the Bill excludes RailCorp's liability *under s 34 of the Act* for any loss or damage to a lessee that was caused by anything done or omitted to be done by RailCorp wholly or predominantly for railway safety or security, or to satisfy regulatory requirements. The Bill therefore prevents RailCorp lessees from seeking compensation under s 34 for any economic loss that is caused by RailCorp's acts or omissions in pursuit of these specified purposes.
12. The Committee has commented that removing the right of a person to seek compensation can be a significant trespass on personal rights and liberties.²²
13. However, the Committee notes that there is a significant public interest in ensuring that RailCorp activities aimed at maintaining public safety and security and complying with statutory requirements can occur without impediment.²³

Minister for the Illawarra, and Minister for Small Business, Second Reading Speech, Legislative Assembly *Hansard*, 19 October 2005.

²¹ The Bill amends s 34(3) of the *Retail Leases Act 1994* to tighten the conditions under which a lessor may prevent or limit a compensation claim under s 34(3) [Schedule 1[44]].

²² The Committee notes that the High Court has treated the denial of compensation rights as akin to the acquisition of property within s 51(xxxi) of the Commonwealth Constitution.

14. The Committee also notes that any future lessees would have notice before entering any contract that compensation would not be payable in such circumstances

15. Given the public interest in ensuring RailCorp is unimpeded in ensuring railway safety and security, the Committee does not consider that s 82A trespasses unduly on personal rights and liberties insofar as it applies to leases entered into after the Bill has been passed.

16. The Bill is silent on whether s 82A is proposed to apply to existing leases (ie, leases entered into before the commencement of s 82A).²⁴ It is arguable that s 82A excludes liability for any relevant RailCorp activities occurring after the Bill's commencement, even where these activities affect leases entered into before the Bill's commencement.

17. The Committee will always be concerned to identify legislative provisions that have a retrospective effect that may impact adversely on any person. The Committee notes that an existing RailCorp lessee has a right to rely on the law as it stood at the time its lease was entered into, including a statutory entitlement under s 34(1) of the Act to compensation for lessor-related disturbances causing loss or damage.

18. The Committee notes, however, that the adverse impact on existing RailCorp lessees of the retrospective application of proposed s 82A is tempered by the existence of s 34(4) of the Act.²⁵ Section 34(4) excludes a lessor from liability for any action that causes loss or damage to a lessee, provided such an action constituted a reasonable response to an emergency situation or was in compliance with any statutory duty or any requirement imposed upon the lessor by a statutory body.²⁶ Whilst general in application, s 34(4) could currently be relied upon to exclude RailCorp from liability in circumstances that may overlap with some of those circumstances (eg compliance with a statutory requirement) that are the subject of the s 82A exemption from liability.

19. The Committee is of the view that the rule of law requires compliance with a set of principles that includes avoiding retrospective legislative provisions that adversely affect a person.

²³ The Explanatory Note to the Bill states that proposed s 82A "is consistent with protections provided for Sydney (Kingsford-Smith) Airport". See s 80D of the *Retail Leases Act 1994*.

²⁴ Schedule 3 of the *Retail Leases Act 1994* is amended to include savings and transitional provisions, but the application of s 82A of the Act to existing leases is not detailed in Schedule 1[93]. The common law presumption is that, in the absence of some clear statement to the contrary, an Act will be assumed not to have a retrospective application: *Maxwell v Murphy* (1957) 96 LCR 261.

²⁵ Section 34(4) of the *Retail Leases Act 1994* states:

"The provisions implied by this section do not apply to any action taken by a lessor:

- (a) as a reasonable response to an emergency situation, or
- (b) in compliance with any duty imposed by or under an Act or resulting from a requirement imposed by a public or local authority acting under the authority of an Act."

²⁶ The Committee notes that s 34(3) provides for a lease to specifically exclude or limit liability for any particular occurrence "if the likelihood of the occurrence was specifically drawn to the attention of the lessee in writing before the lease was entered into". However, it is unlikely that RailCorp would have a provision referring to the occurrences to which proposed s 82A is directed in all of its leases, otherwise the inclusion of this provision would be unnecessary.

- 20. The Committee refers to Parliament the question of whether preventing existing RailCorp lessees from relying on a statutory entitlement to compensation that existed at the time they entered into their leases constitutes an undue trespass on personal rights and liberties.**

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

Prescribing by regulation those retail shops to which the Act is to apply: Schedule 1[4], [93].

21. Currently, an Act of Parliament is required to amend Schedule 1, which lists the types of retail shops located outside of a retail shopping centre that are covered by the Act.²⁷
22. The Bill provides for regulations to prescribe those retail shops outside of a retail shopping centre that are to fall within this definition and deems those businesses specified in Schedule 1 to be so prescribed. The Bill also makes provision for Schedule 1 to be repealed, with all retail shops outside of retail shopping centres to be prescribed by regulation if they are to be within the Act's ambit.
23. These provisions comprise a delegation of legislative power to the executive to determine the leased retail shops outside of a retail shopping centre that are to be covered by the Act.

- 24. The Committee will always be concerned to identify when the subject matter of an Act may be effectively expanded or contracted by a regulation that prescribes those matters that fall within a key definition.**
- 25. The Committee notes, however, that providing for new types of retail shops outside of retail shopping centres to be covered by the Act without the need for its amendment offers regulatory flexibility and responsiveness.**
- 26. Having regard to the fact that any regulations altering the retail shops that may fall within or outside the Act's ambit will be subject to disallowance by Parliament, the Committee considers that the proposed provisions do not constitute an inappropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

²⁷ Note, however, that certain retail shops and retail shop leases are excluded from the scope of the *Retail Leases Act 1994* respectively. See footnotes 17 and 19 above.

