



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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# Membership

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# Functions of the 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.

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

# Guide to the Digest

## COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

### Ministerial Correspondence – Bills previously considered

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

## COMMENT ON REGULATIONS

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

### Regulations for the special attention of Parliament

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

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

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

### Copies of Correspondence on Regulations

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

## APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

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

**APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS  
REPORTED ON**

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



# Conclusions

## PART ONE - BILLS

1. APPROPRIATION BILL 2012; APPROPRIATION (PARLIAMENT) BILL 2012; STATE REVENUE AND OTHER LEGISLATION AMENDMENT (BUDGET MEASURES) BILL 2012

### Appropriation Bill 2012

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

### Appropriation (Parliament) Bill 2012;

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

### State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Rule of law*

The Committee refers to Parliament whether authorising the Director-General to perform an Act irrespective of any other Act or law constitutes a violation of the rule of law.

#### *Self incrimination and the right to silence*

The Committee refers to the Parliament whether the Bill infringes on a person's right to silence and the freedom from self-incrimination.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

#### *Powers of non-elected persons*

The Committee will always be concerned when significant power is granted to a non-elected official who is not responsible to the Parliament and refers to Parliament whether this is appropriate in the circumstances.

#### *Retrospectivity*

The Committee will always be concerned when legislation is permitted to have retrospective effect from a specific date irrespective of whether it has been passed by the Parliament. However, given that a set date is necessary to enable businesses to make future plans regarding financial liabilities, the Committee believes such a provision is reasonable in the circumstances.

#### *Commencement by proclamation*

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes that the sections that are due to commence by proclamation relate to administrative arrangements. In these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.

2. APPROPRIATION (BUDGET VARIATIONS) BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i)

*Retrospectivity*

The Committee will always be concerned where legislation seeks to have retrospective effect especially in relation to the validation of financial expenditure by the Government. However, as the purpose of such validation is for the purpose of the ongoing expenditure as part of the Budget and to ensure the continuation of services the Committee makes no adverse comments.

3. CHILD PROTECTION (WORKING WITH CHILDREN) BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

*Presumption of innocence*

The Committee is always concerned to comment in circumstances in which an individual's rights are affected following the commencement of proceedings, rather than the determination of those proceedings. However, given the object of this legislation – being the protection of children – the Committee considers this to be appropriate in these circumstances, and as such makes no further comment with respect to this issue.

The Committee will always seek to comment in circumstances where the onus of proof has been reversed. Notwithstanding the objects of this Bill, the Committee refers to Parliament whether the reversal of the onus of proof in relation to an individual seeking a Working With Children Check who has been found to pose a risk to the safety of children is reasonable in these circumstances.

The Committee will always seek to comment in circumstances where the onus of proof has been reversed. However, as this offence relates to an individual who has refused to comply with a legal request from the Commission, the Committee considers this to be reasonable in the circumstances and does not make a further comment in relation to this issue.

*Privacy; Privilege*

The Committee will always seek to comment in circumstances where a Bill seeks to authorise the disclosure of private information, particularly information that may be subject to legal professional privilege or other restrictions on disclosure. Notwithstanding the objects of this Bill, the Committee refers to Parliament whether authorising the release of information – which may have been untested evidence - in relation to an individual seeking a Working With Children Check is reasonable in these circumstances.

*Denial of compensation*

The Committee recognises that the effect of removing the right to seek compensation effectively limits an individual's capacity to seek damages. Given the good faith and reasonable care aspects of this clause, the Committee considers this to be a reasonable restraint and makes no further comment on this issue.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

*Right to work*

The Committee is concerned that the Commission's power to place an interim bar on an individual's application for a Working With Children Check which cannot be appealed for up to six months may have a detrimental effect on an individual's right to work. However, given the object of the legislation – and the threshold (a risk to the safety of children) – the Committee makes no further comment in relation to this issue.

The Committee notes that clause 47 has the effect of ousting the jurisdiction of the Courts, tribunals and Industrial Relations Commission with respect to the question of the reinstatement of an individual who has been prohibited from working under this Bill. The Committee refers to Parliament whether this is appropriate.

#### *Double punishment*

The Committee is concerned when an individual who has completed any set punishment with respect to an offence is restricted from entering into certain employment. In particular, this has the effect of restraining the courts from reviewing a decision of the Commission under clause 26. The Committee also notes that clause 27(5) restrains the tribunal from awarding costs. Again, however, given the objects of this Bill – being the protection of children – the Committee makes no further comment with respect to this issue.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

#### *Commencement by proclamation*

Ordinarily, the Committee would comment on acts or parts of acts that are to commence by proclamation. However, the Committee understands that the commencement of this Act has been delayed to accommodate the Commission development of a timetable that will implement the new system in a planned way. The Committee accepts the reasons for commencement by proclamation as appropriate in the circumstances.

### 4. COMMUNITY HOUSING PROVIDERS (ADOPTION OF NATIONAL LAW) BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Self incrimination*

The Committee notes that the requirement for individuals to provide specified documentation, and attend meetings for the purpose of answering questions, may have the effect of those individuals incriminating themselves. The Committee notes that this is not an unusual clause in legislation that relates to business agreements entered into by the state, and as such makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

#### *Transfer of property*

The Committee is concerned that clause 24 provides the Housing Agency with a broad power to transfer land to itself in circumstances where it may only have partly funded the acquisition of that land. However, given the objects of this Bill the Committee considers this to be reasonable in circumstances.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

*Jurisdiction of the courts*

The Committee is concerned that clause 26 removes the right to compensation in circumstances, such as those arising with respect to clause 24. As such, whilst the Committee notes that clause 26 – and section 24 of the National Law – operate to exclude the capacity of the court to order compensation in circumstances where the Housing Agency has acted inequitably, the Committee considers this to be reasonable in the circumstances.

The Committee is concerned that clause 26 seeks to oust the court's ability to review breach of contract, breach of contractual provisions or the right of remedy. The Committee refers to Parliament whether such a clause removes the right to pursue relief in the civil courts, and thus may make decisions under Divisions 3 and 4 non-reviewable.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

*Commencement by proclamation*

The Committee always seeks to comment in circumstances where an Act commences by proclamation, rather than on the day of assent. In these circumstances, the Committee notes the intention of the Bill to introduce uniform legislation and acknowledges that this may require some flexibility in relation to commencement dates with respect to other jurisdictions. As such, the Committee makes no further comment with respect to this issue.

*Conferral of subject power to National Law*

The Committee is keen to comment in circumstances where a Bill has the effect of referring the power of the NSW Parliament to legislate with respect to subject matter to National Law. The Committee notes that in these circumstances, the National Law takes the form of an appendix to the Bill and, as such, is not separate to NSW legislation and may be amended by the NSW Parliament. As such, the Committee makes no further comment in relation to this issue.

*Delegate prescribed in the regulations*

The Committee is concerned when the functions of a statutory officer may be subject to delegation as prescribed in the regulations. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.

*Regulations creating offences*

The Committee notes that the creation of offences is most appropriately performed by Parliament. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.

*Definitions in the regulations*

The Committee notes that definitions are most appropriately included in the primary legislation, particularly when defining the period of time that savings and transitional provisions continue to operate. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.

## 5. GAME AND FERAL ANIMAL CONTROL AMENDMENT BILL 2012\*

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

*Inappropriate delegation of power – Regulations*

The Committee is concerned that the subordinate legislation-making powers of this Bill may deny Parliament its proper role in scrutinising alterations to legislation.

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

*Oppressive official powers*

The Committee will always be concerned when an official has the power to direct an individual who is yet to commit any offence to leave a public area because the official believes an individual may commit an offence in the future. The Committee refers to Parliament its concerns.

6. NATIONAL PARKS AND WILDLIFE AMENDMENT (ILLEGAL FORESTRY OPERATIONS) BILL 2012\*

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

7. SECURITY INDUSTRY AMENDMENT BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

*Retrospectivity:*

The Committee notes clause 6A will ensure that the *Security Industry Act 1997* powers of the NSW Police Force be retained, to oversight registered training organisations in New South Wales, and to ensure that the NSW Police Force can continue to regulate registered training organisations alongside the national regulator. The Second Reading speech explained that advice from the Commonwealth indicated that it will support this approach. Accordingly, the Committee is satisfied that the retrospectivity of clause 6A of Schedule 1 [11] does not, in this case, unduly trespass on individual rights. For the same reason, the retrospectivity of clause 6AA of Schedule 2 [2], does not unduly trespass on individual rights.

*Presumption of Innocence:*

The Committee recognises the right to a presumption of innocence and considers whether clause 17 (10) in allowing records on past spent convictions, may undermine such a right. However, the Committee strongly appreciates the public interest in ensuring compliance and accepts the need for renewal applicants to be fit and proper persons in the security industry.

*Procedural Fairness:*

Clause 26 (5) refers to improper conduct rather than unlawful conduct and as such, the amendments may raise some potential concerns about an applicant's right to procedural fairness, such as, the right to know the reasons and information in order for the applicant to challenge the grounds of the decision when seeking a review. The Committee, however, takes into account subclauses (a1), (2) and (3) of clause 29, which will still provide for a right to seek review from the Administrative Decisions Tribunal.

