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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CIVIL LIABILITY AMENDMENT (FOOD DONATIONS) BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The object of this Bill is to amend the *Civil Liability Act 2002* (the Principal Act) to provide that a person who donates food (the food donor) does not incur civil liability for any death or personal injury resulting from its consumption by another person if certain requirements are met.

Background

2. The second reading speech states:

> Charities are reporting that companies are now refraining from donating food. These companies believe that they may be subject to civil proceedings for liability for death or injury resulting from eating the donated food… The bill will address these concerns and provide protection from civil liability to those generous members of the community who donate food to charities… The bill balances food safety considerations against the need to support the work of those who provide emergency relief food services to those in need. It will clarify the responsibilities of food donors… [and] encourage businesses to donate good quality, nutritious food that they might otherwise throw out.[1]

The Bill

3. Schedule 1[1] of the Bill inserts a new Part 8A into the Principal Act, comprising ss 58A-58C. Schedule 1[2] and [3] of the Bill describes how the new Part 8A is to apply.

Schedule 1[1] – Protection of food donors from civil liability if certain requirements met

4. Proposed s 58C of the Bill protects a food[2] donor from civil liability if a person dies or suffers personal injury[3] as a result of consuming that food, provided that:

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[1] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[2] The Bill defines 'food' by reference to the *Food Act 2003* [proposed s 58A]. Section 5 of the *Food Act 2003* defines food to include any substance or thing of a kind used, or represented as being for use, for human

(a) The food was donated in good faith for a charitable purpose with the intention that the consumer of the food would not have to pay for it; and

(b) The food was safe to consume (that is, it is not 'unsafe food') when it left the possession or control of the donor; and

(c) The donor has informed the person to whom the food is donated of any relevant food handling requirement or time limits for its consumption.

5. 'Unsafe food' is defined by reference to the *Food Act 2003* [proposed s 58A]. Section 8(1) of the *Food Act 2003* provides that food is unsafe at a particular time if it would be likely to cause physical harm to a person who might later consume it, assuming that:

(a) it was, after that particular time and before being consumed by the person, properly subjected to all processes (including storage and preparation processes, if any) that are relevant to its reasonable intended use; and

(b) nothing happened to it after that particular time and before being consumed by the person that would prevents it being used for its reasonable intended use; and

(c) it was consumed by the person according to its reasonable intended use.

Section 8(2) of the *Food Act 2003* provides that food is not unsafe merely because its inherent nutritional or chemical properties cause, or its inherent nature causes, adverse reactions only in persons with allergies or sensitivities that are not common to the majority of persons.

6. Proposed s 58B of the Bill delineates the scope of protection of food donors under Part 8A. Food donors are to be protected from civil liability of any kind, except from civil liability excluded by s 3B of the Principal Act from applying to Part 8A.

7. Many of the kinds of civil liability excluded from the Principal Act's operation by s 3B of the Principal Act relate to statutory compensation schemes, such as workers compensation and motor accidents compensation. However, s 3B of the Principal Act would also exclude from Part 8A coverage civil liability arising from acts intended to cause injury or death (such as intentional food contamination).

Schedules 1[2] and [3] – Application of the amendments

8. Part 8A is to apply to civil liability, whether arising before or after Bill's commencement, but not to proceedings begun in court before that commencement.

consumption (whether it is live, raw, prepared or partly prepared), excluding a therapeutic good within the meaning of the Commonwealth *Therapeutic Goods Act 1989*.

[3] Personal injury is defined in the Bill to include pre-natal injury, impairment of a person's physical or mental condition or disease [proposed s 58A].

Issues Considered by the Committee

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

Denial of compensation: proposed s 58C

9. Protecting a food donor from civil liability prevents a person who suffers harm as a result of consuming donated food from recovering damages to which they may otherwise have been entitled.

10. However, a countervailing public interest exists to encourage persons to donate food to persons who cannot afford to purchase it.

11. Furthermore, the immunity afforded to food donors by the Bill requires that they donate food that is safe for consumption (even if it is unsuitable for sale) and inform recipients of it as to the handling requirements and timeframes in which it may safely be consumed.

12. Given the public interest in encouraging the donation of foods to persons in need, and the requirements the Bill imposes in order for a food donor to be immune from civil liability, the Committee does not consider that s 58C unduly trespasses on personal rights and liberties.

Retrospectivity: Schedule 1[3]

13. Schedule 1[3] provides that proposed Part 8A will apply to civil liabilities that arose before the Bill's commencement, but not to court proceedings already begun. The Bill is to commence on proclamation.

14. Therefore, the Bill restricts the time in which, and therefore the right of, consumers of donated food who have suffered harm to commence civil claims against food donors.

15. By not affecting cases begun before the Bill's commencement, however, the Bill is limited in its retrospective effect. Consumers of donated food who have suffered injury may initiate a civil claim until the Bill commences, effectively avoiding its provisions.

16. A restricted time period for the commencement of claims may have a significant rights impact if injury or harm is latent and does not manifest until the expiry of the period in which claims may be commenced. However, harm or injury caused by the consumption of unsafe food is typically patent and relatively immediate. This minimises the rights impact of the limited time period in which persons harmed by donated food may sue the donor.

17. The Committee further notes the public policy interest in providing food donors with some measure of legal certainty in respect of donations that occur before the Bill's commencement.

18. The Committee will always be concerned to identify the retrospective effects of legislation which may impact adversely on any person.

19. Given the patency and relative immediacy of harm caused by the consumption of unsafe, donated food and the capacity of persons to initiate legal action against food donors for any such harm until the Bill commences, the Committee considers that Schedule 1[3] of the Bill does not unduly trespass on personal rights and liberties.

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

Commencement by Proclamation: Clause 2

20. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

21. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

22. The Minister's Office has advised the Committee that it is intends the Bill to be commenced by proclamation as soon as possible after assent. Proclamation offers the NSW Food Authority flexibility in the timing for the release of information on the legal responsibilities of food donors, as clarified by the Bill.

The Committee makes no further comment on this Bill.

2. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (DEVELOPMENT CONTRIBUTIONS) BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Craig Knowles MP
Portfolio:	Infrastructure and Planning

Purpose and Description

1. The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* ('Principal Act') to extend the means by which planning authorities may obtain contributions from developers to be applied for public purposes.

Background

2. Development may change, or increase the demand for, public amenities and public services within an area. Currently, if a consent authority[4] determines that a proposed development will, or is likely to, have this effect, s 94 of the Principal Act empowers it to grant development consent[5] conditional upon the developer dedicating land free of cost and/or paying a monetary contribution.

3. The second reading speech states that:

> [t]he reforms brought forward today aim to facilitate the means by which planning authorities may obtain a development contribution to be applied for a public purpose. In addition to obtaining such a contribution under the existing section 94 scheme of the Act, a consent authority will have the option of obtaining development contributions through a defined system of voluntary planning agreements, or imposing a condition of a development consent that requires developers to pay a percentage of the proposed cost of carrying out the development. It will be up to the consent authority to determine which approach best suits its particular needs.[6]

4. The second reading speech also describes the consultation process leading to the Bill's introduction:

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[4] A **consent authority**, in relation to the development consent process, is either the council having the function to determine the application, or a Minister or public authority (other than a council) if specified as having this function in a provision of the *Environmental Planning and Assessment Act 1979*, the regulations or an environment planning instrument: *Environmental Planning and Assessment Act 1979*, s 4(1).

[5] Section 4(1) of the *Environmental Planning and Assessment Act 1979* defines **development consent** to mean consent under Part 4 of the Act to carry out development. Both local and State significant development require development consent, which may be obtained by the making of a determination by a consent authority to grant such consent, or by the issue of a complying development certificate: *Environmental Planning and Assessment Act 1979*, s 76A.

[6] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

> …these reforms are the product of an extensive consultation process involving all key interest groups… A section 94 review committee reported to the former Minister for Planning, the Hon Andrew Refshauge, in January 2000. As the report recommended a range of significant reforms, the Minister had the report published in May 2000 and submissions were invited from interested stakeholders… [I]n 2003, the Minister for Infrastructure and Planning, and Minister for Natural Resources established a task force to look more closely at the way the section 94 developer contribution system currently operates… That task force strongly supported the intent and function of a well-administered section 94 regime… The task force also endorsed a number of improvements to the operation and accountability of the current system as well as the introduction of alternative approaches for obtaining development contributions.[7]

The Bill

Amendments to the Principal Act

5. Schedule 1[3] of the Bill substitutes Division 6 of Part 4 of the Principal Act with new provisions detailing how consent authorities and planning authorities[8] may obtain, hold and apply development contributions.

6. The new Division is not intended to affect the provisions of any environmental planning instrument that requires satisfactory arrangements for particular public infrastructure, facilities or services before development is carried out, apart from a prohibition on making development conditional on the existence of a planning agreement (see paragraph 8 below) [proposed s 93D].

Voluntary Planning Agreements (Schedule 1, Subdivision 2)

7. A planning authority is authorised under the Bill to obtain development contributions by entering into a planning agreement with a developer, as an alternative, or in addition, to s 94 arrangements. Under a planning agreement, a developer may dedicate land free of cost, pay a monetary contribution, provide any other material public benefit, or provide any combination of the above, to be used for or applied towards a public purpose [proposed s 93F(1) and (2)].

8. A planning agreement is voluntary. An environmental planning instrument or a consent authority cannot require a planning agreement to be entered into before a development application is made or a development consent is granted or has effect [proposed s 93I]. However, a consent authority is to consider any relevant planning agreement when determining a development application [schedule 1[1], proposed amendment to s 79C].

9. A planning agreement cannot be entered into, nor amended or revoked unless public notice is given, and a copy of the proposed agreement, amendment or revocation has been available for public inspection for not less than 28 days [proposed s 93G(1)].

10. Regulations are to specify the form, subject matter, making, amendment, revocation and public inspection of planning agreements [proposed s 93L]. It is intended that

[7] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[8] The Bill defines a **planning authority** to mean a council, the Minister, a development corporation or other public authority prescribed by regulations [proposed s 93C].

regulations will also contain safeguards to prevent either public authorities or developers abusing the purpose of planning agreements and to provide for effective public participation and accountability.[9] The Minister is authorised to determine or give directions to other planning authorities as to procedures for negotiating planning agreements, among other standard requirements [roposed s 93K].

11. A person cannot appeal to the Land and Environment Court ('the Court') against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement [proposed s 93J(1)]. However, once entered into, a Court may enforce a planning agreement.

Development consent contributions (Schedule 1, Subdivisions 3 and 4)

12. Proposed s 94 of the Bill preserves the ability of consent authorities to obtain reasonable contributions from developers as a condition of development consent, as described in paragraph 2 above.

13. The two major changes to s 94 arrangements are intended to take account of the impacts of development on communities across local government areas.[10] Under proposed s 94C, a condition may be imposed for the benefit of an adjoining local government area and for the apportionment among the relevant councils of any monetary contribution to be paid under the condition. Under proposed s 94EA, two or more councils may prepare joint contribution plans.

14. The primary change introduced in Subdivision 3 is that a consent authority, if authorised by a development contributions plan, may require an applicant to pay a levy of the percentage of the proposed cost of the development as an *alternative* condition of development consent [proposed s 94A].[11] The second reading speech states that the regulations will set 1% as the maximum percentage of the levy on development costs.[12] The means by which the proposed cost of a development is to be determined are also to be prescribed by regulation [proposed s 94A(5)].

15. A s 94 or s 94A condition may be imposed only if it is allowed by, and determined in accordance with, a contributions plan,[13] which councils are to prepare and approve [proposed s 94B and s 94EA]. The validity of any procedure followed in making and approving a contributions plan may be questioned in legal proceedings commenced in the Court within three months of the date the plan came into effect [proposed s 94EB].

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[9] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[10] The second reading speech explains the rationale for these changes: "Under the current interpretation of section 94, a neighbouring council cannot levy contributions, nor can it be spent in a neighbouring council area. This creates inequities as a developer might pay one area's section 94 levies for new facilities while creating a demand for facilities in another area where no payment has been made. The inability to impose cross-boundary levies also acts as a disincentive to the achievement of economies of scale and related efficiencies in providing facilities which are usually funded from section 94 contributions".

[11] A consent authority cannot impose a condition under proposed s 94A as well as a condition under proposed s 94 as conditions of the same development consent [proposed s 94A(2)].

[12] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[13] However, a consent authority that is not a council may impose a s 94 condition so long as it has regard to any contributions plan that applies to the area in which development is to be carried out [proposed s 94B(2)].

16. However, the proposed appeal rights for s 94 and s 94A conditions differ. A s 94 condition may be disallowed or amended by the Court on appeal because it is unreasonable, even if it was determined in accordance with the relevant contributions plan or a Ministerial direction given under proposed s94E [proposed s 94B(3)]. In contrast, a s 94A condition may not be disallowed or amended by the Court on appeal, if it was determined in accordance with the relevant contributions plan or Ministerial direction [proposed s 94B(4)].

Issues Considered by the Committee

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

Exclusion of merits review: proposed s 93J

17. Proposed s 93J prevents appeals to the Land and Environment Court regarding whether or not a planning agreement is made and the terms of any agreement. On this issue, the second reading speech states:

> Acknowledging the voluntary nature of planning agreements, a developer cannot appeal to the Land and Environment Court against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement. This approach is consistent with current law that developers cannot appeal to the court in relation to matters concerning development applications about which they agreed or acquiesced.[14]

18. However, general court remedies, such as judicial review, are unaffected by proposed s 93J.[15] Therefore, a planning agreement may be challenged, for instance, on the ground that a party to an agreement has acted beyond its power or has failed to accord procedural fairness.

19. The Committee considers that, in general, all decisions of an administrative nature should be the subject of review. However, in some instances, policy considerations will dictate that an appeal is not necessary or practical.

