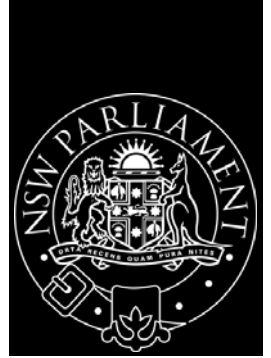


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 8 of 2008

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16 June 2008

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.

Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2008, xiv, 109 p; 30cm

Chair: Mr Allan Shearan MP

16 June 2008

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
  2. Legislation Review Digest No. 8 of 2008
- I Title.
- II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; No. 8 of 2008

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\* Denotes Private Member's Bill

## MEMBERSHIP & STAFF

Chair	Allan Shearan MP, Member for Londonderry
Deputy	Paul Pearce MP, Member for Coogee
Members	Amanda Fazio MLC Judy Hopwood MP, Member for Hornsby Lylea McMahon MP, Member for Shellharbour Robyn Parker MLC Roy Smith MLC Russell Turner MP, Member for Orange
Staff	Catherine Watson, Committee Manager Carrie Chan, Senior Committee Officer Jim Jefferis, Senior Committee Officer Amy Bauder, Committee Officer Keith Johnstone, Assistant Committee Officer
Panel of Legal Advisers The Committee retains a panel of legal advisers to provide advice on Bills as required.	
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 3308
Facsimile	02 9230 3052
Email	<a href="mailto:legislation.review@parliament.nsw.gov.au">legislation.review@parliament.nsw.gov.au</a>
URL	<a href="http://www.parliament.nsw.gov.au/lrc/digests">www.parliament.nsw.gov.au/lrc/digests</a>

## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

### 8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
  - (a) to consider any Bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    - (i) trespasses unduly on personal rights and liberties, or
    - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - (iv) inappropriately delegates legislative powers, or
    - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

### 9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    - (vii) that the form or intention of the regulation calls for elucidation, or
    - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
  - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### **Section A: Comment on Bills**

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

#### **Section B: Ministerial correspondence – Bills previously considered**

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

### Part Two – Regulations

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

#### **Regulations for the special attention of Parliament**

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

#### **Regulations about which the Committee is seeking further information**

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

#### **Copies of Correspondence on Regulations**

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought

information. The Committee's letter to the Minister is published together with the Minister's reply.

## Appendix 1: Index of Bills Reported on in 2008

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

## Appendix 2: Index of Ministerial Correspondence on Bills for 2008

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

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

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

## Appendix 4: Index of correspondence on Regulations reported on in 2007

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. Appropriation Bill 2008; Appropriation (Parliament) Bill 2008; Appropriation (Special Offices) Bill 2008; State Revenue And Other Legislation Amendment (Budget) Bill 2008

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

2. Children (Criminal Proceedings) Amendment Bill 2008

**Issue: Access to Justice and Presumption of Innocence – Schedule 1 [9] - Section 9 Expedition where child in custody:**

**Issue: Excessive Punishment – Schedule 1 [42] – proposed Section 36 (3) Compensation:**

**27. The Committee is concerned about the potential incapacity of young people aged between 16 to 18 years old, to pay the proposed increased maximum amount or the doubling of the penalty to \$2,200 and the likely adverse impact arising from their inability to pay. However, the Committee notes that the Children's Court has the discretion to take into consideration the offender's financial capacity to pay the maximum amount of compensation, and accordingly, this may not constitute as excessive punishment and an undue trespass on personal rights and liberties.**

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

**29. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill (with the exception of clause 6) to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

3. Children (Detention Centres) Amendment Bill 2008

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



#### 4. Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008

**Issue: Retrospectivity – Clause 2 – provides that the proposed Act is taken to have commenced on 1 July 2006:**

14. However, the Committee considers the retrospective commencement of this proposed legislation (Clause 2) does not appear to trespass unduly on personal rights and liberties, as it implements the contribution arrangements initiated by the 2006 amendments and subsequent industry agreements reached by industry parties.
15. The Committee notes that employers will be able to defer to the Commonwealth superannuation guarantee legislation for their superannuation contribution obligations, with mineworkers able to receive employer contributions of at least 9 per cent of their ordinary time earnings, and current employed mineworkers that are eligible for a higher contribution, to remain entitled to the higher contribution. Therefore, the Committee considers the retrospective effect may not be trespassing unduly on personal rights.

#### 5. Courts and Crimes Legislation Amendment Bill 2008

**Issue: Retrospectivity – Amendment of *Crimes (Serious Sex Offenders) Act 2006* - Schedule 9 [6] - proposed Section 6 – application of amendment:**

33. The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights and liberties. However, the Committee notes that both of the offences of assault with intent to have sexual intercourse (Section 61K) and persistent sexual abuse of a child (Section 66EA) are punishable by imprisonment for 20 years and 25 years respectively, which surpasses imprisonment for 7 years under the current Section 5(1) serious sex offence definition. The amendment seeks to include in the definition of 'serious sex offence', the case of an offence against an adult, the offence such as assault with intent to have sexual intercourse (section 61K), which does not have to be committed in circumstances of aggravation.
34. Furthermore, the Committee notes that the current definition of "offence of a sexual nature" under the Act, already includes offences such as assault with intent to have sexual intercourse and persistent sexual abuse of a child. Therefore, the Committee is of the view that the retrospective effect of this amendment to offences (Sections 61K and 61EA offences of the Crimes Act) as 'serious sex offence' committed before the commencement of the amendment, does not unduly trespass individual rights and liberties.

#### 6. Electricity Industry Restructuring Bill 2008

18. The Committee is of the view that the right to seek remuneration or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a clear public interest in doing so. The Committee refers the matter to parliament.

**Issue: Self incrimination – Proposed Schedule 6(6)(3)**

- |     |   |
|-----|---|
| 24. | The Committee is always concerned when individuals are denied the common law right against self-incrimination. However, in this instance the Committee believes that the public interest justifies the denial of the right to silence in relation to company ownership matters. |
|-----|---|

**Issue: Compulsory Acquisition – Proposed Schedule 7(4)**

- |     |   |
|-----|---|
| 29. | The Committee is satisfied that as any acquisition will be done in accordance with the Land Acquisition (Just Terms Compensation) Act 1991 then the rights of affected landholders are adequately protected and the compulsory acquisition process will not unduly trespass on individual rights and liberties. |
|-----|---|

**Issue: Strict Liability – Proposed Schedule 6(3)**

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|-----|--|
| 37. | The Committee considers that, except in extraordinary circumstances, it is inappropriate for a strict liability offence, particularly one that does not allow for a defence or reasonable excuse. However, the Committee believes that in circumstances such as these, which involve corporations, rather than individuals, it may be appropriate. |
|-----|--|

**Issue: Ill and widely defined powers – Clause 8**

- |     |  |
|-----|--|
| 42. | While the Committee is conscious of the government's intent to be flexible in order to achieve maximisation of value to taxpayers, the Committee notes that Clause 8 of the Bill confers powers to the Treasurer that are insufficiently defined and refers this matter to Parliament. |
|-----|--|

**Issue: Commencement by proclamation – Clause 2**

- |     |   |
|-----|---|
| 44. | Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power. |
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**7. Exotic Diseases of Animals Amendment Bill 2008**

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|-----|--|
| 23. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|-----|--|

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8. Filming Related Legislation Amendment Bill 2008

**Issue: Clause 2 – Commencement by Proclamation – Provide the executive with unfettered control over the commence of an Act**

- |     |  |
|-----|--|
| 12. | Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power. |
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9. Firearms Amendment Bill 2008\*

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| 16. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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10. Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008\*

**Issue: Retrospectivity – Schedule 1 [5] – Proposed Section 22 – Operation of amendments:**

- |    |  |
|----|--|
| 7. | The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights and liberties. The Committee notes that the duty to report only arises after the proposed Act has commenced on the date of assent, even though this reporting covers possible corrupt conduct that may have occurred before the date of assent to the proposed Act. However, as the duty to report arises only after the proposed Act has commenced, the Committee considers that this does not trespass unduly on personal rights and liberties. |
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11. Marine Safety Amendment Bill 2008

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

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

12. Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008\*

**Issue: Ill-Defined and Wide Powers – Schedule 1 [18] – Proposed Section 5 (2) – Vacancy in office of appointed member:**

- |  |
|--|
| <p>12. The Committee notes that the power to remove an appointed member from office at any time is very wide in scope, and is concerned that this may make personal rights and liberties unduly dependent on an insufficiently defined administrative power. Accordingly, the Committee refers this to Parliament.</p> |
|--|

**Issue: Matters which should be regarded by Parliament – Schedule 1 [16] -Proposed Section 30 (3) - Regulations:**

- |   |
|---|
| <p>14. The Committee notes that allowing for regulations (rather than the Principal Act) to determine which conduct constitutes an offence may be delegating the power to make a fundamental component of the legislative scheme. The Committee is concerned that this constitutes an extensive regulation making power which comprises an inappropriate delegation of legislative power on matters which should be regarded by Parliament. Accordingly, the Committee refers this to Parliament.</p> |
|---|

13. Shop Trading Bill 2008

- |  |
|--|
| <p>8. The Committee has not identified any issues under section 8A(1)(b) of the <i>Legislation Review Act 1987</i></p> |
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14. Statute Law (Miscellaneous Provisions) Bill 2008

**Commencement by Assent**

**Retrospectivity - Schedule 1.17**

- |  |
|--|
| <p>12. The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.</p>  |
| <p>14. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</p> |

15. Western and Crown Lands Amendment (Special Purpose Leases) Bill 2008

**Issue: Ill-Defined and Wide Powers – Schedule 1 [4] Amendment of *Western Lands Act 1901* – Proposed section 35XB – Development districts:**

19. The Committee notes that the scope for the Minister's declaration that *any* land to be a development district for the purposes of the proposed Part, appears to be very wide. The Committee also notes that the Minister may make further declarations to alter the district's boundaries, abolish the district or vary its designated purposes, which appears to be broad in scope.
20. Therefore, the Committee considers these proposed provisions may make individual rights unduly dependent on an insufficiently defined and wide administrative power, and refers this to Parliament.

**Issue: Ill-Defined and Wide Powers – Schedule 2 [5] Amendment of *Crown Lands Act 1989* – Proposed section 44B – Development districts:**

23. The Committee notes that the scope for the Minister's declaration that *any* land within the Western Division to be a development district for the purposes of the proposed Division, appears to be very wide. The Committee also notes that the Minister may make further declarations to alter the district's boundaries, abolish the district or vary its designated purposes, which appears to be broad in scope.
24. Therefore, the Committee considers these proposed provisions may make individual rights unduly dependent on an insufficiently defined and wide administrative power, and refers this to Parliament.

16. Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008

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

Section B: Ministerial Correspondence – Bills Previously Considered

17. Environmental Planning And Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008

4. The Committee thanks the Minister for Planning for his response.



## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. APPROPRIATION BILL 2008; APPROPRIATION (PARLIAMENT) BILL 2008; APPROPRIATION (SPECIAL OFFICES) BILL 2008; STATE REVENUE AND OTHER LEGISLATION AMENDMENT (BUDGET) BILL 2008

Date Introduced: 3 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Morris Iemma MP  
Portfolio: Premier and Citizenship

## Purpose and Description

### *Appropriation Bill 2008*

1. This Bill aims to appropriate out of the Consolidated Fund sums for the recurrent services and capital works and services of the Government for the year 2008–09 and to make additional appropriations to give effect to budget variations for the years 2007–08 and 2006–07.
2. The Bill relates to appropriations from the Consolidated Fund—the principal account of the Government for General Government Budget Dependent transactions. The Consolidated Fund could be considered as the “public purse” and largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.
3. This Bill for the 2008–2009 year contains an additional appropriation, which allocates revenue raised in connection with changes to gaming machine taxes to the Minister for Health for spending on health related services.
4. It also makes additional appropriations from the Consolidated Fund for recurrent services and capital works and services for the 2007–2008 and 2006–2007 years for the purpose of giving effect to certain Budget variations required by the exigencies of Government.
5. The other Bills cognate with this Bill are: Appropriation (Parliament) Bill 2008, the Appropriation (Special Offices) Bill 2008 and the State Revenue and Other Legislation Amendment (Budget) Bill 2008.

***Appropriation (Parliament) Bill 2008***

6. This Bill appropriates funds out of the Consolidated Fund for the recurrent services and capital works and services of the Legislature for the year 2008 – 2009.

***Appropriation (Special Offices) Bill 2008***

7. This Bill appropriates funds out of the Consolidated Fund for the recurrent services and capital works and services of the Independent Commission Against Corruption, the Ombudsman's Office, the New South Wales Electoral Commission and the Office of the Director of Public Prosecutions, for the year 2008 – 2009.

***State Revenue and Other Legislation Amendment (Budget) Bill 2008***

8. This Bill makes miscellaneous amendments to State revenue and other legislation in connection with the Budget for the year 2008–2009.
9. The objects of the Bill are as follows:
- (a) to amend the *Duties Act 1997*:
    - (i) to bring forward the date for abolition of duty on transfers of business assets, statutory licences and permissions and poker machine entitlements, to 1 January 2011, and
    - (ii) to provide a duty exemption for certain restructure arrangements known as “top hatting” arrangements, and
    - (iii) to ensure that duty on transfers of shares in commercial fisheries is abolished on 1 January 2009 (when duty on transfers of marketable securities is abolished),
  - (b) to amend the *Payroll Tax Act 2007* so that:
    - (i) the current payroll tax rate of 6% will be reduced to 5.5% over 3 years, and
    - (ii) the tax-free threshold will be indexed annually (starting on 1 July 2008) so that it will increase in line with increases in the Consumer Price Index for Sydney, and
    - (iii) special arrangements will apply in the 3 financial years over which the reduction in tax rate will be phased in (including arrangements for the allocation of any unused portion of tax-free threshold for a half-year to the other half of the year),
  - (c) to amend the *Public Finance and Audit Act 1983* as a consequence of the introduction of a new Australian Accounting Standard, and for other purposes,
10. (d) to amend the *Public Sector Employment and Management Act 2002* to ensure that the prohibition on an executive officer undertaking paid work outside the duties of his or her position without the approval of the officer's employer extends to paid work of any kind (whether or not employment to which that Act applies).

**Issues Considered by the Committee**

- |  |
|--|
| 11. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|--|

***The Committee makes no further comment on this Bill.***



## 2. CHILDREN (CRIMINAL PROCEEDINGS) AMENDMENT BILL 2008

Date Introduced: 6 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Barbara Perry MP  
Portfolio: Juvenile Justice

### Purpose and Description

1. This Bill amends the *Children (Criminal Proceedings) Act 1987* and certain other legislation to make further provision with respect to the conduct of criminal proceedings against children and other young persons. It is cognate with the *Courts and Crimes Legislation Amendment Bill 2008*.
2. The Bill omits the current definition of "parent" in the Act and inserts new definitions of "parental responsibility" and "person responsible" to ensure consistency with corresponding definitions in the *Children and Young Persons (Care and Protection) Act 1998*.
3. Section 6 of the Act sets out the guiding principles relating to the exercise of criminal jurisdiction in cases involving children. This will be amended to include the following new principles: that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties; that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions; and that consideration should be given to the effect of any crime on the victim.
4. Section 6 will also be amended so that all persons and bodies exercising functions under the Act, not just the courts, must apply the guiding principles.
5. Section 12 will be amended so that if criminal proceedings are brought against a child, the court must take such measures as are reasonably practicable to ensure that the child understands the proceedings.
6. Based on advice from children's legal practitioners, section 13 of the Act will be amended to allow children over the age of 14 to select a responsible adult to be present when being interviewed by police. Currently, only young persons 16 years or older may choose an adult to fulfil the role of the responsible person. This amendment mirrors a similar provision in the *Young Offenders Act 1997*.
7. Amendments will deal with the circumstances in which the courts can direct that young persons under the age of 21 to serve their sentence in a juvenile detention centre for an offence committed as a child. Currently, a court can direct that a young person under the age of 21 serve all or any part of a custodial sentence imposed in relation to an indictable offence in a juvenile detention centre rather than a correctional centre. The courts may also order that a young person under the age of

21 who is found guilty of a serious children's indictable offence serve all or any part of the imposed custodial sentence in a juvenile detention centre if the court makes a finding of "special circumstances" under section 19 of the Act. The Bill amends section 19 to provide that such a direction may not be made in respect of a person who is of or above the age of 18 years if that person is serving, or has previously served, a term of imprisonment in a correctional centre, unless the court is satisfied that there are "special circumstances" for such a direction.

8. This Bill makes it clear that "special circumstances" can be found on only one or more of three grounds. These are: that the offender is vulnerable on account of illness or disability; that the only available educational or vocational training or therapeutic programs that are suitable to the person's needs are those available in detention centres; or that there would be an unacceptable risk of the person suffering physical or psychological harm, whether due to the nature of the person's offence, any assistance given by the person in the prosecution of other persons or otherwise.
9. It clarifies that a finding of "special circumstances" may not be made just because of the person's youth or because the non-parole period of the person's sentence will expire while the person is still eligible to serve the sentence as a juvenile offender. It also requires a sentencing court to record the reasons for its decision to make a finding of "special circumstances".
10. The Bill deals with the penalties that the Children's Court may impose under the Act. Changes will be made to section 33 so that penalties that can be imposed in relation to children are more consistent with the sentencing options for adult offenders under sections 9, 10 and 12 of the *Crimes (Sentencing Procedure) Act 1999*. It is a guiding principle of the Act that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind. Under sections 9, 10 and 12 of the *Crimes (Sentencing Procedure) Act 1999*, a good behaviour bond may be imposed on a person when a charge is dismissed following a guilty finding. Currently, the courts do not have the power to dismiss a charge but still require a child to enter into a good behaviour bond. This amendment provides greater scope for the courts and the Department of Juvenile Justice to monitor a child's behaviour after he or she has had a charge dismissed.
11. Section 33 will be amended to allow the Children's Court to impose a fine on a child in addition to making an order releasing the child on probation. Currently, these are alternative penalties. In a further amendment to section 33, the courts will be able to release a young person on probation and impose a community service order as a condition of probation. This ensures that even after a child completes a period of community service work, he or she will continue to be supervised in the community.
12. This Bill also amends the *Children (Community Service Orders) Act 1987* to allow the courts to require a young person to participate in a vocational, educational or personal development program as a condition of a community service work order.
13. The Children's Court will be given the same power as other courts to impose a licence disqualification on a person whom it has found guilty of an offence, even if a conviction has not been recorded.
14. The Act currently allows the Children's Court to direct an offender to pay compensation to a victim of crime, up to a maximum amount of \$1,000. This Bill

increases the maximum to 10 penalty units (\$1,100), in the case of an offender who is under the age of 16 years at the time the compensation is ordered, or 20 penalty units (\$2,200), in any other case.

15. This Bill amends the Act to make it clear that the provisions of the *Crimes (Sentencing Procedure) Act 1999* relating to the use of victim impact statements apply to the Children's Court, in the same way as they apply to similar offences when dealt with by the Local Court.
16. Another main amendment to the Act is to be made to section 33(1B) to remove the requirement that the Children's Court set a non-parole period at the time of imposing a control order, if the control order is suspended on condition the person enter into a good behaviour bond. Instead, the Children's Court will be required to set a non-parole period if the person later on contravenes the good behaviour bond and the court decides to revoke the good behaviour bond. This aims to ensure that the court is able to fix a non-parole period that is commensurate with the young person's behaviour while they were released on a bond.
17. At present, if a child is taken into custody in connection with criminal proceedings, and has not been released on bail, the Principal Act requires the child to be brought before the Children's Court or an authorised justice for the making of a bail determination by the next working day. Schedule 1 [9] repeals this requirement, which is uncommenced. However, a more general requirement, that the child must be brought before the Children's Court as soon as practicable, will be commenced by the amendments (see Schedule 1 [1]).

## Background

18. The *Children (Criminal Proceedings) Act 1987* governs the jurisdiction of the Children's Court in criminal matters, and sets out the main provisions relating to criminal proceedings against children.
19. The Agreement in Principle speech explained that a working party has reviewed the operation of the Act. This working party consisted of representatives from the Commission for Children and Young People, the Department of Aboriginal Affairs, the Department of Community Services, the Department of Juvenile Justice, the Law Society of New South Wales, Legal Aid, the Ministry for Police and New South Wales Police Force, the Director of Public Prosecutions, the Children's Court and the New South Wales Attorney General's Department.
20. Accordingly, the working party made recommendations about the way in which the Act might be improved. Those recommendations formed the basis of the amendments in this Bill. The Bill also implements certain recommendations of the New South Wales Law Reform Commission's report No. 104, "Young Offenders", and the New South Wales Ombudsman's "Review of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act".
21. Amendments are also intended to create a more transparent and accountable scheme for the making of orders under section 19 of the Act. According to the Agreement in Principle speech:

Young adults in the 18 to 21 age bracket have significantly different developmental needs from the needs of younger detainees in juvenile detention. The presence of these young adults can have a disruptive influence on the rehabilitation of younger detainees. It is only when there are compelling and exceptional circumstances affecting an individual young person that the courts should direct that the young person be admitted to a juvenile detention centre. This was the intention when the "special circumstances" requirement was inserted into section 19 of the Act...However, the New South Wales Ombudsman, in his report entitled "Review of the Children (Criminal Proceedings) Amendment (Adult Detainees) Act", found that during the review period the "overwhelming majority" of matters in which orders could be made under section 19 resulted in findings of "special circumstances". The Ombudsman found that, contrary to expectations, the requirement for the courts to make findings of "special circumstances" under the Act actually led to an increase in the number of young adults being held in juvenile detention, rather than a reduction. Given the concerns raised by the Ombudsman in relation to the administration of the "special circumstances" regime, the bill will amend section 19 to give greater legislative guidance on what constitutes "special circumstances" under that section. However, section 19, as amended, will continue to play an important role in assisting those young adults who have specific needs or disadvantages in addition to their age to receive adequate support towards their rehabilitation.

22. Parts of the Bill deal with compensation to victims. Changes will double the compensation that may be ordered against a person over the age of 16 years as this acknowledges that many young people over this age have the financial capacity to pay higher amounts of compensation from part-time work.