*Privacy and Property – Powers of Entry Without Warrant:*

The power to enter premises without consent or warrant trespasses on the right to privacy and property. However, a sufficient public interest may justify such a trespass such as ensuring compliance with the legislation in the security industry. The Committee observes that there are some limitations on the exercise of the enforcement officers' powers of entry without warrant. For instance, entry is only permitted at a reasonable time and entry to premises (or

part of premises) used for residential purposes still requires consent of the occupier or the authority of a search warrant. The Committee also notes the Second Reading speech referred to how compliance auditing is carried out by a range of New South Wales government agencies where there are powers of entry without warrants and powers of inspection for civilian inspectors (such as under the *Gaming and Liquor Administration Act 2007*).

## PART TWO - REGULATIONS

### 1. ELECTRICITY SUPPLY (GENERAL) AMENDMENT (SOLAR FEED-IN TARIFFS) REGULATION 2012

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

#### *Reliance*

The Committee notes that adequate time may not have been provided for customers to have a complying generator connected to the distribution system to enable the customer to receive credits under the solar bonus scheme. However, the Committee notes that customers have had over 12 months to obtain a connection prior to the amendment and as such makes no further comment.

## Part One - Bills

### 1. Appropriation Bill 2012; Appropriation (Parliament) Bill 2012; State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012

Date introduced	12 June 2012
House introduced	Legislative Assembly
Minister responsible	Hon. Mike Baird MP
Portfolio	Treasurer

#### PURPOSE AND DESCRIPTION

##### Appropriation Bill 2012

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2012–13 financial year for the recurrent services and capital works and services of the Government, including:
  - (a) the principal departments, and
  - (b) various special offices.
2. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.
3. The Bill contains an additional appropriation which allocates revenue raised in connection with gaming machine taxes to the Minister for Health and Minister for Medical Research for spending on health related services.
4. The Bill provides for appropriation for the whole of the 2012–13 financial year.

##### Appropriation (Parliament) Bill 2012

5. The object of this Bill is to appropriate out of the Consolidated Fund the following sums of money required during the 2012–13 financial year for the recurrent services and capital works and services of the Legislature:
  - (a) Recurrent Services \$117,812,000
  - (b) Capital Works and Services \$6,244,000

6. The expenses and capital expenditure for relevant service groups of the Legislature are as follows:

	Expenses	Capital expenditure
Chamber	\$18,398,000	\$740,000
Members Support	\$113,449,000	\$5,202,000
Community Access	\$7,519,000	\$302,000
Total	\$139,366,000	\$6,244,000

### State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012

7. The objects of this Bill are as follows:

- (a) to amend the Duties Act 1997:

- (i) to defer the abolition of certain duties relating to marketable securities, business assets, mortgages and other matters, and
- (ii) to increase the caps for assistance under the First Home—New Home Scheme, and
- (iii) to establish a new scheme to provide assistance in the purchase or construction of a new home,

- (b) to amend the First Home Owner Grant Act 2000 to limit the operation of the First Home Owner Grant Scheme to new homes and to increase the amount of the grant payable under that Scheme in respect of the purchase or construction of a new home,

- (c) to increase by 12.5% the fines payable under penalty notices for traffic and parking offences,

- (d) to increase from \$50 to \$65 the standard additional amount payable for various enforcement actions following a failure of a person to pay the fine under a penalty notice issued in respect of any offence,

- (e) to amend mining legislation to require an annual rental fee and an administrative levy to be paid by holders of mining authorisations (to fund investment and administrative programs), to change the arrangements for the imposition of security deposit conditions, and for other purposes,

- (f) to amend petroleum (onshore) legislation to require an annual rental fee and an administrative levy to be paid by holders of petroleum titles (to fund investment and administrative programs), to change the arrangements for the imposition of security deposit conditions, and for other purposes,

- (g) to amend the Electricity Supply Act 1995 to:

- i. require electricity retailers to contribute to rebates payable under the solar bonus scheme and to reduce the contribution of electricity distributors accordingly, and



- ii. enable the Independent Pricing and Regulatory Tribunal to determine the rate of the contribution payable by electricity retailers under the solar bonus scheme and also to determine the benchmark for feed-in tariffs for other retail electricity customers who supply electricity to the grid,
- (h) to repeal the Hawkesbury-Nepean River Act 2009,
- (i) to make other miscellaneous and consequential amendments.

## BACKGROUND

- 8. These Bills give legislative effect to the 2012 – 2013 Budget.
- 9. Although they will be separate Acts when they become operative, as the Appropriations Bill 2012 and the Appropriation (Parliament) Bill 2012 are cognate with the State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012, all three Bills have therefore been considered in the one report.

## OUTLINE OF PROVISIONS

### Appropriation Bill 2012

#### *Part 1 Preliminary*

- 10. Clause 1 sets out the name (also called the short title) of the proposed Act.
- 11. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
- 12. Clause 3 interprets a reference to the financial year to which the proposed Act relates.
- 13. Clause 4 is an interpretive provision relating to expenses and capital expenditure information included in the proposed Act.

#### *Part 2 Appropriation (Departments)*

- 14. Part 2 (clauses 5–18) provides for the appropriations for the recurrent services and capital works and services of the specified departments for the financial year of 2012–13. The amounts appropriated are:

- (a) \$49,504,311,000 for recurrent services, and
- (b) \$2,534,310,000 for capital works and services.

#### *Part 3 Additional appropriation for health related services*

- 15. Part 3 (clauses 19 and 20) makes an additional appropriation of \$245,000,000 to the Minister for Health and Minister for Medical Research, with this being part of the revenue raised from gaming machine taxes.

#### *Part 4 Appropriation (Special Offices)*

- 16. Part 4 (clauses 21–30) provides for the appropriations for the recurrent services and capital works and services of the specified offices for the financial year of 2012–13.

17. The total amounts appropriated are:

- (a) \$274,498,000 for recurrent services, and
- (b) \$12,124,000 for capital works and services.

*Part 5 General*

- 18. Part 5 (clauses 31–34) provides for general matters related to the appropriations set out in Parts 2–4 of the proposed Act.
- 19. Clause 31 enables the Treasurer to authorise payment for a purpose, in excess of the sum appropriated for the purpose, in specified circumstances. Clause 32 allows this function to be delegated by the Treasurer.
- 20. Clause 33 allows the Treasurer to apply an appropriation differently in the event that responsibility for a service or function is transferred.
- 21. Clause 34 allows a Minister to table a Budget Paper in the Legislative Assembly by presenting it to the Clerk of the Legislative Assembly, if the Legislative Assembly is not sitting when the Budget Paper is sought to be tabled.

**Appropriation (Parliament) Bill 2012**

- 22. Clause 1 sets out the name (also called the short title) of the proposed Act.
- 23. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
- 24. Clause 3 provides for the interpretation of a reference to the financial year to which the proposed Act relates and other matters of interpretation.
- 25. Clause 4 is an interpretative provision relating to expenses and capital expenditure information included in the proposed Act.
- 26. Clause 5 provides for the appropriation out of the Consolidated Fund, for the recurrent services of the Legislature for the financial year of 2012–13, of the amount of \$117,812,000.
- 27. Clause 6 provides for the appropriation out of the Consolidated Fund, for the capital works and services of the Legislature for the financial year of 2012–13, of the amount of \$6,244,000.

**State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012**

- 28. Clause 1 sets out the name (also called the short title) of the proposed Act.
- 29. Clause 2 provides for the commencement of the proposed Act.
- 30. Clause 3 makes it clear that the explanatory notes contained in the Schedules to the proposed Act do not form part of the proposed Act.

31. Schedules 1–8 make the amendments and repeal outlined in the Overview. The amendments and repeal are explained in more detail in the explanatory notes set out in the Schedules.

## ISSUES CONSIDERED BY COMMITTEE

### Appropriation Bill 2012

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

### Appropriation (Parliament) Bill 2012;

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

### State Revenue and Other Legislation Amendment (Budget Measures) Bill 2012

#### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

##### *Rule of law*

32. Schedule 5 amends NSW mining legislation, whilst Schedule 6 amends NSW petroleum legislation. Schedule 5, Clause 7 (the proposed s239D (2)) and Schedule 6, Clause 9 (the proposed s76A(2)) both authorise the Director-General, despite any other Act or law, to provide a relevant agency with any such document or information received in relation to required reporting conditions.

**The Committee refers to Parliament whether authorising the Director-General to perform an Act irrespective of any other Act or law constitutes a violation of the rule of law.**

##### *Self incrimination and the right to silence*

33. As noted above, Schedule 5 amends mining legislation. Proposed sections 239D(3) and 76A(3) both require the holder of an authorisation to provide required reporting documents or information irrespective of whether such a document or information might incriminate the holder.
34. The requirement that a person must provide such information may infringe upon the freedom against self-incrimination.
35. Whilst the Committee notes that the Act recognises this right by way of the inclusion of safeguards contained in the Acts (in the proposed s239D(3) and s76A(4)) which provide that such information or documents to be inadmissible in evidence against the person in criminal proceedings if certain criteria is met. That criteria requires that the person, when submitting a document or information, objects on the grounds that it might incriminate him or her. Such safeguards could be deemed inadequate as the freedom against self-incrimination ought not be reliant on a person potentially incriminating themselves through their objection.