20. Given the voluntary nature of planning agreements and the preservation of judicial review and general legal remedies in respect of planning agreements, the Committee considers that the operation of proposed s 93J does not unduly subject rights, liberties or obligations to a non-reviewable decision.

No appeal: proposed s 94B(4)

21. The Court cannot disallow or amend a condition under s 94A that is allowed by, and determined in accordance with, a contributions plan or a direction of the Minister.

22. In contrast, an appeal right currently exists, and is preserved under the Bill, in respect of the reasonableness of a s 94 condition imposed on a developer. Court proceedings concerning s 94 conditions sometimes concern the reasonableness, fairness or

[14] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.
[15] Explanatory Note.

proportionality of the financial burden that one or more development consent conditions places on developers.[16]

23. The Committee notes, however, that the legal validity of a relevant contributions plan may be challenged within three months of being made. The Committee also notes that a s 94A condition relates to the imposition of a fixed-rate levy and is less discretionary in its nature than a s 94 condition.

24. The Committee reiterates its general position that whilst administrative decisions should generally be reviewable, policy considerations will dictate that an appeal is not necessary or practical in some instances.

25. Given the general nature of a fixed-rate levy, and assuming that the rate is subject to an appropriate maximum as contemplated in proposed s 94A(5)(b), the Committee does not consider that limiting the court's power to amend or disallow a condition under s 94A makes rights, liberties or obligations unduly dependent on non-reviewable decisions.

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

Commencement by proclamation: clause 2

26. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

27. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

28. The second reading speech states that consultation will occur on draft regulations and the updating of guidelines contained in the s 94 contributions plan manual, both of which are to be prepared prior to the Bill's commencement.[17]

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

Setting a maximum percentage of a s 94A levy: proposed ss 94A(5) and 94E(1)(d)

29. The Bill provides for regulations to set the maximum percentage of a levy imposed under proposed s 94A [proposed s 94A(5)(b)]. Specifying the maximum percentage of the levy in regulations, rather than the Bill, enables flexibility, if circumstances warrant a change to the maximum percentage of the levy in the future.[18]

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[16] For example, in *Joseph Lahoud & Associaties Pty Ltd v North Sydney Council* [1998] NSWLEC 23 (27 February 1998), Justice N R Bignold of the NSW Land and Environment Court found a condition imposed under s 94 of the *Environmental Planning and Assessment Act 1979* to be unjustified and set it aside because it "… place[d] an altogether unfair and unreasonable financial burden upon the Applicant in respect of the provision of a public amenity (the upgraded intersection) that the Applicant's development does not itself require, and which benefits many more traffic users than those associated with the Applicant's development".

[17] Mr Graham West, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[18] It is noted in the second reading speech that the Minister will review the rate and the general operation of s 94A two years after the Bill's commencement.

30. Also, the Minister may generally, or in any particular cases or class of cases, direct a consent authority as to the maximum percentage of the levy to be imposed [proposed s 94E(1)(d)].

31. There is no prescribed maximum levy in the Bill in the absence of any regulation or ministerial direction. Whilst the Bill delegates the power to set a maximum percentage, it does not require that any limitation be imposed. Also, in the absence of a default maximum levy, Parliament cannot effectively control the maximum levy as the disallowance of any regulation setting the initial maximum at a level considered to be too high would result in no maximum at all.

32. Given that any regulation altering the maximum percentage of a s 94A levy must be tabled in, and can be disallowed by, each House of Parliament, the Committee does not consider that allowing regulations to prescribe variations to the maximum percentage comprises an inappropriate delegation of power.

33. However, the Committee notes that the Bill does not require any maximum levy be imposed or provide any base level considered acceptable to Parliament. The Committee refers to Parliament the question as to whether the Bill should require a default maximum percentage on a s 94A levy in the absence of any regulation.

The Committee makes no further comment on this Bill.

3. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (IN-CAR VIDEO SYSTEMS) ACT 2004

Date Introduced:	7 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon R J Debus MP
Portfolio:	Attorney General

This Bill was passed by the Legislative Assembly on 7 December 2004 and the Legislative Council on 9 December 2004. It received Royal Assent on 15 December 2004. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. This Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* in relation to the mandatory use of police in-car video equipment (***ICV equipment***) to record conversations between police and a driver or occupant of a car the police have stopped or detained.

Background

2. The Bill implements one of the "recommendations made by Justice Wood in the Royal Commission into the New South Wales Police Service, that all dealings between police and citizens be electronically recorded".[19]

3. In his second reading speech, the Minister stated that:

> The significant benefits of ICV are that it enhances officer safety and provides an accurate independent witness to events, protecting both police and members of the public against unfounded allegations of improper conduct and behaviour. [20]

4. On the technical aspects of the ICV system, the Minister stated that:

> The system consists of two video cameras, a recorder, a monitor, a wireless microphone and control mechanisms to allow an audio and video recording to be made. One camera is able to point forward, the other backwards. The monitor and control centre are mounted within easy reach of the driver's seat. A wireless microphone is worn on the lapel of an officer to allow the audio recording of events outside the car.
>
> … Approximately 350 highway patrol vehicles will be fitted with ICV, with the rollout to be completed by mid 2005. ICV is not only limited to highway patrol officers but will extend to any police officer using a vehicle fitted with ICV.

[19] The Hon John Watkins MP, Minister for Police, Second reading speech, Legislative Assembly Hansard, 7 December 2004 ["Second reading speech"].

[20] Second reading speech.

> ICV has been trialled in the Holroyd Local Area Command and the results are encouraging. There have been no negative comments from members of the public in relation to the use of ICV and since the pilot commenced there have been no complaints in relation to officer behaviour.[21]

The Bill

5. The Bill commences on proclamation.

6. Under the Bill [proposed s 108B], the following police activities require the use of ICV equipment:

   (a) pursuing or following a vehicle with the intention of stopping it; and

   (b) activities in relation to a vehicle that has been stopped, or in relation to the driver or occupant of a stopped vehicle.

7. A police officer who records a conversation with another person using ICV equipment must inform that person immediately before recording, or as soon as practicable after commencing recording. The consent of the person concerned is not required [proposed s 108D].

8. A police officer cannot make an audio recording of a conversation with a person using ICV equipment after arresting that person. They can, however, make a visual recording of the conversation [proposed s 108E].

9. The Bill exempts ICV recordings from the *Listening Devices Act 1984.* That Act makes it unlawful to record a conversation without the consent of all parties to the conversation, except in limited circumstances[22] [proposed s 108F].

10. The Commissioner of Police must keep ICV recordings for two years and the Minister stated "persons who have been recorded on ICV equipment will be able to view the recordings at a police station."[23]

11. The Bill provides that the offences under the *Privacy and Personal Information Protection Act 1998* of *Corrupt disclosure and use of personal information by public sector officials* (section 62) and *Offering to supply personal information that has been disclosed unlawfully* (section 63) apply to ICV recordings [proposed s 108H]. The maximum penalty for these offences is 100 penalty units ($11,000) or imprisonment for 2 years, or both.

[21] Second reading speech.
[22] See section 5 of the *Listening Devices Act 1984.*
[23] Second reading speech.

Issues Considered by the Committee

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

Privacy: Proposed sections 108B & 108F

12. The *Listening Devices Act 1984* prohibits the audio recording of conversations without the consent of parties to the conversation. In this way, that Act clearly protects individuals' right to privacy from undue interference, especially from law enforcement agencies and other arms of government.

13. By exempting ICV audio recordings from the operation of that Act, the Bill reduces the protection of an individual's privacy. The Committee will always be concerned about the diminution of the fundamental right to privacy. In this case, the Bill requires police officers to make audio recordings of drivers and their passengers regardless of any actual or suspected wrongdoing.

14. The Committee notes that the stated purpose of the introduction of ICV recordings is to provide an accurate record of conversations between the police and members of the public on NSW roads to protect both from unfounded allegations of misconduct. The Committee also notes that the police must inform a person that they are being recorded on ICV equipment before or as soon as practicable after recording has begun.

15. The Committee also notes that once a person is arrested, audio recording must cease, presumably to protect the rights of the accused.

16. The Committee notes that the recording of conversations without consent of all the parties to the conversation is a breach of the right to privacy.

17. The Committee also notes that ICV recordings are intended to protect the police and members of the public from unfounded allegations of misconduct.

18. The Committee refers to Parliament the question whether the introduction of mandatory ICV recordings is an undue trespass on the right to privacy.

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

Commencement by proclamation: Clause 2

19. Clause 2 provides that the Act will commence on proclamation.

20. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

21. The Ministry for Police advised the Committee that the delay was required to allow time for the Police Standard Operating Procedures to be amended to take account of these amendments, especially removing the requirement to obtain consent before making an audio recording of a person.

22. The Act commenced on 23 December 2004.

The Committee makes no further comment on this Bill.

4. LEGAL PROFESSION ACT 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Pursuant to a suspension of Standing Orders, the Legal Profession Bill 2004 passed all stages in the Legislative Assembly on 7 December 2004 and in the Legislative Council on 10 December 2004. The Bill was assented to on 21 December 2004. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. The *Legal Profession Act 2004* ('the Act') replaces the *Legal Profession Act 1987* ('the 1987 Act'), regulating legal practice in New South Wales consistent with the law in other Australian jurisdictions.

Background

2. In 2003, under the auspices of the National Legal Profession Model Laws Project, the Standing Committee of Attorney General endorsed model provisions for national legal practice regulation.

3. These model provisions are designed to ensure that clients and practitioners in all States and Territories have common rights and responsibilities, and to regulate the legal profession on a consistent, national basis, in the interests of the fair administration of justice and for consumer protection. The provisions were finalised following a nation-wide consultation with legal professional associations, regulatory authorities, consumer organisations and heads of courts and tribunals. The model provisions are of three types:

   - Core uniform (CU) provisions that are to be adopted in each State and Territory, using the same wording as far as practicable;
   - Core non-uniform (CNU) provisions that are to be adopted in each State and Territory, but the wording of the model provisions need not be adopted; and
   - Non-uniform (NU) provisions that States and Territories can choose whether to adopt and to what extent.

4. In July 2004, the Commonwealth, States and Territories agreed to implement all the CU and CNU provisions in their respective jurisdictions, and established the Legal Profession Joint Working Group to maintain uniformity and monitor implementation. The Joint Working Group has representatives from all jurisdictions and from the Law Council of Australia.

5. The second reading speech states that the new Act:

> removes barriers to legal practitioners practising across State and Territory borders. A legal practitioner admitted in New South Wales will now be able to practise in any Australian jurisdiction without the need to also be admitted in that jurisdiction. A client in Victoria will have the same rights and remedies as a client in New South Wales. Disciplinary action taken against a practitioner in New South Wales can be enforced in Queensland.[24]

6. The second reading speech details the consultations that led to the new Act:

> In preparing this bill, which adopts the national model provisions for New South Wales, there has been extensive consultation with the Law Society, the Bar Association, the Legal Services Commissioner, the Legal Profession Advisory Board and the Administrative Decisions Tribunal.[25]

The new Act

Overview of the Act's content and structure

7. The Act incorporates the CU and CNU provisions mentioned above and most of the NU provisions. As the model provisions address only those aspects of legal profession regulation where national uniformity is essential, the Act retains parts of the 1987 Act (such as the existing regulatory bodies, and the distinction between barristers and solicitors). The Act also implements recommendations of:

- the Law Reform Commission in Report 99 (*Complaints against lawyers: an interim report*) published in April 2001;
- the Attorney General's Department in a review conducted by it (*A further review of complaints against lawyers*) published in November 2002; and
- legal profession regulators ('reform proposals').

8. The Act comprises eight chapters and nine schedules, the first of which repeals the 1987 Act and the *Legal Profession Amendment (Costs Assessment) Act 1998* (an unrepealed amending Act). Schedule 6 makes minor consequential amendments to other Acts.

General principle regarding legal practice in NSW

9. Consistent with the 1987 Act, the general principle established by the Act is that persons must be eligible for, and established to be fit and proper persons to hold, a NSW practising certificate (ss 42 and 48). In addition to statutory conditions, a Council may impose reasonable and relevant conditions on the issuing of a certificate (e.g., regarding continuing legal education or supervision), the contravention of which may constitute unsatisfactory professional conduct or professional misconduct, and attract a penalty of 100 penalty units ($11,000) (s 58). These conditions may be

[24] Mr Bob Debus MP, second reading speech, Legislative Assembly *Hansard,* 8 December 2004 ('Second reading speech').
[25] Second reading speech.

varied, or additional conditions imposed, if a local legal practitioner has been charged with a **"relevant offence"**.[26]

10. The Act also outlines the grounds upon which a certificate may be refused, suspended or cancelled, delineates "show cause events" (acts of bankruptcy, indictable offences and tax offences) relevant to ascertaining a person's fitness or continuing fitness to hold a certificate, and authorises the immediate suspension of a certificate in certain instances. An applicant has the right to:

- make representations as to why certain decisions should or should not be made by a Council (e.g. ss 61(1)(d) and 78(4));
- provide certain information to be taken into account in decision-making (e.g. s 67); and
- appeal certain decisions before the Administrative Decisions Tribunal (e.g. s 75) or the Supreme Court (e.g. ss 108 and 238).

11. Chapter 2 of the Act further outlines the requirements that are specific both to practising as a barrister or solicitor in relation to client access, advertising, etc, and to differing business structures in which legal services are provided. The objective underpinning these provisions is that clients' rights are protected and the professional obligations and privileges of practitioners are unaffected by the business structure in which they work.[27]

Removal of restrictions on interstate legal practitioners practising in NSW

12. The Act allows legal practitioners admitted outside NSW to practice within NSW without first being admitted in NSW. This amendment is being implemented in other Australian jurisdictions so that the former restrictions on legal practitioners practising interstate no longer exist. The provisions of the Act extend to any lawyer practising in NSW, whether or not the lawyer has been admitted in another jurisdiction.