5. ROYAL BLIND SOCIETY (MERCER) BILL 2005

Date Introduced:	19 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon R J Debus MP
Portfolio:	Attorney General

Purpose and Description

1. This Bill aims to ensure that any gift, devise or bequeath of property in favour of the Royal Blind Society of New South Wales and any predecessor bodies takes effect as if made in favour of Vision Australia.
2. This Bill also provides for the repeal of the *Royal Blind Society (Corporate Conversion) Act 2003*.²⁸

Background

3. The second reading speech stated:

This bill will give full effect to the recent merging of three charitable agencies supporting the blind and vision impaired into a new combined agency. On July 6 2004 the Royal Blind Society of New South Wales, the Royal Victorian Institute for the Blind Ltd and Vision Australia Foundation were merged into a combined agency, RBS.RVIB.VAF Ltd, now known as Vision Australia Ltd. All of the undertakings, property and liabilities of each of the three separate agencies were, where legally possible, transferred to the new body...

It was always intended that legacies and bequests left to each of the respective three agencies would be transferred to the combined agency. However, the Royal Blind Society received legal advice that bequests, gifts and dispositions made to each of the three agencies cannot be automatically transferred to the combined agency. There is also a risk that other bequests, gifts or dispositions might fail, particularly after the Royal Blind Society is wound-up or deregistered. The Royal Blind Society's legal representatives requested that legislation be passed to enable bequests and gifts created or granted since 6 July 2004, and in the future, to be transferred to the combined agency. The three Agencies will be wound up after legislation securing bequests, gifts and dispositions—past and future—to each organisation is enacted.²⁹

4. A Victorian Act to achieve the same aim with respect to those merged agencies incorporated in Victoria was assented to on 20 September 2005.³⁰

²⁸ The *Royal Blind Society (Corporate Conversion) Act 2003* provided for the Royal Blind Society to seek registration as a company limited by guarantee. Proposed s 5 of the Bill provides for the repeal of this Act to be effected by the Governor, by proclamation published in the *Government Gazette*, "on or after the day on which the Royal Blind Society... is deregistered as a company".

²⁹ Mr Graham West MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 19 October 2005.

³⁰ *Royal Victorian Institute for the Blind and Other Agencies (Merger) Act 2005*.

Issues Considered by the Committee

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| <p>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

6. VOCATIONAL EDUCATION AND TRAINING BILL 2005

Date Introduced:	19 October 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carmel Tebbutt MP
Portfolio:	Education & Training

Purpose and Description

1. The Bill provides for the registration of training organisations and the accreditation of vocational courses in accordance with national standards and the approval of providers of courses to overseas students.
2. The Bill also repeals the *Vocational Education and Training Accreditation Act 1990*, but provides for the continuation of the Vocational Education and Training Accreditation Board (which is currently constituted under that Act) as the agency responsible for registering training providers and for accrediting vocational courses in NSW.
3. At the heart of the new framework is the National Register, which is defined to mean the National Training Information Service managed by the Commonwealth Department of Education, Science and Training.
4. For the purposes of the proposed Act, training providers are **registered**, and vocational courses are **accredited**, when the Board records the details of the training provider or the course on the National Register. The new framework also provides for the recognition in NSW of training providers who have been registered by interstate registering bodies and for the recognition of vocational courses that have been accredited by interstate course accrediting bodies.

Background

5. In her second reading speech, the Minister stated:

The Bill implements the November 2002 decision of the Ministerial Council for Vocational Education and Training to introduce legislative reform to more effectively regulate providers of vocational education and training throughout Australia...

In June 2001 the State, Territory and Commonwealth Ministers for vocational education and training agreed to adopt new standards to strengthen the quality of training across the country. The Australian Quality Training Framework standards have been adopted in New South Wales by the Vocational Education and Training Accreditation Board under the current *Vocational Education and Training Act 1990*.³¹

The Bill

6. The Bill contains provisions governing:

³¹ The Hon Carmel Tebbutt MP, Minister for Education and Training, Legislative Assembly *Hansard*, 19 October 2005.

Vocational Education and Training Bill 2005

- functions, composition and operation of the Vocations Education and Training Accreditation Board (Board);
- registration of training organisations, including conditions and term of registration and the cancellation, suspension or amendment of registration by the Board;
- accreditation of courses, including conditions and term of registration and the cancellation of accreditation by the Board;
- the issue by the Board of guidelines in relation to the registration of training organisations and the accreditation of vocational courses;
- approval of persons to provide courses for overseas students, including cancellation, suspension or amendment of approval by the Board;
- enforcement of the registration and accreditation regime under the Bill, including providing for the appointment and powers of inspectors;
- review by the Administrative Decisions Tribunal of certain decisions of the Board, including decisions relating to the register of training organisations, approval of vocational courses and approval of persons to provide courses for overseas students; and
- new offences related to operating without accreditation or providing courses without approval.

Issues Considered by the Committee

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

Procedural fairness, Right to be heard: Clauses 30(2) & 36(2)

7. Clauses 30 and 36 provide that, before the Board refuses an application to accredit a vocational course, imposes conditions on the accreditation or cancels the accreditation it must notify the person concerned of the decision and give them an opportunity to make representations to the Board.
8. However, clause 30(2) allows the Board's decision to take immediate effect, without giving the person concerned an opportunity to make representations, if the Board is of the opinion that it is in the public interest to do so. Clause 36(2) is in similar terms in relation to approval for courses for overseas students. "**Public interest**" is not defined in the Bill.
9. One of the key principles of procedural fairness³² is the "hearing rule", which requires a decision-maker to give an opportunity to be heard to a person whose interests will be adversely affected by the decision.³³ This common law rule has been described as

³² "The Rules of natural justice, or procedural fairness, ... are principles developed to ensure that fair decision-making *procedure* is followed and to enhance the *substantive* quality of decision-making by ensuring that decision-makers are well informed. In this way, procedural fairness protects the individual from arbitrary government action and ensures the legitimacy and integrity of – decision-making by administrators, tribunals and courts." *Douglas and Jones's Administrative Law*, 4th ed., p 171.