## The Bill

23. The object of this Bill is to amend the *Children (Criminal Proceedings) Act 1987* (the **Principal Act**) as follows:

- (a) to extend the guiding principles of the Principal Act,
- (b) to impose a general duty on the Children's Court to ensure that criminal proceedings are explained to any child who is the subject of the criminal proceedings,
- (c) to allow a child aged 14 years or over to be accompanied by an interview friend (who is not their parent) when being interviewed by police,
- (d) to make further provision with respect to the detention of adults in juvenile detention centres,
- (e) to make provision for the imposition of good behaviour bonds by the Children's Court more consistent with the *Crimes (Sentencing Procedure) Act 1999*,
- (f) to enable the Children's Court to impose a fine in addition to probation in respect of a person found guilty of an offence,
- (g) to enable the Children's Court to impose both a community service order and a probation order in respect of a person found guilty of an offence,
- (h) to require the Children's Court to take certain matters into consideration before imposing a fine on a child,
- (i) to enable the Children's Court to exercise certain powers under road transport legislation in relation to persons whom it finds guilty of an offence (in the absence of a conviction),
- (j) to increase the maximum amount of compensation that may be ordered by the Children's Court,
- (k) to allow more than 2 consecutive or concurrent control orders to be imposed in respect of a child offender (up to a maximum total detention period of 3 years),

- (l) to repeal an uncommenced provision of the Principal Act relating to bail,
- (m) to confirm that background reports on children and victim impact statements may be utilised in certain proceedings before the Children's Court,
- (n) to remove the requirement that a non-parole period be set at the time that a control order is made, if the control order is suspended,
- (o) to make other minor, consequential and ancillary amendments.

24. The Bill also:

- (a) amends the *Children (Community Service Orders) Act 1987* so that participation in an approved personal development, educational or other program may be counted as community service work, and
- (b) amends the *Criminal Procedure Act 1986* to extend the powers of a Local Court when dealing with traffic offences committed by children, and
- (c) makes consequential amendments to other legislation.

## Issues Considered by the Committee

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

#### **Issue: Access to Justice and Presumption of Innocence – Schedule 1 [9] - Section 9 Expedition where child in custody:**

25. This proposed amendment will omit Section 9 (2). Currently, if a child is taken into custody in connection with criminal proceedings, and has not been released on bail, the Act requires the child to be brought before the Children's Court or an authorised justice for the making of a bail determination by the next working day. Schedule 1 [9] aims to repeal this requirement, which is uncommenced. A more general requirement that the child must be brought before the Children's Court as soon as practicable, will be commenced by the amendments (Schedule 1 [1] ).

#### **Issue: Excessive Punishment – Schedule 1 [42] – proposed Section 36 (3) Compensation:**

26. Currently, the Act allows the Children's Court to direct an offender to pay compensation to a victim of crime up to a maximum amount of \$1,000. Proposed amendment will increase this amount to 10 penalty units (\$1,100) in the case of an offender who is under the age of 16 years at the time of the compensation is ordered or 20 penalty units (\$2,200) in any other case.

27. **The Committee is concerned about the potential incapacity of young people aged between 16 to 18 years old, to pay the proposed increased maximum amount or the doubling of the penalty to \$2,200 and the likely adverse impact arising from their inability to pay. However, the Committee notes that the Children's Court has the discretion to take into consideration the offender's financial capacity to pay the maximum amount of compensation, and accordingly, this may not constitute as excessive punishment and an undue trespass on personal rights and liberties.**

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

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

28. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation (with the exception of clause 6, which commences on the date of assent). This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

29. **Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill (with the exception of clause 6) to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

***The Committee makes no further comment on this Bill.***

### 3. CHILDREN (DETENTION CENTRES) AMENDMENT BILL 2008

Date Introduced: 6 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Barbara Perry  
Portfolio: Juvenile Justice

#### Purpose and Description

1. The object of this Bill is to amend the *Children (Detention Centres) Act 1987* to ensure that certain persons who are the subject of arrest warrants are not to be detained in detention centres and to clarify the provisions of that Act with respect to the separate detention of different classes of detainees as well as with respect to the transfer of detainees from detention centres to correctional centres.

#### Background

2. According to the Agreement in Principle Speech the proposed changes will allow for greater certainty in the transfer of detainees into adult facilities and the granting of additional powers that will allow the director general to maintain good order in juvenile facilities across New South Wales with particular regard to segregation, and the separation of detainees in particular circumstances where the security of staff, visitors or other detainees might otherwise be placed at risk.
3. The Bill inserts provisions into section 16 of the Act to empower the Director General of the Department of Juvenile Justice to direct that different detainees or groups of detainees be separately accommodated, and ensure that their separate accommodation is not prevented by any section of the Anti-Discrimination Act 1977. This Bill amends section 16 of the Act to provide the Director General with the power to enable the segregation of a particular detainee, or group of detainees, from another detainee or group of detainees for the reasons of good order, discipline and/or security of the detention centre, and that the period of segregation be able to continue until the risk to good order, discipline and/or security has dissipated, in the opinion of the director general.
4. The changes proposed in the Bill recognise the differing maturity levels and developmental stages of young people, especially where issues of disability and mental health are involved. While taking into account the recommendations of the court in assessing a young person 18 years or over, the Director General would be advised by expert staff of the Department of Juvenile Justice with direct and ongoing experience of young offenders' behaviour and demeanour while in detention.
5. The Bill also provides that a person over 18 years can be transferred to an adult correctional centre where the detainee is, or has previously been, detained as an inmate in an adult correctional centre for a period of, or periods totalling, more than

four weeks. This bill proposes amendments to section 9A of the Act to provide that persons who are 21 or over are not to be detained in a detention centre if they are subject to an arrest warrant of any kind, and that persons who are between 18 and 21 are not to be detained in a detention centre if they are subject to an arrest warrant issued in relation to an alleged breach of a good behaviour bond, probation or community service order, or an alleged escape from custody.

6. Currently, young offenders are admitted to detention centres on outstanding juvenile matters, pending transfer to an adult correctional centre. This Bill aims to clarify that older offenders who have breached bond, community service orders, suspended sentence parole or who have escaped from a detention centre do not need to be admitted to a detention centre in order to be transferred to a correctional centre.
7. The provisions proposed in section 9A (2) (e) in the Bill would mean that this category of young offender will be transferred to an adult correctional facility. This means that an offender who has previously served a period of custody in an adult correctional facility cannot be returned directly to a juvenile detention centre to serve a further period of custody.
8. The Bill also amends section 21 (1) (b) of the Act to enable detainees who are being punished for misbehaviour to be restricted from participation in sport or leisure activities for a period of time greater than four days, as is currently the case. The proposals provide that any such restriction cannot be for more than seven days at a time except with the prior approval of the Director General.

## The Bill

### **Persons not to be detained in detention centres**

**Schedule 1 [3]** inserts proposed section 9A into the Act. The proposed section provides that persons who are 21 or over are not to be detained in a detention centre if they are subject to an arrest warrant of any kind, and that persons who are between 18 and 21 are not to be detained in a detention centre if they are subject to an arrest warrant issued in relation to an alleged breach of a good behaviour bond, probation or community service order or an alleged escape from custody.

### **Separation of detainees**

**Schedule 1 [4]** inserts proposed subsections (3), (4) and (5) into section 16 of the Act. The new subsections empower the Director-General of the Department of Juvenile Justice to direct that different detainees or groups of detainees be separately accommodated, and ensure that their separate accommodation is not prevented by anything in the *Anti-Discrimination Act 1977*. **Schedule 1 [5]** makes a consequential amendment to section 19 of the Act.

**Schedule 1 [12]** inserts proposed paragraph (q2) into section 32A (a regulation-making power). The new paragraph enables regulations to be made with respect to the review of directions given by the Director-General under proposed section 16 (3).

### **Transfer of detainees**

**Schedule 1 [8]** substitutes subsection (1A) of section 28 of the Act so as to make it clear that a transfer order can be made under that section regardless of whether or where the detainee is currently in custody.

**Schedule 1 [9]** substitutes subsection (2A) of section 28 of the Act so as to provide two new grounds for making a transfer order with respect to a detainee who is between 18 and 21 years of age. One of those grounds is that the detainee has been at the detention centre for at least 6 months and the Director-General is satisfied that it would be preferable for the



detainee to be at a correctional centre. The other ground is that the detainee is, or has previously been, at a correctional centre (other than a juvenile correctional centre) for more than 4 weeks.

**Schedule 1 [10]** inserts proposed subsections (2C) and (2D) into section 28 of the Act. Proposed subsection (2C) provides that subsection (2) (which restricts the power to transfer a detainee who is under 18) does not apply to a detainee who has previously been transferred to a correctional centre during his or her current period of detention. Proposed subsection (2D) provides that subsection (2A) (which restricts the power to transfer a detainee who is over 18 but under 21) does not apply to a detainee who has previously been transferred to a correctional centre during his or her current period of detention or during any previous period of detention.

**Schedule 1 [11]** makes a consequential amendment to section 28 (3) (b) of the Act.

#### **Miscellaneous amendments**

**Schedule 1 [1]** amends section 3 of the Act so as to provide that notes in the Act (such as the note at the end of proposed section 9A) do not form part of the Act.

**Schedule 1 [2]** amends section 7 (1) of the Act so as to extend the period between successive Departmental inspections of a detention centre from 3 months to 12 months.

**Schedule 1 [6]** amends section 21 (1) (b) of the Act so as to enable detainees who are being punished for misbehaviour to be restricted from participation in sport or leisure activities for an unlimited period of time, rather than 4 days as is currently the case.

**Schedule 1 [7]** inserts proposed subsection (1A) into section 21 of the Act so as to provide that any such restriction cannot be for more than 7 days at a time except with the prior approval of the Director-General.

**Schedule 1 [12]** inserts proposed paragraph (q1) into section 32A (a regulation-making power). The new paragraph enables regulations to be made with respect to the circumstances in which detainees may be confined to their rooms, and the periods for which they may be so confined.

## **Issues Considered by the Committee**

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| 9. | <b>The Committee has not identified any issues under section 8A(1)(b) of the Legislation Review Act 1987</b> |
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***The Committee makes no further comment on this Bill.***

## 4. COAL AND OIL SHALE MINE WORKERS (SUPERANNUATION) AMENDMENT BILL 2008

Date Introduced: 5 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon John Watkins MP  
Portfolio: Deputy Premier, Finance, Transport

### Purpose and Description

1. This Bill amends the *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* with respect to the legal effects of certain industrial agreements and superannuation contributions by mine owners; and for other purposes.
2. It progresses the transition-to-community standard contribution arrangements initiated by the 2006 amendments. In order to better implement the subsequent agreements reached by the industry parties, this Bill is backdated to 1 July 2006, the date on which the 2006 amendments commenced. The complex contribution provisions of the Act are removed under the Bill. Instead, employers will defer to the Commonwealth superannuation guarantee legislation for their superannuation contribution obligations. Mineworkers will generally receive employer contributions of at least 9 per cent of their ordinary time earnings. Most coal mine workers are already getting superannuation contributions at the 9 per cent rate. Current employed mineworkers, eligible for a higher contribution, will remain entitled to the higher contribution.
3. The Bill retains the requirement to make payments under the Act to finance miners pension fund liabilities. Payments to finance pension indexation adjustments will stop as they are to be funded from another source.
4. Various industry agreements previously prescribed the contribution arrangements for New South Wales coal mine workers. This now becomes redundant. Accordingly, the Bill clarifies that the four industry agreements made in 1988, 1991, 1992 and 1999 no longer have legal effect in relation to contributions. A fifth agreement, the 1992 salary sacrifice agreement, was also recently revoked by order of the Australian Industrial Relations Commission.

### Background

5. According to the Agreement in Principle speech:

This Bill represents a major overhaul of the superannuation contribution arrangements for New South Wales coal mine workers in line with industry agreements. It will improve efficiencies for the industry and the fund. Superannuation will also become easier to understand for coal employers and employees alike.

## Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008

The Bill is the result of detailed negotiations between the industry parties. It follows extensive consultation with the Construction, Forestry, Mining and Energy Union and the Minerals Council of New South Wales, on behalf of broader industry representative bodies, and with the fund's administrator, AUSCOAL Services Pty Ltd.

6. The Bill follows a joint industry submission to the Government from coal industry employer and employee representatives to simplify the superannuation contribution arrangements for the some 13,000 New South Wales coal mine workers. New South Wales coal mine workers, like most other Australian workers, will then receive superannuation contributions under the Commonwealth's superannuation guarantee legislation.
7. These arrangements began with the 1940-1941 Royal Commission of Inquiry into Mine Safety. Under the original Act, the New South Wales Government established a pension scheme for coal mine workers and their widows. Over time, the coal industry has taken greater responsibility for the scheme and sought to address the scheme's funding liabilities. Various industry agreements prescribed superannuation contribution arrangements for this purpose.
8. The Agreement in Principle speech explained that:

Under a 1988 agreement, employers agreed to contribute \$14 per week for each eligible employee. A 1991 agreement increased this amount to \$31.20 per week. Further changes were implemented through the 1992 restructure, and salary sacrifice agreements. Contributions were required at prescribed percentages of a reference rate based on an award rate of pay. Employees also undertook to make contributions on a salary sacrifice basis to the fund. In 1995, at the request of the industry parties, the scheme largely moved under Commonwealth superannuation regulation, with a corporate trustee comprising employer and employee representatives. While the scheme rules were mainly transferred to a trust deed, the contribution arrangements were retained in the Act, again at the request of the industry.

In 2000 the contribution arrangements of the last industry agreement, the 1999 superannuation agreement, were incorporated into the Act. These form the basis for the flat weekly rate formula currently in the Act. It is a complex combination of variously allocated prescribed percentages of a reference rate determined by the corporate trustee. An additional fixed amount is also required under the fund's trust deed. The resulting contribution does not reflect or fluctuate with the coal mine worker's individual salary. It produces a flat weekly contribution of about \$120 per week. Employees contribute about \$45 of this on a salary sacrifice basis. Employers are also required to make payments for each mineworker to finance the miners pension fund and consumer price index pension adjustments.

By 2006 it became apparent that these arrangements had not kept pace with superannuation arrangements for other Australian workers. The Construction, Forestry, Mining and Energy Union, the industry's major employee representative, was concerned that employer superannuation contributions for coal mine workers in New South Wales were below the community standard. They suggested that many coal mine workers received contributions less than the 9 per cent of their ordinary time earnings generally required under Commonwealth superannuation guarantee legislation. In 2006 amendments placed a contribution safety net in the Act. This was

to ensure that coal mine workers received contributions of at least the 9 per cent community standard.

The amendments retained the employer's obligation to calculate contributions using the existing flat weekly rate formula. If, however, the resulting contribution amount was less than 9 per cent of the mineworker's ordinary time earnings, employers were expected to make up the shortfall to the 9 per cent amount. Since 2006 the industry parties have continued consultations to reform the contribution arrangements for coal mine workers. A memorandum of understanding was negotiated by the parties to further simplify contribution arrangements. The aim of the memorandum is to move the industry fully to compliance only with Commonwealth superannuation contribution requirements.

9. According to the agreements by the industry parties, the higher amount does not include miners pension fund finance payments or salary sacrifice contributions. The higher contribution entitlement continues if the mineworker later becomes engaged by another industry employer.

## The Bill

10. The object of this Bill is to retrospectively amend the *Coal and Oil Shale Mine Workers (Superannuation) Act 1941* (the **Principal Act**) to complete the transition with respect to superannuation contributions (begun by amendment of the Principal Act in 2006), so that contributions by mine owners will have been in accordance with the requirements of the *Superannuation Guarantee Charge Act 1992* and *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth (the **Commonwealth legislation**) from 1 July 2006.
11. The Bill, with effect from 1 July 2006:
- (a) removes the superannuation contribution provisions of the Principal Act that relate to Part 2 of the AUSCOAL Superannuation Fund (the **Amalgamated Fund**), which is the current default scheme for coal and oil shale mine workers, so that there is no requirement to pay contributions in excess of the minimum required by the Commonwealth legislation, being 9% of ordinary time earnings, as a weekly amount, and
  - (b) removes the legal effect of the provisions for superannuation contributions (including various formulae) that are contained in four industrial agreements made in 1988, 1991, 1992 and 1999, and
  - (c) refers instead to the revised AUSCOAL Superannuation Fund Trust Deed (the **AUSCOAL Trust Deed**) and AUSCOAL Superannuation Fund Rules (the **AUSCOAL Rules**) by which the scheme is governed, and
  - (d) ensures that every employed mine worker will be entitled to at least the same amount of superannuation contribution following the amendment of the Principal Act as applied before it, by inserting a specific transitional provision and by providing the ability to make transitional regulations.
12. **Outline of provisions**

### Schedule 1 Amendments

The superannuation arrangements for coal and oil shale mine workers, former workers and their dependants have been negotiated as a series of industrial agreements between employers and their associations and trade unions (the **parties**).

These agreements include the formulae for contributions and are given effect through the *Coal and Oil Shale Mine Workers (Superannuation) Act 1941*. The contributions can be made to Part 2 of the Amalgamated Fund (the current scheme) or to another fund to which a mine worker has elected to contribute. By amendment of the Principal Act in 2006, the superannuation contribution for each mine worker was prescribed to be not less than 9% of the mine worker's ordinary time earnings, as a weekly amount, even if the application of the formulae would result in a lesser amount. This percentage is the rate prescribed under the Commonwealth legislation.

Contribution to Part 3 of the Amalgamated Fund under section 19 (2A) of the Principal Act was excluded from the 9% calculation. Subsequent to that amendment the parties clarified their intention to fully transition to compliance with the Commonwealth legislation from 1 July 2006.

**Schedule 1 [7]** amends the Principal Act by inserting proposed section 2A, which ceases the legal effect of four listed industrial agreements insofar as they require superannuation contributions to be made to Part 2 or Part 3 the Amalgamated Fund or another fund to which the mine worker has elected to contribute.

**Schedule 1 [13]** amends the Principal Act by substituting section 19 so as to remove the superannuation contribution provisions in respect of Part 2 of the Amalgamated Fund. Certain of the former arrangements for contribution to Part 3 (the closed scheme) of the Amalgamated Fund (by owners) are not affected by the transition and have been retained. Contributions to the current scheme are now to be dealt with by arrangements between the parties in accordance with the Commonwealth legislation.

**Schedule 1 [1]–[4], [6], [8] and [12]** amend references in various sections of the Principal Act to the renamed AUSCOAL Trust Deed and AUSCOAL Rules, formerly the COALSUPER Trust Deed and COALSUPER Rules, the documents that empower the Corporate Trustee to govern the Amalgamated Fund.

**Schedule 1 [18]** amends Schedule 2 to the Principal Act by inserting proposed Part 9 (proposed clauses 35–38) containing savings and transitional provisions.

Proposed clause 36 validates any superannuation contribution paid by an owner for a mine worker before the date of assent to the proposed Act that was in compliance with the Principal Act, the AUSCOAL Trust Deed and any industrial agreement (as then in force), so as to avoid the need for a refund.

Proposed clause 37 applies to circumstances where, immediately before the date of assent to the proposed Act (in respect of any period commencing on or after 1 July 2006), the contribution payable for a mine worker employed by an owner is, as a result of the superannuation contribution formulae contained in the Act, the industrial agreements and the AUSCOAL Trust Deed, an amount that is higher than the amount payable from the date of assent. In such circumstances, the owner, and any subsequent owner who employs the mine worker, are liable to continue to pay the higher amount. For the purposes of this clause, any contribution payable under section 19 (2A) of the Principal Act as then in force or under proposed section 19 (1) and any salary sacrifice contribution payable are not included. If any additional amounts are payable by an owner pursuant to proposed clause 37 they are to be credited to Part 2 of the Amalgamated Fund or another complying fund if the mine worker has made such an election.

## Issues Considered by the Committee

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

**Issue: Retrospectivity – Clause 2 – provides that the proposed Act is taken to have commenced on 1 July 2006:**

13. The Committee will always be concerned with any retrospective effect of legislation that impacts adversely on personal rights.

14. **However, the Committee considers the retrospective commencement of this proposed legislation (Clause 2) does not appear to trespass unduly on personal rights and liberties, as it implements the contribution arrangements initiated by the 2006 amendments and subsequent industry agreements reached by industry parties.**

15. **The Committee notes that employers will be able to defer to the Commonwealth superannuation guarantee legislation for their superannuation contribution obligations, with mineworkers able to receive employer contributions of at least 9 per cent of their ordinary time earnings, and current employed mineworkers that are eligible for a higher contribution, to remain entitled to the higher contribution. Therefore, the Committee considers the retrospective effect may not be trespassing unduly on personal rights.**

***The Committee makes no further comment on this Bill.***

## 5. COURTS AND CRIMES LEGISLATION AMENDMENT BILL 2008

Date Introduced: 6 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Barbara Perry MP  
Portfolio: Juvenile Justice

### Purpose and Description

1. This Bill amends certain Acts with respect to courts, court procedure, jurisdiction, rights and avenues of appeal and various criminal offences; and for other purposes.
2. *Children (Criminal Proceedings) Amendment Bill 2008* and *Children (Detention Centres) Amendment Bill 2008* are cognate with this Bill.

### Amendment of Medical Practice Act

3. Schedule 17 will amend section 148 of the *Medical Practice Act 1992* to provide that judges of Supreme Court status may be appointed to sit on the Medical Tribunal. Currently, only judges of the District Court are eligible to be appointed to the Medical Tribunal. This will broaden the pool of judges available to the tribunal.

### Amendments of Supreme Court Act and Criminal Appeal Act

4. Schedules 10 and 19 will amend the *Supreme Court Act 1970* and the *Criminal Appeal Act 1912* to provide that the Chief Judge of the District Court and the Chief Judge of the Land and Environment Court may act as additional judges of the Court of Appeal and Court of Criminal Appeal. The amendments will allow for the appointment of the Chief Judges to the Court of Appeal and the Court of Criminal Appeal as needed, without having to obtain a commission through the Governor on each occasion.

### Amendments of Civil Procedure Act

5. Schedule 3 will amend the *Civil Procedure Act 2005* to clarify that named office holders are able to appoint their own deputies, who will be able to stand in for the office holders when they are not available. Currently, clause 3A of schedule 2 to that Act provides that where a power exists to nominate or appoint a member of the Uniform Rules Committee, a power also exists to appoint a deputy for that member. This is so that a deputy can attend meetings of the committee where the member is unavailable. However, named office holders who are not nominated or appointed in this way currently have no equivalent power to appoint a deputy.