13. Two new terms are used in the Act: "**Australian lawyer"** and **"Australian legal practitioner**". A person is an "**Australian lawyer"** if they are admitted by the NSW Supreme Court (thereby defined as a "local lawyer") or by a Supreme Court in another jurisdiction (thereby defined as an "interstate lawyer") (s 5).

14. A person becomes an **"Australian legal practitioner**" if they are issued with a practising certificate in NSW or interstate, whether to practise as a solicitor or barrister.

15. Section 40 provides for the entitlement of an **Australian legal practitioner** to engage in legal practice in NSW. Division 11 deals further with the obligations and entitlements to practice of interstate legal practitioners in NSW, including the requirement for professional indemnity insurance.

[26] A **"relevant offence"** is a **"serious offence"** or an offence that would have to be disclosed under the admission rules (s 51(4)). A **"serious offence"** is an indictable offence in any jurisdiction or an offence that would be indictable if committed in NSW (s 4(1)).

[27] Second reading speech.

General requirements for engaging in legal practice and other matters

16. Among other matters, the Act also:

- makes it an offence for any person, other than an Australian legal practitioner, to **"engage in legal practice"** for free, gain or reward, unless that person is an Australian legal practitioner.[28] (Max. penalty: 200 penalty units ($22,000) (s 14);

- sets out requirements for legal practitioner trust accounts, replacing the inconsistent requirements that currently exist in each State and Territory with the aim of reducing compliance costs and creating offences for compliance failures (ss 253-266);

- specifies the kinds of legal costs that are recoverable from clients and what must be included in a cost disclosure statement (ss 309-311, subject to s 312 exceptions). The general rule is that a client will not be required to pay legal costs for undisclosed expenses unless the costs have been assessed under Division 11 (s 317)[29];

- ensures consumer rights in relation to fidelity funds do not differ between jurisdictions, and provide appeal rights (ss 452-453);

- provides the scheme for disciplining both current and former Australian lawyers and foreign lawyers for **"professional misconduct"** or **"unsatisfactory professional conduct"**;

- provides that **"professional misconduct"** involves a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence occurring in the practice of law (s 497);

- provides that **"unsatisfactory professional conduct"** is conduct that falls short of the standard of competence and diligence that a member of the profession is entitled to expect from a reasonably competent legal practitioner (s 496);

- provides that serious offences, tax offences, offences involving dishonesty and the charging of excessive legal costs, for instance, may constitute professional misconduct or unsatisfactory professional conduct (s 498);

- authorises the appointment of, and provides for the duties and powers of, three categories of external intervenors who, in certain circumstances, can intervene in the business and professional affairs of legal practices to protect the interests of the public and clients of the legal practice [chapter 5];

[28] Section 4(1) of the Bill defines **"engage in legal practice"** as including to "practise law". In his second reading speech, the NSW Attorney General stated that the meaning of the term "engaging in legal practice: "... has deliberately been left to the common law. However, I do not expect this definition to limit in any way the current reservation of legal work for practitioners. I intend to ensure that only qualified people can provide legal services to the public. This common law approach has the benefit of remaining flexible and allows the development of common jurisprudence on what constitutes legal practice throughout Australia".

[29] A large number of complaints received by the Office of the Legal Services Commissioner (OLSC) relate to costs non-disclosure and dissatisfaction with legal costs in general: OLSC Submission to the Law Reform Commission Review 2000, paragraph 3.55, www.lawlink.nsw.gov.au/olsc1.nsf.

- specifies the powers of investigation for trust account investigators or external examiners, a complaints investigation, and a compliance auditor, including the entry into and search of premises (ss 662-664), to examine persons, inspect books and hold hearings with respect to an investigation of an incorporated legal practice (ss 667-669);

- enables the Commissioner or the Law Society to conduct a compliance audit of a law practice to determine if the requirements of the Act, the regulations or the legal professional rules are being met, irrespective of whether a complaint has been made against an Australian lawyer (s 670);

- provides that a failure by an Australian legal practitioner to comply with any requirement lawfully made by an investigator, to contravene any condition lawfully imposed by an investigator, or to ensure that others comply with investigative requirements, is capable of being professional misconduct (s 671);

- creates the offences of obstructing an investigation without reasonable excuse (maximum penalty: 100 penalty units ($11,000)) (s 674), and destroying evidence with the intent or prevent or interfere with an investigation (maximum penalty: 5 years imprisonment) (s 675).

Miscellaneous provisions

17. Chapter 8 of the Act contains standard provisions for delegation, liability of principals, injunctions, liability protection, evidence and a five-year review of the proposed Act. Some of these provisions re-state the existing provisions in the 1987 Act. Other provision are new, including:

    - authorising the sharing of information between NSW, interstate and New Zealand regulatory bodies (s 721);
    - making it an offence for a "relevant person"[30] to disclose "personal information", or any other person to disclose information obtained when administering the Act, subject to statutory exceptions (ss 722-723) and a record that is at least 30 years old (s 725); and
    - clarifying that a person is not excused from specified requirements under the Act on the ground of legal professional privilege, the privilege against self-incrimination or any other duty of confidence (s 724(1)).

18. The regulation-making power (s 738) has been amended to remove the requirement that the Bar Council, Law Society and the Advisory Council be given an opportunity to express their views on any proposed regulation unless "the circumstances are exceptional".

[30] A **"relevant person"** is defined to mean a local regulatory authority or a member, an employee, a former member or former employee thereof (s 722(4)). A "**local regulatory authority"** is defined as an authority having powers or functions under this Act, or a person or a body prescribed, or of a class prescribed, by the regulations. Local regulatory authorities include the Law Society, the Bar Council, the Legal Services Commissioner and the Legal Profession Admission Board.

19. Also, the Act now provides that a regulation may provide that an application may be made to the Tribunal for a review of a specified decision or class of decisions made by a specified person or body in the exercise of functions conferred by or under the Act or regulations.

20. Schedule 9 contains savings, transitional and other provisions, including:

- requiring a person who needs to obtain a practising certificate under the Act to do so no later than 12 months after the commencement of Part 2.2, after which time their failure to do so constitutes an offence (cl 10);
- clarifying transitional arrangements for complaint handling provisions; and
- providing that new complaints about conduct that occurred before the Act's commencement that would not be able to be complained about may still be heard (cl 17(2)). However, no determination or order may be made about such conduct that is more onerous than that which could have been made under the old Act (cl 17(4)), avoiding the retroactive application of a penalty.

Issues Considered by the Committee

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

Power of entry into premises: Part 6.3 (ss 661-664)

21. Section 662 of the Act confers upon investigators powers of entry extending beyond situations where the occupier consents or a warrant is obtained. Once entry has been effected, the Act provides investigators with an extensive range of search and seizure powers. A person commits an offence if they fail, without reasonable excuse, to comply with any request made by an investigator to produce material, answer questions or render other assistance (s 664(1)(i) and (5)). A failure to comply with an investigator's request may also constitute professional misconduct (s 671).

22. The Committee considers that the power to enter private land without consent or a warrant is a trespass on the right to property and privacy. Such a power should only be given when overwhelmingly in the public interest to do so.

23. The Committee notes that there is a strong public interest in permitting an investigator to enter premises to prevent the destruction or interference with material relevant to a trust account investigation. (In the case of a complaint investigation, the investigator may only enter premises with the consent of the occupier, or under the authority of a search warrant issued under Part 6.3 (s 662(3)).

24. The Committee also notes that the powers of entry in the Act are limited. For instance, in relation to entry into residential premises without consent or a warrant, an investigator must reasonably believe that it is "urgently necessary" so as to prevent the destruction or interference with relevant materials, and such an entry must first be authorised by the appropriate Council or the Commissioner (s 662(2)(b)(iii) and (4)).

25. Given the limitations on the entry powers and the significant public interest in preserving materials relevant to investigation of legal practitioners for trust account breaches, the Committee does not consider that the powers of entry and search without a warrant in the Act unduly trespass on individual rights.

Right against self-incrimination: ss 639 and 724

26. A person is not excused from complying with three specified requirements under the Act on the ground of legal professional privilege, the privilege against self-incrimination or any other duty of confidence (s 724(1)). These requirements are:

- to report certain irregularities regarding trust accounts under s 263,
- to give a receiver access to documents or information under s 638, and
- to provide assistance in relation to a trust account or complaint investigation, a trust account examination or a compliance audit under Chapter 6.

A failure to comply with these requirements attracts penalties ranging from a maximum of 50 penalty units ($5,500) for a s 263 offence to a maximum of 100 penalty unites ($11,000) for a s 638 offence.

27. However, if before complying with any of these specified requirements, a person advises that compliance may tend to incriminate him or her, the notice, document or information provided is inadmissible in any proceeding against the person for an offence, with three exceptions. The notice, document or information remains admissible in any proceedings against the person for:

- offences under the Act;
- any other offence relating to the keeping of trust accounts or the receipt of trust money; and
- an offence relating to the falsity of the answer (s 724(3)).

28. Similarly, a person examined before the Supreme Court in relation to certain matters (see s 639) is not excused from answering a question because it may incriminate him or her. However, if the person objects on the ground that the answer may incriminate him or her, the evidence is inadmissible in any proceedings for an offence, other than an offence against the Act or an offence relating to the falsity of the answer.

29. It has become relatively common for laws in New South Wales regarding issues of great public concern, such as public safety, to compel persons to provide information the Government requires when that information is peculiarly within the knowledge of the person, even though to do so may incriminate him or her. However, it is usual to prevent such information being used against such persons in criminal proceedings, except for proceedings regarding the falsity of the information.

30. The right not to incriminate oneself is recognised as a basic human right protecting personal freedom and human dignity. Article 14(3)(g) of the International Covenant on Civil and Political Rights states that a person has the right "[n]ot to be compelled to testify against himself or to confess guilt".

31. Allowing testimony compulsorily given by a person to be used against that person in proceedings for offences under the Act is a direct violation of the right not to incriminate oneself.

32. Sections 639(4) and 724(3) do provide some protection against self-incrimination regarding offences outside the Act. If a person objects to providing self-incriminating information, there are certain limits on its use. However, there is no requirement that the person be advised that they may object to providing self-incriminating information, as is usually the case for similar provisions in legislation in New South Wales. Consequently, a person must understand their right against self-incrimination in order to have any benefit of it. Persons who are not lawyers may be subject to questioning under those sections.

33. The Committee notes that the privilege against self-incrimination is a fundamental right expressed in the International Covenant on Civil and Political Rights and the common law. The Committee considers that this right should only be modified or restricted to achieve a legitimate aim in the public interest and in a manner proportionate to that aim.[31]

34. The Committee has written to the Minister to seek advice as to the need to remove the privilege against self-incrimination under sections 639 and 724 in relation to offences under the Act and other offences regarding trust accounts and monies.

35. The Committee has also written to the Minister to seek advice as to the reason that there is no requirement that a person be informed of his or her right to object to compulsory self-incrimination in order to engage sections 639(4) and 724(3).

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

Commencement by Proclamation: Clause 2

36. Clause 2 of the Act provides for it to commence on proclamation.

37. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

38. The second reading speech states that the Act:

> … will be proclaimed when the regulatory and other authorities affected by the amendments have had time to establish the new processes and procedures that will be required.[32]

The Committee makes no further comment on this Bill.

[31] Cf *Legislation Review Digest 15 of 2004*, pp 26–9.
[32] Second reading speech.

5. MARINE SAFETY AMENDMENT (RANDOM BREATH TESTING) BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Ports

Purpose and Description

1. The Bill amends the *Marine Safety Act 1998* (the Act) to:

- enable random breath testing of persons operating vessels;
- prohibit persons under 18 years from operating vessels with any alcohol present in their blood; and
- increase the penalties for offences under the Act involving the presence of certain prescribed concentrations of alcohol in the blood of persons operating vessels in line with the penalties for offences involving prescribed concentrations of alcohol under the *Road Transport (Safety and Traffic Management) Act 1999*.

Background

2. The second reading speech noted that research conducted by the National Maritime Safety Committee has shown that alcohol has been involved in at least 35% of all boating fatalities nationwide; in New South Wales alcohol has been a factor in more than 25% of all boating-related deaths since 1992.

3. Based on this evidence, the Alcohol Summit recommended that the NSW Police investigate the feasibility of random breath testing in New South Wales waterways.[33]

4. The Bill reflects recent changes to the *Road Transport (Safety and Traffic Management) Act 1999* which prohibited drivers who are the holders of learner licences or provisional licences from driving with *any* alcohol present in their blood.[34]

The Bill

5. The Bill amends the definition of *operate a vessel*, so that the term (where used in relation to alcohol and drugs in connection with boating safety) includes *supervising a juvenile operator of a motor vessel* [proposed amended s 20(1)(c)].

[33] Mr G J West MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.
[34] See report on the *Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2004*, Legislation Review *Digest* No 1 of 2004.

6. The Bill provides for a youth range prescribed concentration of alcohol (PCA), being more than zero grams, but less than 0.02 grams, of alcohol in 100 millilitres of blood [proposed amended s 22(a1)].

7. The Bill makes it an offence for a person under 18 years of age to operate a vessel while having the youth range PCA present in the person's blood [proposed new s 24(1A)].