³³ Note that 'hearing' does not necessarily mean providing an opportunity for oral submissions to be made.

both fundamental and universal.³⁴ Failing to provide for it or other procedural fairness rules is an important ground of review of an administrative decision and a basis for a remedy. However, the rule can be displaced by legislation.

10. The Committee is of the view that the hearing rule and other rules of procedural fairness are an important check on the exercise of the executive's powers. For this reason, they should only be restricted or displaced by legislation if there are compelling public interest reasons for doing so.
11. The Committee notes that this Bill clearly excludes the operation of the hearing rule if the Board is of the opinion that it is in the public interest to do so.
12. The Committee notes that a decision to cancel or refuse accreditation for a vocational course could have a serious adverse impact on the person seeking or holding that accreditation. Where that decision is made with immediate effect, without the person having had an opportunity to be heard, the impact could be even more serious.
13. The Department has advised the Committee that the power in these clauses is intended to be used in circumstances in which, for example, public safety is at stake or in other equally serious circumstances.

14. **The Committee notes that it is a fundamental common law rule that a person must be given an opportunity to participate in the decisions that affect him or her, but that this rule can be displaced by clear legislative intent.**
15. **The Committee is of the view that a decision to cancel or refuse accreditation of a vocational course could have a significant adverse impact on a person, which could be compounded if the decision is made with immediate effect.**
16. **The Committee notes the power is intended to be used in circumstances in which, for example, public safety is at stake.**
17. **The Committee has written to the Minister for advice as to why the legislation does not contain an inclusive or indicative list of the public interest circumstances that might warrant a decision of the Board to cancel or refuse accreditation to take immediate effect.**
18. **The Committee refers to Parliament the question as to whether clauses 30(2) and 36(2) unduly trespass on a person's right to be heard before an adverse decision is made against them.**

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

Fees not reviewable by Parliament: Clauses 11(2), 13(3), 16(2), 18(9), 25(2), 27(2), 34(3) & (6) and 35(2)

19. These clauses allow the Board to require payment of a fee set by the Board:
 - for applications for registration as a training organisation [cl 11(2)];

³⁴ *Twist v Council of the Municipality of Randwick* (1976) 136 CLR 106, 110.

Vocational Education and Training Bill 2005

- as a condition of registration as a training organisation [cl 13(3)];
 - for an application by a training organisation that the Board amend details recorded in the National Register in relation to that organisation [cl 16(2)];
 - in relation to the lifting of a restriction or suspension by the Board of a registration for a training organisation [cl 18(9)];
 - in relation to an application for accreditation of a vocational course [cl 25(2)];
 - as a condition of accreditation for a vocational course [cl 27(2)];
 - for an application for approval to provide courses for overseas students [cl 34(3)];
 - as a condition on an approval to provide courses for overseas students [cl 34(6)]; and
 - in relation to the lifting of a suspension by the Board of an approval to provide courses for overseas students [cl 35(2)].
20. These clauses delegate to the Board the power to set the amount of any such fees. Any fee so set by the Board is not reviewable or disallowable by the Parliament. Under the Bill, the Board is subject to the control and direction of the Minister in the exercise of its functions.
21. The Department has advised the Committee that after consultation with stakeholders in 2004, the Board made recommendations to the Minister, amongst other things, on a new level of fees it may levy under the legislation. The Minister endorsed the new fee schedule and agreed that the fee schedule be reviewed annually and adjustments be approved under delegation by the Deputy Director-General in line with changes to the Consumer Price Index.

- 22. The Committee notes that the Bill delegates to the Board the power to determine the level of fees to impose for a range of matters and that such fees are not reviewable or disallowable by the Parliament.**
- 23. The Committee is of the view that the level of fees, particularly fees comprising part of a regulatory scheme rather than merely a fee for a service, should be reviewable and disallowable by Parliament.**
- 24. The Committee has written to the Minister for advice as to why the level of fees is not disallowable by the Parliament.**
- 25. The Committee refers to Parliament the question whether these clauses provide for an undue delegation of legislative power.**

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: REGULATIONS ABOUT WHICH THE COMMITTEE IS SEEKING FURTHER INFORMATION

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Centennial Park and Moore Park Trust Regulation 2004	27/08/04	6699	05/11/04 29/04/05	21/04/05
Companion Animals Amendment (Penalty Notices) Regulation 2005	19/08/05	4579	12/09/05	
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	29/07/05	4033	12/09/05	
Hunter Water (General) Regulation 2005	01/09/05	6837	04/11/05	
Occupational Health and Safety Amendment (Dangerous Goods) Regulation 2005	01/09/05	6856	18/10/05	
Protection of the Environment Operations (Waste) Regulation 2005	26/08/05	5745	04/11/05	
Stock Diseases General (Amendment) Regulation 2005	30/06/05	3277	12/09/05	
Workers Compensation Amendment (Advertising) Regulation 2005	15/06/05	2288	12/09/05	

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Adoption Amendment (Adoption Service Providers) Regulation 2005 <ul style="list-style-type: none"> • Letter dated 12/09/05 from the Committee to the Minister for Community Services • Letter dated 26/09/05 from the Minister for Community Services to the Committee 	13/05/05 page 1663
Legal Profession Amendment (Advertising) Regulation 2005 <ul style="list-style-type: none"> • Letter dated 12/09/05 from the Committee to the Attorney General • Letter dated 17/10/05 from the Attorney General to the Committee 	15/06/05 2279

1. Adoption Amendment (Adoption Service Providers) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

12 September 2005

File ref: LRC1349

The Hon Reba Meagher MP
Minister for Community Services
Level 37
Governor Macquarie Tower
SYDNEY NSW 2000

Dear Minister

Adoption Amendment (Adoption Service Providers) Regulation 2005

Pursuant to its responsibilities under s 9 of the *Legislation Review Act 1987*, the Committee considered the above Regulation at its meeting of 12 September 2005.

The Committee wishes to raise with you the following concerns arising from its consideration of one of the new conditions in the Regulation for adoption service providers to be accredited and remain accredited.