**The Committee refers to the Parliament whether the Bill infringes on a person's right to silence and the freedom from self-incrimination.**

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

*Powers of non-elected persons*

36. Schedule 5, Clause 5 amends the *Mining Act 1992* to replace the Minister with "decision-maker" in regards to setting the conditions of mining leases.
37. Throughout Schedule 5 and 6 there are numerous decision-making powers granted to the "decision-maker" which is defined in the various acts as the Director-General. Such decisions include the power to reduce or waive fees and levies payable by certain mining or petroleum producers.

**The Committee will always be concerned when significant power is granted to a non-elected official who is not responsible to the Parliament and refers to Parliament whether this is appropriate in the circumstances.**

*Retrospectivity*

38. The Bill states that Schedule 5.2 commences or is taken to have commenced on 1 July 2012.

**The Committee will always be concerned when legislation is permitted to have retrospective effect from a specific date irrespective of whether it has been passed by the Parliament. However, given that a set date is necessary to enable businesses to make future plans regarding financial liabilities, the Committee believes such a provision is reasonable in the circumstances.**

*Commencement by proclamation*

39. Schedule 6.1 [9] commences on a day or days to be appointed by proclamation.

**The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, the Committee notes that the sections that are due to commence by proclamation relate to administrative arrangements. In these circumstances the Committee does not consider there to be an inappropriate delegation of legislative powers.**

## 2. Appropriation (Budget Variations) Bill 2012

Date introduced	13 June 2012
House introduced	Legislative Assembly
Minister responsible	Hon. Mike Baird MP
Portfolio	Treasurer

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to set out the recurrent services and capital works and services for which the “Advance to the Treasurer” appropriation was expended in the 2011–12 financial year, and the 2010–11 financial year (where not previously reported), and to make the necessary adjustments to the appropriation for each of those years,
  - (b) to appropriate \$61,200,000 from the Consolidated Fund for recurrent services, and capital works and services, that were required by the exigencies of Government in accordance with section 22 (1) of the Public Finance and Audit Act 1983 in relation to the 2011–12 financial year,
  - (c) to appropriate an additional amount of \$800,000,000 from the Consolidated Fund for certain capital works and services for the 2011–12 financial year.

### BACKGROUND

2. As part of the Budget each year, the Parliament makes available an advance to the Treasurer to provide for unforeseen circumstances, such as natural disasters, which is known as the Treasurer's advance.

### OUTLINE OF PROVISIONS

#### Part 1 Preliminary

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
5. Clause 3 interprets various references in the proposed Act.

#### Part 2 Budget variations 2011–12

6. Clause 4 adjusts the amount appropriated out of the Consolidated Fund for “Advance to the Treasurer” for the 2011–12 financial year. The recurrent services and capital works and services for which the Advance was expended are set out in Column 1 of Schedule 1 and total \$93,542,000 of the \$285,000,000 originally advanced.

7. Clause 5 appropriates the additional amounts for recurrent services and capital works and services under section 22 (1) of the Public Finance and Audit Act 1983, the details of which are set out in Column 2 of Schedule 1. As these amounts are appropriated by the proposed Act, subclause (2) removes the requirement of the Public Finance and Audit Act 1983 that details of them be included in the Appropriation Act for the 2012–13 financial year.
8. Clause 6 appropriates an additional amount for capital works and services, the details of which are set out in Column 3 of Schedule 1.

### Part 3 Budget variations 2010–11 (not previously reported)

9. Clause 7 adjusts the amount appropriated out of the Consolidated Fund for “Advance to the Treasurer” for the 2010–11 financial year. The recurrent services and capital works and services for which the Advance was expended are set out in Column 1 of Schedule 2 and total \$23,145,000 of the \$440,000,000 originally advanced.

### Part 4 General

10. Clause 8 makes it clear that the sums appropriated by the proposed Act are in addition to any other sums appropriated in respect of the 2010–11 or 2011–12 financial year.
11. Clause 9 contains miscellaneous provisions concerning the operation of the proposed Act. Subclause (1) provides that the proposed Act is to be construed as part of the annual Appropriation Act or Acts. (This emphasises that the appropriations are part of the budgetary process for the 2010–11 or 2011–12 financial year and ensures that terms are construed consistently.) Subclause (1) also makes it clear that the appropriations are not limited to meeting shortfalls from other appropriations. Subclause (2) validates any payment of the appropriated sums before the date of assent to the proposed Act. Subclause (2) also provides that the proposed subsection applies whether or not the proposed Act is assented to during or after the 2010–11 or 2011–12 financial year. (This removes an argument, based on section 23 of the Public Finance and Audit Act 1983, that the appropriation lapses at the close of the financial year.)
12. Clause 10 validates, to the extent (if any) to which it may be necessary to do so, the expenditure, before the date of assent to the proposed Act, of any sum to which the proposed Act applies and the approval of that expenditure.
13. Clause 11 makes it clear that a reference to an agency specified in Schedule 1 or 2 to the proposed Act includes any predecessor of the agency that was responsible for the recurrent services, or capital works and services, specified in relation to the agency in Schedule 1 or 2 in the financial year concerned. This provision is included because names of Departments and other agencies may have changed during the financial year concerned because of administrative changes.

### ISSUES CONSIDERED BY COMMITTEE

#### Trespasses on personal rights and liberties: s 8A(1)(b)(i)

##### *Retrospectivity*

14. Clause 9 states that this Act is to have effect as if it had commenced at the start of the financial year relevant to the appropriation.

15. Clause 9 also validates any expenditure out of the Consolidated Fund appropriated by this Act whether this Act is assented to during or after 2010-11 or after 2011-12.
16. Clause 10 provides that the expenditure of any sum to which this Act applies before the assent to this Act is taken to be validly made and validly approved at the time it was approved.

**The Committee will always be concerned where legislation seeks to have retrospective effect especially in relation to the validation of financial expenditure by the Government. However, as the purpose of such validation is for the purpose of the ongoing expenditure as part of the Budget and to ensure the continuation of services the Committee makes no adverse comments.**

### 3. Child Protection (Working with Children) Bill 2012

Date introduced	Wednesday 13 June 2012
House introduced	Legislative Assembly
Minister responsible	The Hon Victor Dominello MP
Portfolio	Citizenship and Communities

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
  - (a) to require people engaged in paid or unpaid work with children to obtain a working with children check clearance (a clearance),
  - (b) to prohibit the granting of clearances to persons convicted of, or charged with, the murder of a child, serious sex offences and other specified offences,
  - (c) to specify the circumstances in which applicants for or holders of clearances will be subject to detailed risk assessment to determine whether they pose a risk to the safety of children,
  - (d) to confer on the Commission for Children and Young People (the Commission) functions relating to the granting and refusal of applications for clearances and the assessment of applicants and holders and other related functions,
  - (e) to provide for reviews of decisions of the Commission and for applications by disqualified persons who wish to work with children,
  - (f) to provide for the establishment of a working with children register and databases by the Commission,
  - (g) to provide for the mandatory provision of information to the Commission by employers, the NSW Police Force and others for the purposes of the proposed Act,
  - (h) to make consequential amendments to other Acts,
  - (i) to enact consequential savings and transitional provisions.

#### BACKGROUND

2. The Bill introduces a new Working With Children Check that improves the current Working With Children Check in four key ways:
  - (a) The same Working With Children Check will be applied to all types of child-related engagement;



- (b) the Working With Children Check will access full criminal histories of applicants and continuously monitor New South Wales records to manage any risks that may arise following the provision of a clearance;
  - (c) the check will only have two outcomes, either a clearance to work with children or a bar;
  - (d) the incorporation of online systems and centralised operations will allow for the more efficient operation of checks.
- 3. The new Working With Children Check is based on recommendations from the 2010 review of the *Commission for Children and Young People Act 1998*. The new Working With Children Check improves the current Working With Children Check which was established in 1998 and which was the first such check in Australia.
  - 4. This Bill makes the New South Wales Working With Children Check consistent with similar checks in other States, and provides New South Wales with the most up-to-date Working With Children Check in Australia.
  - 5. The new Working With Children Check will be operated by the Commission for Children and Young People ('the Commission') and will provide a universal and clearly recognisable standard for workers and employers. It will allow for the provision of a portable and renewable Working With Children clearance that lasts for five years.

## OUTLINE OF PROVISIONS

### Part 1 Preliminary

- 6. Clause 1 sets out the name (also called the short title) of the proposed Act.
- 7. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
- 8. Clause 3 sets out the object of the proposed Act.
- 9. Clause 4 provides that the safety, welfare and well-being of children and, in particular, protecting them from child abuse, is the paramount consideration in the operation of the proposed Act.
- 10. Clause 5 defines certain words and expressions used in the proposed Act.

### Part 2 Restrictions on child-related work

#### *Division 1 Child-related work*

- 11. Clause 6 defines when a worker is taken to be engaged in child-related work for the purposes of the proposed Act. A worker is so engaged if engaged in work for, or in connection with, work prescribed by the regulations that is work in education and care services, child care services, mentoring and counselling services for children, child protection services, schools, private tuition, detention centres for children, residential services for children, sporting and other venues used primarily by children, child health services, disability services, transport services for children and religious organisations. Persons employed in specified roles, including approved providers or managers of education and care services, are also classified as being engaged in child-related work.

12. Clause 7 also defines a worker as engaging in child-related work if the worker's work involves access to confidential records or information about children and the employer requires the worker to obtain a clearance. The requirement may be made or revoked only with the approval of the Commission.