8. The Bill amends s 24 of the Act to provide for a penalty for this proposed offence, and increases the maximum penalties for existing offences under the Act as follows:

Prescribed Concentration of Alcohol	Current Penalty	Proposed Penalty
Proposed youth PCA	None	10 penalty units ($1,100) for first offence 20 penalty units ($2,200) for any subsequent offence
Special range PCA Low range PCA	5 penalty units ($550) for first offence 10 penalty units ($1,100) for any subsequent offence	10 penalty units ($1,100) for first offence 20 penalty units ($2,200) for any subsequent offence
Middle range PCA	10 penalty units ($1,100) or 6 months' imprisonment for first offence and any subsequent offence	20 penalty units ($2,200) or 9 months' imprisonment for first offence 30 penalty units ($3,300) or 12 months' imprisonment for any subsequent offence
High range PCA	15 penalty units ($1,650) or 9 months' imprisonment for first offence 20 penalty units ($2,200) or 12 months' imprisonment for any subsequent offence	30 penalty units ($3,300) or 18 months' imprisonment for first offence 50 penalty units ($5,500) or 2 years' imprisonment for any subsequent offence

9. It is a defence to the proposed offence if the defendant proves that the presence in the defendant's blood of the youth range PCA at the time that the person is alleged to have committed the offence was not caused by:

   - the consumption of an alcoholic beverage (otherwise than for the purposes of religious observance) or
   - the consumption or use of any other substance (eg, food or medicine) for the purpose of consuming alcohol [proposed new s 24A].

10. The Bill allows for random breath testing by police officers, so that a police officer may require a person to undergo a breath test if the officer has reasonable cause to believe the person is or was operating a vessel [proposed new cl 3(1) of Sch 1 to the Act].

Issues Considered by the Committee

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

11. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

12. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

13. The Committee has written to the Minister seeking his advice as to why the Bill is to commence on proclamation.

The Committee makes no further comment on this Bill.

6. PHOTO CARD BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Roads

Purpose and Description

1. The Bill provides for the issue by the Roads and Traffic Authority (RTA) of a Photo Card to residents of New South Wales who are over 16 and do not hold a driver licence. The Photo Card can be used as evidence of the age and identity of a person.

2. The Photo Card will replace the proof of age card currently issued by the RTA, and current proof of age cards will cease to be valid after 3 years.

Background

3. It was stated in the second reading speech that:

> The New South Wales photo card will be a voluntary card and will be available to residents of New South Wales aged 16 years and above who do not hold a drivers licence. The New South Wales photo card is not an Australia card... The card will provide New South Wales residents who do not hold a drivers licence with a document that will assist them to establish their entitlement to rights and privileges in the community.
>
> ...Over recent years the New South Wales drivers licence card has increasingly been relied upon as a trusted and reliable photo identification document. This has placed an obligation on the Government to ensure that people who are unable to obtain a drivers licence for whatever reason are not unfairly disadvantaged. The voluntary New South Wales photo card will make it easier for older people and people with disabilities who require photo identification but cannot obtain a valid photo identification document.
>
> The card will replace the existing proof of age card, which will be phased out over the next three years, and it will contain security and design features that will assist service providers in establishing evidence that a photo card holder is at least 18 years of age...
>
> The bill will also enable the RTA to adapt the photo card to incorporate future developments in security technology that will help prevent identity fraud. The RTA is at the forefront of national strategies to protect the integrity of these systems, which in future may include the use of biometric indicators and anti-tampering and anti-forgery technologies. Of course biometric indicators would only be introduced after proper community consultation and would be strictly regulated under legislation or regulation. It is desirable that any technological solutions in these areas should be developed nationally to ensure compatibility and interoperability between jurisdictions.[35]

[35] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

4. The cost of the card will be $40 for a five-year period. The RTA will index the Photo Card fee annually on 1 July each year.[36]

The Bill

5. The Bill consists of the following:

- Part 1 Preliminary;
- Part 2 Issue of Photo Card:
  - authorises the RTA to issue Photo Cards [proposed s 5]; and sets out matters such as the criteria for eligibility for a Photo Card [proposed s 6][37], and the grounds on which the issue of a Photo Card must or may be refused [proposed s 7];[38]
  - a person who is directed by the RTA to return a Photo Card must do so within 14 days after the direction is given, or such longer period as the direction may allow.[39] Failure to do so attracts a maximum penalty of 20 penalty units (currently $2,200) [cl 11(3)].[40]
  - a person to whom a Photo Card has been issued must notify the RTA as soon as practicable if the Photo Card is damaged, stolen, lost or destroyed during the period for which the Photo Card is valid. The maximum penalty is 10 penalty units (currently $1,100) [cl 12].
- Part 3 Photo Card Register:
  - requires the RTA to maintain a Photo Card Register [proposed s 13]; imposes obligations on the RTA to ensure the security of information

[36] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[37] A person is eligible for the issue of a Photo Card only if the RTA is satisfied that the person:
(a) is ordinarily resident in NSW;
(b) is at least 16 years of age;
(c) is not the holder of a driver licence under the *Road Transport (Driver Licensing) Act 1998*; and
(d) satisfies such other eligibility criteria as may be prescribed by the regulations.

[38] An application may be refused as a result of:
- an offence under the ensuing Photo Card Act;
- an offence involving fraud or dishonesty;
- an offence prescribed by the regulations; or
- such other grounds as may be prescribed by the regulations.

However, such Regulations are not to be made except on the recommendation of the Minister, made after consultation with the Attorney General [cl 7(4)]. The Bill provides for the review by the Administrative Decisions Tribunal of decisions of the Authority to refuse to issue or to cancel a Photo Card: cl 13 of the *Photo Card Bill 2004*.

[39] The Authority may cancel a Photo Card issued to a person by notice in writing and direct the person to return a cancelled Photo Card to the Authority [cl 11]. The grounds for such cancellation are:
(a) the person is not eligible for the issue of a Photo Card;
(b) the Photo Card was issued in error;
(c) the photograph on the Photo Card is no longer a true likeness of the person;
(d) the Photo Card is incorrect in any respect; or
(e) such other grounds as may be prescribed by the regulations": cl 11(1) of the *Photo Card Bill 2004*.

[40] Proceedings for an offence under the ensuing Act or any subsequent Regulations may be dealt with summarily before a Local Court: cl 33 of the *Photo Card Bill 2004*.

thereon [proposed s 14][41]; and provides the RTA with powers designed to protect the integrity of such [proposed s 15];

- Part 4 deals with security arrangements for photographs;
- Part 5 creates the following offences:
  - obtaining or attempting to obtain a Photo Card by a false statement, misrepresentation or other dishonest means, and possession of a Photo Card so obtained [proposed s 20];
  - unlawful possession of a Photo Card [proposed s 21];
  - manufacturing false Photo Cards [proposed s 22];
  - giving or lending a Photo Card to another person [proposed s 23];
  - improper use of a Photo Card [proposed s 24];
  - altering or tampering with a Photo Card [proposed s 25]; and
  - unauthorised reproduction of a Photo Card photograph [proposed s 26].
- Part 6 Enforcement:
  - provides for an authorised officer[42] to direct a person in possession of a Photo Card to produce it to the officer on suspicion of various irregularities [proposed s 27]; and authorises the seizure of a Photo Card on various grounds [proposed s 28]; and
- Part 7 Miscellaneous.

Issues Considered by the Committee

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

Commencement: Clause 2

6. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

7. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

8. The Committee has written to the Minister seeking his advice as to why the Bill is to commence on proclamation rather than assent.

The Committee makes no further comment on this Bill.

[41] The Register may be kept as part of or in conjunction with any register kept by the RTA under the *Road Transport (Driver Licensing) Act 1998*.

[42] An *authorised officer* is:
(a) a police officer;
(b) a person who is appointed for the time being by the Authority as an authorised officer for the purposes of the provision in which the expression is used; or
(c) a person (or a person belonging to a class or description of persons) prescribed by the regulations: cl 3 of the *Photo Card Bill 2004*.

7. ROAD TRANSPORT (GENERAL) BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Roads

Purpose and Description

1. This Bill:

   (a) implements in New South Wales a legislative scheme for the compliance and enforcement of mass, dimension and loading requirements for heavy vehicles based on model provisions (the ***national model provisions***) approved by the Australian Transport Council for the purpose of achieving nationally consistent legislation;

   (b) repeals and re-enacts the *Road Transport (General) Act 1999* (the ***former Act***) to include the national model provisions and consequentially re-organise the provisions of the former Act; and

   (c) makes consequential amendments to other Acts.

Background

2. In the second reading speech, Mr. Stewart said that the Bill:

> [S]eeks to improve compliance within the heavy industry with load restraint, mass and dimension requirements for heavy vehicles as well as with fatigue and driving hours obligations. The Bill extends liability for breaches of these requirements from truck drivers and/or operators to consigners, loaders, packers and owners, thereby establishing a so-called chain of responsibility throughout the road transport supply chain. The Bill also provides the Roads and Traffic Authority with additional powers to search business premises with a warrant or by consent and to search trucks.
>
> To date, only truck drivers and/or operators have been held responsible for breaches of road transport laws. The National Transport Commission, however, recommended that uniform legislation be introduced by all States and Territories that would enable other parties in the supply chain to be held liable for breaches of road transport laws. This was approved by Australian transport and roads Ministers in November 2003.[43]

The Bill

3. Among other things, this Bill:

   - establishes a chain of responsibility so that all those parties in the road transport supply chain, not just drivers and transport operators, can be held accountable and prosecuted for an offence under the Act;

[43] Mr Tony Stewart MP, Parliamentary Secretary, Second reading speech, Legislative Assembly Hansard, 8 December 2004.

- requires a consignor or other person who organises transport of a container by road to provide a "container weight declaration" without which a driver is not permitted to transport the container;
- provides a "reasonable steps defence" to substantial and severe risk breaches relating to load mass requirements. The model bill provided this defence only for minor risk breaches;
- provides new penalties "that have been tailored to address specific types of offences. For example, the Bill distinguishes between first-time offenders and systemic offenders with more serious sanctions for those who persistently break the law."[44]
- provides both administrative and court-imposed penalties, including the administrative penalties of the RTA issuing improvement notices, which identify improvements a business can make to its systems to ensure compliance, and issuing formal warnings, for example, when a breach of a load restraint requirement has unintentionally occurred;
- enables the enforcement in NSW of penalties imposed in other Australian jurisdictions, and vice versa;
- provides whistleblower protection for people who assist with investigations or report breaches; and
- extends powers to authorised officers to investigate offences relating to heavy-vehicle driver fatigue, including stopping, directing, or moving a heavy vehicle, and inspecting or searching heavy vehicles and, with consent, business premises, for compliance purposes.

Issues Considered by the Committee

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

Extended Strict liability

4. To extend responsibility for heavy vehicle offences up the supply chain, the bill makes consigners, loaders, packers and owners liable for various offences regarding the mass, loading and dimension requirements for heavy vehicles, many of which are actually committed when the driver takes the vehicle onto the road [proposed ss 53 – 57, 75, 80]. The bill makes such persons liable regardless of whether they intended or even knew of the offence. For many of the offences, the Bill also provides that a mistaken and reasonable belief about the circumstances of the offence is not a defence [proposed s 90].

5. To balance this extended and strict liability, the Bill provides various "reasonable steps" defences [proposed ss 87 – 89]. Generally, these defences provide that the person is not liable for a contravention if they had taken all reasonable steps to prevent the contravention.

[44] Mr Tony Stewart MP, Parliamentary Secretary, Second reading speech, Legislative Assembly Hansard, 8 December 2004.

6. Given the regulatory nature of the offences, the apparent reasonableness of placing an obligation on all those in the supply chain to ensure that mass requirements for heavy vehicles are met, and the provision of the defence of taking reasonable steps (as defined in the Bill) to prevent the offence, the Committee does not consider that the extended and strict liability provisions in the Bill trespass unduly on personal rights and liberties.

Authorised officers

7. The RTA can appoint authorised officers for the purposes of the Act. Such officers need not be a member of staff of the RTA or of a public authority. The Bill does not specify any requirements or qualifications regarding who may be appointed as an authorised officer [proposed s 121].

8. Authorised officers have the powers conferred by the road transport legislation, although the RTA may limit the powers conferred on specific officers or classes of officers. Regulations may specify powers that may only be exercised if the RTA specifically empowers the officers or classes of officers [proposed s 122].

9. The road transport legislation confers a wide range of powers on authorised officers, including the power to:

- search vehicles and business premises;
- detain vehicles;
- seize records;
- issue penalty notices; and
- issue improvement notices.

10. The Committee has previously expressed the view that, when legislation conveys on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.[45]

11. The Committee has written to the Minister to seek his advice as to why an authorised officer need not be a member of staff of a public authority and there are no other requirements regarding the qualifications or attributes of persons who may be appointed as authorised officers under the Bill.

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

Providing for taxes by Regulation: Clause 10

12. Clause 10 of the Bill provides for the general regulation making power under the Bill. Subclause 10(3) provides that:

> The regulations may impose a fee in respect of services provided by the Authority under this Act or the regulations despite the fact that the fee may also comprise a tax.

[45] *Legislation Review Digest No 4 of 2003*, 27 October 2003, at 30-31.

13. This provision allows new fees to be imposed by regulation, even if the fee amounts to a tax. While it is not uncommon for regulations to impose fees for service, the Committee is of the view that taxes are properly imposed by the Parliament.

14. The Committee notes that regulations, as disallowable instruments, are subject to a degree of Parliamentary scrutiny. Nonetheless, the Committee generally considers the imposition of taxes by regulation to be an inappropriate delegation of legislative powers.

15. The Committee notes that an equivalent provision already exists in s 71 of the *Road Transport (General) Act 1999*.

16. The Committee has written to the Minister to seek an explanation of the need for a power to impose fees that may also comprise a tax.

The Committee makes no further comment on this Bill.

8. ROAD TRANSPORT LEGISLATION (SPEED LIMITERS) AMENDMENT BILL 2004

Date Introduced:	8 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Roads

Purpose and Description

1. The Bill amends the *Road Transport (Safety and Traffic Management) Act 1999* (the Act) and the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999* (the Regulation) to make further provision with respect to compliance with, and enforcement of, requirements for the speed limiting of heavy vehicles.