Proposed clause 12 in Schedule 1 of the Regulation states that an accredited adoption service provider:

must allow the Director-General, and any public servant authorised by the Director-General in that regard:

- (a) to enter any premises from which it provides adoption services; and
- (b) to inspect such of its records as relate to the provision of adoption services,

and must provide the Director-General, and any such public servant, with such assistance as it reasonably necessary for the purposes of the inspection.

This clause appears to provide what amounts to a power of entry (albeit with administrative rather than criminal sanction) without explicit requirements regarding:

- the grounds for such entry;
- the need for identification;
- the types of premises to which entry may be requested, eg, no restriction on entering private residences; and
- the times at which entry may be requested.

It is unusual for a provision which amount to a power of entry to be found in a regulation. The Committee's general position is that powers to require entry to premises are not appropriate for a regulation and should only be provided by an Act of

Parliament, given that the exercise of these powers significantly affect personal rights and liberties.

As such a power has been included in the Regulation, the Committee seeks your advice as to what safeguards are in place to ensure that the entry and inspection of any premises at which an adoption service is being provided does not trespass unduly on the personal rights and liberties.

The Committee would appreciate a prompt response to this request so that it can conclude its consideration of the Regulation and make any report to Parliament in a timely manner.

Yours sincerely

A handwritten signature in cursive script that reads "Peter Primrose".

Peter Primrose MLC
Chairman



Minister for Community Services
Minister for Youth

R 05/01203

The Hon P Primrose MLC
Chairman, Legislative Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000




Dear Mr Primrose

I refer to your request for advice concerning what safeguards are in place to ensure that the entry and inspection of any premises at which an adoption service is being provided does not trespass unduly on personal rights and liberties.

I note that the committee is of the view that clause 12 of Schedule 1 of the *Adoption Amendment (Adoption Service Providers) Regulation 2005* is a power of entry as that term is traditionally understood.

When considered within the regulatory scheme, of which it forms part, I do not share that view. This is particularly the case when contrasted with the previous regulation (*Adoption of Children Regulation 1995* Clause 15, Schedule 2) which did provide for an absolute power of entry without consent, arguably with the use of reasonable force if necessary. The new set of conditions abolishes the absolute power of entry and replaces it with a less intrusive statutory obligation to consent to entry as a condition of accreditation.

Contrary to how most powers of entry are understood, failure to consent does not amount to a criminal offence. It provides no authorisation of forced entry in the absence of consent. The sole consequence of a failure to consent is that it may amount to a breach of condition of accreditation which may or may not have adverse consequences on the accreditation. The consequence of failure to consent is treated no differently than for example, a failure to publicly display a scale of fees or to comply with an undertaking. An adoption service provider who withholds consent will be afforded an opportunity to provide a reasonable explanation for doing so. Any decision to revoke or suspend accreditation is reviewable by the Administrative Decisions Tribunal.

It is reasonable to expect that a person or organisation that participates in a regulated fee for service enterprise should be subjected to monitoring for regulatory compliance. The Clause in issue does no more than to require a person who voluntarily seeks to be accredited as an adoption service provider to consent as a condition of accreditation to entry of relevant premises and inspection of relevant documents and to provide such assistance as is reasonably necessary for the purpose of the inspection. On its face, the clause is restricted to those commercial premises where adoption services are provided.

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Each of these elements establishes that this regulation, unlike the former regulation, does not contain a power of entry as that term is usually understood.

The clause does not unduly trespass on personal rights and liberties. Relevant stakeholders were consulted on the draft regulation. Detailed submissions were received. No stakeholders raised any objection to the condition being included in the Regulation. It is recognised that its consequences are no different from an administrative practice of making access a condition or undertaking associated with accreditation.

There are sufficient existing safeguards in place to ensure adoption accreditation officers employed by the Children's Guardian conduct themselves in a reasonable, responsible and professional manner with due regard to the rights of members of the public and the spirit and letter of the law. Those safeguards are contained in the Office of the Children's Guardian Code of Conduct.

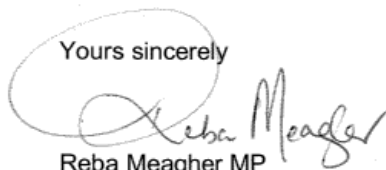
The conduct of adoption accreditation officers is also subject to the provisions of the *Ombudsman Act 1974*, *Privacy and Personal Information Protection Act 1998*, *Public Sector Employment and Management Act 2002* and the *Freedom of Information Act 1989*. Any decision to revoke accreditation is also subject to review by the Administrative Decisions Tribunal.

Consistent with this scheme for the operation of the Regulation a policy and set of procedures to be followed by adoption accreditation officers will be published. These will deal with issues such as the grounds and circumstances upon which entry to premises can be sought, the requirement to produce sufficient identification, the types of premises to which entry may be requested and the times at which entry may be requested. The relevant stakeholders will again be consulted prior to this policy and procedure being finalised.

The concerns of the Committee that the Regulation might, contrary to the clear intent of the regulatory scheme, be misused and will require additional safeguards are noted. The policy and procedures will be drafted to prevent any undue trespass on personal rights and liberties.

Thank you for your deliberations and the opportunity to comment on your conclusions. Your comments will be most useful in developing associated documentation.

Yours sincerely



Reba Meagher MP
Minister

26 SEP 2005

2. Legal Profession Amendment (Advertising) Regulation 2005



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

12 September 2005

Our Ref: LRC 1305

The Hon Bob Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Attorney General

Legal Profession Amendment (Advertising) Regulation 2005

Pursuant to its responsibilities under s 9 of the *Legislation Review Act 1987*, the Committee considered this Regulation at its meeting on 12 September 2005.

The Committee resolved to write to you to express its concern that this Regulation may trespass unduly on personal rights and liberties. As this Regulation is almost identical to the *Workers Compensation Amendment (Advertising) Regulation 2005*, the Committee is writing in similar terms to the Minister for Commerce in relation to that Regulation.