*Division 2 Mandatory requirements for child-related work*

13. Clause 8 makes it an offence to engage in child-related work unless the worker holds a clearance or has a current application for a clearance. It will also be an offence for a worker to engage in child-related work at any time while subject to an interim bar.
14. Clause 9 makes it an offence for an employer to commence employing or to continue to employ a worker in child-related work if the employer knows or has reasonable cause to believe that the worker is not the holder of a clearance and does not have a current application for a clearance or that the worker is subject to an interim bar.

*Division 3 Additional persons who must obtain clearances*

15. Clause 10 requires an adult who resides for more than 3 weeks at a home where an education and care service is provided, or at the home of an authorised carer, to obtain a clearance. The designated agency that authorises the authorised carer or the approved provider of the education and care service must ensure that the adult complies with the proposed section.
16. Clause 11 provides for the screening by the Commission of persons applying to adopt a child as if they were applicants for a clearance.

## Part 3 Working with children check clearances

*Division 1 Classes of clearances*

17. Clause 12 provides for volunteer and non-volunteer classes of clearances and provides that the holder of a volunteer clearance may engage in paid work for a transitional period of up to 30 consecutive days.

*Division 2 Applications for clearances*

18. Clause 13 provides for applications for working with children clearances.

*Division 3 Risk assessment of applicants and holders*

19. Clause 14 makes a person subject to an assessment requirement if any of the matters specified in proposed Schedule 1 apply to the person.
20. Clause 15 requires the Commission to conduct a risk assessment of a person to determine whether the person poses a risk to the safety of children if the person is an applicant for or holder of a clearance who is subject to an assessment requirement. Assessments may also be conducted if the Commission becomes aware that a clearance has been granted on wrong or incomplete information or if the Commission otherwise decides to conduct an assessment. The Commission may consider matters relating to the matters that caused the assessment, including the seriousness of any offences, the age of the person and victim when they occurred and the likelihood of repetition when assessing risk.

21. Clause 16 enables the Commission to request applicants for or holders of clearances to provide information related to the application or clearance. The Commission may terminate an application if the applicant fails to provide requested information within 6 months.
22. Clause 17 empowers the Commission to impose an interim bar on an applicant for or holder of a clearance if the Commission is of the opinion that it is likely there is a risk to the safety of children if the applicant or holder continues to engage in child-related work. An interim bar will be in force for 12 months unless earlier revoked or an application for clearance is granted. It will be an offence under proposed section 8 to engage in child-related work while subject to an interim bar.

*Division 4 Determination of applications for clearances*

23. Clause 18 prohibits the granting of a clearance to a person convicted of or charged with an offence specified in proposed Schedule 2 (a disqualified person), if the offence was committed as an adult. The Commission must grant a clearance to a person subject to a risk assessment if satisfied that the person does not pose a risk to the safety of children. The Commission must also grant a clearance to a person who is not a disqualified person and who is not subject to risk assessment.
24. Clause 19 requires the Commission to notify applicants (other than disqualified persons) of proposed decisions not to grant clearances and to consider any submissions made by applicants within a period specified for that purpose in the notice.
25. Clause 20 provides for written notice to be given of a decision to refuse or grant a clearance. If a clearance is granted, the notice must include the person's working with children check number.
26. Clause 21 prohibits an unsuccessful applicant for a clearance from making a further application for a period of 5 years, except where a person is not found guilty of an offence, a finding of guilt or other relevant finding is quashed or set aside or ceases to have effect or the Commission permits an application to be made.

*Division 5 Duration and termination of clearances*

27. Clause 22 provides that a clearance ceases to have effect 5 years after it is granted unless sooner cancelled or surrendered. A new clearance may be applied for up to 3 months before the expiry of the clearance.
28. Clause 23 requires the Commission to cancel a clearance on becoming aware that the holder is a disqualified person or if satisfied that the holder poses a risk to the safety of children. Notice of the cancellation, containing reasons, must be given to the holder.
29. Clause 24 provides for the surrender of clearances.

*Division 6 Working with children register*

30. Clause 25 requires the Commission to establish a working with children register containing particulars of applications for clearances and particulars of holders of clearances (including their working with children check numbers). The register is to be kept in the manner and form approved by the Commission.

## Part 4 Reviews and appeals

31. Clause 26 prohibits a person from making an application under the proposed Part if the person has been convicted of the murder of a child or the person's application for a clearance has been refused wholly or partly because the person has been charged with an offence and the proceedings have not been finally determined.
32. Clause 27 confers a right to apply to the Administrative Decisions Tribunal (the Tribunal) for a review of a decision to refuse or cancel a clearance within 28 days after notice of the decision is given. An application may also be made for a review of a decision to impose an interim bar if the interim bar has been in force for more than 6 months. Any party to the appeal proceedings may appeal to the Supreme Court on a question of law.
33. Clause 28 confers on a disqualified person a right to apply to the Tribunal for an order (an enabling order) declaring that the person is not to be treated as a disqualified person for the purposes of the proposed Act in respect of a specified offence. It also confers on a person who is ineligible to apply for a clearance (because of a previous refusal) a right to apply to the Tribunal for an order declaring that the person is eligible to apply for a clearance. The Tribunal may also order the Commission to revoke an interim bar or to grant the person a clearance.
34. Clause 29 enables the Commission to apply to the Tribunal to revoke or vary an enabling order. On such an application, the Tribunal may revoke or vary an enabling order if satisfied that the person concerned poses a risk to the safety of children.
35. Clause 30 provides that in determining an application under the proposed Part, the Tribunal is to consider matters relating to relevant offences or findings, including the seriousness of the matters, the age of the person and victim when they occurred and the likelihood of repetition. It also enables the Tribunal to order a stay of the operation of a determination of the Commission if an appeal or application is made under the proposed Part for an enabling order. It also disapplies appeal provisions under the *Administrative Decisions Tribunal Act 1997*.

## Part 5 Provision of information

36. Clause 31 re-enacts, with necessary modifications, a provision of the Commission for *Children and Young People Act 1998* (the CCYP Act) to confer power on the Commission to require government agencies and other persons to provide information relevant to an assessment of whether a person poses a risk to the safety of children.
37. Clause 32 authorises the Director of Public Prosecutions, on receipt of a notice to provide information under proposed section 31, to disclose documents even if they contain other additional information that may be subject to legal professional privilege or other restrictions on disclosure.
38. Clause 33 authorises the Commissioner of Police to disclose to the Commission information relating to matters that may result in an assessment requirement affecting a person, information relating to a person's criminal history and information relating to the circumstances of an offence. Such information may include information about spent convictions and criminal charges.

39. Clause 34 re-enacts a provision of the CCYP Act that enables the disclosure of information about convictions, criminal history, offences and charges by the Commissioner of Police to CrimTrac, police forces of other jurisdictions and interstate screening agencies for the purposes of interstate child-related work screening.
40. Clause 35 imposes a duty on a reporting body to notify the Commission of the identity of any child-related worker against whom the body makes a finding that the worker has engaged in conduct specified in proposed Schedule 1 (that is, conduct which makes the worker liable to an assessment requirement). Regulations may be made about the notification and related matters. The bodies that are reporting bodies include NSW Government agencies, government Departments or public sector agencies, registration or licensing authorities constituted by an Act and other bodies exempt from requirements under the *Ombudsman Act 1974* relating to the reporting of conduct involving actions against children.
41. Clause 36 re-enacts a provision of the CCYP Act providing for the issue of enforcement notices to reporting bodies to require compliance with obligations under proposed section 35.

## Part 6 Functions of Commission

42. Clause 37 confers on the Commission functions with respect to the establishment and maintenance of databases containing information about Tribunal orders under the proposed Act, findings resulting in assessment requirements, notifications by reporting bodies and employers seeking information about clearances.
43. Clause 38 enables the Commission to promote public awareness of and provide advice on requirements for clearances and related matters.
44. Clause 39 requires the Commission to monitor and audit compliance with the proposed Act and regulations made under the proposed Act.
45. Clause 40 re-enacts a provision of the CCYP Act to confer power on the Commission to issue a notice to compel the provision of information or documents by an officer of a government agency, an employer or an employer body. It will be an offence to fail to comply with such a notice.

## Part 7 Miscellaneous

46. Clause 41 provides that the proposed Act binds the Crown.
47. Clause 42 re-enacts, with necessary modifications, a provision of the CCYP Act to enable an assessment under the proposed Act, or interstate child-related work screening, to be conducted despite any other Act or law. The proposed section also provides that the proposed Act does not affect any statutory right of an employee in relation to employment or termination of employment, though any court exercising jurisdiction over such a right is required to have regard to the results of any assessment or application for a clearance and the welfare of children in connection with the employment concerned. The provision is subject to proposed section 47.
48. Clause 43 re-enacts, with necessary modifications, a provision of the CCYP Act to protect persons carrying out functions relating to assessment and clearances from liability for

acts or omissions done in good faith and with reasonable care. Any such person has qualified privilege in proceedings for defamation and is not liable to pay damages or compensation in respect of decisions about applications and clearances.