**Appeals to District Court instead of Supreme Court – Amendments of Community Land Management Act; Consumer, Trader and Tenancy Tribunal Act; Legal Profession Act; Local Court Act; Local Courts Act; Strata Schemes Management Act**

6. Schedules 4, 5, 14, 15, 16 and 18 to the Bill will respectively, amend the *Community Land Management Act 1989*, the *Consumer, Trader and Tenancy Tribunal Act 2001*, the *Legal Profession Act 2004*, the *Local Court Act 2007*, the *Local Courts Act 1982*, and the *Strata Schemes Management Act 1996*, in order to provide that certain minor appeals governed by these Acts are to be held in the District Court instead of the Supreme Court.

**Amendment of Director of Public Prosecutions Act**

7. Schedule 11 will amend the *Director of Public Prosecutions Act 1986* to clarify that where the DPP has taken over a matter for an application or appeal in the Supreme or District Court, the Director Of Public Prosecutions (DPP) is able to return the matter to the original prosecutor (New South Wales Police), for prosecution where the matter has been remitted to the Local Court.

**Amendment of Crimes (Domestic and Personal Violence) Act**

8. Section 92 of the *Crimes (Domestic and Personal Violence) Act 2007* currently provides that the District Court has original jurisdiction to issue an apprehended violence order (AVO) following dismissal of an application by the Local Court or Children's Court. It is not clear whether this requires a full hearing of the matter, rather than a normal appeal or review process. Therefore, schedule 8 to the Bill provides that a magistrate's dismissal of an application will be reviewable on appeal in the way that magistrate's orders are reviewed elsewhere.

**Amendment of District Court Act**

9. Schedule 12 amends the *District Court Act 1973* to ensure that there is an appeal right from jury trials in the District Court, equivalent to the right provided in the Supreme Court.

**Amendment of Land and Environment Court Act**

10. Schedule 13 makes a number of amendments to the *Land and Environment Court Act 1979* to improve the court's organisation and procedures. Section 35 (1A) of the *Supreme Court Act 1970* provides that the President of the Court of Appeal will be Acting Chief Justice when the Chief Justice is absent from duty. This amendment aims to streamline the appointment process, reduce the need for an Acting Chief Justice to be appointed by commission under the public seal each time the Chief Justice is absent. The Bill amends the Land and Environment Court Act in a similar way to provide that when the Chief Judge is absent from Australia, and no Acting Chief Judge has been appointed, the most senior judge present in Australia will be taken to be the Acting Chief Judge.
11. This Bill amends the Land and Environment Court Act to enhance the prospects of a successful outcome at conciliation conferences. The amendments require that proceedings at a conciliation conference are consistent with the good faith requirements relating to mediations in part 4, section 27 of the *Civil Procedure Act 2005*.



12. It also amends the Land and Environment Court Act to improve flexibility in on-site conferences and allows for the specialist expertise of other commissioners to be used where appropriate. The amendments permit more than one commissioner to preside over an on-site conference where appropriate.. This amendment makes on-site conferences consistent with section 36 (1) (a) of the Land and Environment Court Act, which provides that the Chief Judge may, on the Chief Judge's own motion or at the request of a party, direct that proceedings be heard and disposed of by one or more commissioners.
13. It further amends the Land and Environment Court Act to give the Land and Environment Court power to dispense with an on-site inspection where appropriate. Currently, applications for an easement over land can be made where the court has made a determination to grant development consent on an appeal under section 97 of the Act. This Bill amends the Land and Environment Court Act to provide that applications for an easement over land may also be made when an appeal under section 97 is pending before the court. This amendment will allow applications for an easement relevant to the grant of development consent can be made at the same time as the appeal seeking the grant of development consent.

#### **Amendment of Local Court Act**

14. Section 10A (2) of the *Local Courts Act 1982* provides that "a person appointed as deputy registrar has, under the registrar, all the functions of the registrar and may exercise those functions". This provision allows deputy registrars such as chamber registrars, to do registrar work, when registrars are on duty and when registrars are absent from duty. Schedule 15 inserts this provision into the new *Local Court Act 2007*. This means it is consistent with the former legislation and clarifies that when the new Act commences, deputy registrars will be able to continue to exercise the functions of registrars.

#### **Amendment of Births, Deaths and Marriages Registration Act**

15. Schedules 1 and 22 will amend the Births, Deaths and Marriages Registration Act and regulation to provide that New South Wales residents, regardless of where they were born, will be able to apply for legal recognition of their change of sex. Applicants who are born overseas will need to satisfy certain requirements in order to obtain a certificate recognising the change of sex.
16. The Births, Deaths and Marriages Registration Act currently provides for legal recognition of a change of sex on the basis that a person has undergone sexual reassignment surgery. The Bill amends the Births, Deaths and Marriages Registration Act, to adopt the phrase "sex affirmation procedure", to be in line with updated terminology. That term was recently introduced in Victorian legislation.

#### **Amendment of Crimes (Serious Sex Offenders) Act**

17. Schedule 9 amends the *Crimes (Serious Sex Offenders) Act 2006* to extend the application of the Act to offenders who have committed certain offences, and with respect to other matters relating to pre-trial proceedings under the Act. The Bill amends the section 5 definition of "serious sex offence" to enable the extended supervision and continuing detention of a person who is convicted of an offence under section 61K (assault with intent to have sexual intercourse), or section 66EA

(persistent sexual abuse of a child), of the *Crimes Act 1900*. The effect of this will extend to offences committed before the commencement of the amendment.

18. The amendments will enable the Supreme Court to appoint the following to conduct examinations of offenders during pre-trial procedures as an alternative to two qualified psychiatrists: two registered psychologists; or one registered psychologist and one qualified psychiatrist; or two registered psychologists and two qualified psychiatrists.

#### **Amendments of Surveillance Devices Act and Children and Young Persons (Care and Protection) Act**

19. Schedule 20 amends the *Surveillance Devices Act 2007*, and Schedule 2 amends the *Children and Young Persons (Care and Protection) Act 1998*, to provide exemptions for the use of optical surveillance devices in specified law enforcement operations. The relevant law enforcement operations are the execution of search and crime scene warrants under the *Law Enforcement (Powers and Responsibilities) Act 2002* and certain other Acts; and the execution of a search warrant, entry to and inspection of premises, and the removal of a child from a place or premises, in accordance with the *Children and Young Persons (Care and Protection) Act 1998*.

#### **Amendments of Crimes Act and Terrorism (Police Powers) Act**

20. The offence of membership of a terrorist organisation is found under section 310J in part 6B of the *Crimes Act 1900*. There is a sunset clause of two years for that offence. Schedule 6 will extend the sunset clause for another two years from 13 September 2008 to provide time for the Commonwealth to pass the necessary legislation.

#### **Amendment of Crimes (Administration of Sentences) Act**

21. Schedule 7 amends the *Crimes (Administration of Sentences) Act 1999* to update provisions regarding the conveyance and detention of offenders received from the Australian Capital Territory as a consequence of the replacement of the *Removal of Prisoners Act 1968* of the Australian Capital Territory by the *Crimes (Sentence Administration) Act 2005*. The Bill also enables disclosure of information in connection with the administration or execution of interstate laws in their application to inmates who have been transferred interstate.

### **Background**

22. The Supreme Court generally deals with disputes involving large amounts of money or proceedings involving difficult and important questions of law. The District Court generally deals with less complex disputes and proceedings involving smaller amounts of money. In a number of classes of cases currently going to the Supreme Court, the District Court has been identified as a more suitable venue as these cases involve small claims or proceedings, the subject matter is of limited monetary value. Transferring such cases will free up sitting time for the Supreme Court and will promote the use of a less expensive forum for resolving smaller matters.
23. The DPP appears in applications and appeals to the District Court and Supreme Court, against convictions and sentences in the Local Court under parts 3 and 5 of

the *Crimes (Appeal and Review) Act 2001*. After taking over an application or appeal from the police, pursuant to section 9 of the *Director of Public Prosecutions Act 1986*, these matters should be able to be returned to the police where an appeal is upheld and it is remitted to the Local Court. While this is the case for matters remitted by the District Court, the DPP currently retains conduct of matters remitted to the Local Court from the Supreme Court. This is based on the reasoning in the New South Wales Court of Appeal in *Price v Ferris* (1994) 34 New South Wales LR 704, where the majority held that once the DPP takes over a matter under section 9 of the Director of Public Prosecutions Act, the original prosecutor ceases to be a party to the proceedings.

24. The *Supreme Court Act 1970* provides for an appeal to the Court of Appeal in a jury trial when there is an application for the setting aside of a judgment or verdict, a new trial, or the alteration of a verdict by increasing or decreasing any amount of debt, damages or other money. However, the *District Court Act 1973* does not make similar provision for an appeal from the District Court to the Court of Appeal in a jury trial. The Court of Appeal found in *Keramianakis & Anor v Regional Publishers Pty Ltd* (2008) NSWCA 3, that a right of appeal has never been available in relation to a jury verdict in the District Court. This distinction between the courts creates an anomaly in the treatment of jury trials, and may lead to forum shopping. The Bill will rectify this anomaly.
25. The *Births, Deaths and Marriages Registration Act 1995* currently provides for the issue of new birth certificates for people born in New South Wales who have undergone surgery to change their sex. This Bill will provide means for transgender people who were born overseas to also have their change of sex legally recognised in New South Wales. Similar legislation in Western Australia, the *Gender Reassignment Act 2000*, provides this legal recognition for people who were born overseas.
26. Amendments are proposed for law enforcement agencies to be able to use optical surveillance devices, generally video recordings, during their operations in order to preserve the continuity of evidence, under the *Surveillance Devices Act 2007*, and amendments to the *Children and Young Persons (Care and Protection) Act 1998*. The amendments aim to provide exemptions for the use of optical surveillance devices in specified law enforcement operations. The Agreement in Principle speech explained that the agency will have already obtained a warrant for the search, and so it is unnecessary to seek an additional warrant for the use of equipment such as a video camera, which is only used incidentally to record the search.
27. The offence of membership of a terrorist organisation is under the *Crimes Act 1900*. The Crimes Act contains a sunset clause of two years for that offence. The sunset clause was to allow the Commonwealth Government time to develop a national covert search warrant scheme pursuant to the Commonwealth *Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2007*. That scheme was to replace the State scheme. The change in Federal Government meant that the Bill was never debated. The new Commonwealth Government now needs time to enact its own delayed notification search warrant scheme. The scheme will ensure consistency between all jurisdictions as to who should investigate terrorism offences and who should prosecute them.

28. This Bill aims to address issues to do with the smooth and effective running of courts in New South Wales, as well as to ensure greater legislative consistency between New South Wales and other Australian jurisdictions.

## The Bill

29. The objects of this Bill are as follows:

(a) to amend the *Births, Deaths and Marriages Registration Act 1995*:

(i) to provide for the legal recognition of persons who have undergone sex affirmation procedures and whose birth is not registered in New South Wales, and

(ii) to remove redundant offences concerning the use of birth certificates by persons who have undergone sex affirmation procedures, and

(iii) to amend terminology in the Act,

(b) to amend the *Children and Young Persons (Care and Protection) Act 1998* to allow the removal of a child or young person under the Act, the execution of a search warrant or an authorised entry to, and inspection of, premises to be filmed (section 8 of the *Surveillance Devices Act 2007* would otherwise prohibit the installation, use and maintenance of such an optical surveillance device in these circumstances),

(c) to amend the *Civil Procedure Act 2005* to provide for the appointment of deputies for ex-officio members of the Uniform Rules Committee,

(d) to amend the *Community Land Management Act 1989*, the *Consumer, Trader and Tenancy Tribunal Act 2001*, the *Legal Profession Act 2004*, the *Local Courts Act 1982*, the *Local Court Act 2007* and the *Strata Schemes Management Act 1996* to provide that certain appeals are to be made to the District Court rather than the Supreme Court,

(e) to amend the *Crimes Act 1900* and the *Terrorism (Police Powers) Act 2002* to provide that membership of a terrorist organisation is to remain an offence until 13 September 2010,

(f) to amend the *Crimes (Administration of Sentences) Act 1999*:

(i) to update provisions regarding the conveyance and detention of offenders received from the Australian Capital Territory as a consequence of the replacement of the *Removal of Prisoners Act 1968* of the Australian Capital Territory by the *Crimes (Sentence Administration) Act 2005*, and

(ii) to enable disclosure of information in connection with the administration or execution of interstate laws in their application to inmates who have been transferred interstate,

(g) to amend the *Crimes (Domestic and Personal Violence) Act 2007* to provide for a right of appeal against the dismissal of an application for an apprehended violence order by the Local Court or Children's Court,

(h) to amend the *Crimes (Serious Sex Offenders) Act 2006*:

(i) to extend the definition of **serious sex offence** to include offences under section 61K (Assault with intent to have sexual intercourse) or 66EA (Persistent sexual abuse of a child) of the *Crimes Act 1900*, and

(ii) to enable the Supreme Court to appoint registered psychologists to conduct examinations of offenders during pre-trial procedures,

(i) to amend the *Criminal Appeal Act 1912* to enable the Chief Judge of the Land and Environment Court and the Chief Judge of the District Court to act as Judges of the Court of Criminal Appeal in proceedings of that Court,

- (j) to amend the *Director of Public Prosecutions Act 1986* to enable matters taken over by the Office of the Director of Public Prosecutions and subsequently remitted to the Local Court to be handed back to the original prosecutor,
- (k) to amend the *District Court Act 1973* to provide that an appeal from a jury trial in the District Court lies as of right to the Supreme Court,
- (l) to amend the *Land and Environment Court Act 1979*:
  - (i) to provide that parties must participate, in good faith, in conciliation conferences, and
  - (ii) to make further provision with respect to on-site hearing matters, and
  - (iii) to enable the Land and Environment Court to, in certain circumstances, exercise the jurisdiction of the Supreme Court to grant easements over land,
- (m) to amend the *Medical Practice Act 1992* to enable the Governor to appoint a Judge of the Supreme Court, or a Judge having the same status as a Judge of the Supreme Court, as Chairperson or a Deputy Chairperson of the Medical Tribunal,
- (n) to amend the *Supreme Court Act 1970* to enable the Chief Judge of the Land and Environment Court and the Chief Judge of the District Court to sit as additional Judges of Appeal,
- (o) to amend the *Surveillance Devices Act 2007* to allow a law enforcement officer to film the execution of search warrants and crime scene warrants (section 8 would otherwise prohibit the installation, use and maintenance of such an optical surveillance device in these circumstances),
- (p) to make consequential amendments to other Acts and instruments and amendments of a savings or transitional nature.

## Issues Considered by the Committee

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

#### Issue: Retrospectivity – Amendment of *Crimes (Serious Sex Offenders) Act 2006* - Schedule 9 [6] - proposed Section 6 – application of amendment:

30. Schedule 9 amends the Section 5 definitions of "serious sex offence" and "offence of a sexual nature" under the *Crimes (Serious Sex Offenders) Act*, to enable the extended supervision and continuing detention of a person who is convicted of an offence under section 61K (assault with intent to have sexual intercourse), or section 66EA (persistent sexual abuse of a child), of the *Crimes Act 1900*. The effect of this will extend to offences committed before the commencement of the amendment.
31. "Serious sex offence" currently under Section 5(1) of the Act, means (a) an offence under Division 10 of Part 3 of the *Crimes Act*, where: (i) in the case of an offence against an adult or a child, the offence is punishable by imprisonment for 7 years or more, and (ii) in the case of an offence against an adult, the offence is committed in circumstances of aggravation (within the meaning of the provision under which the offence arises).
32. Proposed Section 6 in Schedule 9 [6] reads: Section 5 (1)(a1), as inserted by Schedule 9 [1] to the *Courts and Crimes Legislation Amendment Act 2008*, applies to and in respect of offences committed before the commencement of that amendment in the same way as it applies to and in respect of offences committed after that commencement.

33. **The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights and liberties. However, the Committee notes that both of the offences of assault with intent to have sexual intercourse (Section 61K) and persistent sexual abuse of a child (Section 66EA) are punishable by imprisonment for 20 years and 25 years respectively, which surpasses imprisonment for 7 years under the current Section 5(1) serious sex offence definition. The amendment seeks to include in the definition of ‘serious sex offence’, the case of an offence against an adult, the offence such as assault with intent to have sexual intercourse (section 61K), which does not have to be committed in circumstances of aggravation.**
34. **Furthermore, the Committee notes that the current definition of “offence of a sexual nature” under the Act, already includes offences such as assault with intent to have sexual intercourse and persistent sexual abuse of a child. Therefore, the Committee is of the view that the retrospective effect of this amendment to offences (Sections 61K and 61EA offences of the Crimes Act) as ‘serious sex offence’ committed before the commencement of the amendment, does not unduly trespass individual rights and liberties.**

***The Committee makes no further comment on this Bill.***

## 6. ELECTRICITY INDUSTRY RESTRUCTURING BILL 2008

Date Introduced: 4 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon. Morris Iemma MP  
Portfolio: Premier

### Purpose and Description

1. This Bill provides for the restructuring of part of the State's electricity industry by authorising and facilitating the transfer of certain assets to the private sector:
2. The restructure provides for the lease of the power stations of an electricity generator and the transfer of the rest of its business,
3. The restructure provides for the transfer of the retail business of an electricity distributor and the transfer by initial public offer of the business of an electricity generator (including power stations). The Act specifically provides that the distribution and transmission assets (the "poles and wires") of an electricity distributor will remain in public ownership.
4. According to the Agreement in Principle speech of 4 June 2008, the intention of the reform package is to "increase competition in the State's electricity market, deliver competitive outcomes and encourage new investment in the industry".

### Background

5. Following the investigation and report by Professor Anthony Owen into electricity supply in New South Wales, it was recognised that there was a critical need for additional investment in baseload capacity from 2013 – 2014. Following on from this, the Government proposed measures designed to secure the State's future energy supply.
6. In order to implement these measures, the Bill will authorise the restructuring of the New South Wales electricity industry to secure the State's future electricity supply. This restructure involves the sale of the State's retail electricity businesses and the long-term lease of the State's generation assets.
7. The restructure plan provides for the State's electricity distributors – EnergyAustralia, Country Energy and Integral Energy – to transfer their retail business to the private sector while retaining their network distribution businesses. The Bill expressly provides that the distribution and transmission assets (the 'poles and wires') will remain in public ownership.
8. The restructure plan also provides that the State's electricity generators – Macquarie Generation, Delta Electricity and Eraring Energy – the authority to lease their power

stations. The Bill expressly provides that, subject to certain exceptions, power stations may only be leased and cannot be transferred.

9. The Bill provides that authorised transfers of the generation and retail assets can be combined in a single transaction, including by way of a public share offer or an initial public offering. If an initial public offering is undertaken, the Bill imposes a shareholding restriction for between three and five years, limiting any individual stake in the float company to no more than between 10% and 15%.
10. The Auditor-General will be able to perform an audit of the process arising from their functions under the *Public Finance and Audit Act 1983*. The Auditor-General has the discretion to report to Parliament on any matter, at any time, that the Auditor-General considers necessary and any such report is to be tabled in Parliament.
11. The Bill includes provisions to ensure that existing employees affected by the reforms will retain their accrued sick leave, annual leave, long service leave and superannuation entitlements. The Bill also expressly allows the making of transfer payments to employees.
12. Consumer protection will be ensured by allowing the State's independent pricing regulator – the Independent Pricing and Regulatory Authority Tribunal (IPART) – the power to set regulated electricity retail prices for households and small business until June 2013, with the possibility of extending the date by regulation. To assist in the execution of their functions, the Bill expands the information-gathering powers of IPART.

## The Bill

### 13. Outline of Provisions

#### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** contains definitions of key terms used in the proposed Act. Schedule contains other definitions. The clause defines *authorised restructuring* to mean the transfer of State electricity assets authorised by Part 2.

#### Part 2 Restructuring of State electricity industry

**Clause 4** authorises the transfer to the private sector of State electricity assets as described in the Overview.

**Clause 5** provides that the distribution and transmission assets of an electricity distributor and the transmission system of TransGrid must remain in public ownership.

**Clause 6** authorises the transfer of State electricity assets between public sector agencies.

**Clause 7** requires the proceeds of the transfer of State electricity assets pursuant to the authorised restructuring, after deduction of certain amounts for debt repayment and payment of expenses, to be paid into the NSW Community Infrastructure (Intergenerational) Fund under the proposed *Community Infrastructure (Intergenerational) Fund Act 2008*.

#### Part 3 Facilitating the authorised restructuring

##### Division 1 Functions of public sector agencies



**Clause 8** provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring.

**Clause 9** provides for the establishment of statutory State owned corporations as *restructure SOC*s for the purposes of the authorised restructuring.

**Clause 10** provides for the establishment of companies as *restructure companies* for the purposes of the authorised restructuring (including by means of the corporate conversion of a State electricity corporation or restructure SOC).

**Clause 11** provides that each State electricity corporation and *restructure entity* (a restructure SOC or restructure company) has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring. The clause also authorises the Treasurer to act for and on behalf of and in the name of a State electricity corporation or restructure entity in the exercise of any of its functions for the purposes of the authorised restructuring.

**Clause 12** provides that State electricity corporations and restructure entities are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of the authorised restructuring.

**Clause 13** establishes the Electricity Assets Ministerial Holding Corporation to hold State electricity assets acquired by it or transferred to it and to carry on any activities or business that relate to any State electricity assets held by it.

#### Division 2 Arrangements for transfer of assets, staff and functions

**Clause 14** authorises the Treasurer to make vesting orders under Schedule 4 for the purposes of the authorised restructuring.

**Clause 15** activates Schedule 5 which provides for the transfer of employment of employees of electricity distributors and electricity generators as a consequence of the authorised restructuring.

**Clause 16** deals with the transfer of State electricity assets between public sector agencies and provides that a public sector agency to which State electricity assets are transferred is, as the new operator of those assets, deemed to be an electricity distributor or electricity generator (as appropriate to the assets transferred) and is entitled to be issued with any relevant operating licence.

**Clause 17** provides for the Treasurer to give directions for the issue of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of State electricity assets pursuant to the authorised restructuring.

**Clause 18** authorises the Electricity Assets Ministerial Holding Corporation to acquire land for the purposes of the authorised restructuring by agreement or compulsory acquisition that the Corporation determines to be land on which State electricity assets of an electricity generator are situated or land used or occupied by an electricity generator.

#### Division 3 Operation of other laws

**Clause 19** provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of the authorised restructuring and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with the authorised restructuring.

**Clause 20** authorises the release of information by the Auditor-General for the purposes of the authorised restructuring.

**Clause 21** exempts contracts for the sale of land from section 52A of the *Conveyancing Act 1919* when entered into for the purposes of the authorised restructuring.