Access to Justice

The Committee has identified the following concerns with the Regulation. First, the Committee is of the view that expanding the blanket prohibition on the advertising of certain legal services could have the effect of denying some members of the general public information about where to go to for the expert advice they need in order to enforce their rights. It may also deny some members of the public the opportunity to find out about their rights in the first place.

Those most likely to have their rights adversely affected in this way are those with the fewest resources and least ability to gain this information from other sources. The fact that the Regulation includes community legal centres (CLC), albeit with two important but limited exceptions, may compound any trespass on the right to access to justice of these people as they are most likely to use the services of CLCs.

CLCs work together with other community groups (eg the NSW Council of Social Service - NCOSS) in informing disadvantaged people of the services that are available to them, including legal services. The Committee notes that under the Regulation, NCOSS for example, could no longer share information about legal services of CLCs relating to personal injury if that amounted to an advertisement. As the definition of "advertisement" under the Regulation is very broad, the prohibition could severely inhibit dissemination of information of this type, further limiting access to justice.

The Committee notes that the legal aid commission, which does similar work on a similar non-profit, public interest basis as CLCs, is exempted from the prohibition on advertising personal injury services. By contrast, CLCs are only exempted in relation to two areas of their work, and while these exceptions are important, they are limited and somewhat arbitrary. In addition to discrimination and domestic violence, CLCs typically also deal with cases for personal injury compensation arising in other areas of equal importance (eg, child sexual assault, police abuse, bullying at school and in the workplace and victims compensation).

In fact, CLCs provide many of the legal services that legal aid commissions are no longer funded to provide. People with legitimate legal claims who cannot get help from legal aid and who cannot afford private legal services often go to CLCs for assistance. By plugging the gap in this way, CLCs play a unique role in providing access to justice.

Given the similarity between CLCs and the legal aid commission, and the very important role that CLCs play in providing access to justice to the disadvantaged, especially in a time of limited funding for legal aid, it is unclear to the Committee why CLCs are not treated in the same manner as legal aid commissions and exempted from the prohibitions on advertising under the legislation.

It is also not clear to the Committee that the objective of the Regulation could not have been achieved by alternative means that would not have the same adverse effect on the right to have access to justice.

Strict Liability

The Committee is concerned that the new offences under the Regulation appear to be strict liability offences and reiterates its view that strict liability offences should be:

- imposed only after careful consideration of all available options;
- subject to defences wherever possible where contravention appears reasonable; and
- have only limited monetary penalties.

The Committee notes with concern that the maximum penalties for the new strict liability offences under this Regulation are quite substantial and apply without distinction to individuals, non-profit community legal centres and corporations.

Penalty increase

The Committee notes that the Regulation greatly increases the penalty for the prohibition under clause 139, bringing it into line with the equivalent offence under the *Workers Compensation Regulation 2003*. The Committee notes that the offence in clause 139 appears to be a strict liability offence and its comments above in relation to the appropriate level of penalties for strict liability offences, apply.

Reversal of onus of proof

The new offences under the Regulation reverse the onus of proof, inconsistent with the presumption of innocence, by providing in clause 140BA that a barrister or solicitor is taken to have published or caused to be published an advertisement under the Regulation in two circumstances unless the barrister or solicitor "proves" that they "took all reasonable steps to prevent the advertisement being published".

The Committee has commented on this issue previously and has generally considered that a reasonable limit for a reversal of onus of proof would involve placing no more than an evidential burden on a defendant, as defined in the Commonwealth Criminal Code (s 13.3). However, the Regulation, by requiring that a barrister or solicitor "prove" that they took all reasonable steps to prevent the publication of the advertisement, imposes the higher, legal burden of proof.

Unclear definition of material element of the offence

The Committee is also concerned that the new offence of publishing a personal injury advertisement may not be sufficiently clearly defined under the Regulation. In particular, the definition leaves open a large area of uncertainty as to what sorts of publications might fall within the definition and so constitute a criminal offence.

Without a clear definition, it is difficult for members of the public to know what acts might constitute a criminal offence. If crimes are not clearly defined, people who genuinely believe that they are acting lawfully in a particular circumstance may find that they have, in fact, broken the law.

While the Committee is aware that there are some complex areas of criminal law in which it is difficult fully to define the elements of the crime, in the interests of fairness, every effort should be taken in drafting legislation that creates new offences to be as clear and precise as possible.

Advice sought

In relation to these concerns, the Committee seeks your advice as to:

1. Why, in the interests of the right to access to justice, CLCs are not exempt from the prohibition on advertising, both under clause 139 and under 140G, in the same manner as the legal aid commission, given their very close similarities;
2. The necessity for making the new offence under clause 140G a strict liability offence;

3. The justification for imposing such a high penalty for the new offence under new clause 140G and for drastically increasing the existing offence under clause 139 of the Regulation, given that these offences do not include a statutory fault element and that the penalty may be applied to individuals;
4. The need to reverse the onus of proof so that an accused barrister or solicitor must prove that they took all reasonable steps to prevent the publication of the advertisement;
5. The need to place a legal rather than an evidential burden of proof on a barrister or solicitor under new clause 140BA; and
6. Whether the definition of "advertisement" can be further defined both to reduce the "grey area" present in the current wording and to limit the adverse effect of the Regulation on a person's right to access justice.

Yours sincerely



Peter Primrose MLC
Chairman



NEW SOUTH WALES

ATTORNEY GENERAL



03/7130

The Hon Peter Primrose MLC
Chairman Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

17 OCT 2005

Dear Mr Primrose

Thank you for your letter of 12 September 2005 in which you raised a number of issues about *Legal Profession Amendment (Advertising) Regulation 2005*.

The background to the Regulation is that a series of international and domestic forces caused a dramatic and unsustainable increase in the cost of public liability insurance in late 2001 and during 2002. In response to significant underwriting losses, the insurance industry made the commercial decision to significantly increase premiums and / or withdraw from the public liability market altogether. Consumers were confronted with a situation where liability insurance was either unaffordable or unavailable.