49. Clause 44 provides for the issue by the Commission of evidentiary certificates as to clearances, applications and interim bars.
50. Clause 45 re-enacts, with necessary modifications, a provision of the CCYP Act to prohibit the disclosure of information obtained in connection with the exercise of functions under the proposed Act except in specified circumstances.
51. Clause 46 re-enacts, with necessary modifications, a provision of the CCYP Act to enable access to certain information under the *Government Information (Public Access) Act 2009*. The provision enables access to information about disciplinary findings that give rise to assessment requirements under the proposed Act.
52. Clause 47 re-enacts, with necessary modifications, a provision of the CCYP Act to prevent a person from being re-instated contrary to a prohibition on employment under the CCYP Act. It also provides that a court or tribunal does not have jurisdiction under any Act or law to order the re-instatement or re-employment of a person or to order the payment of damages or compensation for removal of employment if the proposed Act prohibits the person from engaging in the employment.
53. Clause 48 provides that section 579 of the *Crimes Act 1900*, which requires certain convictions or findings of guilt for offences to be disregarded for all purposes, is not to apply in respect of offences specified by the proposed Act for the purposes of identifying a person as a disqualified person or as a person subject to an assessment requirement.
54. Clause 49 enables proceedings for offences under the proposed Act to be dealt with summarily before the Local Court.
55. Clause 50 re-enacts a provision of the CCYP Act to make a director or manager of a corporation liable for an offence under the proposed Act or regulations committed by the corporation if the director or manager knowingly authorised or permitted the contravention.
56. Clause 51 provides for the service of documents under the proposed Act.
57. Clause 52 enables the Governor to make regulations for the purposes of the proposed Act.
58. Clause 53 provides for the review of the proposed Act in 5 years.

### Schedule 1 Assessment requirement triggers

59. Schedule 1 specifies the offences, and stage of proceedings for the specified offences, that will make a person liable to an assessment requirement under the proposed Act. It also specifies findings by reporting bodies about sexual misconduct involving a child and the serious physical assault of a child by a person as conduct that will make the person liable to an assessment requirement under the proposed Act.

## Schedule 2 Disqualifying offences

60. Schedule 2 specifies the offences for which proceedings or a conviction will render a person a disqualified person under the proposed Act.

## Schedule 3 Savings, transitional and other provisions

61. Schedule 3 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

## Schedule 4 Amendment of other Acts

62. Schedule 4.1 amends the *Children and Young Persons (Care and Protection) Act 1998* to update references.
63. Schedule 4.2 amends the *Commission for Children and Young People Act 1998* to omit provisions relating to employment screening for child-related work and to omit other related provisions now re-enacted in the proposed Act.
64. Schedule 4.3 amends the *Criminal Records Act 1991* so as to except applications for clearances from the operation of the provision that excludes spent convictions from being included in legislative references to criminal history or convictions and requirements for disclosure.
65. Schedule 4.4 amends the *Education Act 1990* to update references.
66. Schedule 4.5 amends the *Education (School Administrative and Support Staff) Act 1987* to:
- (a) enable the Director-General of the Department of Education and Communities to suspend a permanent employee who is subject to an interim bar, has been refused a clearance (if there is an appeal or the time for an appeal has not elapsed) or who is eligible to apply for a clearance but has not so applied, and
  - (b) terminate the employment of a permanent employee whose clearance is cancelled or who does not hold a clearance (other than a person whose employment may be suspended) and require any such person to notify the person's status, and
  - (c) provide for the re-instatement or re-employment of a person who obtains a clearance after being dismissed, and
  - (d) make other amendments consequential on the enactment of the proposed Act.
67. Schedule 4.6 amends the *Industrial Relations Act 1996* to remove a reference to proceedings that are no longer dealt with by the Industrial Relations Commission.
68. Schedule 4.7 amends the *Institute of Teachers Act 2004* to enable the revocation of the accreditation of a teacher who becomes an unauthorised person under the *Teaching Service Act 1980*.
69. Schedule 4.8 amends the *Ombudsman Act 1974* to enable the Ombudsman to disclose certain information to the Commission.

70. Schedule 4.9 amends the *Parliamentary Electorates and Elections Act 1912* as a consequence of the amendment of the *Commission for Children and Young People Act 1998* by the proposed Act.
71. Schedule 4.10 amends the *Teaching Service Act 1980* to:
- (a) enable the Director-General of the Department of Education and Communities to suspend an officer of the Teaching Service who is subject to an interim bar, has been refused a clearance (if there is an appeal or the time for an appeal has not elapsed) or who is eligible to apply for a clearance but has not so applied, and
  - (b) terminate the employment of an officer of the Teaching Service whose clearance is cancelled or who does not hold a clearance (other than a person whose employment may be suspended) and require any such person to notify the person's status, and
  - (c) provide for the re-instatement or re-employment of a person who obtains a clearance after being dismissed, and
  - (d) make other amendments consequential on the enactment of the proposed Act.
72. Schedule 4.11 amends the *Young Offenders Act 1997* to provide that warnings, cautions or conferences under that Act may be disclosed or taken into account for the purposes of an application for a clearance or an assessment of a person or an application for a review or an enabling order under the proposed Act.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Presumption of innocence*

73. Division 4 outlines the circumstances in which the Commission must not grant a Working With Children Check. One such circumstance is where a person against whom proceedings for particular specified offences have been commenced.

**The Committee is always concerned to comment in circumstances in which an individual's rights are affected following the commencement of proceedings, rather than the determination of those proceedings. However, given the object of this legislation – being the protection of children – the Committee considers this to be appropriate in these circumstances, and as such makes no further comment with respect to this issue.**

74. Clause 28(7) states that in any appeal proceedings, the onus is on the applicant to disprove they are a risk to the safety of children.

**The Committee will always seek to comment in circumstances where the onus of proof has been reversed. Notwithstanding the objects of this Bill, the Committee refers to Parliament whether the reversal of the onus of proof in relation to an individual seeking a Working With Children Check who has been found to pose a risk to the safety of children is reasonable in these circumstances.**



75. Clause 40(5) provides that any proceedings which may arise relation to the failure to produce of information for monitoring or auditing purposes involves the reversal of the onus of proof.

**The Committee will always seek to comment in circumstances where the onus of proof has been reversed. However, as this offence relates to an individual who has refused to comply with a legal request from the Commission, the Committee considers this to be reasonable in the circumstances and does not make a further comment in relation to this issue.**

*Privacy; Privilege*

76. Clause 32 provides that the Director of Public Prosecutions may provide to the Commission information or any other documentation that may contain information, notwithstanding any legal professional privilege or other restrictions on disclosure, if that information relates to the assessment as to whether a person poses a risk to the safety of children.

**The Committee will always seek to comment in circumstances where a Bill seeks to authorise the disclosure of private information, particularly information that may be subject to legal professional privilege or other restrictions on disclosure. Notwithstanding the objects of this Bill, the Committee refers to Parliament whether authorising the release of information – which may have been untested evidence - in relation to an individual seeking a Working With Children Check is reasonable in these circumstances.**

*Denial of compensation*

77. Clause 43(2)(b) outlines that damages or compensation are not payable in respect of a decision not to grant a clearance or to cancel a clearance, the imposition of an interim bar or as a result of an assessment carried out in good faith and with reasonable care for the proposes of this Bill.

**The Committee recognises that the effect of removing the right to seek compensation effectively limits an individual's capacity to seek damages. Given the good faith and reasonable care aspects of this clause, the Committee considers this to be a reasonable restraint and makes no further comment on this issue.**

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

*Right to work*

78. Clause 17 permits the Commission to place an interim bar on an individual's application for a Working With Children Check where the Commission is of the opinion that there is a risk to the safety of children. This bar may remain in place for 12 months, and may only be appealed after six months.

**The Committee is concerned that the Commission's power to place an interim bar an individual's application for a Working With Children Check which cannot be appealed for up to six months may have a detrimental effect on an individual's right to work. However, given the object of the legislation – and**

**the threshold (a risk to the safety of children) – the Committee makes no further comment in relation to this issue.**

79. Furthermore, clause 47 restricts the Industrial Relations Commission or any other court or tribunal from having any jurisdiction with respect to the employment of a person that is inconsistent with a restriction placed upon that person by the Commission for Children and Young People.

**The Committee notes that clause 47 has the effect of ousting the jurisdiction of the Courts, tribunals and Industrial Relations Commission with respect to the question of the re-instatement of an individual who has prohibited from working under this Bill. The Committee refers to Parliament whether this is appropriate.**

*Double punishment*

80. Part 4 of the Bill provides for circumstances in which an individual may not appeal a decision of the Commission to the Administrative Decisions Tribunal. Specifically of concern to the Committee is the restraint placed on individuals who have been previously convicted of specified offences.

**The Committee is concerned when an individual who has completed any set punishment with respect to an offence is restricted from entering into certain employment. In particular, this has the effect of restraining the courts from reviewing a decision of the Commission under clause 26. The Committee also notes that clause 27(5) restrains the tribunal from awarding costs. Again, however, given the objects of this Bill – being the protection of children – the Committee makes no further comment with respect to this issue.**

**Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA**

*Commencement by proclamation*

81. The Bill provides for the Act to commence on a day or days to be appointed by proclamation. Commencement by proclamation delegates to the Executive the power to commence the Act on a day of its choosing.