Background

2. Currently, under cl 140 of the Regulation, the responsible person[46] for a vehicle to which Part 11 of the Regulation applies must not cause, permit, or allow a heavy vehicle which is required to be speed limited to be used, unless the speed at which it can be driven is limited to 100 kilometres per hour. The maximum penalty of 20 penalty units (currently $2,200).

[46] Under NSW road transport legislation, the ***responsible person*** for a vehicle is:
(a) in relation to a registered vehicle—each of the following persons:
(i) a registered operator of the vehicle, except where the vehicle has been disposed of by the operator;
(ii) if the vehicle has been disposed of by a previous registered operator—a person who has acquired the vehicle from the operator;
(iii) a person who has a legal right to possession of the vehicle (including any person who has the use of the vehicle under a lease or hire-purchase agreement, but not the lessor while the vehicle is being leased under any such agreement); and
(b) in relation to an unregistered vehicle to which a trader's plate is affixed—each of the following persons:
(i) the person to whom the trader's plate is issued under the *Road Transport (Vehicle Registration) Act 1997*,
(ii) a person who has a legal right to possession of the vehicle (including any person who has the use of the vehicle under a lease or hire-purchase agreement, but not the lessor while the vehicle is being leased under any such agreement), and
(c) in relation to an unregistered vehicle to which no trader's plate is affixed—each of the following persons:
(i) a person who was last recorded as a registered operator of the vehicle,
(ii) a person who has a legal right to possession of the vehicle (including any person who has the use of the vehicle under a lease or hire-purchase agreement, but not the lessor while the vehicle is being leased under any such agreement), and
(d) any other person (or class of persons) prescribed by the regulations for the purposes of this definition.
For the purposes of subsection (1) (d), the regulations may prescribe different persons for different provisions of the road transport legislation: s 7 of the *Road Transport (General) Act 1999*.

3. The proposed amendments transfer this offence provision, with modifications, to the Act.[47]

4. It was stated in the second reading speech that:

> Roads and Traffic Authority [RTA] speed surveys on major freight routes in New South Wales show that almost 4 per cent of heavy vehicles are travelling at over 115 kilometres per hour. In theory, these speeds should not be possible, but clearly they are for some trucks. Speed limiters were introduced in 1991 to limit the maximum speed of heavy vehicles. They form an important part of the heavy vehicle speed management strategy.
>
> There is strong anecdotal evidence that speed limiters on some heavy vehicles are being tampered with to allow heavy vehicles to exceed 100 kilometres per hour. It is clear from the public's experience and RTA surveys that this is occurring. Responsible heavy vehicle operators must have policies and systems in place to monitor the speed of their vehicles. Operators who recklessly set unattainable timetables, encourage their drivers to speed, and allow their speed limiters to be tampered with, will no longer be able to do so with impunity...
>
> As the law stands, however, the fact that a vehicle is detected travelling at more than 115 kilometres per hour is not sufficient evidence that the speed limiter is not functioning as required and that the responsible person has not met their duty. The passing of this bill will change this, so that it will be clear that heavy vehicles that speed in a manner that is impossible with a functioning speed limiter, will be deemed not to be speed limited, and that the responsible person is at fault.[48]

The Bill

5. The Bill provides that a vehicle is *speed limiter compliant* if the speed at which it is capable of being driven is limited, in the manner prescribed by the regulations, to not more than 100 km/h [proposed s 69A].

6. The Bill's amendments apply to vehicles and the drivers of, and responsible persons for, vehicles whether or not:

- the vehicles are registered in New South Wales;
- the drivers hold driver licences issued in New South Wales, or
- the responsible persons ordinarily reside (or, being corporations, are incorporated or have their principal places of business) in New South Wales [proposed s 69B].[49]

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[47] Clause 140 of the Regulation applies to the following:
(a) a motor lorry or bus manufactured on or after 1 January 1988 (but not a motor lorry or bus to which Part 9 of Schedule 4 to the *Road Transport (Vehicle Registration) Regulation 1998* applies), being:
(i) a motor lorry having a GVM exceeding 15 tonnes, or
(ii) a bus used to provide a public passenger service and having a GVM exceeding 14.5 tonnes; and
(b) a motor lorry or bus manufactured on or after 1 January 1991, being:
(i) a motor lorry having a GVM exceeding 12 tonnes,; or
(ii) a bus used to provide a public passenger service and having a GVM exceeding 5 tonnes: cl 139 of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*.

[48] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[49] The second reading speech noted that an estimated 80 per cent of interstate freight travels through New South Wales: Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

7. Under the new offence provision, the responsible person will be guilty of an offence if the speed of the vehicle is not limited, in the manner prescribed by the regulations, to not more than 100 km/h [proposed new s 69C(1)].

8. This offence is punishable by a maximum of 30 penalty units ($3,300) in the case of an individual, or 150 penalty units ($16,500) in the case of a corporation. The penalty notice amount is $1,550 [Schedule 2.1].

9. Proof that a vehicle has been driven on a road or road related area at a speed of more than 115 km/h will be evidence (unless contrary evidence as to that speed is adduced) that the vehicle was not speed limited as required [proposed s 69C(2)].

10. It will be a defence to a prosecution for the new offence if the defendant proves that:

- the vehicle was a stolen vehicle, or had been illegally taken or used [proposed s 69C(3)(a)]; or
- the vehicle is speed limited as required but that the circumstances in which it was travelling at the time meant that the speed limiter did not operate to limit the speed to 100 km/h [proposed s 69C(3)(b)].

11. Proposed s 69C(3)(b) recognises that the gradient of a length of road or road related area may in certain circumstances affect the speed of a vehicle even if it is properly speed limited. The RTA will provide NSW Police with information as to the gradients of major freight routes in New South Wales so they will be able to apply this provision at appropriate sites.[50]

Issues Considered by the Committee

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

Absolute liability: Proposed s 69C(4)

12. In September, the then Minister for Roads foreshadowed the Bill's changes as follows:

> The penalties [for travelling in excess of the speed limit] must bear upon those who put pressure on the drivers who, more often than not, would like to do the right thing. However, more often than not, the drivers are pressured to get the goods to market quickly…
>
> It is all very well to pull over a driver and book him, and sometimes charge him with a serious offence. However, other people involved in the consignment chain are responsible for loading and unloading a vehicle. The Government proposed to make changes in the law to ensure those involved in the consignment chain bear the consequences of their actions.[51]

13. It was stated in the second reading speech that the Bill:

[50] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.
[51] See the Hon P C Scully MP, Answer to Question Without Notice, Legislative Assembly *Hansard*, 14 September 2004.

> sends a strong message to heavy vehicle operators that they must have policies and systems in place to monitor the speed of their vehicles and ensure they are appropriately speed limited at all times.[52]

14. Accordingly, proposed s 69C(4) provides that it is *no* defence to a charge under the Act that a defendant had a mistaken, but reasonable belief as to the facts constituting the offence.

Mistake of fact

15. Traditionally, an honest and reasonable belief in a state of facts, which had they existed would make the accused's act innocent, has been a defence at common law.[53]

16. Similarly, mistaken belief as to the facts which would otherwise constitute an offence has been recognised as a statutory defence in New South Wales.[54] It is generally applicable in respect of what would be otherwise offences of strict liability.[55]

17. Nonetheless, legislation may exclude the defence.

18. This approach has also been adopted in the *Road Transport (General) Bill 2004* in relation to specified offences, namely offences relating to breaches of requirements by consignors, packers, loaders, operators, drivers and responsible entities, and including false or misleading statements in transport documentation.

The national scheme

19. The aim of both the Bill and the *Road Transport (General) Bill 2004* is to extend accountability to parties in the "road transport supply chain" other than the driver and transport operator who may bear significant responsibility for the occurrence of an offence. The amendments are part of the agreed uniform national legislation approved by Australian transport and roads Ministers in November 2003.[56]

20. It was stated in the second reading speech of the *Road Transport (General) Bill 2004* that:

> [t]hese provisions recognise that to date drivers and operators have generally been the focus of enforcement action for breaches of road transport law. Under this new regulatory framework, those other parties in the transport chain who by their actions, inactions or demands put drivers and other road users at risk and gain unfair

[52] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

[53] *Proudman v Dayman* (1941) 67 CLR 536.

[54] See, eg, s 61R of the *Crimes Act 1900* in relation to sexual offences. Similar provisions exist in other States (see, eg, s 24 of the Queensland *Criminal Code 1899*) and in Commonwealth legislation (see eg, s 9.2 of the *Criminal Code Act 1995*).

[55] See, eg, report on the *Stock Diseases Amendment (False Information) Bill 2004*, Legislation Review *Digest* No 4 of 2004.

[56] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004. As a result of these agreements, the National Transport Commission (NTC) commenced operations in January 2004. Its mandate is to "progress regulatory and operational reform for road, rail and intermodal transport in order to deliver and sustain uniform or nationally consistent outcomes": www.ntc.gov.au.

commercial advantages may also be committing an offence and liable to substantial penalties.[57]

21. The Committee notes the Bill makes a responsible person liable for his or her heavy vehicle not being speed limiter compliant when driven on the road, regardless of whether he or she had reasonably believed it was compliant or, it would seem, had taken all reasonable steps to ensure its compliance.

22. The Committee also notes that limiting the ability of operators to avoid liability under the road transport legislation for such offences is the crux of the nationally-agreed legislative changes which aim to ensure that the various members of the "transport chain" are to be liable for road safety compliance.

23. Having regard to the importance of heavy vehicle road transport safety, the aim of compelling operators to ensure their heavy vehicles are speed limiter compliant, and the limited maximum penalties for the offence, the Committee considers that proposed section 69C(4) does not unduly trespass upon personal rights and liberties.

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

Commencement: Clause 2

24. Clause 2 of the Bill provides that the ensuing Act will commence on proclamation.

25. The Committee notes that providing for an Act to commence on a day or days to be proclaimed delegates to the Government the power to commence the Act on a day it chooses after assent or not to commence the Act, or parts of the Act, at all. However, there are often good reasons why such discretion is required.

26. The Committee has written to the Minister seeking his advice as to why the Bill is to commence on proclamation rather than assent.

The Committee makes no further comment on this Bill.

[57] Mr A P Stewart MP, Parliamentary Secretary, Legislative Assembly *Hansard*, 8 December 2004.

9. SPECIAL COMMISSION OF INQUIRY (JAMES HARDIE RECORDS) AMENDMENT ACT 2004

Date Introduced:	7 December 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Carr MP
Portfolio:	Premier

This Bill passed both Houses on 7 December 2004. It was assented to on 10 December 2004. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.

Purpose and Description

1. This Bill amends the *Commission of Inquiry (James Hardie Records) Act 2004* (the **Principal Act**) to make it clear that the Australian Competition and Consumer Commission (ACCC) can have access to, and use the records of, the special inquiry in any investigations or action it may undertake in relation to the activities of James Hardie.

Background

2. In November 2004, the Parliament passed the *Commission of Inquiry (James Hardie Records) Act 2004*, which provided for the transfer of records of the Special Commission of Inquiry into the Medical Research and Compensation Foundation to the Australian Securities and Investments Commission (ASIC).[58] It also gave ASIC control of those records, including allowing it to transfer the records to other regulators to assist those bodies in the conduct of any investigations into James Hardie.

3. In the second reading speech, the Premier stated that the Australian Competition and Consumer Commission [ACCC] has indicated that it will be scrutinising the conduct of James Hardie and its executives and it has sought access to the records.[59] The Premier also said that ACCC has requested this Bill to ensure that no person can object to the transfer by ASIC of the records to the ACCC or any other person.

The Bill

4. Current section 7 of the Principal Act prevents a person from objecting to the use of a transferred record by ASIC, or to the disclosure of any matter contained in a transferred record, on certain grounds of privilege. This section is amended to make it clear that a person is also prevented from objecting to the use of a transferred record by the ACCC or any other person to which ASIC has given possession or custody of the

[58] The Legislation Review Committee commented on this Act in its *Legislation Review Digest* No. 15 of 2004.
[59] The Hon Bob Carr MP, Premier, Second reading speech, Legislative Assembly Hansard, 7 December 2004.

record, or to the disclosure of any matter contained in such a transferred record, on those grounds of privilege [schedule 2[4]].

5. Current section 8 provides that a transferred record is to be treated for the purposes of a law of the State as if it were a record that ASIC had lawfully obtained in the performance of its functions or the exercise of its powers under Commonwealth law and that, accordingly, if a record would be admissible in a court under Commonwealth law it will be treated as being admissible in a NSW court. The Bill amends this section to apply it to record that has been transferred to ACCC [schedule 2[5]].

6. Proposed schedule 1 to the Principal Act applies the amendment to section 7 retrospectively.

Issues Considered by the Committee

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

Removal of client/lawyer privilege: Schedule 2, clauses 4 and 5

7. Section 7 of the Principal Act prevents a person from objecting to the use by ASIC of a record, or to the disclosure of any matter contained in the record to ASIC, on the grounds of lawyer-client privilege. The effect of this provision is to remove the protection normally given to communications between lawyers and their clients.

8. Section 8 of the Principal Act allows records transferred to ASIC to be admissible in a NSW court.

9. The amendments to sections 7 and 8 extend these provisions to the transfer and use of records to the ACCC or other person. The effect of these amendments is to limit further the circumstances in which legal professional privilege will apply to records of the special inquiry.

10. The Committee has commented on these issues in relation to sections 7 & 8 of the Principal Act in its Legislation Review Digest 15 of 2004. The Committee is of the view that a general erosion of legal professional privilege could significantly trespass on personal rights and liberties. The Committee is also of the view that there may be good reasons for removing the privilege in this case, including the desirability of avoiding protracted legal disputes over the use by ASIC, the ACCC and other regulatory agencies of the special inquiry records in their investigations into James Hardie's conduct.