**Clause 22** confers exemption from the *Trade Practices Act 1974* of the Commonwealth and the *Competition Code of New South Wales* for agreements entered into by a State electricity corporation or restructure entity in connection with the management of electricity trading risks.

**Clause 23** activates the maximum shareholding restriction provided for by Schedule 6 when the authorised restructuring is effected by the sale of a restructure company by an initial public offer of securities in the company.

#### Part 4 Miscellaneous

**Clause 24** authorises the Treasurer to delegate any function of the Treasurer under the proposed Act to the Secretary of the Treasury or any other officer of the Government Service prescribed by the regulations.

**Clause 25** provides for the Act to bind the State and all other Australian jurisdictions.

**Clause 26** provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and other State legislation.

**Clause 27** provides for the operation of the proposed Act outside the State.

**Clause 28** provides for the interpretation of the proposed Act so as not to exceed the legislative power of the State.

**Clause 29** authorises the making of regulations to exclude the operation of provisions of the Corporations legislation to matters arising under the proposed Act.

**Clause 30** prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.

**Clause 31** protects the validity of provisions of leases of State electricity assets entered into for the purposes of the authorised restructuring.

**Clause 32** protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

**Clause 33** provides for the issue of evidentiary certificates by the Treasurer.

**Clause 34** provides for how documents are to be given or served for the purposes of the proposed Act.

**Clause 35** provides for the director of a corporation to be guilty of an offence committed by the corporation if the director knowingly authorised or permitted the corporation's contravention.

**Clause 36** provides for proceedings for offences to be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction.

**Clause 37** is a general regulation-making power.

**Clause 38** activates Schedule 7 which contains savings and transitional provisions.

**Clause 39** activates Schedule 8 which contains amendments to other legislation.

#### **Schedule 1 Interpretative provisions**

**Schedule 1** contains definitions and other interpretative provisions for the purposes of the proposed Act.

#### **Schedule 2 Provisions concerning restructure SOC's**

**Schedule 2** contains special provisions for the board of directors, chief executive officer, dividends scheme and other procedures of a restructure SOC.

#### **Schedule 3 Corporate conversion of State electricity corporations and restructure SOC's**

**Schedule 3** provides the procedure for the corporate conversion of a State electricity corporation or restructure SOC to a restructure company.

**Schedule 4 Vesting of assets, rights and liabilities**

**Schedule 4** provides for the making of vesting orders by the Treasurer for the purposes of the authorised restructuring. Vesting orders operate to vest assets, rights and liabilities of a State electricity corporation or restructure entity in the transferee specified in the order.

**Schedule 5 Transfer of electricity employees**

**Schedule 5** provides a mechanism for the transfer of employment of employees of electricity distributors and electricity generators and for the terms and conditions of the transferred employment.

**Schedule 6 Ownership restrictions in floated restructure companies**

**Schedule 6** provides for the maximum shareholding restriction that is to be applicable to a restructure company that is sold by means of an initial public offer of shares in the company.

**Schedule 7 Savings, transitional and other provisions**

**Schedule 7** enacts a savings and transitional regulation-making power and contains special provisions for the transfer of power stations and associated assets operated by Eraring Energy.

**Schedule 8 Amendment of Acts and Regulation**

**Schedule 8** makes consequential amendments to various Acts and a Regulation.

**Issues Considered by the Committee****Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]****Issue: Denial of compensation – Clause 32**

14. Clause 32(1) reads:

Compensation is not payable by or on behalf of the State:

- (a) because of the enactment or operation of this enactment or operation of the Act, or for any consequence of that enactment or operation, or
- (b) because of any statement or conduct relating to the enactment of the Act.

15. However, Clause 32(2) provides that the rule in Clause 32(1) does not extend to compensation payable under a restructure arrangement to a party to the restructure arrangement in connection with the performance of obligations under the restructure arrangement.

16. While the Act enables parties to the restructure agreement to seek compensation for breaches of contract, it expressly excludes third parties affected by the restructure from seeking remuneration or compensation from the Crown or any public sector agency in relation to the restructure.

17. The Committee notes that the government believes that this provision may be necessary to ensure that there is legal finality once the authorised restructuring is

completed and that there are precedents for this type of provision in other Acts such as the *Freight Rail Corporation (Sale) Act 2001*.

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| 18. <b>The Committee is of the view that the right to seek remuneration or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a clear public interest in doing so. The Committee refers the matter to parliament.</b> |
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**Issue: Self incrimination – Proposed Schedule 6(6)(3)**

19. Proposed Schedule 6(6)(3) authorises that regulations may make provisions with respect to requiring a person to keep and retain records where the records are relevant to an ownership matter and may also require that person to give information to the Treasurer or a floated restructure company that is relevant to an ownership matter.
20. The Schedule does not excuse a person from giving information to the Treasurer or a floated restructure company on the ground that the information may tend to incriminate the person or expose the person to a penalty.
21. Generally, the Committee would express reservations about proposed legislation that compels an individual to provide self-incriminating evidence.
22. Proposed schedule 6(6)(4) provides that any information obtained from a person in compliance with a requirement of regulations made in respect to information gathering by the Treasurer is not admissible against that person in criminal proceedings (other than proceedings for an offence to refuse to provide information).
23. The Committee is always concerned about the denial of the common law right against self-incrimination and believes that it should be balanced against the public interest. However, it is clearly in the public interest that information relating to company ownership matters be divulged to the Treasurer. Further, the information to be provided is company, rather than personal, information.

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| 24. <b>The Committee is always concerned when individuals are denied the common law right against self-incrimination. However, in this instance the Committee believes that the public interest justifies the denial of the right to silence in relation to company ownership matters.</b> |
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**Issue: Compulsory Acquisition – Proposed Schedule 7(4)**

25. Schedule 7(4) enables the Treasurer to acquire land by compulsory process. Compulsory acquisition of land may constitute a trespass on personal rights and liberties.
26. The Committee notes that under proposed schedule 7(4)(c), land may be acquired even if any consent or permission required under State legislation has not been obtained or granted. Ordinarily, the Committee would be concerned that this act would constitute a trespass on personal rights and liberties.
27. However, the Committee also notes that in the same clause, the Treasurer must comply with the terms of the *Land Acquisition (Just Terms Compensation) Act 1991*.

This Act provides for minimum periods of notice to be given, rights of review to the Land and Environment Court and methods for determining just compensation.

28. The Committee therefore considers that, on balance, the Bill retains adequate protections for affected landholders.

29. **The Committee is satisfied that as any acquisition will be done in accordance with the Land Acquisition (Just Terms Compensation) Act 1991 then the rights of affected landholders are adequately protected and the compulsory acquisition process will not unduly trespass on individual rights and liberties.**

#### **Issue: Strict Liability – Proposed Schedule 6(3)**

30. Proposed Schedule 6(3) makes it an offence if a floated restructure company fails to take reasonable steps to ensure that a prohibited ownership situation exists in relation to the company. Proposed schedule 6(3)(3) makes this offence a strict liability offence.
31. Under Australian law, offences are generally considered to have two aspects: a physical aspect (the guilty act) and a mental aspect (the intent to commit the offence). In strict liability offences, the prosecution does not need to prove that the accused had the mental aspect (the intent to commit the offence) when seeking a conviction.
32. Strict liability causes concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right to a presumption of innocence.
33. The Committee is of the opinion that it is not appropriate for Bills to specifically create strict liability offences, except in extraordinary circumstances.
34. However, the Committee notes that an offence will only have been committed if the company failed to take “reasonable steps” to ensure a breach of shareholding restrictions did not arise.
35. The Committee notes the difficulty of proving that a corporation had a particular intent to commit a breach and accepts that it is not uncommon for corporate offences to be drafted in this way.
36. Further, while directors of the corporation may also be liable for the offence, they will only be guilty if they knowingly authorised or permitted the contravention. Therefore, the offence is not a strict liability offence in relation to any individual.
37. **The Committee considers that, except in extraordinary circumstances, it is inappropriate for a strict liability offence, particularly one that does not allow for a defence or reasonable excuse. However, the Committee believes that in circumstances such as these, which involve corporations, rather than individuals, it may be appropriate.**

### **Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]**

#### **Issue: Ill and widely defined powers – Clause 8**

38. The Committee notes that the Bill has been intentionally drafted so as not to be overly prescriptive as to the precise transaction strategy that may be undertaken to ensure that the Government can structure and time transactions based on expert financial advice and market conditions at the time.
39. However, while the Treasurer's functions appear constrained by Part 2 Clauses 4 and 5, the Committee notes that Clause 8 reads:

The Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of the authorised restructuring. The functions conferred on the Treasurer by any other provision of this Act do not limit the Treasurer's functions under this section.

40. Generally, the Committee prefers that powers conferred to a Minister be expressed in clearer and strictly defined terms. The Committee considers that Clause 8 provides the Treasurer with powers that are not well articulated and too widely defined.
41. By way of comparison, the Committee notes there are numerous provisions in the Bill that provide for the conferral of powers to the Treasurer that have been expressed in clear and strictly defined terms. For example, Clause 10 provides that the Treasurer may establish companies as restructure companies and provides limited ways in which the Treasurer can execute these powers.

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| 42. <b>While the Committee is conscious of the government's intent to be flexible in order to achieve maximisation of value to taxpayers, the Committee notes that Clause 8 of the Bill confers powers to the Treasurer that are insufficiently defined and refers this matter to Parliament.</b> |
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### **Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**

#### **Issue: Commencement by proclamation – Clause 2**

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

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| 44. <b>Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</b> |
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***The Committee makes no further comment on this Bill.***

## 7. EXOTIC DISEASES OF ANIMALS AMENDMENT BILL 2008

Date Introduced: 4 June 2008  
House Introduced: Legislative Council  
Minister Responsible: Hon Ian MacDonald MLC  
Portfolio: Primary Industries

### Purpose and Description

1. This Bill amends the *Exotic Diseases of Animals Act 1991* to make further provision with respect to the detection, containment and eradication of certain animal diseases; to make amendments with respect to proceedings under other primary industry legislation; and for other purposes.
2. The *Exotic Diseases of Animals Act 1991* deals with exotic disease outbreaks in animals in New South Wales. It provides for the detection, containment and eradication of certain serious diseases affecting livestock and other animals. Currently, the Act imposes a duty on stock owners and veterinary practitioners to notify the New South Wales Department of Primary Industries if they suspect an animal is infected with an exotic disease. It sets up a fund to provide compensation to owners of animals or equipment that need to be destroyed because of disease.
3. However, the current provisions of the Act cannot be used to manage major outbreaks of endemic diseases that might fall within the definition of "emergency animal diseases" under the National Cost Sharing Deed. To overcome this limitation, two amendments are proposed.
4. The first amendment is to extend the emergency powers under the Act to outbreaks of all emergency animal diseases. This will allow the Act to cover emergency endemic as well as exotic diseases. It will ensure that the Act is consistent with the national Cost Sharing Deed. The second amendment reflects the expanded focus of the Act, that is, its title. It will be known as the *Animal Diseases (Emergency Outbreaks) Act 1991*.
5. This Bill extends the reporting requirements for veterinary practitioners. Veterinary practitioners will have a duty to report diseases that they suspect are new or emerging diseases, even if they are not endemic to New South Wales, or do not usually occur in the species of animal or animal product that the practitioner is examining. Veterinary practitioners will be required to report the findings to a stock inspector by the quickest means of communication available.
6. This change recognises that some of the key biosecurity threats to New South Wales are from new and emerging diseases that may not have been previously recorded.
7. The other significant proposed amendment aims to strengthen the provisions of the Act to control the spread of disease. The Bill allows for the destruction of an animal in

certain circumstances, even if the animal is not showing signs of the declared disease. Destruction of the animal is an option if it is at risk of contracting and spreading the disease so that an effective buffer can be established between an infected area and an area free of infection.

8. This power will be used as a last resort where other disease control mechanisms, such as vaccination, are not available or are not effective and moving the animal is not an option. The power would be invoked with the agreement of industry and other Governments in accordance with the national Cost Sharing Deed. Compensation would be payable to owners whose animals are destroyed using this power. There are similar powers in the New South Wales *Stock Diseases Act 1923* and the Victorian *Livestock Disease Control Act 1994*.
9. The Bill includes an amendment to require persons to disinfect themselves when leaving any premises, place or vehicle. Currently, the Act only provides for disinfection orders for persons entering premises. The Bill introduces controls and restrictions to prevent the movement of soil where a disease can be transmitted through the movement of soil.
10. The Bill also outlines minor amendments to streamline processes during an outbreak of an emergency animal disease. For example, the Minister will have the power to make control orders. Currently, the Minister must direct an inspector to make a control order. This amendment aims to remove unnecessary delays during an emergency response.
11. The Bill introduces a "general permit" which can be applied to classes of people or, if the case requires, all people in New South Wales. General permits will be notified on the department's website. General permits will allow, for example, the movement of specified items that are unlikely to spread the disease.
12. On the spot fines known as penalty notices, will be introduced for minor offences. The Bill extends the current six-month period to commence proceedings for an offence under the Act to two years. It is proposed to make similar amendments to other New South Wales biosecurity legislation to ensure consistency. The Acts that will be amended are: the *Apiaries Act 1985*; the *Exhibited Animals Protection Act 1986*; the *Non-indigenous Animals Act 1987*; the *Noxious Weeds Act 1993*; the *Plant Diseases Act 1924*; and the *Stock Diseases Act 1923*.
13. The other proposal relates to cost recovery. Currently, the Act does not provide for the collection of fees or charges to cover the costs of issuing permits to allow movement of stock and equipment and other Government activities. The Bill will introduce a regulation making power to impose fees and charges.

## Background

14. The need for the amendments was identified during the outbreak of equine influenza in 2007.
15. The proposed amendments aim to ensure faster and more effective responses to emergency disease outbreaks, such as equine influenza, foot and mouth disease, and avian influenza. Nationally agreed policy changes to the management of emergency diseases have also resulted in the need to amend the Act.



16. The Bill aims to improve the way emergency animal disease outbreaks are managed in New South Wales. One way is by aligning the Act more closely with the national "Government and Livestock Industry Cost Sharing Deed in Respect of Emergency Animal Disease Responses", or the Cost Sharing Deed. The Cost Sharing Deed is a national agreement entered into in 2002 by the Commonwealth, State and Territory governments and peak livestock industry bodies such as the Cattle Council of Australia Incorporated, Australian Pork Limited, the Sheep Meat Council of Australia Incorporated, and the Australian Chicken Meat Federation Incorporated.
17. The deed outlines how costs and responsibilities will be shared between Government and the livestock industry in the management of emergency animal disease outbreaks. The deed covers endemic and exotic animal diseases that are likely to have a significant effect on livestock and the community. However, the New South Wales Act only applies to exotic diseases, due to an earlier national agreement.
18. Currently, the eligibility criteria for payment of compensation under the Act differ from the more limited criteria in the national Cost Sharing Deed. This means that not all compensation paid under the Act can be cost shared between the New South Wales Government and other governments and industry. Currently, the Act provides compensation to the owner of animals that have died of an exotic disease and to the owner of animals destroyed in order to control a disease. However, the Cost Sharing Deed only pays compensation for animals that have died of an emergency disease if the animal would have been destroyed had they not died. The Bill establishes two eligibility categories for the payment of compensation. The first category retains the existing eligibility criteria under the Act. The second category is consistent with the eligibility criteria in the national Cost Sharing Deed.
19. The Bill also provides for orders to be published on the New South Wales Department of Primary Industries' website. Along with the existing means of notification such as newspaper and radio, the website will help to ensure that everybody knows about the orders.
20. According to the Second Reading speech, the New South Wales Farmers Association, the New South Wales Apiarists Association, the Deer Industry Association, the Australian Veterinary Association and the New South Wales Veterinary Practitioners Board have been consulted on the proposals in this Bill and that they support the amendments. Further consultation will be carried out with industry groups as to the setting of fees and charges.

## The Bill

21. The object of this Bill is to amend the *Exotic Diseases of Animals Act 1991* as follows:
  - (a) to replace the concept of "exotic disease" with that of "emergency animal disease" to reflect the fact that the animal diseases that need to be dealt with by way of the emergency powers under the Act are not necessarily exotic (or non-endemic) diseases,
  - (b) to modify and enhance the measures that may be taken under the Act for controlling, eradicating and preventing the spread of emergency animal diseases,

- (c) to extend the existing requirement for veterinary practitioners to notify an inspector under the Act if an animal or animal product is infected with an emergency animal disease so that the requirement applies to certain other animal diseases,
- (d) to modify the grounds on which compensation is payable to the owner of an animal that has died of an emergency animal disease,
- (e) to enable offences under the Act to be dealt with summarily and to enable penalty notices to be issued for certain offences,
- (f) to make other amendments of a minor or administrative nature or that are consequential on the other amendments made by the proposed Act.

22. The Bill also amends other Acts (as set out in Schedule 2):

- (a) to extend the limitation period for commencing proceedings for offences under certain primary industry legislation, and
- (b) to enable fees to be charged for the provision of services under certain primary industry legislation, and
- (c) to make other amendments of a minor or consequential nature.

### **Schedule 1 Amendment of *Exotic Diseases of Animals Act 1991***

#### **Emergency animal diseases**

**Schedule 1 [5]** provides for a new term to describe the animal diseases to which the Act applies, namely ***emergency animal disease***, so as to reflect the nature of the diseases concerned. Some of these diseases may not necessarily be exotic or non-endemic but are diseases in respect of which the emergency powers under the Act need to be exercised. The Minister will, as is currently the case, be able to declare animal diseases to be emergency animal diseases by order published in the Gazette.

**Schedule 1 [1]** replaces the term “exotic disease” throughout the Act with the new term and **Schedule 1 [2]** changes the name of the Act to reflect the wider operation of the Act. **Schedule 1 [49] and [50]** also change the name of the Fund established under the Act to reflect the change in terminology.

#### **Duty to notify**

At present under section 7 (b) of the Act, a veterinary practitioner must notify an inspector if the practitioner suspects that an animal (or animal product) is infected with an exotic disease (which will now become a requirement relating to an emergency animal disease).

**Schedule 1 [6]** extends this requirement to notify so that it also applies when the practitioner suspects that an animal or product is infected with a disease that is not an emergency animal disease but which the practitioner suspects is a new or emerging disease, or is not an endemic disease, or does not usually occur in the animal being examined.

#### **Measures for controlling, eradicating and preventing the spread of emergency animal diseases**

**Schedule 1 [8]** provides that a declaration by the Minister of an infected place or an infected vehicle must identify the classes or descriptions of animals and other things affected by the declaration.

**Schedule 1 [10], [11], [13], [18], [22], [30], [31] and [36]** will enable action to be taken under the Act in respect of contaminated soil. At present under the Act, the power to prohibit and restrict the movement of things is limited to animals, animal products, fodder, fittings and vehicles.

**Schedule 1 [16]** provides that an area restriction order made by the Minister under section 20 of the Act may direct all or any specified persons or class of persons within a restricted area to take certain measures specified in the order (at present, such an order may only be

made in relation to the owners or persons in charge of animals and things within a restricted area).

**Schedule 1 [19]** provides that the declaration by the Minister of a control area under section 21 of the Act must only identify the boundaries of the control area and not the classes or descriptions of animals or animal products that are affected by the declaration.

**Schedule 1 [20]** provides for control orders under section 22 of the Act to be made by the Minister instead of being made by an inspector at the direction of the Minister. At present, a control order can prohibit, regulate or control certain activities and movements in the control area to which it relates and require persons to take certain measures.

**Schedule 1 [21]** provides that the operation of a control order is not restricted to specified animals or animal products but can apply to all animals or animal products in the control area to which the order relates.

**Schedule 1 [24] and [26]** provide for the issuing of permits authorising any activity that is the subject of a control order.

**Schedule 1 [27]** provides that a permit can, without limiting the basis on which permits are granted, be granted generally so that it applies to a specified class of persons.

**Schedule 1 [28]** provides that an inspector may vary or revoke a general permit by a notice published on the Department of Primary Industries' website.

**Schedule 1 [32] and [33]** enable the Minister to order the destruction of any domestic animal in a declared area (ie, an area declared under Part 3 of the Act to be an infected place, restricted area or control area) if it is necessary to do so to prevent the spread of an emergency animal disease. Because the measure is designed to create a buffer zone between an infected area and non-infected areas, the Minister may order the destruction of an animal even though it is not infected by an emergency animal disease. The owner of any such animal may be compensated under Part 7 of the Act.

**Schedule 1 [35]** makes it clear that a quarantine order under section 35 of the Act may apply to any part of any premises or place.

**Schedule 1 [37]** requires a quarantine order to identify the classes or descriptions of the animals or other things to which the order relates.

**Schedule 1 [38]** provides that a disinfection order under section 39 of the Act may apply to persons leaving as well as entering any premises, place or vehicle.

**Schedule 1 [43]** makes it clear that the power of inspectors under section 45 of the Act (eg such as the power to enter and search premises) may be exercised in relation to premises that have been the subject of a declaration of a restricted area within the previous 2 years.

### **Compensation of owners**

At present under Part 7 of the Act, the owner of any domestic animal or property that has been destroyed under the Act, or that has died of an exotic disease, may claim compensation for that loss.

**Schedule 1 [55]** modifies the grounds on which compensation is payable to the owner of an animal that has died of an emergency animal disease (as opposed to being destroyed under the Act for the purposes of controlling, eradicating or preventing the spread of such a disease) by creating 2 classes of "compensable disease". In order to be compensated in relation to a "class A compensable disease", the owner is required (as is currently the case under section 55 of the Act) to notify the Director-General or an inspector of the death of the animal and the Chief Veterinary Officer also needs to certify that the animal has died of the compensable disease. In the case of a "class B compensable disease", the same requirements apply but there must be no unreasonable delay in reporting the death of the animal and the CVO must certify that the destruction of the animal would have been required had it not died. The amendments do not affect the existing arrangements for compensating owners when an animal (or any property) is destroyed in accordance with the Act.

### **Miscellaneous amendments**

**Schedule 1 [59]** enables the regulations to prescribe fees that may be charged for services provided under the Act, such as permits to move into, within or out of declared areas. A fee cannot be charged in respect of the movement of persons, animals or other things within the same property.

**Schedule 1 [61]** makes it an offence to make a false or misleading statement when applying for a permit or other authorisation under the Act or when complying with a requirement to provide information.