**Ordinarily, the Committee would comment on acts or parts of acts that are to commence by proclamation. However, the Committee understands that the commencement of this Act has been delayed to accommodate the Commission development of a timetable that will implement the new system in a planned way. The Committee accepts the reasons for commencement by proclamation as appropriate in the circumstances.**

## 4. Community Housing Providers (Adoption of National Law) Bill 2012

Date introduced	13 June 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Pru Goward MP
Portfolio	Minister for Family and Community Services

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to enact legislation in relation to the registration of community housing providers that applies in this State as part of a proposed substantively uniform scheme of legislation applying the Community Housing Providers National Law in the States and Territories (the participating jurisdictions). The Community Housing Providers National Law is set out in the Appendix to the Bill, which operates as a template for all participating jurisdictions.
2. In addition to applying the Community Housing Providers National Law, this Bill and the application legislation of other participating jurisdictions would specify local administration details such as the appointment of a Registrar of Community Housing, the persons to whom functions may be delegated and the Appeal Tribunal in relation to various matters.
3. The Bill also contains provisions for New South Wales purposes only that have been transferred from the Housing Act 2001 relating to the provision of assistance and the transfer of land to registered community housing providers and makes consequential amendments to various Acts.

### BACKGROUND

4. This Bill provides uniform template legislation – the Community Housing Providers National Law – for a national system of registration, monitoring and regulation of community housing providers.
5. The community housing sector has increased its role in the provision of social and affordable housing, with community housing stock increasing from seven per cent of all social housing stock to 17 per cent in the last ten years. In New South Wales there are currently 233 registered community housing providers, managing 26,000 properties.
6. The provision of community housing, typically by not-for-profit organisations, is consistent with the Government's commitment to partnerships with non-government organisations in the delivery of social services.

### OUTLINE OF PROVISIONS

#### Part 1 Preliminary

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

8. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
9. Clause 3 specifies the objects of the proposed Act.
10. Clause 4 defines certain words and expressions used in the provisions of the proposed Act other than the Community Housing Providers National Law (NSW) (the applied National Law). The New South Wales Land and Housing Corporation constituted by the Housing Act 2001, the Director-General of the Department of Family and Community Services or a Division Head of a Division of the Government Service or a NSW Government agency prescribed by the regulations, are Housing Agencies.

## Part 2 Application of Community Housing Providers National Law

11. Clause 5 applies the Community Housing Providers National Law as a law of this jurisdiction called the Community Housing Providers National Law (NSW).
12. Clause 6 declares the Administrative Decisions Tribunal to be the Appeal Tribunal for New South Wales for the purposes of the applied National Law.
13. Clause 7 declares Parts 3 and 4 of, and Schedule 1 to, the proposed Act (which substantially re-enact provisions of the Housing Act 2001) to be community housing legislation of this jurisdiction.
14. Clause 8 declares the Director-General of the Department of Family and Community Services and the New South Wales Land and Housing Corporation constituted by the Housing Act 2001 to be Housing Agencies for the purposes of certain provisions of the applied National Law.
15. Clause 9 declares who is the relevant New South Wales Minister in relation to the applied National Law.
16. Clause 10 provides for the appointment of a person as the New South Wales Registrar for the purposes of the applied National Law.
17. Clause 11 specifies the persons to whom functions under the applied provisions may be delegated by the Registrar.
18. Clause 12 enables regulations to be made by the Governor prescribing fees for the purposes of the applied provisions.

## Part 3 Additional New South Wales provisions relating to community housing

### *Division 1 Interpretation*

19. Clause 13 defines certain terms for the purposes of the proposed Part.

### *Division 2 Giving assistance to registered community housing providers*

20. Clause 14 sets out the circumstances in which a Housing Agency is taken to have an interest in land of a community housing provider for the purposes of the proposed Part. Those circumstances are where land owned by the Housing Agency has been vested in the community housing provider under the proposed Part, where land has been

acquired by the community housing provider using funds of the Housing Agency, where the Housing Agency makes improvements on the land or where a community housing agreement identifies the land as being land in which a Housing Agency has an interest. (See existing section 67HA of the Housing Act 2001.)

21. Clause 15 provides that a Housing Agency may provide assistance to a registered community housing provider by entering into a community housing agreement with the provider. (See existing section 67I of the Housing Act 2001.)
22. Clause 16 enables a Housing Agency to enter into community housing agreements with registered community housing providers for the purposes of providing assistance under clause 15 or with respect to land transferred to the provider under the proposed Part. (See existing section 67J of the Housing Act 2001.)
23. Clause 17 enables a community housing agreement to contain conditions relating to land in which a Housing Agency has an interest and specifies some examples of the types of conditions that may be included. (See existing section 67K of the Housing Act 2001.)
24. Clause 18 prevents a community housing provider from transferring or otherwise dealing with land in which a Housing Agency has an interest without the Housing Agency's consent.
25. A Housing Agency may register its interest in the land and, if the interest is registered, the Registrar-General is not to register any dealing with the land unless the consent of the Housing Agency has been obtained to the dealing. (See existing section 67L of the Housing Act 2001.)
26. Clause 19 enables a community housing agreement to provide that land of a community housing provider that is a party to the agreement is to be charged with the payment of money that is or may become payable under the agreement. If the land is land to which the Real Property Act 1900 applies, the charge over the land is to be registered in accordance with that Act. (See existing section 67M of the Housing Act 2001.)
27. Clause 20 states that a community housing agreement is binding on the community housing provider that is a party to the agreement and enables a Housing Agency to monitor the activities of a community housing provider to determine whether it is complying with the terms of the agreement. (See existing section 67N of the Housing Act 2001.)

*Division 3 Vesting of Housing Agency land in registered community housing providers*

28. Clause 21 enables the Governor, by order published in the Gazette, to vest land owned by a Housing Agency in a registered community housing provider that is also a registered company under the Corporations Act 2001 of the Commonwealth. (See existing section 67O of the Housing Act 2001.)
29. Clause 22 states the effect of the vesting, including that the rights and liabilities of a Housing Agency in relation to the land become the rights and liabilities of the community housing provider in which the land is vested. (See existing section 67P of the Housing Act 2001.)

*Division 4 Provisions to protect Housing Agency's interest in land*

30. Clause 23 enables the Director-General of the Department of Family and Community Services to require, by notice in writing, a registered community housing provider or an officer of a registered community housing provider to provide specified information and records relating to the assets and liabilities of the community housing provider or any financial matter relating to the community housing provider or to take specified measures to facilitate the Director-General's access to such information. (See existing section 67Q of the Housing Act 2001.)
31. Clause 24 enables a Housing Agency to give instructions to a community housing provider that holds land in which the Housing Agency has registered an interest under the proposed Part, or an officer of such a community housing provider, if the Housing Agency cancels the registration of the provider, the provider becomes insolvent or the land has been vested in or transferred to the provider under the proposed Part and the provider has failed to enter into a community housing agreement with the Housing Agency in respect of the land within a specified period. The instructions may require the transfer of the land to the Housing Agency or a specified registered community housing provider or compliance with a term or condition of a community housing agreement that is binding on the community housing provider. An officer of a community housing provider includes a receiver, liquidator or administrator of the community housing provider. (See existing section 67R of the Housing Act 2001.)
32. Clause 25 declares proposed sections 23 and 24 to be Corporations legislation displacement provisions for the purposes of section 5G of the Corporations Act 2001 of the Commonwealth. The effect of the declaration is to enable those proposed sections to prevail despite any inconsistencies with the Commonwealth Act. (See existing section 67S of the Housing Act 2001.)

*Division 5 Miscellaneous*

33. Clause 26 contains provisions relating to the operation of proposed Divisions 3 and 4 including provisions that ensure that the operation of those proposed Divisions will not give rise to any claim for compensation or be taken as a breach of contract. (See existing section 67T of the Housing Act 2001.)
34. Clause 27 provides that no duty is payable under the Duties Act 1997 in relation to vestings or transfers of land under proposed Division 3 or 4. (See existing section 67U of the Housing Act 2001.)

**Part 4 Miscellaneous**

35. Clause 28 provides for offences under the proposed Act to be dealt with summarily before the Local Court.
36. Clause 29 enables the Governor to make regulations for the purposes of the proposed Act.
37. Clause 30 repeals the Housing Regulation 2009 as a consequence of the proposed Act.
38. Clause 31 provides for the review of the proposed Act in 5 years.

## Schedule 1 Savings, transitional and other provisions

39. Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

## Schedule 2 Consequential amendments to other legislation

40. Schedule 2 contains consequential amendments to the Acts specified in the Schedule.

## Appendix

41. The Appendix sets out the Community Housing Providers National Law.

## Part 1 Preliminary

42. Clause 1 sets out the name (also called the short title) of the National Law.
43. Clause 2 provides for the commencement of the National Law in a participating jurisdiction to be as provided for by an Act of that jurisdiction.
44. Clause 3 provides for the objects of the National Law.
45. Clause 4 defines certain terms for the purposes of the National Law, including *community housing* which means housing for people on a very low, low or moderate income or for people with additional needs that is delivered by non-government organisations. *Primary Registrar*, in relation to a particular unregistered entity or registered community housing provider, is defined as the Registrar for the primary jurisdiction of the entity or provider.
46. Clause 5 defines *primary jurisdiction* in relation to an unregistered entity or a registered community housing provider. Generally, this will be the participating jurisdiction in which the unregistered entity or registered community housing provider provides (or intends to provide) the majority of its community housing. The Registrars of the participating jurisdictions may agree to a different primary jurisdiction in relation to a particular unregistered entity or registered community housing provider.
47. Clause 6 provides for the Register established under the National Law to operate as a single National Register.
48. Clause 7 provides for the extraterritorial operation of the National Law.
49. Clause 8 provides that the National Law binds the Crown in right of a participating jurisdiction.