11. The Committee considers that the privilege attached to lawyer-client communications is vital to maintain a fair and just legal system and a general erosion of that privilege could significantly trespass on personal rights and liberties.

12. The Committee notes the Premier's statement in the second reading speech for the Principal Act, that the measures in Part 3, including sections 7 and 8 of that Act:

> **are justified because of the impact that James Hardie's conduct has had on the ability of victims in the future to recover compensation for their illnesses. The public interest requirement and the application of Part 3 of the bill only to civil proceedings recognise that it is a very serious matter to abrogate legal professional privilege and existing rights to confidentiality.**[60]

13. The Committee also notes that the protracted delays in resolving a legal dispute can deny a party to the dispute of the right to have the matter determined. This is particularly relevant with regard to claims for compensation for injuries resulting from asbestos where the injury can result in premature death.

14. The Committee notes that these amendments only affect the privilege of communications already in the possession of the Special Commission of Inquiry and (except to the extent the it creates uncertainty regarding the possible retrospective application of future laws) they do not affect the confidence of any other present or future privileged communications.

15. The Committee refers to Parliament the question as to whether removal of privilege for client-lawyer and other confidential communications as provided in this Act unduly trespasses on personal rights and liberties.

Retrospectivity: Schedule 1[7] (proposed Schedule 1)

16. The amendment to section 7 extends to the giving of possession or custody of a record by ASIC to the ACCC or any other person *before* the commencement of that Act.

17. The Committee is always concerned to identify where retrospective provisions adversely affect individuals.

18. The effect of the amendment to section 7 is to remove the privilege that existed at the time the record was made, namely during evidence given in the course of the special inquiry.

19. The Committee has commented on these issues in relation to sections 7 of the Principal Act in its *Legislation Review Digest* 15 of 2004 and refers Parliament to those comments.

20. The Committee notes that to remove privileges that previously protected confidential communications is a significant trespass on personal rights.

21. The Committee further notes that to remove retrospectively statutory protections on which a person may have relied not only trespasses on the rights of that person but, if seen to create a precedent, can undermine confidence in the law.

22. The Committee considers that such retrospective provision should only be made in the most serious and isolated circumstances.

[60] The Hon Bob Carr MP, Premier, Second Reading Speech, *Special Commission of Inquiry (James Hardie Records) Bill 2004*, *Legislative Assembly Hansard*, 20 October 2004.

23. The Committee refers to Parliament the question whether this retrospectivity trespasses unduly on personal rights and liberties.

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

10. LICENSING AND REGISTRATION (UNIFORM PROCEDURES) AMENDMENT (PHOTO ID) BILL 2004

Date Introduced:	19 November 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon J Della Bosca MLC
Portfolio:	Commerce

Background

1. The Committee reported on the *Licensing and Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004* in Legislation Review Digest No 17 of 2004.

2. The Committee noted that the Bill provided for the ensuing Act to commence on a day or days to be appointed by proclamation and wrote to the Minister to seek his advice as to the reasons for commencing the Act by proclamation, and a likely commencement date of the Act.

Minister's Reply

3. In a letter dated 9 December 2004, the Minister advised the Committee that:

> [t]he proposed Act enables the Director-General of the Department of Commerce to enter into photo-access arrangements with the Roads and Traffic Authority and licensing authorities. The technical services and administrative processes that support implementation of the photo-access arrangements are currently being finalised.
>
> I anticipate that the legislation will be commenced in the first quarter of 2005.

Committee's Response

4. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

3 December 2004

Our Ref: LRC1062

The Hon John Della Bosca MLC
Special Minister of State & Minister for Commerce
Level 30 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 17 of 2004*.

The Committee notes that this Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation.

The Committee seeks your advice as to the reasons for commencing this Bill by proclamation, and a likely commencement date of the Act.

Yours sincerely

Peter Primrose

Peter Primrose MLC
Chairman

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Assistant Treasurer
Minister for the Central Coast

- 9 DEC 2004

Hon Peter Primrose MLC
Chairman
Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Primrose

Licensing and Registration (Uniform Procedure) Amendment (Photo ID) Bill 2004

I refer to your request for advice on the reasons why the proposed *Licensing and Registration (Uniform Procedures) Amendment (Photo ID) Act 2004* will not commence on assent and a likely date for commencement.

The proposed Act enables the Director-General of the Department of Commerce to enter into photo-access arrangements with the Roads and Traffic Authority and licensing authorities. The technical services and administrative processes that support implementation of the photo-access arrangements are currently being finalised.

I anticipate that the legislation will be commenced in first quarter of 2005.

Yours sincerely

John Della Bosca, MLC
SPECIAL MINISTER OF STATE

11. ROAD TRANSPORT (GENERAL) AMENDMENT (LICENCE SUSPENSION) BILL 2004

Date Introduced:	2 June 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Roads

Background

1. The Committee reported on the *Road Transport (General) Amendment (Licence Suspension) Bill 2004* in Legislation Review Digest No 9 of 2004.

2. The Committee noted that the Bill would provide police officers with expanded powers to suspend driver licences. The Committee also noted that the suspension powers in the Bill were discretionary.

3. As the scope of this discretion was not defined under the Bill the Committee wrote to the Minister for Roads for advice as to what will guide police officers when deciding whether or not to issue a suspension notice.

4. The Committee also wrote to the Minister for advice as to what guidelines were in place for a decision by either a police officer, an appropriate officer for the penalty notice within the meaning of Part 3 of the *Fines Act 1996*, or a member of staff of the State Debt Recovery Office whether or not to enforce a suspension notice once issued.

Minister's Reply

5. The then Minister for Roads replied to the Committee by letter dated 1 December 2004 (below).

6. Regarding guidelines for police officers deciding whether or not to issue licence suspension notices, the Minister advised the Committee that after receiving advice from NSW Police he has referred a copy of the Committee's letter to the Minister for Police for response. The Committee will await his response.

7. In reply to the Committee's query regarding the enforcement of a suspension order once issued, the Minister responded that:

> [t]his provision [s 34(7)(e) of the Bill] does not apply to a decision to enforce a suspension notice but rather to a decision to enforce the penalty notice for speeding in excess of 45km/h over the speed limit.
>
> It has been a long established practice that at any time during the lifecycle of a penalty notice for either a traffic or parking offence, a decision to withdraw the notice remains available. NSW Police, Infringement Processing Bureau or the State Debt Recovery Office can make the decision. The decision to do so rests with the agency that has carriage of the enforcement at the time either representations or other information is brought to its attention that casts doubt as to the appropriateness of

the enforcement continuing. A decision to withdraw may be made in consultation between the agencies.

Where a decision is made not to enforce the penalty notice, it will have the consequence of ending the corresponding licence suspension imposed by Police. The ending of the suspension in these circumstances is appropriate and is the intended outcome of the new provisions. It ensures that the licence of a person is restored after it is established that he or she is not responsible for the speeding offence.

Committee's Response

8. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 June 2004

Our Ref:LRC761/772

The Hon Carl Scully MP
Minister for Roads
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Road Transport (General) Amendment (Licence Suspension) Bill 2004

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 9 of 2003*.

The Committee notes that the Bill provides police officers with an expanded power to suspend driver licences. The Committee also notes that this is a discretionary power.

The Committee is concerned that the exercise of this power may have a significant impact upon persons who have been charged with an offence set out in the Bill, and should therefore be subject to strict control.

As the scope of the discretion is not defined in the Bill, the Committee has resolved to write to you to seek your advice as to what will guide the discretion of police officers when deciding whether or not to issue a suspension notice

Similarly, the Committee seeks your advice as to the guidelines for a decision by:

(a) a police officer;

(b) an appropriate officer for the penalty notice within the meaning of Part 3 of the *Fines Act 1996*; or

(c) a member of staff of the State Debt Recovery Office

whether or not to enforce a suspension notice once issued.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

M04/5492

NEW SOUTH WALES

Minister for Roads
Minister for Housing
Leader of the House

The Hon Peter Primrose MLC
Chairperson
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

- 1 DEC 2004

Dear Mr Primrose

I refer to a letter from the previous Chairperson, Mr Barry Collier MP, in which he sought advice on issues in relation to the Road Transport (General) Amendment (Licence Suspension) Bill 2004.

I apologise for the delay in responding but I have been awaiting advice from the NSW Police, which has advised that there are broader issues in relation to the application of Police discretion generally. Therefore this matter is best responded to by the Hon John Watkins MP, Minister for Police. I have referred a copy of your letter to the Minister for response.

With respect to your request for advice as to the guidelines for a decision by certain agencies whether or not to enforce a suspension notice once issued, I take it that you refer to the provisions found at Sec 34 (7)(e). This provision does not apply to a decision to enforce a suspension notice but rather to a decision to enforce the penalty notice for speeding in excess of 45km/h over the speed limit.

It has been a long established practice that at any time during the lifecycle of a penalty notice for either a traffic or parking offence, a decision to withdraw the notice remains available. NSW Police, Infringement Processing Bureau or the State Debt Recovery Office can make the decision. The decision to do so rests with the agency that has carriage of the enforcement at the time either representations or other information is brought to its attention that casts doubt as to the appropriateness of the enforcement continuing. A decision to withdraw may be made in consultation between the agencies.

Where a decision is made not to enforce the penalty notice, it will have the consequence of ending the corresponding licence suspension imposed by Police. The ending of the suspension in these circumstances is appropriate and is the intended outcome of the new provisions. It ensures that the licence of a person is restored after it is established that he or she is not responsible for the speeding offence.

Yours sincerely

CARL SCULLY MP
Minister for Roads

Level 36, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Tel.: (02) 9228 4455 Fax.: (02) 9228 4633

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Centennial Park and Moore Park Trust Regulation	27/08/04	6699	05/11/04	
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	03/09/04	7343	26/10/04 17/02/05	01/02/05
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04 30/04/04	01/04/04
Forestry Regulation 2004	27/08/04	6778	26/10/04 17/02/05	18/01/05
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	05/03/04	957	30/04/04	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	15/06/04
Wild Dog Destruction Regulation 2004	27/08/04	7133	26/10/04	

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Architects Regulation 2004 • Letter dated 21/09/2004 to the Minister for Commerce • Letter dated 30/11/2004 from the Minister for Commerce	25/06/2004 page 4388
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004 • Letter dated 26/10/2004 to the Minister for Infrastructure and Planning • Letter dated 01/02/2005 from the Minister for Infrastructure and Planning	03/09/04 page 7343
Forestry Regulation 2004 • Letter dated 26/10/2004 to the Minister for Primary Industries • Letter dated 18/01/2005 from the Minister for Primary Industries	27/08/2004 page 6778
Stock Diseases (General) Regulation 2004 • Letter dated 05/11/2004 to the Minister for Primary Industries • Letter dated 16/12/2004 from the Minister for Primary Industries	02/07/2004 page 5531
Sydney Olympic Park Amendment Regulation 2004 • Letter dated 05/11/04 to the Minister for Sport and Recreation • Letter dated 03/12/04 from the Minister for Sport and Recreation	30/07/2004 page 6173

1. Architects Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

21 September 2004

Our Ref:LRC797
Your Ref:

The Hon John Della Bosca MLC
Minister for Commerce
Level 30 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Architects Regulation 2004

The Committee has considered the above Regulation and has resolved to write to seek your advice as to the cost-benefit analysis undertaken as part of the Regulatory Impact Statement process.

The RIS stated that:

> As the proposed Code requires nothing more than professional behaviour as normally provided by practising architects there is no cost burden created.

In its submission on the RIS and draft Regulation, the Royal Australian Institute of Architects (RAIA) challenged this conclusion claiming it was inaccurate.

The RAIA stated that, "while the professional behaviour and practices required are probably undertaken by many architects at the moment, the detailed provisions and requirements of the Code would not necessarily be in operation routinely and their implementation will have significant cost burdens", especially on the many small firms and sole practitioners. Examples given by the RAIA included new requirements in relation to client/architect agreements, the cost of personal indemnity insurance and the requirement for continuing education.

The Committee is also of the view that the introduction of any mandatory professional code of conduct is likely to result in some additional cost to the profession it governs. Even if the majority of architects already conduct their practice in accordance with the standards established in the Code, the compulsory nature of the Code is likely result in some new cost burden.

In light of the submission of the RAIA and the Committee's view, we seek your advice on how this conclusion in the RIS was reached. Specifically, the Committee seeks your advice as to:

- the factors considered;
- the analysis relied upon; and
- the reasoning behind;

the conclusion in the RIS that there would be no cost burden to the profession;

Yours sincerely

SIGNED BY BARRY COLLIER

BARRY COLLIER MP
CHAIRPERSON

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Assistant Treasurer
Minister for the Central Coast

30 NOV 2004

Ref: A24788

The Chairperson
Legislation Review Committee
Parliament of New South Wales
SYDNEY NSW 2000

Dear Mr Primrose

I refer to your Committee's letter dated 21 September, 2004 regarding the cost impact of the New South Wales Architects Code of Professional Conduct ("Code").

I am advised that the issue of the cost impact on the industry was given consideration in light of advice from the professional bodies extensively consulted from 2001 to early 2004.

Officials remained in frequent contact with the Association of Consulting Architects Australia, an employer organisation, the Royal Australian Institute of Architects, a professional society whose members include approximately 30% of architects in New South Wales, and the Building Designers Association of New South Wales, a professional society including a very small proportion of architects. These consultations were in the context of formal national consultations with the Architects Accreditation Council of Australia and the national organisation of the Royal Australian Institute of Architects.

The New South Wales Board of Architects, including in its members architects practicing in both small and large firms, provided detailed advice to officials in the development of the Code.