**Schedule 1 [62]** provides for the offences under the Act to be dealt with summarily before the Local Court or the Supreme Court. The limitation period for commencing proceedings will be 2 years and the maximum monetary penalty that the Local Court may impose will be \$11,000. The amendment also enables certain offences under the Act or the regulations to be dealt with by way of penalty notice.

**Schedule 1 [64] and [65]** provide that the protection given under section 76 of the Act in relation to disease control programs under the Act applies not only in relation to outbreaks in New South Wales but also to outbreaks occurring elsewhere in Australia.

### **Issues Considered by the Committee**

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| 23. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b> |
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***The Committee makes no further comment on this Bill.***

## 8. FILMING RELATED LEGISLATION AMENDMENT BILL 2008

Date Introduced: 6 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Frank Sartor MP  
Portfolio: Arts

### Purpose and Description

1. This Bill amends various Acts and instruments including: the *Crown Lands Act 1989*; the *Filming Approval Act 2004*; the *Local Government Act 1993*; the *Western Lands Act 1901*; the *Standard Instrument (Local Environmental Plans) Order 2006*; and the *State Environmental Planning Policy No.4-Development Without Consent and Miscellaneous Exempt and Complying Development* to support the screen industry by reducing or simplifying regulatory impediments to the carrying out of filming projects.
2. The Bill enables subleases, licenses and sublicenses to be granted over Crown land and reserves that are the subject of a lease, to enable the carrying out of filming projects despite any provision that may otherwise prohibit this.
3. A reserve trust will also be able to grant a lease or license over the reserve for the purpose of enabling a filming project to be carried out whether or not it is in accordance with any plan of management or declared purpose of the reserve.
4. A presumption is created in favour of the relevant Minister granting approval for the carrying out of filming in National Parks unless the activity is expressly prohibited by a plan of management.
5. The bill creates a presumption that councils will grant a lease or licence over most types of community land to allow a filming project to be carried out, unless there are exceptional circumstances or the plan of management for the land clearly prohibits the use of the land for filming projects. Certain types of particularly sensitive community land will not be affected by this presumption.
6. Councils will be able to deal with community concerns by imposing conditions on the approval. Where a council has refused to grant the approval the council will need to inform the applicant as soon as practicable after it has made the decision. The council must give written reasons for the refusal within three business days.
7. The amendments to the *Western Lands Act 1901* enable a lessee to grant a sublease or licence to allow the carrying out of a filming project

## Background

8. According to the Agreement in Principle Speech, more than 1,100 film and television-related businesses are located in New South Wales, employing more than 9,000 people and generating income in the vicinity of \$1 billion per annum. New South Wales dominates the Australian feature film and television drama production industry, attracting almost 50 per cent of total production expenditure in Australia over the last five years.
9. Unnecessary administrative obstacles and red tape can impede film production and place New South Wales at a competitive disadvantage compared to other States and internationally. The bill removes unnecessary red tape affecting the New South Wales film and television industry. It builds on the reforms implemented in 2000. Those reforms introduced a single application system for council approvals related to filming.
10. A filming project may involve a number of different council approvals, for example, relating to traffic regulation and parking or use of council-managed land. The bill will require all local councils to comply with a revised Local Government Filming Protocol when determining applications or setting fees, rather than simply taking it into consideration. The revised Filming Protocol will be developed in consultation with local councils, government agencies and the film industry to ensure that New South Wales remains film-friendly while maintaining a proper balance between community and economic concerns.

## The Bill

**Schedule 1.2** amends the *Filming Approval Act 2004* as follows: (a) to create a presumption in favour of the relevant Minister granting approval to the carrying out of filming activities in a designated area under that Act that forms part of land that is reserved under Part 4 of the *National Parks and Wildlife Act 1974* (other than a wilderness area) unless the carrying out of filming activities on the land is expressly prohibited by a plan of management for the land (**Schedule 1.2 [2], [3], [4] and [5]**) (b) to ensure that applications for approvals are not refused where any concerns about giving the approvals could be adequately addressed by imposing conditions on the approvals (**Schedule 1.2 [4]**) (c) to make consequential amendments (**Schedule 1.2 [1] and [3]**).

**Schedule 1.3** amends the *Local Government Act 1993* as follows:

- (a) to require a council to grant an application for a lease, licence or other estate in respect of certain community land to allow a filming project to be carried out unless the plan of management for the land expressly prohibits use of the land for filming projects or there are exceptional circumstances warranting refusal of the application (**Schedule 1.3 [1]—proposed section 46 (5A)**),
- (b) to ensure that applications for approvals are not refused where any concerns about giving the approvals could be adequately addressed by imposing conditions on the approvals (**Schedule 1.3 [1]—proposed section 46 (5B)**),
- (c) to require a council to give notice of such a refusal as soon as practicable, and the reasons for it within 3 days, after the refusal (**Schedule 1.3 [1]—proposed section 46 (5C)**),
- (d) to enable regulations to be made capping the amount of security deposits, bonds, fees or charges payable in respect of applications for approvals necessary to carry out filming

projects (**filming approvals**) and to require in accordance with applicable filming protocols (**Schedule 1.3 [2]**),

(e) to require councils to comply with either a filming protocol issued by the Director-General or a comparable filming protocol adopted by the council and approved by the Director-General in determining applications for filming approvals (**Schedule 1.3 [4], [6] and [10]**),

(f) to require councils to give notice of the reasons for refusing applications for filming approvals and of any review or appeal rights within 3 business days after the refusals (**Schedule 1.3 [5] and [8]**),

(g) to create a presumption in favour of the grant of an application for a filming approval unless exceptional circumstances warrant refusal of the application or an Act requires refusal and to require councils to consider the imposition of conditions to address concerns they have about granting approvals (**Schedule 1.3 [9]**),

(h) to make consequential amendments (**Schedule 1.3 [3], [7] and [11]–[14]**).

**Schedule 1.4 and 1.5** amend the *Standard Instrument (Local Environmental Plans) Order 2006* and the *State Environmental Planning Policy No 4—Development Without Consent and Miscellaneous Exempt and Complying Development*, respectively, to allow, as exempt development, the erection and use of temporary structures and the temporary alteration or addition to buildings or works for the sole purpose of filming subject to certain specified requirements concerning the period of use and accessibility to the public.

**Schedule 1.6** amends the *Western Lands Act 1901* as follows:

(a) to enable the grant, with the consent of the Minister, of a sublease of land held under a lease for the purposes of enabling the carrying out of a filming project, despite any provision of the head lease or the Act relating to the purposes for which the land may be used (**Schedule 1.6—proposed section 18G (6A)**),

(b) to enable the holder of a lease to grant a licence with the consent of the Minister and on such terms and conditions as the Minister determines to enable the carrying out of a filming project and to do so without the consent of the Minister in specified circumstances (**Schedule 1.6—proposed section 18G (6B)–(6E)**),

(c) to enable consent to be given and licences to be granted by the Minister or a lessee to enable the carrying out of a filming project despite any provision to the contrary in a lease (**Schedule 1.6—proposed section 18G (6F)**).

## Issues Considered by the Committee

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

**Issue: Clause 2 – Commencement by Proclamation – Provide the executive with unfettered control over the commence of an Act**

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

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| <ol style="list-style-type: none"> <li>12. <b>Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</b></li> </ol> |
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***The Committee makes no further comment on this Bill.***

## 9. FIREARMS AMENDMENT BILL 2008\*

Date Introduced: 5 June 2008  
House Introduced: Legislative Council  
Minister Responsible: Hon Roy Smith MLC  
Portfolio: Private Member – Shooters Party

### Purpose and Description

1. This Bill amends the *Firearms Act 1996* and the *Firearms Regulation 2006* to make further provision with respect to the regulation and control of firearms; and for other purposes.
2. Items [1] and [2] of schedule 1 to the Bill insert a new definition into section 4 (1) of the Act by defining a "theatrical armourer" as a person who carries on a business of providing firearms for the purpose of film, television or theatrical productions. This, along with other amendments, aim to effect a change in the type of instrument under which a theatrical armourer operates.
3. Currently, theatrical armourers operate under a permit issued by the Commissioner of Police under clause 53 of the regulations. However, a theatrical armourer's permit only authorises a theatrical armourer to use firearms or prohibited weapons that are registered to the theatrical armourer. To overcome this problem, this Bill will amend the Act and the regulations to allow theatrical armourers to operate under a subcategory of the firearms dealers licence because firearms dealers, while having to record details of every firearm in their possession, are exempt from the requirement to obtain a permit when acquiring a firearm and are not restricted to dealing only in firearms that are registered to them.
4. Item [3] of schedule 1 inserts expanded versions of certain exemptions from the Act that are currently contained in the *Firearms Regulation 2006*. Proposed section 6A will exempt persons from being required to have a licence to possess or to register any firearm manufactured before 1900 if the firearm does not take breech-loaded metallic cartridges or is a firearm for which ammunition is not commercially available. This amendment is an extension of an exemption and temporary amnesty set out in the regulations.
5. A similar exemption is currently contained in clause 116 of the regulations in relation to long arms and pre-percussion pistols manufactured before 1900. All such firearms are more than 108 years old. They are antiques for collectors. These firearms remain a firearm within the meaning of the Act and the proposed exemption does not allow any such firearm to be fired.
6. Proposed section 6B will enable unlicensed persons to shoot on approved ranges when under supervision and subject to the requirements set out in the regulations. The proposed section exempts supervised persons who are handling firearms as part of an approved firearms safety course from the requirement to be licensed. This proposed amendment streamlines the current procedures by which unlicensed



persons can experience target shooting by extending the system that currently applies to open day participants. Under the proposed amendment, unlicensed persons wishing to experience target shooting may do so on approved shooting ranges when under supervision, but only after having received appropriate instructions and after having completed and signed a declaration that they are a person who would be eligible for the issue of a licence or permit under the Act.

7. Item [6] of schedule 1 provides that the mandatory 28-day waiting period for the issuing of a licence does not apply if the application is for the renewal of a licence and when the applicant is already the holder of a current licence, and is only seeking to renew that licence.
8. Item [10] of schedule 1 relates to the use of mail for sending firearms. The current legislation provides a general prohibition on the use of mail for sending firearms or firearms barrels. However, there is an exemption in the case of licensed firearms dealers enabling them to use mail to send firearms or firearms barrels to another licensed firearms dealer in another State. The proposed amendment will amend section 52 of the Act to make it clear that a licensed firearms dealer can send firearms or firearms barrels to another licensed firearms dealer either interstate or within New South Wales by mail so long as it is the type of mail that requires delivery in person to the addressee, such as registered mail.

## Background

9. The bill proposes a number of amendments to the *Firearms Act 1996* and the *Firearms Regulation 2006*. The proposed amendments aim to streamline and improve the operation of the system for the legal use and registration of firearms within New South Wales by removing some of the impediments to legitimate sport shooting, hunting and collecting, but without adverse impact on public safety.
10. The Second Reading speech stated that the amendments have been drafted following consultation with the Ministry of Police, the Firearms Registry and approved sport shooting, hunting and collecting clubs over a number of years.
11. A theatrical armourer runs a business that has to be able to meet diverse needs at short notice. Depending on the production being filmed, a theatrical armourer may be required to produce at short notice—firearms or prohibited weapons from any period. Therefore, a theatrical armourer cannot own every type of firearm, weapon or prop that a film production might require and must be able to borrow or hire firearms, weapons and props from other theatrical armourers or, from private collectors. However, currently, a theatrical armourer's permit only authorises a theatrical armourer to use firearms or prohibited weapons that are registered to the theatrical armourer. The amendments aim to overcome this problem.
12. With respect to the amendments to the 28-day waiting period, some refer to this waiting period as a cooling-off period, intended to minimise the possibility of a person acquiring a firearm in the heat of the moment with the intent to harm themselves or others. The Second Reading speech mentioned that the Northern Territory, Victoria and Queensland do not impose a 28-day cooling off period where applicants already have a firearm registered in their name. Western Australia also does not have a permit-to-acquire system or a cooling-off or waiting period for each firearm, but a

person cannot acquire a firearm within 28 days of obtaining their licence. Item [9] of schedule 1 removes the mandatory 28-day waiting period for permits to acquire a firearm where the applicant already has a firearm of that category registered.

13. Item [7] of schedule 1 amends section 17A of the Act to allow members of clubs affiliated with shooting bodies approved by the Commissioner of Police to apply for a special category C licence authorising the person to use a self-loading or pump-action shotgun in a recognised clay target shooting competition. Currently, only members of the Australian Clay Target Association or clubs affiliated with it may have access to category C shotguns for competition purposes in New South Wales. The Second Reading speech noted that Western Australia, Victoria and Queensland have already extended this access to include people competing in shooting disciplines beyond those administered by the Australian Clay Target Association.
14. Item [12] of schedule 1 provides that the Commissioner of Police may deal with certain minor offences under the Act and regulations by a penalty notice. However, penalty notices will not be able to be issued for any indictable offence. Penalty notices may also only be issued only for those offences prescribed in the regulations. The Bill does not set out the offences that are to be prescribed, which will be a matter for the Minister to determine after consultation. The issue of a penalty notice will not constitute a disqualifying offence unless the person to whom the notice was issued had elected to contest it in court and the person was subsequently found guilty of the offence by the court.

## The Bill

15. The object of this Bill is to amend the *Firearms Act 1996* (***the Act***) and the *Firearms Regulation 2006* (***the Regulation***) as follows:
  - (a) to enable theatrical armourers to be treated as firearms dealers under the Act and to be issued with firearms dealer licences instead of theatrical armourer permits under the Regulation,
  - (b) to exempt persons from the licensing and registration requirements under the Act in relation to the possession of antique firearms (ie those manufactured before 1900) that do not take breech-loaded metallic cartridges or for which ammunition is not commercially available,
  - (c) to provide that the exemption for pre-1900 firearms does not allow a person to use any such firearm without a licence or permit,
  - (d) to allow unlicensed persons to possess and use firearms on approved shooting ranges while under supervision and to allow unlicensed persons to possess and use firearms while participating in approved firearms safety training courses,
  - (e) to remove the mandatory 28-day waiting period for issuing a licence if the application is for the renewal of a licence,
  - (f) to provide that the mandatory 28-day waiting period for issuing a permit to acquire a firearm (such permits are required by any licensed person other than a firearms dealer in order to acquire a firearm) does not apply if the applicant already has a firearm of the same kind as the firearm that is the subject of the permit application,
  - (g) to allow licensed firearms dealers to send and receive firearms by registered post (or other form of certified or security mail),
  - (h) to remove the need for a licensed person who is participating in an arms fair, or in a historical re-enactment that involves firearms, to have a separate permit authorising the person to participate in the arms fair or the historical re-enactment,

- (i) to provide that firearms may be kept under the authority of an heirloom permit if they are rendered temporarily inoperable,
- (j) to enable minors who have held a minor's target pistol permit under the Act for at least 12 months to obtain a permit to shoot large calibre pistols in specialised shooting competitions involving those pistols,
- (k) to enable penalty notices to be issued for certain summary offences under the Act and the Regulation,
- (l) to remove the requirement to include the name and address of a firearms dealer in an advertisement for the sale of a firearm,
- (m) to modify certain requirements under the Regulation relating to the provision of information to the Commissioner,
- (n) to make a number of other miscellaneous amendments of an administrative, minor or consequential nature.

## Issues Considered by the Committee

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| 16. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b> |
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***The Committee makes no further comment on this Bill.***

## 10. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (REPORTING CORRUPT CONDUCT) BILL 2008\*

Date Introduced:	6 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Mr Barry O'Farrell MP
Portfolio:	Non Government – Leader of the Opposition, Liberal Party

### Purpose and Description

1. This Bill amends the *Independent Commission Against Corruption Act 1988* to extend to Ministers of the Crown the duty to report possible corrupt conduct.
2. It seeks to ensure that when a Minister of the Crown has information relating to allegations of corruption within his or her department of the Government, of which the Minister is a member, that there be a requirement for the Minister to refer the matter to the ICAC (Independent Commission Against Corruption).

### Background

3. ICAC (Independent Commission Against Corruption) was established in 1989 by the former Coalition Government. This Bill seeks to overcome the current situation where there is no legal obligation under the current Act for Ministers of the Crown to report corrupt conduct to ICAC. The Act states that it might be appropriate for departmental heads to do so, but they are under no obligation to do so

### The Bill

4. The object of this Bill is to extend to Ministers of the Crown, including the Premier, the duty to report possible corrupt conduct to the Independent Commission Against Corruption.

#### 5. Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

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

**Clause 3** is a formal provision that gives effect to the amendments to the *Independent Commission Against Corruption Act 1988* set out in Schedule 1.

**Clause 4** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

### Schedule 1 Amendments

The *Independent Commission Against Corruption Act 1988* (**the Principal Act**) currently provides that the Ombudsman, the Commissioner of Police, the principal officer of a public authority and an officer who constitutes a public authority are under a duty to report possible corrupt conduct to the Commission.

**Schedule 1 [2]** amends the Principal Act to extend this duty to all Ministers of the Crown, including the Premier.

**Schedule 1 [1] and [3]** are consequential amendments.

**Schedule 1 [4]** provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

**Schedule 1 [5]** provides that the duty to report extends to possible corrupt conduct that occurred before the date of assent to the proposed Act.

## Issues Considered by the Committee

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

**Issue: Retrospectivity – Schedule 1 [5] – Proposed Section 22 – Operation of amendments:**

6. Proposed Section 22 (to be inserted after Part 7), reads: Section 11, as amended by the *Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Act 2008*, extends to possible corrupt conduct that occurred before the date of assent to that Act.

7. **The Committee will always be concerned with any retrospective effect of legislation which impacts adversely on personal rights and liberties. The Committee notes that the duty to report only arises after the proposed Act has commenced on the date of assent, even though this reporting covers possible corrupt conduct that may have occurred before the date of assent to the proposed Act. However, as the duty to report arises only after the proposed Act has commenced, the Committee considers that this does not trespass unduly on personal rights and liberties.**

***The Committee makes no further comment on this Bill.***

## 11. MARINE SAFETY AMENDMENT BILL 2008

Date Introduced: 5 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Joseph Tripodi MP  
Portfolio: Ports and Waterways

### Purpose and Description

1. This Bill amends the *Marine Safety Act 1998* with respect to boating safety and marine safety licences; and for other purposes.
2. This Bill proposes changes to the penalty provisions to ensure they adequately reflect the seriousness of the offence and consistency with other legislation. The current penalty for negligent, reckless or dangerous navigation that results in death or grievous bodily harm will be increased so that it is consistent with the penalties for similar offences on the roads. An imprisonment term for reckless or negligent navigation resulting in death or grievous bodily harm will be introduced. The current penalty provisions for driving a vessel at 10 knots or more or a personal watercraft at any speed without a licence will also be enhanced.
3. Unlike roads legislation, the current penalty regime for driving a vessel when disqualified from holding a licence does not cover repeat offences. This Bill introduces an imprisonment option for repeat offences of driving a vessel while disqualified. This amendment will ensure consistency with similar offences under the roads legislation. Another proposed amendment relates to the penalty for negligent, reckless or dangerous navigation on larger vessels such as trading vessels. A sliding scale of penalties, depending on the type of vessel, will be introduced.
4. A number of other amendments to penalty provisions in the Marine Safety Act are proposed. These include the penalties for operating an unregistered or unsafe vessel and creating excessive vessel wash. Such amendments, again, ensure consistency with the roads legislation.
5. The Bill will be giving New South Wales Maritime and New South Wales Police Force officers certain direction-giving powers. The purpose of these powers will be to maintain general on-water safety and to prevent damage to property on or in the vicinity of navigable waters. For example, these powers will enable New South Wales Maritime and New South Wales Police to direct the master of a vessel not to cross a coastal bar during dangerous conditions.
6. This proposed power could also be used to direct a vessel operator to refrain from entering an area being used for a special aquatic event such as the swim leg of a triathlon. This direction-giving power will implement recommendations by the New South Wales Coroner.
7. Currently, there is a deficiency in the legislation that enables a person with a suspended or cancelled New South Wales boat licence to legally operate a power-

driven vessel in New South Wales waters by using a boat licence from another State. Current legislation also allows a person with a suspended interstate boat licence to obtain a New South Wales boat licence to operate in New South Wales and possibly his or her home State. Therefore, it is proposed that the legislation be amended to ensure that any person with a cancelled or suspended boat licence from any State or Territory in Australia cannot legally operate a vessel in New South Wales.

8. This Bill introduces amendments to clarify that non-commissioned Defence Force vessels should be required to comply with the Marine Safety Act. It is not intended that this provision apply to Defence Force personnel who are engaged in military exercises. This amendment will preserve the current application of general water traffic laws to non-commissioned vessels contained in the *Maritime Services Act 1938* and the Water Traffic Regulations.
9. The arrangement whereby a vessel greater than 30 metres in length can be operated without a pilot in a pilotage port provided the master holds a certificate of local knowledge will be included.
10. Currently, in order for a pilotage vessel to move within a pilotage port without a pilot on board, a written exemption order must be provided to the relevant harbourmaster under a sub-delegation from the New South Wales Maritime chief executive. It is now proposed that the Marine Safety Act be amended to allow such a vessel to move within the port without a pilot on basis of a verbal approval from the harbourmaster provided the movement is recorded in the ship's log. This Bill will also provide the option for more than one person to be appointed to exercise the harbourmaster's functions to ensure that a harbourmaster is available at all times.
11. Another key aspect of this Bill is the introduction of amendments to facilitate the implementation of the National Standard for Commercial Vessels. This standard will be the principal technical standard for commercial vessels and is replacing the Uniform Shipping Laws Code. This is based on the progressive development of a common national standard for the design, construction, crewing and operation of commercial vessels.
12. Under the current provisions of the Marine Safety Act, New South Wales Maritime is responsible for the inspection of public ferry wharves and if necessary, can issue a notice to improve, or prohibit the use of, a wharf. The proposed amendments will allow New South Wales Maritime to require a report from an appropriately qualified engineer to satisfy itself that a wharf complies with the relevant design, construction and safety requirements. It is also proposed that New South Wales Maritime be provided with statutory protection from liability when it relies on such certificates.

## Background

13. From the Agreement in Principle speech:

National boating fatality studies conducted on behalf of the National Marine Safety Committee for the period 1992 to 2004 concluded that the most common contributing factors in fatal boating incidents were error of judgement and alcohol. Alcohol was involved in at least 35 per cent of fatalities investigated in the earlier study, and 40 per cent in the later study. The later study found that 47 per cent of vessel operators involved in fatal boating incidents were positive for alcohol. It is

clear the consumption of alcohol has the same safety implications on the water as on the road.