## Part 2 The Registrar

50. Clause 9 requires there to be a Registrar appointed for each participating jurisdiction.
51. Clause 10 sets out the functions of the Registrar which include maintaining the Register of community housing providers, registering entities as community housing providers and monitoring compliance of registered community housing providers with the National Law and the other provisions of the jurisdiction declared to be community housing legislation.

52. Clause 11 enables the Registrar of a jurisdiction to delegate the Registrar's functions under the National Law to other Registrars or to persons specified in the community housing legislation of the jurisdiction.

### Part 3 Registration

53. Clause 12 establishes the National Register of Community Housing Providers and specifies the information that is to be recorded on it.
54. Clause 13 enables an entity that provides or intends to provide community housing to apply to the primary Registrar for registration as a community housing provider under the National Law or a variation of registration. If the application is made to a Registrar who is not the primary Registrar, the Registrar to whom the application has been made must refer it to the primary Registrar.
55. Clause 14 requires the primary Registrar to approve an application for registration if satisfied that the application has been duly made and the requirements of the National Law and the community housing legislation of participating jurisdictions (including the conditions of registration) will be complied with.
56. Clause 15 requires a registered community housing provider to comply with the conditions of registration and sets out those conditions. The conditions include that the provider must comply with any applicable requirements of the community housing legislation of a participating jurisdiction in relation to the transfer of, or other dealing with, any community housing assets of the provider and that the provider must have provision in its constitution for all its remaining community housing assets in a participating jurisdiction on its winding up to be transferred to another registered community housing provider or to a Housing Agency in the jurisdiction in which the assets are located. There are also conditions relating to the provision of information to a Registrar, compliance with certain provisions of the National Regulatory Code set out in Schedule 1 to the National Law and the keeping of a list of all of the community housing provider's community housing assets.
57. Clause 16 enables the primary Registrar for a registered community housing provider to cancel the provider's registration if the provider applies for cancellation or it has been wound up or has otherwise ceased to exist. The primary Registrar may also cancel the registration of a registered community housing provider if the primary Registrar has issued a notice of intent to cancel registration, has not been satisfied by the provider that the registration should not be cancelled and has notified the provider of the proposed cancellation.

### Part 4 Enforcement powers of Registrar

58. Clause 17 provides that action may be taken under the proposed Part by a primary Registrar for a registered community housing provider if the Registrar reasonably believes that the provider is not complying with the community housing legislation of a participating jurisdiction.
59. Clause 18 enables the primary Registrar for a registered community housing provider to issue a notice of non-compliance to the provider identifying the matters that are to be addressed and the period for doing so to avoid cancellation of the provider's registration.



60. Clause 19 enables the primary Registrar for a registered community housing provider to issue written instructions to the provider specifying the manner in which the provider is to address any matters that are the subject of a notice of non-compliance.
61. Clause 20 enables the primary Registrar for a registered community housing provider to issue a notice of intent to cancel registration if the provider has not addressed the matters identified in a notice of non-compliance or in the written instructions within the required period or if the failure to comply is serious and requires urgent action.
62. Clause 21 provides that the primary Registrar may appoint a statutory manager of a registered community housing provider to conduct specified affairs and activities of the provider that relate to the community housing assets of the provider. That action may be taken only after the issue of a notice of intent to cancel registration or if the Registrar forms the opinion that the failure to comply is serious and requires urgent action.
63. Clause 22 contains provisions relating to the appointment of, and exercise of functions by, a statutory manager.
64. Clause 23 declares proposed sections 19 and 21 to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth. The effect of the declaration is to enable those proposed sections to prevail despite any inconsistencies with the Commonwealth Act.
65. Clause 24 provides that there is no compensation payable by or on behalf of a State (which includes the Crown in right of a participating jurisdiction) in connection with the operation of the proposed Part.

## Part 5 Miscellaneous

66. Clause 25 provides a right of appeal against certain decisions of a Registrar under the National Law.
67. Clause 26 imposes a duty on a Registrar and any delegate of a Registrar not to disclose information obtained in the course of the administration of the National Law except in specified circumstances.

## Schedule 1 National Regulatory Code

68. Schedule 1 contains certain requirements relating to the conduct and management of the affairs of a registered community housing provider.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Self incrimination*

69. Clause 23 of the Bill outlines the circumstances in which the Director-General may require information, outlining at subclause 23(3) that a person who is the subject of such a notice from the Director-General must comply with a request. Subsections 15(2)(d)-(f) of the Appendix (the Community Housing Providers National Law) similarly provide that documentation, and attendance at a meeting to answer questions, may be compelled by the Registrar.

**The Committee notes that the requiring individuals to provide specified documentation, and attend meetings for the purpose of answering questions, may have the effect of those individuals incriminating themselves. The Committee notes that this is not an unusual clause in legislation that relates to business agreements entered into by the state, and as such makes no further comment.**

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

*Transfer of property*

70. Subclause 24(2) outlines that the Housing Agency (which includes the Director-General or a Division Head of a NSW Government agency) may give instructions requiring the transfer of land in which the Housing Agency has an interest so that it vests in the Housing Agency. Subclauses 14(c) and 14(e) outline that the Housing Agency may acquire an interest by partly funding the acquisition of land or by identifying the land as having an Housing Agency interest in the agreement.

**The Committee is concerned that clause 24 provides the Housing Agency with a broad power to transfer land to itself in circumstances where it may only have partly funded the acquisition of that land. However, given the objects of this Bill the Committee considers this to be reasonable in circumstances.**

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

*Jurisdiction of the courts*

71. Clause 26 outlines that compensation is not payable to any person or body in connection with the operation of Divisions 3 or 4. Clause 24, as identified above, requires that land be transferred to the Housing Agency in circumstances where the Housing Agency may have only partly funded the acquisition of that land. Similarly, section 24 of the National Law outlines that compensation is not payable by or on behalf of the State in connection with the operation of a Part which includes provisions relating to the compulsory winding up of a community housing provider.

**The Committee is concerned that clause 26 removes the right to compensation in circumstances, such as those arising with respect to clause 24. As such, whilst the Committee notes that clause 26 – and section 24 of the National Law – operate to exclude the capacity of the court to order compensation in circumstances where the Housing Agency has acted inequitably, the Committee considers this to be reasonable in the circumstances.**

72. Clause 26 outlines that the operation of Divisions 3 and 4 are not to be regarded as a breach of contract, confidence or civil wrong or to be regarded as giving rise to any remedy.

**The Committee is concerned that clause 26 seeks to oust the court's ability to review breach of contract, breach of contractual provisions or the right of remedy. The Committee refers to Parliament whether such a clause removes the right to pursue relief in the civil courts, and thus may make decisions under Divisions 3 and 4 non-reviewable.**

## Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

### *Commencement by proclamation*

73. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

**The Committee always seeks to comment in circumstances where an Act commences by proclamation, rather than on the day of assent. In these circumstances, the Committee notes the intention of the Bill to introduce uniform legislation and acknowledges that this may require some flexibility in relation to commencement dates with respect to other jurisdictions. As such, the Committee makes no further comment with respect to this issue.**

### *Conferral of subject power to National Law*

74. The object of the Bill is to apply as a law of this State a National Law for the registration and regulation of community housing providers under a national system of registration.

**The Committee is keen to comment in circumstances where a Bill has the effect of referring the power of the NSW Parliament to legislate with respect to subject matter to National Law. The Committee notes that in these circumstances, the National Law takes the form of an appendix to the Bill and, as such, is not separate to NSW legislation and may be amended by the NSW Parliament. As such, the Committee makes no further comment in relation to this issue.**

### *Delegate prescribed in the regulations*

75. Clause 11 of the Bill outlines that the Registrar's functions may be delegated to a person or class of persons prescribed by the regulations

**The Committee is concerned when the functions of a statutory officer may be subject to delegation as prescribed in the regulations. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.**

### *Regulations creating offences*

76. Subclause 29(2) outlines that the regulations may create offences punishable by up to 50 penalty units.

**The Committee notes that the creation of offences is most appropriately performed by Parliament. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.**

### *Definitions in the regulations*

77. Section 2 of Schedule 1 of the Bill outlines that the regulations may define the transitional period for the enactment of the primary legislation.