The effects of this were serious and far-reaching. Volunteer organisations, community groups, sporting organisations and clubs, tourism operators, small businesses and local councils were suffering. The media regularly reported on the cancellation of community, recreational and sporting events, the closure of horse riding schools and adventure tourist sites, and the withdrawal of services (such as medical and welfare services) as a result of the insurance crisis.

Organisations were forced to either cease their activities or, more problematically for consumers, continue their operations uninsured. Many made urgent representations to the Government seeking assistance.

As the manner in which lawyers advertise their services can have a detrimental impact on the affordability of public liability insurance, tighter restrictions on personal injury advertising were one part of the Government's response to the very real and significant increases in premiums which small businesses, community groups, local councils, homeowners and families faced.

More recently there have been concerns that some lawyers were attempting to circumvent the advertising restrictions and the *Legal Profession Amendment (Advertising) Regulation 2005* was considered necessary to address this.

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In response to the specific questions you raised:

1. *Why, in the interests of the right to access to justice, community legal centres (CLCs) are not exempt from the prohibition on advertising, both under clause 139 and under 140G, in the same manner as the Legal Aid Commission, given their very close similarities;*

The Regulation does not prohibit legal advertising generally, but specifically targets personal injury advertising. It therefore does not interfere with the ability of CLCs to advertise the provision of legal services generally, nor with the ability of disadvantaged people to access legal services.

It was considered inappropriate to permit CLCs to advertise the availability of personal injury legal services when private lawyers and law firms are prohibited from doing so.

Exemptions for CLCs were granted for advertising services in connection with domestic violence or discrimination because these were specifically identified by the Combined Community Legal Centres Group (NSW) Ltd and the Shoalcoast Community Legal Centre Inc. as possible problems for them. The Government considered it was appropriate in these instances to clarify that such advertisements would not constitute an offence.

2. *The necessity for making the new offence under clause 140G a strict liability offence;*

The distinction between a strict liability offence and one where mens rea is required does not seem particularly significant in relation to clause 140G. By its very nature placing an advertisement is a deliberate act and it seems artificial to distinguish between the act of placing an advertisement and the intention to place an advertisement.

In any event, the defence of honest and reasonable mistake of fact remains available.

3. *The justification for imposing such a high penalty for the new offence under new clause 140G and for drastically increasing the existing offence under clause 139 of the Regulation, given that these offences do not include a statutory fault element and that the penalty may be applied to individuals;*

The Government considers the penalties are set at an appropriate level to deter persons from breaching the Regulation. Penalties need to take into account the financial benefit that may result from a breach and be set sufficiently high to be an effective deterrent.

The NSW Parliament passed the *Legal Profession Legislation Amendment (Advertising) Act 2004* which increased the maximum penalty that could be imposed by an advertising regulation from 10 to 200 penalty units. The second reading speech explained the purpose of this amendment was to

make the level of penalty consistent with that for a similar offence in the *Workers Compensation Regulation 2003*.

4. *The need to reverse the onus of proof so that an accused barrister or solicitor must prove they took all reasonable steps to prevent the publication of the advertisement;*

The Government considered that requiring a barrister or solicitor to prove they took all reasonable steps to prevent the publication of the advertisement was necessary in order to ensure the prohibition was effective and to prevent the few unscrupulous practitioners from 'turning a blind eye' to the placing of advertisements for their legal practice.

A similar approach has been adopted in many other areas where there are comparable issues:

- Tobacco advertising (section 61B Public Health Act 1991);
- Environmental matters (Chapter 5 Protection of the Environment Operations Act 1997);
- Possession of stolen property (section 527C Crimes Act 1900); and
- Occupational health and safety (section 26 Occupational Health and Safety Act 2000).

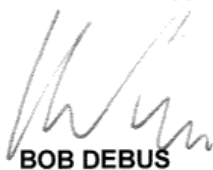
5. *The need to place a legal rather than an evidential burden of proof on a barrister or solicitor under new clause 140BA;*

Please refer to the response in 4.

6. *Whether the definition of "advertisement" can be further defined both to reduce the "grey area" present in the current wording and to limit the adverse effect of the Regulation on a person's right to access justice.*

The Government considers that the definition as currently drafted is as clear and precise as possible and does not unreasonably affect a person's right to access justice.

Yours faithfully



BOB DEBUS

Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Anti-Discrimination Amendment (Equality in Education and Employment) Bill 2005*	12
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	10
Appropriation Bill 2005	7
Appropriation (Budget Variations) Bill 2005	6
Appropriation (Parliament) Bill 2005	7
Appropriation (Special Offices) Bill 2005	7
Brigalow and Nandewar Community Conservation Area Bill 2005	7
Building Legislation Amendment (Smoke Alarms) Bill 2005	9
Building Professionals Bill 2005	7
Civil Liability Amendment (Food Donations) Bill 2004	1
Civil Liability Amendment (Offender Damages) Bill 2005	2, 3
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	10
Civil Procedure Bill 2005	5
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	3
Coal Acquisition Amendment (Fair Compensation) Bill 2005	5
Confiscation of Proceeds of Crime Amendment Bill 2005	11
Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005	13
Courts Legislation Amendment Bill 2005	7
Court Security Bill 2005	2
Crimes Amendment (Grievous Bodily Harm) Bill 2005	3
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	10
Crimes Amendment (Road Accidents) Bill 2005	11
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	6
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	3
Criminal Assets Recovery Amendment Bill 2005	7
Criminal Procedure Amendment (Evidence) Bill 2005	3
Criminal Procedure Further Amendment (Evidence) Bill 2005	4
Criminal Procedure (Prosecutions) Bill 2005	11
Crown Lands Amendment (Access to Property) Bill 2005*	4
Crown Lands Legislation Amendment Bill 2005	7
Defamation Bill 2005	10