As a result of these consultations, and in seeking to understand the impact of the Code on architects, it was concluded that any costs which would flow out of the Code would be of a minor nature and not present a burden to architects. Indeed, it was found that the costs were of such a minor nature that it was not possible to identify them with any reliability. There is no known monitoring of the activities which might be affected by the Code as they are largely integral parts of normal business.

It is recognised that insurance would represent an additional business cost to those architects practicing on their own behalf, but currently uninsured. The minimum annual insurance premium at the time the Regulatory Impact Statement was

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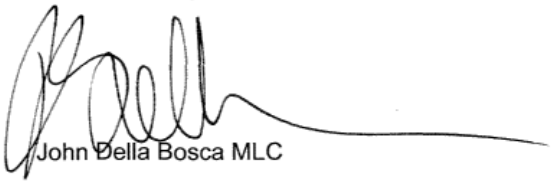
prepared was of the order of $3000, or less than $60 per week. Professional indemnity insurance is not required of employed architects, but only for architects practicing as sole traders. Plans are afoot to similarly regulate architect firms and corporations. Because of the exposure to loss of clients whose architects were not insured, it was considered that any additional cost to business was outweighed by the public benefit.

Furthermore, as the power to require insurance is given by Parliament in the Architects Act 2003 (section 84(2)(g), the Code in this respect gives effect to a matter contemplated by Parliament.

On the matter of possible additional costs arising through continuing professional education requirements, it was assessed that because the requirements would be detailed in yet to be developed Board policy and that such a wide diversity of activities could constitute continuing professional education, including free industry seminars, research integral to design activities by architects, lecturing, structured reading, preparation of articles as well as commercially provided courses, that architects could have recourse to activities which may be no cost at all.

I enclose a paper which addresses the matters you raise in more detail.

Yours sincerely



John Della Bosca MLC

Architects Regulation 2004: Code of Professional Conduct

Background

The reform of legislation regulating architects was commenced in late 2000 following a Review by the Commonwealth Productivity Commission.

The review culminated with action within New South Wales to proceed with reform according to a framework agreed by all jurisdictions.

As part of the reform process extensive consultation was done through 2001 and 2002 with the New South Wales Board of Architects, the New South Wales Chapter of the Royal Australian Institute of Architects and the New South Wales branch of the Association of Consulting Architects, Australia and the Building Designers Association of New South Wales. The consultation was in the form of meetings in a number of forums including Ministerial conferences.

Formal community consultation on the reform was proposed in 2002 but on the Premier's instruction, briefing of Parliamentary Counsel was commenced at that time.

Parliament passed the Architects Act in December 2003 after approximately six months of negotiation with the cross benches in the Legislative Council in response to representations made to them by the Royal Australian Institute of Architects New South Wales chapter.

Under the Architects Act 2003, power is given for the making of regulations, and the making of a Code of Professional Conduct for architects ("Code").

The profession, in the form of the Architects Accreditation Council of Australia and the Royal Australian Institute of Architects national body, provided to the Minister a 'model' code of professional conduct. This was welcomed by the Minister and formed the basis for the New South Wales Code. During formulation of the Code consultation continued with representatives of the profession. The impact of the Code on the profession was the central question in these consultations. It was the Minister's requirement that the Code be workable and consistent with normal professional practice.

Particular provisions promoted by the profession included continuing professional education, professional indemnity insurance and the need for written client-architect agreements. The then New South Wales Board of Architects ("Board") was supportive of all client-architect agreements being in writing given the number of complaints made by clients of architects where no written agreement existed and the costs to consumers, architects and the public in the complaint process.

The Board was consulted about the particular matters to be covered by the client-architect agreement. The Board members involved in the consultation included senior members of the architectural profession in New South Wales. Among them were the president of the Royal Australian Institute of Architects New South Wales chapter, and architects who worked in both small and large firms.

The conclusion reached following an analysis of the issues involved by then Strategic Procurement Services and Legal Branch, with advice also from Department of Fair Trading policy officers, was that the Code would not create an additional cost burden for architects. It was found that the potential cost issues were minor and it was not a reasonable use of public funds to seek quantification of the possible impact. Additionally, a number of potential costs issues would be subject to policies developed by the Architects Registration Board. As this Board would include practicing architects as members it was considered that this would provide a check against excessive burdens being imposed on the profession.

Consultation and Advice

During the lengthy and detailed discussions with the profession (the Royal Australian Institute of Architects and the Association of Consulting Architects, Australia, represented by senior officers of these organisations), the issue of cost burdens was not raised by the profession. Rather, it appeared that the inclusion of the requirements they sought amounted to a codification of the current practice.

The View on Resulting Costs

The conclusion was reached that while there could be some additional costs flowing from the Code being prescribed for some architects, these would not be burdensome and would be far outweighed by the benefits to consumers and architects of the Code being implemented.

No business data was available from the profession or elsewhere which would suggest that any cost burdens would be created by the Code. As the Board is the body which will set the policy on continuing education, it was possible to only make an estimate of cost impact on the basis of assumptions about what the Board's policy might be. The cost of typical professional education courses on public offer range from $250 to less than $1000. Single subjects in University of Newcastle post graduate courses which may be of interest to architects are of the order of $1,500. These costs may be tax deductible for most candidates. However, continuing professional education may be defined by activities other than formal courses and include activities which create no additional costs for architects. For instance, attendance at free industry seminars, structured reading programs, preparation of lectures and articles for publication and the research entailed in design projects may become regarded by the Board as constituting continuing professional education.

To ensure that the needs and interests of practising architects are considered by the Board, registrants elect two board members. Taking account of these considerations, it was concluded that the Code requirement for continuing professional education was unlikely to constitute an additional burden on architects.

On the matter of the requirement for written client-architect agreements, it is noted that there are standard form client-architect agreements available for adoption by architects. As the Code gives clear direction as to the contractual terms to be covered, the possible cost impact of the agreements on business, as advised by departmental legal officers, was considered to be minimal. Only one submission made mention of costs, but refrained from providing any detail to permit further research or assessment.

The process of consultation prior to publication of the draft Code included the Board of Architects' elected members reviewing the proposed Code provisions for client-architect agreements term by term. This was done to ensure the workability and reasonableness of the requirements being considered.

Nevertheless, the Department of Commerce proposes to prepare a model client-architect agreement for use in home design as in this segment of the industry small firms predominate. The availability of the model agreement will offset any minimal cost pressures which small firms may experience in this respect.

Conclusion

During a responsive consultation period continuing over approximately three years no information was forthcoming from the profession or otherwise which would indicate that burdens would be produced by the introduction of a Code. Indeed, the Government was encouraged to introduce a Code on the basis of a model proposed by the profession. Consultation conducted by Commerce did not indicate that a cost burden would be created thus it was considered by senior management not to expend public resources on further detailed industry research.

An unintended but practical consequence of the Code is that it provides a means to assist architects in discussing their fees with clients, including providing a framework for dealing with variations to commissions. It is expected that architects may be able to make the Code a part of their business processes to ensure fair recompense for their services; a factor which may be significant in small firms that are in a weak bargaining position with many clients, according to comments made in a number of conferences with representatives of the profession.

Overall it is anticipated that the Code will bring benefits to architects as well as consumers and any costs will be offset by business development inherent in the Code.

Consistent with this, advice from the Registrar of the Architects Registration Board has been that no concerns over a cost burden have been expressed to her by registrants either in writing or in the many public forums the Board has recently run.

2. Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

26 October 2004

Our Ref: LRC957

The Hon C. Knowles MP
Minister for Infrastructure and Planning
Level 33, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004

The Committee has recently considered the above Regulation under s 9 of the *Legislation Review Act 1987*. The Committee resolved to write to you to clarify the nature of the environmental impact assessment obligations it imposes on the Australian Rail Track Corporation (ARTC).

Among other matters, the Regulation provides for the ARTC to prepare and comply with a Code, to be approved by you, in assessing the environmental impacts of activities that are not to be assessed in accordance with Part 5 of the *Environmental Planning and Assessment Act 1979* ("the Act").

The Committee requests clarification of the intended or anticipated class of ARTC rail infrastructure development activities whose environmental impact assessment would be:

(a) governed by Part 5 of the Act; or
(b) governed by the Code, once approved; or
(c) subject to Ministerial exemption from the Code pursuant to clause 244E(2) of that Regulation.

The Committee would also be pleased if you could clarify the rationale for not expressly requiring the approved Code to be made public.

The Committee looks forward to receiving your advice on the above matters.

Yours sincerely

Peter Primrose

Peter Primrose MLC
Chairman

NEW SOUTH WALES

MINISTER FOR INFRASTRUCTURE AND PLANNING
MINISTER FOR NATURAL RESOURCES

The Hon Peter Primrose MLC
Chairman
Legislative Review Committee
Parliament of New South Wales
SYDNEY NSW 2000

D04/6616

- 1 FEB 2005

Dear Mr Primrose

I refer to your request for advice concerning the Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004. Australian Rail Track Corporation (ARTC) is a Commonwealth business corporation, established in 1998, which owns or leases rail track from Perth to Albury (NSW) and from Adelaide to Darwin. ARTC has significantly improved the track and transport efficiency since taking over these tracks.

As you are aware, ARTC has leased for 60 years 3,400 Km of NSW rail track including NSW interstate and Hunter Valley rail corridors, the metropolitan freight lines to Sydney Port and has entered into a development agreement to construct the Southern Sydney Freight Line. Ownership of the track will remain with NSW with ARTC fully responsible for the investment decisions and train controls. ARTC will manage the remaining network outside the urban system on behalf of the RIC under a management agreement.

The ARTC have proposed a significant $870M program of major and minor works over the next 4 years, mostly in existing easements but with a limited number of new works in new easement. The major projects will include:

- $180M new Southern Freight Line from Macarthur to Chullora
- $145M upgrade of the Hunter rail network plus $67M to eliminate bottlenecks
- $175M upgrade the Main South Line from Macarthur to Albury including new Murrumbidgee Bridge
- $123M upgrade from Maitland to Qld border.
- $54M upgrade from Cootamundra to Werris Creek including new bridges
- $21.8M upgrade between Parks and Broken Hill

There needs to be an efficient environmental assessment regime to deliver these works. Because ARTC is not a State government entity, the planning approval regime under the Environmental Planning and Assessment Act 1979 applying to Rail Infrastructure Corporation (RIC) did not apply to ARTC. Because of the desire to have rail infrastructure works to be assessed under Part 5 of the EP&A Act in a comparable way to RIC (and not approved under Part 4 by the various councils responsible for the areas through which the lines pass), a suite of provisions were introduced in the Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Act

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2004, Environmental Planning and Assessment Regulation 2000 and State Environmental Planning Policy (ARTC Railway Infrastructure) (ARTC SEPP).

The majority of ARTC rail infrastructure works are declared to be development without consent under the ARTC SEPP to be assessed under Part 5 of the EP&A Act. The ARTC has been declared to be a "public authority" for the purposes of Part 5 of the EP&A Act under the provisions of the Transport Administration Act. As a result ARTC is a determining authority for the purposes of Part 5 of the EP&A Act. This then provides an assessment and approvals regime comparable to RIC. The only development not be assessed under Part 5 are freight intermodal terminals and buildings in the rail corridors for rail stations, commercial/ retail buildings. These types of projects will continue to be assessed under Part 4 because of the potential for private sector involvement.

Under Part 5 of the EP&A Act, the determining authority has an obligation to consider the likely environmental impacts when approving an activity. If the impacts are likely to be significant, an EIS must be prepared with obligations for consultation with affected communities. For example, it is expected that an EIS will be prepared for the Southern Freight Line with the project being assessed under Division 4 Part 5 of the EP&A Act and the Minister for Infrastructure, Planning and Natural Resources the approval authority.

However, in general, only a small proportion of rail projects trigger EISs. For the other projects such as routine rail maintenance works and line upgrades which usually do not trigger an EIS, there is no requirement under Part 5 to consult the community or to undertake formalised environment assessment though there is a general obligation to consider environmental impacts in the undertaking of these works. Different agencies fulfil this obligation in different ways – for example some have detailed manuals to ensure environmental aspects are properly managed.

Because ARTC does not have the same accountability obligations to a Minister of the State or transparency obligations under NSW Freedom of Information Act (or the C'wth FOI legislation), a provision was introduced into the amendments to the Transport Administration Act to require ARTC to make environmental assessment and monitoring information publicly available if requested (comparable to NSW FOI provisions which would apply to Railcorp). This will provide the community or NSW Government agencies with the ability to request and receive information on the environmental aspects of projects for which this information would not otherwise be available.

In addition, the amendments to the EP&A Regulation introduced a requirement for ARTC to prepare a Code (to be approved by the Minister), setting out the proposed environmental management regime of activities which do not require an EIS. The requirement to prepare a Code is beyond the obligations placed upon RIC and other government agencies under Part 5 of the Act. However it was considered an appropriate systematic approach given the status of ARTC and their need to deliver a major program of routine upgrade activities of the freight lines across NSW within a short timeframe.

ARTC has been provided with a six months transition period from the 3rd September 2004 during such time they may operate as if they are a State agency in terms of the EP&A Act. During this time they are to prepare a Code and it have approved by the Minister. Should they not achieve this deadline, all works after that time for which there is not an approved Code provisions, will require an EIS.

The Code is intended to apply to all minor maintenance and asset management works, corrective major periodic maintenance (eg ballast tamping) and renewal major periodic maintenance (eg rerailing, resleepering) and any other routine works nominated by ARTC. However, it was recognised that from time to time one-off non-routine activities and emergency works could occur which would be outside the scope of the Code. As a result, the clause 244E of the EP&A Regulation makes provisions for the Minister to exempt these types of works from the need to comply with the Code.