14. New South Wales has a 2,140 kilometre coastline, 12,500 square kilometres of navigable waters and covers an area of 800,000 square kilometres. There are more than 450,000 licensed recreational vessel operators and some 217,000 registered recreational boat owners, and more than 18,000 of these operate on Sydney Harbour. The boating industry in New South Wales is estimated to be worth more than \$2 billion per year.
15. Since 1992, more than 275 people have been killed and more than 630 people have been seriously injured as a result of boating activities on New South Wales waterways. This represents an average of 17 fatalities and 41 serious injuries per year. Recently, there was the tragic incident on Sydney Harbour that resulted in the death of six people. Last year, two fatal incidents on Sydney Harbour resulted in the deaths of five people. The amendments proposed in the *Marine Safety Amendment Bill 2008* aim to achieve better safety outcomes.
16. The general water traffic provisions in the Marine Safety Act in relation to alcohol, speeding, distance-off and negligent navigation type offences do not apply to any type of Defence Force vessel. This is appropriate for commissioned Defence Force vessels, which are formally designated as an operational warship in order for them to carry out their day-to-day functions.
17. However, this is not appropriate for non-commissioned vessels such as small supply-type vessels, which may be used like any other vessel on the harbour to transport goods or persons on the water.
18. The New South Wales roads legislation does not exempt vehicles belonging to the Australian Defence Force from its operation. This amendment will therefore also ensure consistency between the legislation that applies on the road and the water.
19. The Marine Safety Act currently provides for the continuation of existing certificates and licences through the marine safety licence framework. These include vessel registration certificates, survey certificates for commercial vessels, boat driving licences and marine pilots' licences.
20. According to the Agreement in Principle speech, New South Wales Maritime has consulted extensively with the port corporations in relation to these amendments.
21. The proposed amendments will allow for the making of regulations in relation to the crew to be carried on a commercial vessel. Appeals and reviews of crewing determinations will be subject to appeal by safety crewing committees in the first instance and, if necessary, to the Administrative Decisions Tribunal.

## The Bill

22. The object of this Bill is to amend the *Marine Safety Act 1998* (***the Principal Act***):
  - (a) to increase penalties for certain offences relating to the negligent and dangerous operation of vessels, and
  - (b) to create new offences with increased penalties for operating a vessel while disqualified from doing so, and



- (c) to confer on authorised officers (who include police officers) a direction power in relation to conduct affecting the safety of persons and property in, on or near navigable waters, and
- (d) to ensure that, as far as is practicable, the provisions of that Act relating to the operation of vessels while having the prescribed concentration of alcohol in the breath or blood or being under the influence of alcohol or a drug, and the random breath testing of the operators of vessels, are in line with provisions relating to those matters in respect of vehicles under the road legislation, and
- (e) to require certain commercial vessels that are not required to have a survey certificate to comply with other prescribed standards in relation to their design, construction and equipment, and
- (f) to make further provision in relation to the pilotage of vessels and the appointment and functions of harbour masters, and
- (g) to make further provision for the regulation by the Minister of public ferry wharves, and
- (h) to facilitate the application of the *National Standard for Commercial Vessels* of the Commonwealth (***the National Standard***), and
- (i) to facilitate the introduction in the State of uniform provisions relating to builders plates for recreational vessels, and
- (j) in miscellaneous respects to further improve the licensing, administration and enforcement provisions of that Act.

## Issues Considered by the Committee

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

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

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

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| 24. <b>Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</b> |
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***The Committee makes no further comment on this Bill.***

## 12. PROTECTED DISCLOSURES AMENDMENT (SUPPORTING WHISTLEBLOWERS) BILL 2008\*

Date Introduced:	6 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Mr Barry O'Farrell MP
Portfolio:	Non Government – Leader of the Opposition, Liberal Party

### Purpose and Description

1. This Bill amends the *Protected Disclosures Act 1994* to make further provision for disclosures in the public interest and the investigation of matters raised by such disclosures; and for other purposes.
2. It seeks to strengthen the Protected Disclosures Act with: the establishment of a Protected Disclosures Unit within the Office of the Ombudsman to provide advice to whistleblowers; the monitoring of the response of public authorities to protected disclosures; and the annual reporting on disclosure matters made across the New South Wales public sector.
3. It will seek to establish standard guidelines to provide for the lodgement, investigation, handling and reporting of protected disclosures.
4. The Bill aims to put in place a statistical program to provide a reliable foundation for future performance assessment.
5. It also aims to ensure that the Act imposes an explicit requirement on an authority to investigate a disclosure, subject to exceptions, that might be prescribed by regulation.

### Background

6. The State's whistleblower legislation, the Protected Disclosures Act, has been reviewed on three occasions, in 1996, 2000 and 2006. According to the Agreement in Principle speech, this Bill seeks to put into effect the reforms that came out of that 2006 review by the joint parliamentary committee on the Independent Commission Against Corruption.
7. From the Agreement in Principle speech:

The Coalition wants to change the name of the Protected Disclosures Act to the Public Interest Disclosures Act. We believe that change better characterises what the Act is about. We want to amend the Act to protect whistleblowers who have an honest belief on reasonable grounds that their disclosure meets the grounds for protection under the Act. As there is a question mark over whether whistleblowers could be subject to action, a clause should be inserted to provide for no action to be

taken against whistleblowers who make a disclosure on the basis of an honest belief. That is in line with other States.

8. The Coalition also wants to introduce the right to seek damages when whistleblowers have suffered detrimental action or reprisal, when making a protected disclosure.

## The Bill

9. The object of this Bill is to amend the *Protected Disclosures Act 1994* (the **Principal Act**) to:
- (a) rename the Principal Act as the *Public Interest Disclosures Act 1994* and amend the long title to the Principal Act to emphasise the Act's purpose in encouraging and facilitating disclosures in the public interest, and
  - (b) provide that a disclosure made by a public official with reasonable grounds for believing that the disclosure is substantially true is, if the other applicable requirements are met, a protected disclosure, and
  - (c) provide that a disclosure to the Health Care Complaints Commission that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money in connection with the public health system is a disclosure protected under the Principal Act, and
  - (d) provide for the Supreme Court to issue injunctions to prevent reprisals against a person who has made a protected disclosure, and
  - (e) provide for an authority responsible for a disclosure made under the Principal Act to investigate matters raised by the disclosure and keep the person who made the disclosure informed of the investigations, unless it is already the function of the responsible authority to do so under any other Act, and
  - (f) establish a Public Interest Disclosures Advisory Committee, and
  - (g) establish a Public Interest Disclosures Unit within the Ombudsman's Office.

### **Schedule 1 Amendment of *Protected Disclosures Act 1994***

**Schedule 1 [1]** amends the long title of the Principal Act to emphasise the Act's purpose in encouraging and facilitating disclosures in the public interest.

**Schedule 1 [2]** substitutes section 1 of the Principal Act, renaming the Principal Act the *Public Interest Disclosures Act 1994*.

**Schedule 1 [7]** inserts proposed section 9A, making provision for those circumstances where a public official may have reasonable grounds for believing that a disclosure is substantially true but is unable to determine conclusively whether the disclosure is substantially true.

**Schedule 1 [8]** inserts proposed section 12D, which provides that a disclosure by a public official to the Health Care Complaints Commission is protected by the Principal Act if the disclosure is made in accordance with the *Health Care Complaints Act 1993* and is a disclosure that shows corrupt conduct, maladministration or serious and substantial waste of public money in connection with the public health system.

**Schedule 1 [11]** inserts proposed section 20A, which provides for the Supreme Court to issue an injunction to prevent a person from engaging in conduct that constitutes taking detrimental action against another person substantially in reprisal for the other person making a protected disclosure or being in any way concerned in such conduct.

**Schedule 1 [12]** inserts proposed Part 3A (proposed sections 24A–24C), which establishes a Public Interest Disclosures Advisory Committee.

**Schedule 1 [13] and [14]** make amendments to provide for the authority responsible for a disclosure made under the Principal Act to investigate the matters raised by the disclosure

and keep the person who made the disclosure informed of the investigations, unless it is the function of the responsible authority to do so under any other Act. **Schedule 1 [13]** inserts proposed section 24D. **Schedule 1 [14]** omits current section 27 and inserts instead proposed sections 27–27B.

**Schedule 1 [19]** amends clause 1 (1) of Schedule 2 to the Principal Act so as to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

**Schedule 1 [3]–[6], [9], [10] and [15]–[18]** generally make amendments of a minor or consequential nature. However, special mention is made in relation to proposed Section 5 (2) and proposed Section 30 (3).

#### **Schedule 2 Amendment of other Acts**

**Schedule 2.1** amends the *Health Care Complaints Act 1993* to make an amendment consequential on the amendment made by **Schedule 1 [8]**.

**Schedule 2.2** amends the *Ombudsman Act 1974* to provide for the establishment within the Ombudsman's Office of a Public Interest Disclosures Unit.

## **Issues Considered by the Committee**

### **Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]**

#### **Issue: Ill-Defined and Wide Powers – Schedule 1 [18] – Proposed Section 5 (2) – Vacancy in office of appointed member:**

10. Proposed Section 5 (2) reads: The Minister may remove an appointed member from office at any time.
11. This relates to the appointment of members to the Public Interest Disclosures Advisory Committee.

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| 12. <b>The Committee notes that the power to remove an appointed member from office at any time is very wide in scope, and is concerned that this may make personal rights and liberties unduly dependent on an insufficiently defined administrative power. Accordingly, the Committee refers this to Parliament.</b> |
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### **Delegation of legislative powers [s 8A(1)(b)(iv) LRA]**

#### **Issue: Matters which should be regarded by Parliament – Schedule 1 [16] -Proposed Section 30 (3) - Regulations:**

13. Proposed Section 30 (3) reads: A regulation may create an offence punishable by a penalty not exceeding 250 penalty units (in the case of a corporation) and 100 penalty units (in any other case).

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| 14. <b>The Committee notes that allowing for regulations (rather than the Principal Act) to determine which conduct constitutes an offence may be delegating the power to make a fundamental component of the legislative scheme. The Committee is concerned that this constitutes an extensive regulation making power which comprises an inappropriate delegation of legislative power on matters which should be regarded by Parliament. Accordingly, the Committee refers this to Parliament.</b> |
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***The Committee makes no further comment on this Bill.***

## 13. SHOP TRADING BILL 2008

Date Introduced:	6 June 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Joe Tripodi MP
Portfolio:	Small Business and Regulatory Reform

### Purpose and Description

1. The Bill de-regulates shop trading hours while restricting trading on Good Friday, Easter Sunday, Anzac Day (but only in the morning), Christmas Day and Boxing Day (***restricted trading days***),
2. The Bill also enables small shops and specified other shops to trade on restricted trading days and to provide for the exemption by the Director-General of the Department of Commerce (the ***Director-General***) of other shops from trading restrictions,
3. The Bill also repeals the *Shops and Industries Act 1962* and to transfer provisions relating to weekend trading by banks and day baking to other Acts, and enacts savings and transitional provisions as a consequence of the enactment of the proposed Act and makes other consequential amendments.

### Background

4. According to the Agreement in Principle Speech, on 5 October 2006, IPART provided the Government with a final report of its investigation into the burden of regulation and improving regulatory efficiency. One of the specific recommendations made by IPART was that consideration be given to reforming shop trading hour restrictions. To implement that recommendation the Better Regulation Office was charged with undertaking a review of shop trading hour regulation in New South Wales. That review included a full public consultation process.
5. The bill repeals the *Shop and Industries Act 1962* which is now almost half a century old and regulates, in minute detail, which shops can and cannot open on Sunday and on public holidays. The Act is complex, arcane and outdated.
6. Currently for general shops to be open on a Sunday—and that includes every Coles, Woolworths, David Jones, and Myers—they must apply for a specific exemption from the Director General of the Department of Commerce. Literally thousands of these exemptions have been granted. Exemptions have been granted for shops in almost 70 per cent of local government areas throughout New South Wales.
7. This bill will do away with that unnecessary red tape. Under the bill, the need to apply for a specific exemption to trade on a Sunday will be abolished. Retailers will have the flexibility to open their doors on Sunday whenever their customers want them to and whenever they consider it is economically viable for them to do so. The bill will

retain trading restrictions for major retailers on only a few of the most significant public holidays—on Good Friday, Sunday, Christmas Day, Boxing Day and before 1.00 p.m. on Anzac Day.

## The Bill

### Part 2 Restricted trading days

**Clause 4** requires all shops to be kept closed at all times on Good Friday, Easter Sunday, Anzac Day (before 1 pm), Christmas Day and Boxing Day. The proposed section will not apply to shops exempted from it under Part 3 of the proposed Act.

**Clause 5** makes it an offence to fail to keep a shop closed in accordance with proposed section 4. It will be a defence if a shop is kept open for less than 30 minutes after the commencement of a restricted trading day for the purpose of serving a customer who was in the shop before that commencement and to whom goods were sold or offered for sale before that commencement.

**Clause 6** makes it an offence to publish, or cause to be published, (by any means) an express or implied statement that a shop will be open for business at a time it is required to be kept closed under the proposed Act.

### Part 3 Exemptions

#### Division 1 General exemptions

**Clause 7** exempts shops specified in proposed Schedule 1 from the requirement to be kept closed on a restricted trading day. Businesses specified in proposed Schedule 1 include shops in bazaars, fairs and markets conducted for charitable or public fundraising purposes, book shops, chemist shops, newsagencies, recorded music shops, souvenir shops and shops ancillary to venues for playing sport or other physical recreation.

**Clause 8** exempts small shops from the requirement to be kept closed on a restricted trading day. The shops exempted are essentially the same as those shops currently designated as small shops under the *Shops and Industries Act 1962*.

**Clause 9** provides that the proposed Act does not apply to certain licensed premises.

#### Division 2 Exemptions by Director-General

**Clause 10** enables the Director-General to exempt shops from a requirement to be kept closed on a restricted trading day, on application by any person or at the Director-General's discretion. Exemptions may apply to one or more days, to particular times, to a specified shop or shops or to specified areas.

**Clause 11** requires an application for an exemption to be made in the manner approved by the Director-General and to be accompanied by the application fee under the proposed Act.

**Clause 12** confers a right to apply to the Administrative Decisions Tribunal for a review of a decision to refuse or revoke an exemption or as to the conditions of an exemption.

**Clause 13** makes all exemptions granted by the Director-General subject to the condition that, on a restricted trading day, an exempted shop must be staffed only by persons who have freely elected to work on that day, without any coercion, harassment, threat or intimidation by or on behalf of the occupier of the shop.

**Clause 14** makes it an offence to fail to comply with a condition of an exemption.

### Part 4 Enforcement

**Clause 15** has the effect of conferring on inspectors under the proposed Act powers under Part 4 of Chapter 7 of the *Industrial Relations Act 1996*, including powers to inspect premises and require the production of records, for the purpose of investigating possible contraventions of the proposed Act.

**Clause 16** provides for proceedings for offences under the proposed Act to be dealt with summarily.

**Clause 17** sets out the persons who may prosecute offences under the proposed Act.

**Clause 18** contains an evidentiary provision providing for circumstances when a shop will be taken not to have been closed for the purposes of proceedings for offences under the proposed Act.

**Clause 19** enables the Director-General to issue evidentiary certificates as to exemptions for the purposes of proceedings for offences under the proposed Act.

**Part 5 Miscellaneous**

**Clause 20** enables the Director-General to delegate his or her functions under the proposed Act (other than the power of delegation).

**Clause 21** makes provision for the service of documents under the proposed Act.

**Clause 22** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 23** is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 2.

**Clause 24** repeals the *Shops and Industries Act 1962*.

**Clause 25** is a formal provision that gives effect to the amendments to the Acts set out in Schedule 3.

**Clause 26** provides for the review of the proposed Act in 5 years.

## **Issues Considered by the Committee**

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

## 14. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2008

Date Introduced: 5 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon. Morris Iemma MP  
Portfolio: Premier

### Purpose and Description

1. The Bill repeals certain Acts and statutory instruments and amends certain other Acts and instruments in various respects and for the purpose of effecting statute law revision; and to make certain savings.

### Background

2. The Bill continues the established statute law revision program that is recognised a cost-effective and efficient method for dealing with minor amendments.

### The Bill

3. Schedule 1 includes minor amendments to various Acts that are considered too minor or inconsequential to warrant the introduction of a separate amending Bill.
4. Schedules 2 and 3 amend certain other Acts and instruments for the purpose of effecting statute law revision. Schedule 2 deals with matters of pure statute law revision consisting of minor technical changes to legislation that the Parliamentary Counsel considers are appropriate for inclusion. Examples of amendments in Schedule 2 are those arising out of the enactment or repeal of other legislation, those correcting duplicated numbering and those updating terminology. Meanwhile, Schedule 3 contains statute law revision amendments that are consequential on the enactment of the *Legal Profession Act 2004*.
5. Schedule 4 repeals certain Acts and instruments and provisions of Acts and instruments that are deemed redundant or of no practical utility. The repeal also extends to amending Acts or provisions that have commenced.
6. Schedule 5 makes other provisions of a consequential or ancillary nature including general savings, transitional and other provisions.



## Issues Considered by the Committee

### Issues arising under section 8(1)(b)

#### Commencement by Assent

7. Clause 2 of the Bill provides that if a date of commencement is not specified, then all amending provisions are taken to commence on assent.
8. All amending provisions of the Bill are deemed to commence on assent, with the exceptions of the two provisions addressed below.

#### Retrospectivity - Schedule 1.17

9. Schedule 1.17 amends the *Native Vegetation Act 2003* to alter the definition of Director-General in section 4(1). Specifically, Schedule 1.17 repeals the current definition and instead provides that '**Director-General** means the Director-General of the Department of Environment and Climate Change'.
10. On 27 April 2007, the *Public Sector Employment and Management (General) Order 2007* abolished the Department of Natural Resources. Clause 17 of that Order provided that in any document, a reference to the Department of Natural Resources is to be construed as a reference to the Department of Environment and Climate Change.
11. The proposed amendment is taken to have commenced on 27 April 2007, the same day the abovementioned Order came into effect.

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| 12. <b>The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass on personal rights or liberties.</b> |
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#### Commencement by Proclamation - Schedule 1.40

13. Schedule 1.40 provides that amendments to the *Wesley College Incorporation Act 1910* commence on a day or days to be appointed by proclamation. This may delegate the power to the Government to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

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| 14. <b>Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.</b> |
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***The Committee makes no further comment on this Bill.***

## 15. WESTERN AND CROWN LANDS AMENDMENT (SPECIAL PURPOSE LEASES) BILL 2008

Date Introduced:	4 June 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Lands, Rural Affairs, Regional Development

### Purpose and Description

1. This Bill amends the *Western Lands Act 1901* and the *Crown Lands Act 1989* with respect to the establishment of development districts and the granting of special purpose leases in the Western Division; and for other purposes.
2. Special purpose leases will be able to co-exist with other tenures under those Acts in relation to the same land. In the case of land that is already the subject of some other tenure, it will only be possible to grant a special purpose lease with the consent of the holder of that tenure.
3. Under the amended Acts, it will be possible to grant a special purpose lease to enable the establishment of a wind farm (to generate electricity) over land that is currently leased for grazing purposes. While most of the land may remain available for grazing, any particular part of it (other than the site of a dwelling-house or other significant improvement) could become the site of a windmill or other structure ancillary to a wind farm.
4. This Bill aims to ensure long-term security of tenure for developers of critical infrastructure while preserving the tenure of existing leaseholders. General purpose leaseholders, like graziers and farmers, will be able to negotiate for adequate compensation in return for their consent, and be able to retain the right to repossess the land once the special purpose lease expires.
5. It mirrors similar provisions in the Crown Lands Act. The Bill will also allow the Minister, so long as any pre-existing lessees give their consent, to grant a second lease—a "special purpose lease"—to a developer over a parcel of land within the boundaries of the existing lease. Once a special purpose lease expires, pre-existing lessees with longer-term tenure, such as a perpetual lease—"general purpose lease"—will be able to exercise their rights over the whole land again.
6. Schedule 1 inserts part 9E into the *Western Lands Act 1901*. Part 9E gives the Minister power under proposed section 35XC (1) to grant a special purpose lease in accordance with sections 34 or 34A of the Crown Lands Act. Such a lease can be granted only in respect of Crown land within a "development district", declared by notification in the *Government Gazette*, for an "approved purpose".

7. Under proposed section 35XB, an approved purpose that is not already in the Bill must be proclaimed under section 44B (4) (b) of the *Crown Lands Act 1989*. Proposed section 44B (4) (b), which will be inserted by this Bill into the *Crown Lands Act 1989*, states that a proclamation by the Governor has to be made on a recommendation by the Minister. Subsection (5) of section 44B requires the Minister to first consult with the Minister administering the *Environmental Planning and Assessment Act 1979* before recommending to the Governor to proclaim an approved purpose.
8. The scheme provides a safeguard of a number of approval steps before a special purpose lease can be granted. It can only be granted for a specific purpose. The intention behind part 9E is to facilitate leasing for large-scale developments that do not fit easily within the traditional framework of the *Western Lands Act 1901*, in consultation with the Minister for Planning.
9. Another important provision within part 9E is proposed section 35XC (3), which limits the term of any special purpose lease, including any option, to 100 years. Subsection (4) of that provision allows a special purpose lease to be granted in respect of land that is already subject to a standard Western Lands Act lease or a general purpose lease.
10. This provision will allow a special purpose lease to sit parallel to the underlying general purpose lease held by someone like a grazier or a farmer. Proposed section 35XC (4) requires general purpose lessees to give their consent before the Minister can grant a special purpose lease on top of their general purpose lease. Existing general purpose leaseholders will be able to negotiate fair compensation in return for giving their consent. Proposed section 35XC (5) makes a general purpose lessee's consent irrevocable and binding on his or her successors in title.
11. Another important provision to be introduced is proposed section 35XE (b), which inserts a number of compulsory conditions into a special purpose lease that has been granted on top of a general purpose lease. That section prohibits a special purpose lessee from carrying out activities that directly interfere with the lessee's enjoyment of his or her improvements unless consent has been given. For example, proposed section 35XE (b) (i) prevents a special purpose lessee from doing anything on or within 200 metres of land upon which a dwelling house is situated.