	Digest Number
Drug Misuse and Trafficking Amendment Bill 2005	8
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005	6
Duties Amendment (Abolition of Bob Carr's Vendor Duty) Bill 2005*	9
Duties Amendment (Abolition of Vendor Duty) Bill 2005	10
Electricity Supply Amendment Bill 2005	2, 5
Energy Administration Amendment (Water and Energy Savings) Bill 2005	5
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	7
Fair Trading Amendment (Responsible Credit) Bill 2005*	6
Farm Debt Mediation Amendment (Water Access Licences) Bill 2005	13
Fire Brigades Amendment (Community Fire Units) Bill 2005	7
Fiscal Responsibility Bill 2005	7
Fisheries Management Amendment (Catch History) Bill 2005*	6
Gambling (Two-up) Amendment Bill 2005	7
Game and Feral Animal Control Amendment Bill 2005	5
Gaming Machines Amendment Bill 2005	8
Gene Technology (GM Crop Moratorium) Amendment (Postponement of Expiry) Bill 2005	12
Health Legislation Amendment Bill 2005	12
Independent Commission Against Corruption Amendment Bill 2005	2, 3
James Hardie Former Subsidiaries (Special Provisions) Bill 2005	9
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Amendment Bill 2005	8
Legal Profession Bill 2004	1, 5
Legislation Review Amendment (Family Impact) Bill 2005*	9
Local Government Amendment Bill 2005	8
Local Government Amendment (Stormwater) Bill 2005	10
Local Government and Valuation of Land Amendment (Water Rights) Bill 2005	9
Luna Park Site Amendment (Noise Control) Bill 2005	13
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
National Park Estate (Reservations) Bill 2005	7
National Parks and Wildlife (Adjustment of Areas) Bill 2005	3
National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005	11
National Parks and Wildlife (Further Adjustment of Areas) Bill 2005	9

	Digest Number
Occupational Health and Safety Amendment (Workplace Deaths) Bill 2005	7
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	9
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	8
Pawnbrokers and Second-hand Dealers Amendment Bill 2005	8
Pay-roll Tax Amendment (Supporting Jobs and Small Business) Bill 2005*	12
Petroleum (Submerged Lands) Amendment (Permits and Leases) Bill 2005	7
Photo Card Bill 2004	1
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	2
Poultry Meat Industry Amendment (Prevention of National Competition Policy Penalties) Bill 2005	7
Prisoners (Interstate Transfer) Amendment Bill 2005	4, 5
Property Legislation Amendment Bill 2005	10
Protection of Agricultural Production (Right to Farm) Bill 2005*	4
Protection of the Environment Operations Amendment Bill 2005	10
Public Sector Employment and Management Amendment (Ethanol Blended Fuel) Bill 2005*	11
Public Sector Employment and Management Amendment (Extended Leave) Bill 2005	12
Residential Tenancies Amendment (Social Housing) Bill 2005	12
Retail Leases Amendment Bill 2005	13
Road Transport (General) Bill 2004	1, 4
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1, 4, 7
Royal Blind Society (Merger) Bill 2005	13
Rural Workers Accommodation Amendment Bill 2005	7
Security Industry Amendment Bill 2005	9
Security Interests in Goods Bill 2005	10
Sheriff Bill 2005	2
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2005*	9
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1
Sporting Venues (Offenders Banning Orders) Bill 2005	10
Standard Time Amendment (Co-ordinated Universal Time) Bill 2005	2
Standard Time Amendment (Daylight Saving) Bill 2005	10
State Emergency and Rescue Management Amendment Bill 2005	11
State Revenue Legislation Amendment Bill 2005	8
State Revenue Legislation Amendment (Budget Measures) Bill 2005	7
Statute Law Miscellaneous Provisions Bill 2005	8

	Digest Number
Surveying Amendment Bill 2005	7
Sydney 2009 World Masters Games Organising Committee Bill 2005	7
Sydney University Settlement Incorporation Amendment Bill 2005*	7
Terrorism Legislation Amendment (Warrants) Bill 2005	8
Transport Administration Amendment (Transport Levy For Major Events) Bill 2005	2
Transport Legislation Amendment (Implementation of Waterfall Rail Inquiry Recommendations) Bill 2005*	2
Transport Legislation Amendment (Waterfall Rail Inquiry Recommendations) Bill 2005	7
Vocational Education and Training Bill 2005	13
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	3
Workplace Surveillance Bill 2005	6

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Building Professionals Bill 2005	Minister for Infrastructure and Planning (Planning Administration)	03/06/05	22/06/05		7, 9
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04	12/09/05	6	10
Civil Liability Amendment (Offender Damages) Bill 2005	Minister for Justice	01/03/05	08/03/05		2, 3, 5
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05			11
Crime Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05			11
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05			6
Criminal Procedure Further Amendment (Evidence) Bill 2005	Attorney General	01/05/05	21/06/05		4, 9
Electricity Supply Amendment Bill 2005	Minister for Energy and Utilities	01/03/05	30/03/05		2, 5
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	Minister for Infrastructure and Planning	03/06/05	24/06/05		7, 9
Gaming Machines Amendment Bill 2005	Minister for Gaming and Racing	20/06/05	20/09/05		8, 11
Independent Commission Against Corruption Amendment Bill 2005	Premier	01/03/05	02/03/05		2, 3
Legal Profession Amendment Bill 2005					8
Legal Profession Bill 2004	Attorney General	17/02/05	07/04/05		1, 5
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Local Government Amendment Bill 2005	Minister for Local Government	20/06/05	05/09/05		8, 9
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Photo Card Bill 2004	Minister for Roads	17/02/05	30/06/05		1, 9
Prisoners (Interstate Transfer) Amendment Bill 2005	Minister for Justice	01/04/05	18/04/05		4, 5
Road Transport (General) Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 19/07/05 23/09/05		1, 4, 10, 11

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1, 5
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05 01/04/05	14/03/05 23/05/05		1, 4, 7
Security Industry Amendment Bill 2005	Minister for Police	12/09/05			9
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/04		15	
State Emergency and Rescue Management Amendment Bill 2005	Minister for Emergency Services	10/10/05	13/10/05		11, 12
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05			8
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05			13