The Code will essentially be a technical document setting the environmental performance regimes for different types of works to be used by ARTC operational staff and their contractors. This provides for an agreed environmental performance upfront. However the Code will also include the assessment requirements and documentation of that assessment to demonstrate due consideration of environmental issues. In addition, the Code is to include a consultation regime to ensure the community is appropriately notified and consulted given the level of impacts and community interest when major periodic maintenance is proposed. It also includes auditing protocols of ARTC's environmental and consultation performance – consistent with ARTCs general commitments to openness and sound environmental outcomes. These provisions will enable ARTC to efficiently deliver their extensive program of works while ensuring appropriate environmental safeguards are maintained.

The Code has been designed essentially to be an operational manual for ARTC staff and contractors, similar to the manuals developed by other State government authorities such as RTA, to ensure sound and consistent performance across all regions. However, there would be no reason why the Code could not be made available to interested parties. There are provisions in the EP&A Regulation for the Minister when approving the Code to do so subject to conditions, for example in relation to the public availability of the approved Code. However the key outcome of the Code which should not be overlooked relates to the commitment by ARTC to community consultation when undertaking routine works. These provisions represent an innovative approach, setting the bar at a higher level of community engagement than is currently required under Part 5 of the EP&A Act for works which do not trigger an EIS.

I trust that this advice is of assistance. Should you have further inquiries regarding these provisions, please contact Sam Haddad, Deputy Director-General on 9762 8002.

Yours sincerely

Craig Knowles MP
Minister for Infrastructure and Planning
Minister for Natural Resources

3. Forestry Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

26 October 2004

Our Ref: LRC933

The Hon I Macdonald MLC
Minister for Primary Industries
Level 30 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Forestry Regulation 2004

The Committee has recently considered the above regulation under s 9 of the *Legislation Review Act 1987*. The Committee resolved to write to you in relation to the newly created offence in cl 13(7) of the 2004 Regulation. Clause 13(7) makes illegal the driving or parking an unregistered vehicle (excluding a timber hauling or harvesting vehicle) in a forestry area.

The Committee notes that there is nothing in the wording of the offence that would exclude its application to Crown lessees and holders of licences or permits granted under the *Forestry Act 1916* ("the Act"). The Committee has noted the concern expressed in submissions your Department received on the Regulation's Regulatory Impact Statement that this could have an adverse impact on leaseholders who were previously able to park and drive unregistered vehicles on forestry areas they held by lease.

The Committee seeks your advice on:

(a) whether or not the driving or parking of an unregistered vehicle by a Crown lessee or the holder of a licence or permit granted under the Act is intended to be proscribed or permitted;

(b) If it is intended to proscribe the driving of an unregistered vehicle by a Crown lessee on his or her Crown leasehold, the rationale for this proscription; and

(c) if it is intended to continue to allow a Crown lessee to park an unregistered vehicle on his or her Crown leasehold, why is this not excluded from the scope of the offence.

The Committee notes that it would be concerned with an approach whereby the offence of parking an unregistered vehicle applied generally to lessees and, rather than exempting lessees from the scope of the offence, an administrative discretion not to prosecute was used, in practice, as a means of exempting lessees.

The Committee looks forward to receiving your advice on the above matters.

Yours sincerely

Peter Primrose

Peter Primrose MLC
Chairman

NEW SOUTH WALES

MINISTER FOR PRIMARY INDUSTRIES

MPI04/4727

18 JAN 2005

The Hon Peter Primrose MLC
Chairman
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

Dear Mr Primrose Peter

I refer to your letter dated 26 October 2004 (Ref: LRC933) in which you advise of your Committee's concerns about the application of Clause 13 (7) of the 2004 Forestry Regulation on leaseholders and certain other forest users on State forests.

I am advised Clause 13 (7) was intended to clarify personal injury insurance coverage, to facilitate prosecution for dumping of vehicles in State forests and parking or driving vehicles in such a manner as to interfere with lawful access to State forests. However, I acknowledge that strict enforcement of Clause 13 (7) may have an adverse effect on certain classes of users of State forests who have in the past been able to park and drive unregistered vehicles legally.

I have therefore requested the Chief Executive of Forests NSW to review the application of Clause 13 (7) with a view to determining the feasibility of amending the Forestry Regulation 2004 to provide for further exemptions where warranted.

Please pass on my thanks to the Committee members and staff for their advice on this matter.

Yours sincerely

Ian Macdonald

IAN MACDONALD MLC
MINISTER FOR PRIMARY INDUSTRIES

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4. Stock Diseases (General) Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

5 November 2004

Our Ref: LRC856
Your ref: MA04/316

The Hon Ian Macdonald MLC
Minister for Primary Industries
Level 30 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Stock Diseases (General) Regulation 2004

The Committee has recently considered the above Regulation under s 9 of the *Legislation Review Act 1987*.

The Committee notes that the relevant Regulatory Impact Statement (RIS) stated that the *Privacy and Personal Information Act 1989* applied to information contained in the Registries maintained pursuant to the Regulation.

The Committee notes, however, that although the Regulation provides for district registers, a central register and a permanent identification register, the only explicit access restrictions relate to the permanent identification register.

The Committee is concerned that, in the absence of privacy protection, operators in the livestock industry may be compelled to impart personal information which may then be publicly available.

The Committee also notes that, in submissions to NSW Agriculture responding to the RIS, a number of individual operators and industry associations raised concerns about the costing of the Regulation's impact on the industry. The Committee seeks your advice as to what extent NSW Agriculture reconsidered the costings contained in the RIS, in the light of criticisms of the likely benefits of the National Livestock identification Scheme contained in those submissions.

The Committee looks forward to receiving your advice on the above matters

Yours sincerely

Peter Primrose

Peter Primrose MLC
Chairman

NEW SOUTH WALES

MINISTER FOR PRIMARY INDUSTRIES

RECEIVED
04 JAN 2005
LEGISLATION REVIEW COMMITTEE

The Hon Peter Primrose
Chairman
Legislative Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

16 DEC 2004

Dear Mr Primrose, Peter

I refer to your letter of 5 November 2004 concerning certain aspects of the *Stock Diseases (General) Regulation 2004* (the Regulation).

In your letter, you note your concern that there may not be protection for private information kept in the district registers and central register. You also note that there are specific provisions in the Regulation to protect privacy in relation to the permanent identification register.

I am advised that personal information contained in the district registers and central register, which are to be administered by the Rural Lands Protection Boards and my department respectively, is protected by the provisions of the *Privacy and Protection of Personal Information Act 1998*. This is because both bodies are government bodies and are subject to that legislation. As such, it would have been inappropriate to repeat those provisions in the Regulation. Personal information contained in the permanent identification register is not protected by the *Privacy and Protection of Personal Information Act 1998* because the body operating the register – Meat and Livestock Australia – is not a NSW government body. Therefore, to ensure the protection of information in the permanent identification register, it was necessary to include a specific clause to that effect in the Regulation.

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- 2 -

In your letter, you also ask whether costs of the Regulation's impact on industry were considered as part of the regulatory impact statement process, particularly in light of the submissions dealing with this point. I am advised the costs of the obligations imposed by the Regulation were fully considered as part of the regulatory impact statement process. Additionally, I am advised that all public submissions were considered, including those that dealt with the costing of obligations imposed by the Regulation. However, on balance, it was considered that the benefits outweighed the cost on the community.

If you have any enquiries please do not hesitate to have your staff contact Adam Badenoch on 9228 3344.

Yours sincerely,

IAN MACDONALD, MLC
Minister for Primary Industries

5. Sydney Olympic Park Amendment Regulation 2004

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

5 November 2004

Our Ref: LRC894

The Hon S. C. Nori MP
Minister for Tourism and Sport and Recreation
Level 34 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Sydney Olympic Park Amendment Regulation 2004

On 5 November 2004, the Committee considered the above Regulation pursuant to s 9 of the *Legislation Review Act 1987*.

The Committee resolved to write to you concerning its penalty provisions.

The Committee is concerned that some of the maximum penalties and penalty notice amounts under the Regulation do not appear to be in keeping with the severity of the offence.

Examples of offences for which the maximum penalty and penalty notice amounts appear to be excessive include:

- distribute a brochure, leaflet or handbill;
- participate in a game in a manner that unduly interferes with the amenity of the area;
- operate a motorised model aircraft, boat or car;
- play or practise golf;
- bathe, wade, wash or swim in any lake, pond, stream or ornamental water;
- climb any tree, sculpture, decoration or other equipment.

All of the above offences attract a maximum penalty of 20 penalty units ($2,200) and the penalty notice amount is $200.

The Committee further notes that these types of prohibited activities are subject to higher maximum penalties that other prohibited activities that may be of more risk to the safety and proper conduct of persons. For example, the sale or supply of liquor to minors attracts a maximum penalty of 10 penalty units ($1,100).

Yours sincerely

Peter Primrose

Peter Primrose MLC
Chairman

The Hon Sandra Nori MP
Minister for Tourism and Sport and Recreation
Minister for Women

Mr Peter Primrose MLC
Chairman
Legislation Review Committee
NSW Legislative Council
Parliament House
Macquarie St
Sydney NSW 2000

Dear Peter

Re: Sydney Olympic Park Amendment Regulation 2004
Your ref: LRC894

Reference is made to your correspondence dated 5 November, 2004 in which you advised that the Legislation Review Committee had considered the above Regulation and expressed concern over the penalty provisions of some of the offences within the legislation. Of particular concern was that it appeared that some of the maximum penalties and penalty notice amounts under the Regulation did not appear to be in keeping with the severity of the offence.

Please be advised that whilst the Sydney Olympic Park Authority instigated the need for changes to the Regulation, all the Regulation amendments, including the Penalty Notice Offences and monetary Penalties were drafted and endorsed by Parliamentary Counsel.

Parliamentary Counsel subsequently prepared the Offence and Penalty provisions at their own request based on their need for appropriate editorial formatting of the amendments and also to ensure the Penalty amounts were revised to create consistency with other regulations of a similar nature.

Accordingly, **Schedule 1 – Penalty notice offences** of the amendment Regulation as prepared by Parliamentary Counsel, was accepted.

In respect of excessive penalties for seemingly minor offences (such as climbing trees, playing golf, operating model aircraft and the like), please be advised it is not the intention of the Sydney Olympic Park Authority to actively prohibit or impose on-the-spot fines for activities such as the above that are either minor or inconsequential in nature.

However, in managing the orderly day to day activities of the park, the Authority required the appropriate legislative framework to assist in the lawful control of activities that may be reckless or become a nuisance to other users of the Park. The Authority's Rangers are mindful that they are not to issue penalty notices for minor offences and to always request nuisance offenders to cease their activities in the first instance for the benefit of other Sydney Olympic Park users.

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Should however, a reckless activity continue, the offender will then be warned that an on-the-spot fine could be issued under the lawful ability of the Regulation. An on-the-spot fine would only ever be issued as a last resort. Please be advised the Authority's records indicate it has never issued any on-the-spot fines for minor or inconsequential type offences in Sydney Olympic Park.

Trusting the above information is of assistance to you.

Yours sincerely,

SANDRA NORI MP
Minister for Tourism and Sport and Recreation
Minister for Women

Appendix 1: Index of Bills Reported on in 2005

	Digest Number
Civil Liability Amendment (Food Donations) Bill 2004	1
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004	1
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	1
Legal Profession Bill 2004	1
Marine Safety Amendment (Random Breath Testing) Bill 2004	1
Photo Card Bill 2004	1
Road Transport (General) Bill 2004	1
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	1
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply	Digest 2004	Digest 2005
Child Protection (Offender Prohibition Orders) Bill 2004	Minister for Police	18/06/04			
Legal Profession Bill 2004	Attorney General	17/02/05			1
Lord Howe Island Amendment Bill 2003	Attorney General/ Premier	13/02/04	Premier 13/07/04	1,10[61]	
Licensing And Registration (Uniform Procedures) Amendment (Photo ID) Bill 2004	Minister for Commerce	03/12/04	09/12/04	17	1
Marine Safety Amendment (Random Breath Testing) Bill 2004	Minister for Ports	17/02/05			1
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04 18/06/04	17/06/04	8,9	
Photo Card Bill 2004	Minister for Roads	17/02/05			1
Road Transport (General) Bill 2004	Minister for Roads	17/02/05			1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04	01/12/04	9	1
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	Minister for Roads	17/02/05			1
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/04		15	
State Records Amendment Bill 2004	Premier	19/10/04	28/10/04	13,15	
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	1	
Water Management Amendment Bill 2004	Minister for Natural Resources	28/05/04 26/10/04	24/09/04	8,14	

[61] Published under the title "Commencement of Acts."

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

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Civil Liability Amendment (Food Donations) Bill 2004	N			N	
Environmental Planning and Assessment Amendment (Development Contributions) Bill 2004			N	N	N
Law Enforcement (Powers and Responsibilities) Amendment (In-Car Video Systems) Bill 2004	R			N	
Legal Profession Bill 2004	N,C			N	
Marine Safety Amendment (Random Breath Testing) Bill 2004				C	
Photo Card Bill 2004				C	
Road Transport (General) Bill 2004	N	C		C	
Road Transport Legislation (Speed Limiters) Amendment Bill 2004	N			C	
Special Commission of Inquiry (James Hardie Records) Amendment Bill 2004	N,R				

Key

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

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

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2004	Digest 2005
Architects Regulation 2004	Minister for Commerce	21/09/04	30/11/04		1
Environmental Planning and Assessment Amendment (ARTC Rail Infrastructure) Regulation 2004	Minister for Infrastructure and Planning	26/10/04 17/02/05	01/02/05		1
Forestry Regulation 2004	Minister for Primary Industries	26/10/04 17/02/05	18/01/05		1
Stock Diseases (General) Regulation 2004	Minister for Primary Industries	05/11/04	16/12/04		1
Sydney Olympic Park Amendment Regulation 2004	Minister for Sport and Recreation	05/11/04	03/12/04		1