## Background

12. This has been drafted in response to a proposed investment in renewable energy in the Western Division. According to the Second Reading speech:

The *Western Lands and Crown Lands Amendment (Special Purpose Leases) Bill 2008* creates a simple and practical way to allow large-scale development in the Western Division on Crown land that is part of a lease used for a contrary purpose such as pastoralism or agriculture. The current legislation for the Western Lands Division is restrictive when it comes to the conditions and purposes required for leases of Crown land. For example, it is currently impossible for individuals or businesses to obtain a lease of Crown land under the more flexible leasing provisions of section 34 of the *Crown Lands Act*—a right that is enjoyed by people elsewhere in New South Wales. This point was raised recently in the five-yearly

review of the Western Lands Act 1901, which is soon to be tabled in Parliament. The bill addresses the need for greater flexibility.

13. Under the current *Western Lands Act 1901*, if the required land is already held under a perpetual lease, the Minister can only grant another lease over the same land by compulsorily acquiring or withdrawing the relevant parcel. Compulsory withdrawal or acquisition is undesirable for many leaseholders. Some have held the same lease in their family for generations. Others fear that compulsory acquisition or withdrawal of land from one group of leases might undermine the security of tenure holders elsewhere in the Western Division by introducing a risk to potential investors and mortgagees.

14. The Second Reading speech explained that:

The Government believes subleasing is inappropriate when it comes to massive investments like the wind farm proposed at Silverton and is legally questionable. For small-scale developments that are consistent with and do not overwhelm the ordinary activities allowed under a general purpose lease, that may be a viable option.

However, the Government considers that where large-scale and critical infrastructure of importance to the State and the community as a whole is involved, developments on Crown land should be facilitated by a direct lease from the State. A direct lease from the State gives the people of New South Wales greater control over big projects at both the construction and operational phases of development. A direct lease from the ultimate landowner also gives developers greater security of tenure than if they had to acquire a mere sub-lease from the general purpose lessee. There are also advantages for a proponent if the relevant land is already leased out to different individuals under many different leases. A direct lease from the State saves the proponent from having to negotiate and administer numerous and complicated sub-leases with each and every general purpose lessee.

The bill has been drafted in light of a massive \$2 billion, 500-turbine wind farm proposal at Silverton, near Broken Hill. The proposed wind farm will be the biggest in Australia, generating up to 1,000 megawatts of electricity and capable of supplying 4.5 per cent of the entire State's energy needs. It will save approximately three million tonnes of greenhouse gas emissions per year. The developers propose to build the wind farm on 32,000 hectares of Crown land which is currently leased under 17 separate perpetual leases for grazing. The bill will allow the Silverton wind farm proponents to obtain a single and secure form of tenure directly from the State in the form of a special purpose lease. The holders of the 17 perpetual leases will be able to negotiate fair compensation directly with the proponents and shared access and usage rights in return for their consent. The bill also will give the Government a degree of control over the project that will allow it, amongst other things, to charge a fair rent on behalf of the people of New South Wales. Any revenue generated can be used to fund new infrastructure and facilities across western New South Wales.

## The Bill

15. The object of this Bill is to amend the *Western Lands Act 1901* and the *Crown Lands Act 1989* so as to facilitate the granting of special purpose leases in relation to land within the Western Division of New South Wales.

16. **Clause 5** amends the definition of **landholder** in section 30 of the *Forestry Act 1916* so as to exclude from that definition any lessee under a special purpose lease granted under the *Crown Lands Act 1989* or the *Western Lands Act 1901* (as amended by the proposed Act). The effect of the amendment is to exclude such lessees from any entitlement to royalty for timber taken from the land under the lease.

### **Schedule 1 Amendment of *Western Lands Act 1901***

#### **Special purpose leases**

**Schedule 1 [4]** inserts proposed Part 9E into the Act. The new Part contains the following provisions:

##### **Proposed section 35XA**

This provision defines the expressions **designated purpose**, **development**, **development district**, **general purpose lease**, **significant improvement** and **special purpose lease** for the purposes of the proposed Part.

##### **Proposed section 35XB**

This provision enables the Minister to declare any land to be a development district for the purposes of the proposed Part. The declaration will designate the purposes for which a special purpose lease may be granted over such land, being purposes that are approved for the purposes of the proposed section. Approved purposes include the construction and operation of facilities to harness energy and convert it into electricity and such other purposes as are approved by a proclamation under proposed section 44B of the *Crown Lands Act 1989* (to be inserted by Schedule 2 [5]). Further declarations will be able to alter the district's boundaries, abolish the district or vary its designated purposes.

##### **Proposed section 35XC**

This provision enables the Minister to lease any Crown land within a development district for the purpose of enabling development for a designated purpose to be carried out on that land. In the case of land the subject of a mining lease (under the *Mining Act 1992*) or a production lease (under the *Petroleum (Onshore) Act 1991*) the granting of such a lease will require the consent of the Minister administering the Act concerned. A lease granted under the proposed section will have a maximum term of 100 years. Land the subject of a general purpose lease can be leased under the proposed section, but only with the consent of the lessee under that lease (such consent to be irrevocable and to bind successors in title). A lease granted under the provision will be subject to the provisions of the *Crown Lands Act 1989* and not to any provisions of the *Western Lands Act 1901* other than the proposed Part.

##### **Proposed section 35XD**

This provision ensures that a general purpose lease is (or remains) a lease even though, as a consequence of the granting of a special purpose lease, it does not confer (or no longer confers) exclusive possession of the land over which it is granted. The provision also imputes into the general purpose lease a condition prohibiting the lessee under that lease from doing anything that has the effect of restricting or impeding the lessee under the special purpose lease from exercising the rights conferred by that lease, and a further condition prohibiting the carrying out of development for the purposes of any dwelling-house, garden or significant improvement except with the consent of the lessee under the special purpose lease (such consent not to be unreasonably withheld). The conditions imposed pursuant to this provision will flow through to any sublease of the general purpose lease.

##### **Proposed section 35XE**

This provision ensures that a special purpose lease is (or remains) a lease even though, as a consequence of the granting of a general purpose lease, it does not confer (or no longer

confers) exclusive possession of the land over which it is granted. The provision also imputes into the special purpose lease a condition prohibiting the lessee under that lease from exercising any rights under the lease over land within the vicinity of any dwelling-house, garden or significant improvement except with the consent of the lessee under the general purpose lease (such consent to be irrevocable and to bind successors in title). The prohibition will not apply to the use of existing roads and tracks. The provision also allows the special purpose lease to include conditions agreed between the lessee under that lease and the lessee under the general purpose lease. The conditions imposed pursuant to this provision will flow through to any sublease of the special purpose lease. The agreed conditions will be enforceable between the lessees (and any sublessees) as if they were contained in a deed entered into between them.

### **Miscellaneous amendments**

**Schedule 1 [1]** amends section 2A of the Act (which determines how the *Crown Lands Act 1989* is to apply to leases under the Act) so as to ensure that proposed section 35XC (6) (which determines how the *Crown Lands Act 1989* is to apply to special purpose leases) will prevail over section 2A.

### **Schedule 2 Amendment of *Crown Lands Act 1989***

#### **Special purpose leases of land within the Western Division**

**Schedule 2 [5]** inserts proposed Division 3A into Part 4 of the Act. The new Division contains the following provisions:

#### **Proposed section 44A**

This provision defines the expressions ***designated purpose, development, development district, general purpose lease, significant improvement*** and ***special purpose lease*** for the purposes of the proposed Division.

#### **Proposed section 44B**

This provision enables the Minister to declare any land within the Western Division to be a development district for the purposes of the proposed Division. The declaration will designate the purposes for which a special purpose lease may be granted over such land, being purposes that are approved for the purposes of the proposed section. Approved purposes include the construction and operation of facilities to harness energy and convert it into electricity and such other purposes as are approved by proclamation. Further declarations will be able to alter the district's boundaries, abolish the district or vary its designated purposes.

#### **Proposed section 44C**

This provision enables the Minister to lease any Crown land within a development district for the purpose of enabling development for a designated purpose to be carried out on that land. In the case of land the subject of a mining lease (under the *Mining Act 1992*) or a production lease (under the *Petroleum (Onshore) Act 1991*) the granting of such a lease will require the consent of the Minister administering the Act concerned. A lease granted under the proposed section will have a maximum term of 100 years. Land the subject of a general purpose lease can be leased under the proposed section, but only with the consent of the lessee under that lease (such consent to be irrevocable and to bind successors in title).

#### **Proposed section 44D**

This provision ensures that a general purpose lease is (or remains) a lease even though, as a consequence of the granting of a special purpose lease, it does not confer (or no longer confers) exclusive possession of the land over which it is granted. The provision also imputes into the general purpose lease a condition prohibiting the lessee under that lease from doing anything that has the effect of restricting or impeding the lessee under the special purpose lease from exercising the rights conferred by that lease, and a further condition prohibiting the carrying out of development for the purposes of any dwelling-

house, garden or significant improvement except with the consent of the lessee under the special purpose lease (such consent not to be unreasonably withheld). The conditions imposed pursuant to this provision will flow through to any sublease of the general purpose lease.

#### **Proposed section 44E**

This provision ensures that a special purpose lease is (or remains) a lease even though, as a consequence of the granting of a general purpose lease, it does not confer (or no longer confers) exclusive possession of the land over which it is granted. The provision also imputes into the special purpose lease a condition prohibiting the lessee under that lease from exercising any rights under the lease over land within the vicinity of any dwelling-house, garden or significant improvement except with the consent of the lessee under the general purpose lease (such consent to be irrevocable and to bind successors in title). The prohibition will not apply to the use of existing roads and tracks. The provision also allows the special purpose lease to include conditions agreed between the lessee under that lease and the lessee under the general purpose lease. The conditions imposed pursuant to this provision will flow through to any sublease of the special purpose lease. The agreed conditions will be enforceable between the lessees (and any sublessees) as if they were contained in a deed entered into between them.

#### **Miscellaneous amendments**

**Schedule 2 [1]** inserts a definition of *land district* into section 3 (1) of the Act. The definition includes not only the land districts currently referred to in section 8 of the Act, but also any development districts in the Western Division that are established under proposed Division 3A of Part 4 of the Act (to be inserted by Schedule 2 [5]) or under proposed Part 9E of the *Western Lands Act 1901* (to be inserted by Schedule 1 [4]). The effect of this amendment is to enable land boards to be constituted for the development districts. These land boards will have a role in dealing with disputes that arise in relation to special purpose leases granted in respect of land within those districts.

**Schedule 2 [2]** inserts proposed subsection (7) into section 34 of the Act. The new subsection provides that Crown land the subject of a special purpose lease (within the meaning of proposed Division 3A of Part 4) may be leased under that section, but only if the granting of a lease under that section is authorised by, and complies with, the terms of the special purpose lease.

**Schedule 2 [4]** inserts proposed subsection (9) into section 34A of the Act. The new subsection provides that a Crown reserve the subject of a special purpose lease (within the meaning of proposed Division 3A of Part 4) may be leased under that section, but only if the granting of a lease under that section is authorised by, and complies with, the terms of the special purpose lease.

### **Issues Considered by the Committee**

#### **Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]**

**Issue: Ill-Defined and Wide Powers – Schedule 1 [4] Amendment of *Western Lands Act 1901* – Proposed section 35XB – Development districts:**

17. This proposed provision enables the Minister to declare any land to be a development district for the purposes of the proposed Part. The declaration will designate the purposes for which a special purpose lease may be granted over such land (subsections (2) and (3)). Approved purposes include the construction and operation of facilities to harness energy and convert it into electricity (subsection

(4)(a)), and subsection (4)(b), such other purposes as are approved by a proclamation under proposed section 44B of the *Crown Lands Act 1989* (to be inserted by Schedule 2 [5]).

18. Further declarations may also be made to change the district's boundaries, abolish the district or vary its designated purposes (subsection (5)).

19. **The Committee notes that the scope for the Minister's declaration that *any* land to be a development district for the purposes of the proposed Part, appears to be very wide. The Committee also notes that the Minister may make further declarations to alter the district's boundaries, abolish the district or vary its designated purposes, which appears to be broad in scope.**

20. **Therefore, the Committee considers these proposed provisions may make individual rights unduly dependent on an insufficiently defined and wide administrative power, and refers this to Parliament.**

**Issue: III-Defined and Wide Powers – Schedule 2 [5] Amendment of *Crown Lands Act 1989* – Proposed section 44B – Development districts:**

21. This proposed provision enables the Minister to declare any land within the Western Division to be a development district for the purposes of the proposed Division. The declaration will designate the purposes for which a special purpose lease may be granted over such land (subsections (2) and (3)). Approved purposes include the construction and operation of facilities to harness energy and convert it into electricity (subsection (4)(a)), and subsection (4)(b), such other purposes as are approved by a proclamation on the recommendation of the Minister.

22. Further declarations may also be made to change the district's boundaries, abolish the district or vary its designated purposes (subsection (6)).

23. **The Committee notes that the scope for the Minister's declaration that *any* land within the Western Division to be a development district for the purposes of the proposed Division, appears to be very wide. The Committee also notes that the Minister may make further declarations to alter the district's boundaries, abolish the district or vary its designated purposes, which appears to be broad in scope.**

24. **Therefore, the Committee considers these proposed provisions may make individual rights unduly dependent on an insufficiently defined and wide administrative power, and refers this to Parliament.**

***The Committee makes no further comment on this Bill.***



## 16. WORKERS COMPENSATION LEGISLATION AMENDMENT (FINANCIAL PROVISIONS) BILL 2008

Date Introduced: 5 June 2008  
House Introduced: Legislative Assembly  
Minister Responsible: Hon. John Watkins MP  
Portfolio: Minister for Finance

### Purpose and Description

1. The proposed *Workers Compensation Legislation Amendment (Financial Provisions) Act 2008* amends the *Workplace Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Act 1987* to make further provision for the funding of the WorkCover Authority.

### Background

2. The object of the Bill is to amend the *Workplace Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Act 1987* to provide new funding arrangements for the WorkCover Authority.
3. The Bill contains proposed amendments to the workers compensation legislation designed to implement a new, more transparent model for the funding of the WorkCover Authority of New South Wales.
4. The Bill proposes a funding model in which it is expected to remove the risk of volatility to WorkCover's budget caused by unanticipated surpluses and deficits arising from unforeseen changes to premium income.
5. Under the new arrangements, WorkCover's operations will be funded from the Workers Compensation Insurance Fund by payments made from that Fund to the WorkCover Authority Fund with the approval of the Minister.
6. Existing provisions that enable WorkCover to require a contribution from the premium income of insurers will be retained but limited to contributions from specialised insurers and self-insurers.
7. As a result of the changes, WorkCover will no longer be able to levy a contribution on the premium income of the National Insurer.
8. WorkCover will be authorised to transfer money or other forms of surplus from the WorkCover Authority Fund to the Insurance Fund.

## The Bill

### 9. Outline of Provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on 1 July 2008 with the exception of the amendment that allows the transfer of any surplus in the WorkCover Authority Fund to the Insurance Fund (which is to commence on the date of assent).

**Clause 3** is a formal provision that gives effect to the amendments to the *Workplace Injury Management and Workers Compensation Act 1998* set out in Schedule 1.

**Clause 4** is a formal provision that gives effect to the amendments to the *Workers Compensation Act 1987* set out in Schedule 2.

**Clause 5** provides for the repeal of the proposed Act after the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

### **Schedule 1 - Amendment of Workplace Injury Management and Workers Compensation Act 1998**

**Schedule 1 [1], [2] and [5]** establish the new arrangements for the funding of WorkCover's operations by providing for the payment into the WorkCover Authority Fund of amounts approved by the Minister to be paid into the Fund from the Insurance Fund.

**Schedule 1 [4] and [6]–[12]** limit the existing arrangements for the levying of contributions on insurance premiums to premiums payable to specialised insurers and the deemed premium income of self-insurers, so that contributions will no longer be levied on the premium income of the Nominal Insurer.

**Schedule 1 [3]** authorises WorkCover to transfer any surplus in the WorkCover Authority Fund to the Insurance Fund.

### **Schedule 2 Amendment of Workers Compensation Act 1987**

**Schedule 2 [1]** makes a consequential amendment to the provision that authorizes payments from the Insurance Fund to provide for the payments that will be authorised to be made under the proposed new funding arrangements.

**Schedule 2 [2]** enacts a transitional provision that requires the payment from the Insurance Fund into the WorkCover Authority Fund of contributions on outstanding premium debts due to the Nominal Insurer. The provision is consequential on the termination of existing arrangements for levying contributions on the premium income of the Nominal Insurer and provides for the levying of a contribution on premiums that are due and unpaid when the existing arrangements end.

**Schedule 2 [3]** enacts a savings and transitional regulation-making power.

## Issues Considered by the Committee

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| 10. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b> |
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***The Committee makes no further comment on this Bill.***

## SECTION B: MINISTERIAL CORRESPONDENCE – BILLS PREVIOUSLY CONSIDERED

# 17. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2008; BUILDING PROFESSIONALS AMENDMENT BILL 2008

### Ministerial Correspondence

Date Introduced:	15 May 2008
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Frank Sartor MP
Portfolio:	Planning

### Background

1. The Committee reported on these Bills in its *Legislation Review Digest 7* of 2008.

### Minister's Response

2. By letter dated 12 June 2008, the Minister for Planning responded to the Committee's concerns. Please refer to the Minister's response in the attached table.
3. The Minister advised that:

The introduction of these Bills follows a lengthy and comprehensive consultation process in which stakeholders were provided with extensive opportunities to give feedback on the proposed planning reforms. The Bills are an essential component of the ongoing reforms to the NSW's planning system, necessary to ensure State's ongoing prosperity.

I recognise that the LRC's report is based on a review of the Bills pursuant to s.8A of the *Legislation Review Act 1987*. In this regard the LRC's review is, of necessity, focused on a narrow range of issues.

Whilst I appreciate the valuable contribution the LRC makes to the legislative process, I believe the LRC report on the Bills includes a number of misconceptions about the purpose of specific provisions and does not have regard to the overall benefits of the reforms to the planning system that would result from the Bill's introduction.

The aim *Environmental Planning and Assessment Act 1979* is to ensure that appropriate balance is brought to the competing interests in the development process. I believe, having regard to the provisions of the Bills as a whole, that the proposed reforms strike the correct balance in this regard.

## **Committee's Response**

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| 4. <b>The Committee thanks the Minister for Planning for his response.</b> |
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Environmental Planning And Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008



**The Hon Frank Sartor MP**

Minister for Planning  
Minister for Redfern Waterloo  
Minister for the Arts

12 JUN 2008

Mr Allan Shearan MP  
Chairperson  
Legislative Review Committee  
Parliament House  
Macquarie Street  
SYDNEY 2000

Dear Mr Shearan MP

I note that the Legislative Review Committee (LRC) has considered and reported on the *Environmental Planning and Assessment Amendment Bill 2008* (EP&A Bill) and the *Building Professionals Amendment Bill 2008* (Building Professionals Bill) in the Legislation Review Digest No 7 – 2 June 2008.

The introduction of these Bills follows a lengthy and comprehensive consultation process in which stakeholders were provided with extensive opportunities to give feedback on the proposed planning reforms. The Bills are an essential component of the ongoing reforms to the NSW's planning system, necessary to ensure State's ongoing prosperity.

I recognise that the LRC's report is based on a review of the Bills pursuant to s.8A of the *Legislation Review Act 1987*. In this regard the LRC's review is, of necessity, focused on a narrow range of issues.

Whilst I appreciate the valuable contribution the LRC makes to the legislative process, I believe the LRC report on the Bills includes a number of misconceptions about the purpose of specific provisions and does not have regard to the overall benefits of the reforms to the planning system that would result from the Bills' introduction.

The aim *Environmental Planning and Assessment Act 1979* is to ensure that appropriate balance is brought to the competing interests in the development process. I believe, having regard to the provisions of the Bills as a whole, that the proposed reforms strike the correct balance in this regard.

Please find attached the Government's response to the LRC report for your consideration. If you have any queries with respect to the response please contact Marcus Ray, Director Legal Services, Department of Planning on 9228 6396.