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Anti-Discrimination Amendment (Religious Tolerance) Bill 2005*	N				
Building Professionals Bill 2005	N, C				
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Civil Liability Amendment (Offender Damages) Bill 2005	N,C				
Civil Liability Amendment (Offender Damages Trust Fund) Bill 2005	N				
Civil Procedure Bill 2005	N			N	
Classification (Publications, Films and Computer Games) Enforcement Amendment (X 18+ Films) Bill 2005*	R				
Confiscation of Proceeds of Crime Amendment Bill 2005	R, C				
Consumer Credit (New South Wales) Amendment (Maximum Annual Percentage Rate) Bill 2005	R				
Court Security Bill 2005				N	
Crimes Amendment (Protection of Innocent Accused) Bill 2005*	R				
Crimes Amendment (Road Accidents) Bill 2005	R, C				
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	R, C		R		
Criminal Appeal Amendment (Jury Verdicts) Bill 2004*	R				
Criminal Assets Recovery Amendment Bill 2005	R				
Criminal Procedure Amendment (Evidence) Bill 2005	N				
Criminal Procedure Further Amendment (Evidence) Bill 2005	C			N	
Criminal Procedure (Prosecutions) Bill 2005	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Drug Misuse and Trafficking Amendment Bill 2005				N	
Dust Diseases Tribunal Amendment (Claims Resolution) Bill 2005				N	
Electricity Supply Amendment Bill 2005				C	
Energy Administration Amendment (Water and Energy Savings) Bill 2005				R, N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill 2005	N, R	C	N, C		R, C
Gaming Machines Amendment Bill 2005	C				
Independent Commission Against Corruption Amendment Bill 2005				C	
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Amendment Bill 2005	N			R	
Legal Profession Bill 2004	N,C			N	
Local Government Amendment Bill 2005	C, R				
Luna Park Site Amendment (Noise Control) Bill 2005	R				
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
National Parks and Wildlife (Adjustment of Areas) Bill 2005				N	
Parliamentary Electorates and Elections Amendment (Voting Age) Bill 2005*	R				
Passenger Transport Amendment (Maintenance of Bus Services) Bill 2005	R	R	R	R	
Photo Card Bill 2004				C	
Police Integrity Commission Amendment (Shaw Investigation) Bill 2005*	N				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Prisoners (Interstate Transfer) Amendment Bill 2005				C	
Protection of Agricultural Production (Right to Farm) Bill 2005*	R				
Protection of the Environment Operations Amendment Bill 2005	R				
Retail Leases Amendment Bill 2005	N, R			N	
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Rural Workers Accommodation Amendment Bill 2005	R				
Security Industry Amendment Bill 2005	C,R				
Sheriff Bill 2005				N	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	R, N				
State Emergency and Rescue Management Amendment Bill 2005	C				
State Revenue Legislation Amendment Bill 2005	N, C, R				
State Revenue Legislation Amendment (Budget Measures) Bill 2005	N				
Surveying Amendment Bill 2005	N				
Terrorism Legislation Amendment (Warrants) Bill 2005	R				
Vocational Education and Training Bill 2005	C, R			C, R	
Water Efficiency Labelling and Standards (New South Wales) Bill 2005	N			N	N

Key

- R Issue referred to Parliament
C Correspondence with Minister/Member
N Issue Noted

Appendix 4: Index of correspondence on regulations reported on in 2005

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2005
Adoption Amendment (Adoption Service Providers) Regulation 2005	Minister for Community Services	12/09/05	26/09/05	13
Architects Regulation 2004	Minister for Commerce	21/09/04	30/11/04	1
Centennial and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	05/11/04 29/04/05	21/04/05	5
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	Minister for Infrastructure and Planning	26/10/04 17/02/05	01/02/05	1
Forestry Regulation 2004	Minister for Primary Industries	26/10/04 17/02/05	18/01/05	1
Hunter-Central Rivers Catchment Management Authority Regulation 2005	Minister for Natural Resources	20/06/05	04/09/05	10
Institute of Teachers Regulation 2005	Minister for Education and Training	01/04/05 03/06/05	26/05/05	7
Legal Profession Amendment (Advertising) Regulation 2005	Attorney General	12/09/05	17/10/05	13
Mental Health Amendment (Transfer of Queensland Civil Patients) Regulation 2005	Minister for Health	29/04/05 26/10/05	11/07/05	9
Occupational Health and Safety Amendment (Transitional) Regulation 2004	Minister for Commerce	01/04/05 23/05/05	17/05/05	6
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	Minister for Transport Services	30/04/04 01/03/05	17/02/05	2
Protection of the Environment Operations (Luna Park) Regulation 2005	Minister for the Environment	29/04/05	10/08/05	9
Road Transport (General) Amendment (Driver Licence Appeals) Regulation 2005	Minister for Roads	01/04/05	12/07/05	9
Stock Diseases (General) Regulation 2004	Minister for Primary Industries	05/11/04	16/12/04	1
Sydney Olympic Park Amendment Regulation 2004	Minister for Sport and Recreation	05/11/04	03/12/04	1

Appendix 5: Notice of Discussion Paper on the Right to Silence

The Legislation Review Committee is seeking comment in relation to the principles it should apply when considering bills that trespass on the right to silence. The Committee will then use these comments when suggesting standards and principles to which the Parliament should have regard when considering bills that trespass on this fundamental right.

The Committee has prepared a Discussion Paper raising a number of questions. This Discussion Paper is available online at www.parliament.nsw.gov.au under "Inquiries receiving Submissions". Copies are also available from the Committee's Secretariat.

Tel: (02) 9230 3418 or 9230 2899

Fax: (02) 9230 3052

Legislation.Review@parliament.nsw.gov.au

Submissions responding to the Discussion Paper should be sent to:

Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

Alternatively, submissions can be made on-line by following the links at www.parliament.nsw.gov.au

The closing date for submissions is **30 November 2005**.