Yours sincerely

Frank Sartor

CC. Committee Manager – Catherine Watson

## ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2008

Issues raised by the Parliamentary Legislation Review Committee  
Government responses

## Section 8A(1)(b)(i) – trespasses unduly on personal rights and liberties

ISSUE	RESPONSE
77. Requirement for Ministerial approval before Crown development may be refused or a condition imposed. Possible impact on rights of objectors.	<ul style="list-style-type: none"> <li>The restriction on refusal or conditions on a Crown development application without approval of the Minister reflects the current, longstanding provisions in Part 15A of the EP&amp;A Act that prevent local councils from inappropriately frustrating the delivery of infrastructure to the community by State agencies. The Bill provisions include a simplified dispute resolution process but are otherwise reflective of the current provisions applying to Crown DAs.</li> <li>The amendment makes no change to the public participation requirements for Crown development applications. The Bill does not inhibit the community's ability to make submissions regarding the development application or the consent authority's or Minister's ability to take these submissions into account.</li> <li>Procedural legal challenges under s.123 of the Act to the determination of Crown DAs are available to members of the community as they are for any other local council DA.</li> </ul>
81. Proposed s.79C(1A) – a bill of a consent authority to reject submissions with respect to certain types of development if it is made primarily to secure or maintain a direct or indirect commercial advantage. Possible impact on procedural fairness.	<ul style="list-style-type: none"> <li>This provision only relates to development subject to the new third party reviews introduced in the Bill. The new third party review provisions are the first expansion of the rights of third parties to seek a review appeal against a decision since the EP&amp;A Act commenced in 1979.</li> <li>The provision has been included as a necessary safeguard to ensure the new review provisions are not abused by commercial competitors. To ensure this, the provision enables the consent authority to reject a submission made purely for the purposes of maintaining or securing a commercial advantage. Therefore only submissions from commercial competitors will be able to be rejected. This amendment is based on similar provisions in Victorian legislation which has been in operation for many years.</li> <li>A person whose submission is rejected under s.79C(1A) will still be able challenge the decision on legal grounds under s.123 of the Act.</li> </ul>

## Environmental Planning And Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008

ISSUE	RESPONSE
83/84 Right to legal representation	<ul style="list-style-type: none"> <li>• The PAC and JRPP will be determining authorities for development and project applications that are currently determined by councils or the Minister. It is not current custom or practice for legal representatives to be involved in the process of determining such applications in the first instance. The relevant provisions in the Bill reflect the current position.</li> <li>• When a review is before a planning arbitrator they will be essentially standing in shoes of council (not the Court) and are undertaking a review on the merits of the decision, similar to the existing s.82A review i.e. not a review on questions of law.</li> <li>• The proposed amendments will not necessarily prevent people being represented by a lawyer when matters are before the PAC, JRPP or a planning arbitrator, however they will need to be given leave to be represented. The regulations will set out the circumstances in which leave may be given, including where a person is unable to effectively represent themselves.</li> <li>• These provisions are aimed at increasing access and equity and ensuring everybody has the ability to seek an independent review of decisions irrespective of their ability to pay lawyers.</li> <li>• The provisions that are to be introduced, to allow legal representation before review bodies by leave, are similar to provisions currently applicable in the Consumer, Trader and Tenancy Tribunal (see s.36 of the <i>Consumer Trader and Tenancy Tribunal Act 2001</i>).</li> </ul>



ISSUE	RESPONSE
88. Paper subdivision – 60% majority consent to development plan	<ul style="list-style-type: none"> <li>• These paper subdivisions areas were promoted by unscrupulous developers in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries. Rural land was subdivided into terrace style blocks. These lands remain zoned rural and owners are not legally able to build a dwelling house on them. Throughout the 20<sup>th</sup> Century these blocks have been traded speculatively in the hope that someday a residential zoning would be permitted. The pattern of subdivision and fragmented land ownership is unsuitable for 21<sup>st</sup> century residential subdivisions.</li> <li>• Where land has been able to be rezoned the fragmented ownership of the land effectively prevents a market solution for many years.</li> <li>• The Bill introduces a scheme to enable the Government to put a framework in place for a particular paper subdivision, for the benefit of the land owners within these paper subdivision areas. A number of paper subdivision schemes have been developed over time but have been unable to be implemented because of opposition by a small minority of landowners.</li> <li>• The Bill provides that the relevant framework will only become operational once the double majority of the land owners and the owners of the land has agreed to it. The issue raised by the Committee relates to only a small aspect of the total scheme contained in the Bill.</li> <li>• In order for paper subdivisions to be rezoned and developed for residential development – for the benefit of all land owners in the area - co-operation between land owners is required.</li> <li>• A subdivision order cannot be made unless a majority of owners of a majority of the land agree to a development plan that sets out how the co-ordinated development of the land is to be achieved.</li> <li>• A majority of land owners will benefit from the provision of subdivision works as a result of the subdivision order. It is both equitable and appropriate that those land owners who will benefit contribute their share to the cost of these subdivision works. It is not appropriate that a small minority of land owners be able to frustrate the resolution process for the vast majority of land owners.</li> <li>• The implementation of the development plan will enhance the value of all the land held in the paper subdivision, whether or not the owners have agreed to the development plan, by rezoning it for residential, commercial or industrial use as appropriate. The provision enabling multiple owners of a single lot to be treated as one owner is to prevent multiple owners of a single lot disorning the requirement for a 60% majority.</li> </ul>



ISSUE	RESPONSE
88. Paper submittion – 60% majority consent to development plan	<ul style="list-style-type: none"> <li>• Clause 20(a) enables regulations to be made regarding the manner in which consent to a development plan is to be given. Regulations may set out how consent to a development plan may be given by multiple owners of a single lot - one owner's consent to the plan will not necessarily override the remaining owners' failure to consent.</li> </ul>

ISSUE	RESPONSE
<p>90.95/96 Effect of a Development Plan on the application of Land Acquisition (Just Terms Compensation) Act (Sch 5, cl 2(f))</p>	<ul style="list-style-type: none"> <li>• The Bill introduces a scheme to enable the Government to put a framework in place to resolve a particular paper subdivision, for the benefit of the land owners within area. The framework will only become operational once a 60% majority of the land owners has agreed to it. The issue raised by the Committee relates to only a small aspect of the total scheme contained in the Bill.</li> <li>• All land owners will benefit from the provision of subdivision works as a result of the subdivision order. It is equitable and appropriate that all land owners contribute their share to the cost of those subdivision works.</li> <li>• A development plan must set out the rules regarding the form of compensation for land that is acquired and how entitlement to compensation is to be calculated. To provide a flexible mechanism to promote co-operation between land owners it is necessary to enable compensation to be paid as works in kind or in such other way to enable the scheme to be completed. The inflexible provisions of the LA(JTC) Act may not be appropriate if a majority of land owners has agreed to an alternative method of determining compensation.</li> <li>• A majority of at least 60% of the land owners of at least 60% of the land must agree to the development plan before it can be made, including to any provisions which dis-apply the LA(JTC) Act. Clause 3(f) provides additional protection by providing that the Minister for Planning must also consider the specific provisions of the development plan which seek to dis-apply Div 4 Pt 3 of the LA(JTC) Act before making a subdivision order.</li> <li>• Under a development plan it is likely that land owners will have the option of making a monetary contribution to the provision of subdivision works, however if they do not agree to do so, the relevant authority will have the ability to compel the land owner to make a contribution by way of the provision of land or payment of a compulsory monetary contribution. This will be determined in accordance with the development plan that has been agreed by a majority of land owners and will ensure all owners make an equitable contribution to the provision of subdivision works for the area.</li> <li>• An appeal will be available to the Land and Environment Court in relation to determinations relating to compensation if the scheme applying to all other land owners is incorrectly applied in a particular instance. In addition to this, any person will be able to bring a legal challenge under s. 123 of the Act regarding a development plan, within 3 months of the plan being adopted.</li> </ul>

ISSUE	RESPONSE
100. Addition of a party to a Planning Agreement (cl 21) by approval of the Minister	<ul style="list-style-type: none"> <li>This provision replicates the requirements of the existing provision of the Act (see s.93F(7)).</li> <li>Planning agreements are voluntary. Unless a person has made an offer (voluntarily) to enter into a planning agreement, owners and applicants can not be compelled to enter into a voluntary planning agreement.</li> <li>The purpose of enabling Minister to approve that an authority or person is entitled to be a party to a planning agreement is to ensure parties such as the RTA or community groups that may be recipients of public benefits under a planning agreement are parties to the planning agreement and can therefore receive such benefits (otherwise the parties to an agreement may only be the developer and a planning authority).</li> </ul>
Section 84(1)(b)(ii) – makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers	
ISSUE	RESPONSE
103/104. Scope of Minister's SEPP making power	<ul style="list-style-type: none"> <li>The scope of SEPP making power reflects the Minister's current powers to make a SEPP and an REP. As REPs are to be removed, SEPPs will now be able to made with respect to matters of State or regional significance. There is effectively no change to the current statutory provisions.</li> <li>Consultation will still occur where the Minister considers it appropriate, having regard to the subject matter of the proposed instrument. This reflects the current provisions of s.37.</li> <li>There will still be mandatory consultation regarding threatened species under s.34A.</li> <li>The ability to appeal to the Court to challenge a SEPP (s.123) is retained.</li> </ul>
107/108 Scope of LEP gateway determination	<ul style="list-style-type: none"> <li>The introduction of the 'Gateway' process in the LEP making process was supported by a wide cross-section of stakeholders during the consultation process.</li> <li>The gateway determination is a flexible mechanism which will produce more tailored outcomes for the making of LEPs by allowing requirements to be specified that are appropriate to the nature and scope of the proposed LEP.</li> <li>The determination of the community consultation requirements will set the legal minimum requirements that must be complied with before the LEP is made. If these requirements are transgressed then the LEP will be open to legal challenge.</li> <li>The Gateway determination process is being introduced to simplify what is currently, at times, a very complicated and lengthy process.</li> </ul>

ISSUE	RESPONSE
11.0.11 Variation of maximum development contributions by Ministerial Direction	<ul style="list-style-type: none"> <li>• Indirect development contributions are currently regulated by s.94A. The amount of an indirect levy will generally remain at 1%. It is appropriate for maximum fixed development consent levies to be set out in the Regulation rather than in the Act. The current maximum is set out in clause 25K of the Regulation.</li> <li>• A regulation will be made setting out the means by which the proposed cost of carrying out the development is to be estimated and the maximum percentage of an indirect contribution. The equivalent provision for the current s.94A is already prescribed in clause 25J of the Regulation.</li> <li>• Indirect contributions are typically used in brownfield areas, and particularly town centres. If the indirect levy in these types of situation were limited to percentage set out in the regulation it would not effectively capture some of the increased values the result from rezoning the height and density of town centres.</li> <li>• With the introduction of the approval role for the Minister in relation to a additional community infrastructure there is already a formal process in place by which the Minister can consider variations from the maximum prescribed amount after the council has submitted an appropriately verified business plan.</li> <li>• The new direction power allows the council to request, an additional indirect contribution be payable in the case of a particular development application or a particular town centre where the increased development potential can support a higher contribution rate and still allow for reasonable and affordable contributions. In such cases, council will have to demonstrate that a legitimate case exists for increasing the maximum percentage. Any request will have to be justified with a business plan.</li> <li>• The proposed direction power enables the variation of the maximum rate after consideration of the verified business plans on a site by site basis after appropriate ministerial consideration rather than requiring a regulation amendment for each site, which would be administratively cumbersome and over regulatory given the limited areas that will be affected.</li> </ul>

## Environmental Planning And Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008

Section 84(1)(b)(iii) – makes rights, liberties or obligations unduly dependent upon non-reviewable decisions

ISSUE	RESPONSE
11.6. No appeal from decision of PAC after public hearing (s.23F)	<ul style="list-style-type: none"> <li>• Since 1979 the provisions of the Act have allowed appeals from major development proposals unless a public inquiry has been held. The public scrutiny given to a proposal the subject of an inquiry is significantly greater than the mere possibility of an appeal being brought by a concerned party.</li> <li>• These provisions reflect the current provisions relating to Commissions of Inquiry generally and IHA Ps under Part 3A i.e. where a merit appeal would otherwise be available a person may not appeal where a commission of inquiry or an IHA P has held a public hearing.</li> <li>• The public hearing of the PAC will ensure that all interested parties have had an opportunity to be heard and the merits of their views assessed in the ultimate decision.</li> <li>• This provision does not prevent a legal challenge against a PAC decision under s.123 of the Act.</li> </ul>

ISSUE	RESPONSE
<p>119. Panel privative clause (s.118AG)</p>	<ul style="list-style-type: none"> <li>• The provision prevents appeals regarding a decision to appoint a planning administrator, planning assessment panel (PAP) or to confer functions on a regional panel, to exercise certain functions of a council.</li> <li>• The appointment of an administrator, PAP or conferring functions on a JRP is a sanction against councils failing to comply with obligations under planning legislation, unsatisfactory performance or corrupt conduct on the part of the council.</li> <li>• These provisions are designed to protect the community and individual ratepayers who might otherwise be disadvantaged or affected by the actions of a council in failing to meet its obligations under the EP &amp; A Act. Where such intervention is warranted and necessary, ratepayers should not be subject to further costs and delays arising from drawn out court proceedings challenging the validity of an order.</li> <li>• The requirements of natural justice (procedural fairness) requires a decision-maker to inform a party whose interests are likely to be affected by the exercise of power of the case against them and to afford that person a reasonable opportunity to comment and make submissions. The LRC report does not acknowledge that Schedule 2.1 (4.4) creates a requirement for procedural fairness to be given to a council whose powers or functions will be affected by a decision by the Minister (proposed sections 118(7B) and 118(7C)).</li> </ul>

ISSUE	RESPONSE
<p>126. Limitation of appeals regarding infrastructure contributions (Sch.1 cl.2)</p>	<ul style="list-style-type: none"> <li>• The provisions essentially replicate the existing provisions in the Act (see s.94EAA of the Act). They are designed to prevent developers appealing against the community infrastructure contribution payable which could place the whole scheme at risk.</li> <li>• Once a contributions plan has been adopted and a scheme for contributions for essential infrastructure has been established, appeals in respect of individual contributions would put the scheme as a whole at risk.</li> <li>• Levies that are raised under a contributions plan may relate to funds that have already been expended by councils (as the scheme enables recoupment of costs already spent on infrastructure), or that councils have already committed to spending. If a contributions plan could not be relied upon as a final document, the entire scheme would be put at risk.</li> <li>• This limitation only applies where there has been additional level of scrutiny of this plan by the Minister.</li> <li>• It is open to councils to seek the Minister's approval for a plan and then receive protection from appeal in return. Similarly, councils can choose not to seek Ministerial approval and leave the matter open to legal appeals on these questions.</li> <li>• The Bill introduces a series of new considerations as well as accountability provisions (ss.116D and 116E). It is within this context of greater accountability and rigour that the Government recognises that councils should have some protection from administrative challenges to their contributions plans.</li> </ul>
<p>128. Limitation of appeals regarding State infrastructure contributions (Sch.1 cl.16)</p>	<ul style="list-style-type: none"> <li>• The provisions essentially replicate the existing provisions in the Act (see s.94EF of the Act). They are designed to prevent developers appealing against the State infrastructure contribution payable. This is appropriate given the importance of ensuring essential state infrastructure is delivered.</li> <li>• Levies that are raised under a direction or determination by the Minister may relate to funds that have already been expended, or that relate to existing spending commitments. If a direction or determination could not be relied upon as binding all relevant developers, the entire scheme would be put at risk.</li> </ul>



ISSUE	RESPONSE
130/131 Limitation on appeals re failure to enter into planning agreement	<ul style="list-style-type: none"> <li>Planning agreements are voluntary. The only circumstances where one can be required to be entered into as a condition of consent are set out in the proposed schedule 1, clause 25(3) replicating the existing (s.93(1) of the Act). The limitations on appeals are designed to prevent the developer (or any other person) seeking to compel a planning authority to enter into a planning agreement and to prevent a developer (or any other person) who entered into an agreement on a voluntary basis from challenging the terms of that agreement. This provision is necessary to ensure planning agreement remain voluntary commercial agreements.</li> </ul>

## Section 84(1)(b)(N) – Inappropriately delegates legislative powers

ISSUE	RESPONSE
135/136/137 Regulation making power to enable restriction of appeals (under s.96C and 96E)	<ul style="list-style-type: none"> <li>The rights of review created by s.96C and 96E are new and a different review to what is available under the current system. These provisions are breaking new ground.</li> <li>With respect to third party reviews (s.96E), the Regulations that form part of the Bill set out the classes of development to which these types of reviews will apply. The classes have been established having regard to the recommendations of ICAC.</li> <li>The ability to prescribe classes of development for which merit appeals are available is similar to the present situation with designated development (in relation to which merit appeals are presently available). As with the proposed third party reviews, designated development is defined in the Regulations and in ERIs.</li> <li>With respect to planning arbitrator matters (s.96C), a Policy Statement was placed on the table when the Bill was introduced in the Legislative Assembly setting out the proposed class of minor development to be dealt with by planning arbitrators. These have been proposed having regard to the overall planning framework and to ensure there is no inappropriate overlap with other decision making bodies, such as JRPPs.</li> <li>The Implementation Advisory Committee will be consulted before the class planning arbitrator matters is finalised in the regulations. As the introduction of planning arbitrators is a new initiative, it is appropriate that further consultation with the Implementation Advisory Committee be undertaken before the regulations are finalised.</li> </ul>



ISSUE	RESPONSE
140. Prescription of key community infrastructure by regulation	<ul style="list-style-type: none"> <li>The new regime set out in Part 5B provides greater accountability mechanisms for contributions that are not contained in the existing contributions provisions. The types of contributions that can be levied for under the existing provisions is not clearly defined. The new regime outlines key community infrastructure that a council can levy for and sets out 5 key considerations for contributions which promote greater accountability and which have no counterpart under the existing Act. The prescription of key community infrastructure promotes greater transparency and consistency across council areas.</li> <li>Key community infrastructure is set out in the Regulation that accompanies the Bill. A council must justify that a legitimate case exists for any additional community infrastructure. Any request will have to be justified with a business plan and an independent assessment of the proposal.</li> <li>Prescribing the list in regulations is appropriate as it is operational in nature and, therefore, better suited to regulations.</li> </ul>
142. Commencement of Act by proclamation	<ul style="list-style-type: none"> <li>Commencement of legislation by proclamation is not an unusual procedure.</li> <li>Various regulations and guidelines will be drafted to effectively implement the various planning reforms. Enabling the legislation to be commenced by proclamation will enable a staged roll-out of the reforms over an appropriate period of time once regulations and guidelines have been developed. A staged implementation will allow local councils to appropriately plan for the introduction of the reforms.</li> <li>The proposed Implementation Advisory Committee will have a role in reviewing proposed regulations and guidelines before they are finalised.</li> <li>From the consultation process, stakeholders have expressed a desire to be involved in the development of these regulations and guidelines and it is appropriate that further stakeholder input occur in respect of these matters. Opportunity for stakeholder involvement through these consultations is an additional opportunity for people to be engaged in the planning reform process. For this reason it is not possible to set commencement dates for the legislation at this stage.</li> </ul>

Section 84(1)(b)(v) – Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

ISSUE	RESPONSE
144. Ministerial directions regarding contributions powers	<ul style="list-style-type: none"> <li>• The direction power essentially replicates the existing directions powers in section 94E of the Act.</li> <li>• It is not unreasonable that councils who levy contributions should have the arrangements for imposing these levies subject to Ministerial oversight.</li> <li>• There are over 500 existing contributions plans made by councils. In these circumstances it would be administratively unworkable to require all administrative acts to control contribution plans to be submitted to Parliament.</li> <li>• Some directions will only apply to individual land release precincts in a single local government area. It is not an appropriate use of government resources to submit all directions of this nature to parliamentary scrutiny.</li> <li>• A broad directions power is necessary to ensure, for example:             <ul style="list-style-type: none"> <li>- that councils use unspent contributions to provide new infrastructure to new and existing communities within reasonable time frames;</li> <li>- that the scheme can respond quickly where, for example, councils are seeking to levy for matters that are not appropriately the subject of a development contribution;</li> <li>- that councils are able to, where appropriate, expend excess funds raised from contributions for a purpose other than those for which it was collected; and</li> <li>- that levies are not imposed on inappropriate types of development, such as seniors housing or home renovations.</li> </ul> </li> </ul>

ISSUE	RESPONSE
147/148 Removal of concurrences	<ul style="list-style-type: none"> <li>Through the consultation process councils expressed concern about delays and administrative burdens of multiple and often duplicated concurrence requirements. Removal of these unnecessary and duplicative concurrences is, in part, a response to requests made by councils and is an essential part of the State Government's aim to remove red-tape to improve the planning system.</li> <li>Guidelines will be prepared in consultation with the relevant Government agencies regarding determination of development applications for which concurrences are removed by the Bill. Environmental Planning Instruments may also provide heads of consideration, developed in consultation with the relevant Government agencies, to replace the concurrence requirements.</li> </ul>

## BUILDING PROFESSIONALS AMENDMENT BILL 2008

Issues raised by the Parliamentary Legislation Review Committee  
Government responses

ISSUE	RESPONSE
17/18 Exclusion of liability of the State in connection with functions under proposed s.71A and 71B.	<ul style="list-style-type: none"> <li>Proposed sections 71A and 71B make provision for an additional oversight by the Building Professionals Board for accredited certifiers carrying out certification work on complex development where the builder has a history of non-compliance. It is only in connection with functions under these provisions that the protection is provided which will ensure the Board is able to exercise this function without the threat of people bringing actions in negligence or defamation.</li> <li>The Board, in carrying out this function will be required to publish a list of prescribed persons. A mandatory mechanism is available under the Division to ensure people who are to be listed as a prescribed person are able to have their submissions considered. The Board should not be subject to defamation claims for publishing the list in accordance with the legislation.</li> </ul>
21/22/23 Proposed offence under s.84(1) a strict liability offence	<ul style="list-style-type: none"> <li>This provision creates an offence for a building professional to seek to accept or to accept a bribe for acting in contravention of the EP&amp;A Act and regulation in exercising their functions as a building professional. This is an important safeguard against corruption and an important provision relating to building professionals to protect the community.</li> <li>The offence requires the building professional to seek or accept a bribe for contravening the Act. The elements of the offence require the building professional to act or propose to act in contravention of the EP&amp;A Act or regulation in exchange for a benefit which necessarily includes a mental element that must be proven - linking the receipt of the benefit with the associated contravention. This is mirrored in s.84(2) which creates an offence for a person to offer or give a benefit for this purpose.</li> </ul>

ISSUE	RESPONSE
25. Commencement of Act by proclamation	<ul style="list-style-type: none"> <li>• Commencement by proclamation is not an unusual procedure.</li> <li>• Various regulations and guidelines will be drafted to implement the various parts of the legislation effectively. Enabling the legislation to be commenced by proclamation will enable a staged roll-out of these reforms over an appropriate period of time.</li> <li>• From the consultation process, stakeholders expressed a desire to be involved in the development of these regulations and guidelines and it is appropriate that further stakeholder input occur in respect of these matters. Opportunity for stakeholder involvement through these consultations is an additional opportunity for people to be engaged in the planning reform process.</li> <li>• The proposed Implementation Advisory Committee will have a role in reviewing proposed regulations and guidelines.</li> </ul>

# Appendix 1: Index of Bills Reported on in 2008

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Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008	8

## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning				8
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	

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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Board of Adult and Community Education Repeal Bill 2008	N, R				
Building Professionals Amendment Bill 2008	N, R			N, R	
Children (Criminal Proceedings) Amendment Bill 2008	N			N, R	
Coal and Oil Shale Workers (Superannuation) Amendment Bill 2008	N				
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Courts and Crimes Legislation Amendment Bill 2008	N				
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes Amendment (Rock Throwing) Bill 2008	N, R			N, R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Criminal Case Conferencing Trial Bill 2008	N, R				
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Electricity Industry Restructuring	N, R	N, R		N, R	
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Filming Related Legislation Amendment Bill 2008				N, R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Hemp Industry Bill 2008	N, R		N, R	N, R	
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Jury Amendment Bill 2008	N				
Marine Safety Amendment Bill 2008					
Medical Practice Amendment Bill 2008	N, R			N, R	
Mining Amendment Bill 2008	N				
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008		N, R		N, R	
Public Sector Employment and Management Amendment Bill 2008	R				
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Statute Law (Miscellaneous Provisions) Bill 2008	N			N, R	
Strata Management Legislation Amendment Bill 2008				N, R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Western Crown Lands Amendment (Special Purpose Leases) Bill 2008		N, R			
Workers Compensation Amendment Bill 2008	N, R				

Key

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

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

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2007
Road Transport (Safety and Traffic Management) (Road Rules) Amendment (Mobility Parking Scheme) Regulation 2007	Minister for Roads	04/12/07	25/03/08	3