**The Committee notes that definitions are most appropriately included in the primary legislation, particularly when defining the period of time that savings and transitional provisions continue to operate. However, given the objects of the Bill the Committee considers this to be reasonable in circumstances.**

## 5. Game and Feral Animal Control Amendment Bill 2012\*

Date introduced	15 June 2012
House introduced	Legislative Council
Minister responsible	The Hon. Rob Brown MLC
Portfolio	Private member

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Game and Feral Animal Control Act 2002 (the Act) as follows:
  - (a) to enable the Minister responsible for national park estate land (which includes national parks and certain other land reserved under the National Parks and Wildlife Act 1974) to make that land available for the hunting of game animals by persons who hold a game hunting licence;
  - (b) to specify certain national park estate land that cannot be made available for the hunting of game animals;
  - (c) to add several species of non-indigenous birds to the list of game animals that may be hunted under the authority of a game hunting licence;
  - (d) to enable the list of game animals to be amended by Ministerial order but to specifically exclude native animals from being added by such an order;
  - (e) to make it an offence to interfere with persons lawfully hunting game animals on public hunting land; and,
  - (f) to make a number of other amendments of an administrative, minor or consequential nature.
2. The Bill also amends certain other legislation:
  - (a) to enable a public or local authority to give permission to shoot on land owned or managed by the authority whether or not it is rural land, and
  - (b) to require the Game Council to be consulted before any pest control order is made declaring a game animal to be a pest, and
  - (c) to make a number of consequential and other minor or miscellaneous amendments.

## BACKGROUND

3. The Game Council of New South Wales was established as a statutory authority under the Game and Feral Animal Control Act 2002 and its associated Game and Feral Animal Control Regulation 2004.
4. A main objective of the Game Council is to use licensed hunters to help in the reduction of introduced animal species declared as pests, such as rabbits, foxes, cats and pigs.
5. According to the Game Council the cost impact of 11 introduced animal species was estimated in 2004 at \$720 million per year.

## OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act 6 months after the date of assent (though a proclamation may provide for a provision of the proposed Act to be commenced sooner).

### Schedule 1 Amendment of Game and Feral Animal Control Act 2002 No 64

#### *Declaration of national park estate land as public hunting land*

8. Schedule 1 [4] and [5] amend the definition of public land so that it includes, rather than excludes as is currently the case, national park estate land (eg national parks and other land reserved under the National Parks and Wildlife Act 1974). The effect of this amendment is that the Minister responsible for national park estate land (namely the Minister for the Environment) will, subject to certain restrictions, be able to declare any such land as public hunting land under section 20 of the Act. Under the Act, the hunting of game animals on public land is only permitted if the land is declared to be available for hunting. Schedule 1 [3] and [12] are consequential amendments and Schedule 1 [2] inserts a definition of declared public hunting land for clarification purposes.
9. Schedule 1 [18] provides that certain national park estate land cannot be declared as public hunting land by the relevant Minister. The land that cannot be declared includes wilderness areas, world heritage properties and a number of national parks and other reserves and areas that are generally in or adjacent to metropolitan areas.
10. The national park estate land that is effectively “off-limits” is listed in proposed Schedule 3A to the Act (as inserted by Schedule 1 [30]).

#### Game animals that may be hunted

11. Schedule 1 [6] recasts the provision of the Act that specifies the non-indigenous game animals that may be hunted under the authority conferred by a game hunting licence so that the provision refers instead to a list set out in proposed Schedule 3 to the Act (as inserted by Schedule 1 [30]). The list of game animals contains 2 separate parts (eg the game animals currently referred to in section 5 (2) of the Act will now be listed in Part 2 of the new Schedule). The list will be able to be amended by Ministerial order, but native animals will not be able to be added. As is the case currently under the Act, any animal that is or is part of a threatened species, population or ecological community is not a game animal for the purposes of the Act and cannot be hunted. Schedule 1 [1], [15] and [16] make consequential amendments.

## Offences

12. Schedule 1 [24] extends the existing offence of obstructing, hindering or impeding an inspector to include assaulting, threatening or intimidating an inspector.
13. Schedule 1 [25] creates a new offence of not complying with a direction by an inspector to leave, or not to enter, specified declared public hunting land. Such a direction may be given to a person if the inspector has reason to believe the person is committing an offence under the Act or is about to commit such an offence.
14. Schedule 1 [26] creates the following new offences:
  - (a) proposed section 55A makes it an offence to interfere with a person who is lawfully hunting game animals on public hunting land in accordance with the authority conferred by a game hunting licence,
  - (b) proposed section 55B prohibits commercial taxidermists from preserving or preparing the skins of certain game animals unless satisfied the animal concerned has been killed by a person who is the holder of a game hunting licence (or by a person with some other lawful authorisation) and also requires commercial taxidermists to record certain information and to make those records available for inspection.

## Miscellaneous amendments relating to administration of the Act and other matters

15. Schedule 1 [7] provides for exemptions from offences under the National Parks and Wildlife Act 1974 and the regulations under that Act in so far as those offences would otherwise relate to lawful hunting by the holders of game hunting licences.
16. Schedule 1 [7] also provides that certain orders and notices under other legislation cannot prevent or interfere with any activity carried out in accordance with the authority conferred by a game hunting licence. Schedule 1 [14] makes a consequential amendment.
17. Schedule 1 [9] provides for a member of the Game Council to be nominated by the Minister administering the Aboriginal Land Rights Act 1983 rather than by the New South Wales Aboriginal Land Council.
18. Schedule 1 [10] provides for an additional member of the Game Council, namely a person nominated by the Minister administering the National Parks and Wildlife Act 1974. Schedule 1 [8] makes a consequential amendment.
19. Schedule 1 [11] enables the Game Council to delegate any of its functions to the chief executive officer of the Game Council.
20. Schedule 1 [13] provides that a game hunting licence authorises the licence holder to possess the carcass (or the skin or any other part) of a game animal that the licence holder has killed under the authority conferred by the licence.
21. Schedule 1 [17] removes a provision that exempts professional game hunters from the licensing requirements under the Act.

22. Schedule 1 [19] and [20] provide that the Game Council may refuse an application for a game hunting licence, or may suspend or cancel such a licence, if the applicant or licence holder is found guilty of an indictable offence under the Firearms Act 1996.
23. Schedule 1 [21] provides that the power of an inspector to require a vehicle to stop so that it can be searched may be exercised without the inspector being accompanied by a police officer.
24. Schedule 1 [22] removes the limit on the value of a thing that the Local Court may require to be forfeited in connection with an offence under the Act.
25. Schedule 1 [23] provides that, in order for a person to be found guilty of an offence of failing to comply with a requirement by an inspector or a police officer under the Act, the person must first be warned that the failure to comply is an offence.
26. Schedule 1 [27]–[29] make provision for the office of Deputy Chairperson of the Game Council.
27. Schedule 1 [31] enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act.

## Schedule 2 Amendment of other legislation

28. Schedule 2.1 amends the Firearms Act 1996 to enable a public or local authority to give permission to shoot, in connection with the genuine reason of recreational hunting/vermin control or vertebrate pest animal control, on land that is owned by, or under the control or management of, the authority and that is within a non-metropolitan area.
29. Schedule 2.2 amends the Game and Feral Animal Control Regulation 2004 mainly as a consequence of the amendments to the Act made by Schedule 1.
30. Schedule 2.3 amends the Rural Lands Protection Act 1998 to make a consequential amendment and to require the Game Council to be consulted before pest control orders are made declaring game animals to be pests.

## ISSUES CONSIDERED BY COMMITTEE

### Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

#### *Inappropriate delegation of power – Regulations*

31. Schedule 1, Clause 6 permits the Minister to, by order published on the NSW legislation website, amend Schedule 3 by adding, omitting or amending the name or description of animal listed as permissible to hunt under the Act.
32. The Committee will always note clauses in regulations, referred to as Henry VIII clauses, that confer power to a Minister to add, amend, suspend or repeal provisions in a primary statutory instrument. Through Henry VIII clauses, amendments can be made to legislation without introducing an amending bill in Parliament. As such, the use of Henry VIII clauses may be seen as denying the Parliament its proper role of scrutinising alterations to legislation.

**The Committee is concerned that the subordinate legislation-making powers of this Bill may deny Parliament its proper role in scrutinising alterations to legislation.**

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

*Oppressive official powers*

33. Schedule 1, Clause 20 allows for an inspector who has reason to believe that a person is committing or about to commit a game hunting offence to direct that person to leave or not to enter any declared public hunting land specified in the direction. A person who fails to abide by such a direction is guilty of an offence.

**The Committee will always be concerned when an official has the power to direct an individual who is yet to commit any offence to leave a public area because the official believes an individual may commit an offence in the future. The Committee refers to Parliament its concerns.**



## 6. National Parks and Wildlife Amendment (Illegal Forestry Operations) Bill 2012\*

Date introduced	14 June 2012
House introduced	Legislative Council
Minister responsible	The Hon Luke Foley, MLC
Portfolio	* Private Member

### PURPOSE AND DESCRIPTION

1. This Bill amends the *National Parks and Wildlife Act 1974* to increase the monetary penalties for offences against that Act in connection with illegal forestry operations; and for other purposes.

### BACKGROUND

2. Section 8A of the *Forestry Act 1916* defines the objects of the Forestry Commission, where it is charged with three key objectives: to deliver timber, to provide for recreation and to care for the resource it manages. This third objective requires the Forestry Commission to "conserve birds and animals" in State forests.
3. The current New South Wales koala population is estimated to be around 10,000. Illegal logging is one of the main threats to the koala population. The Bill aims to address such issues by making amendments to the penalties for environmental offences in State forests.

### OUTLINE OF PROVISIONS

4. The object of this Bill is to amend the National Parks and Wildlife Act 1974 (the NPW Act):
  - (a) to create a new offence that involves contravening a provision of the NPW Act or the regulations in the course of carrying out forestry operations (which includes activities such as logging for timber production purposes), and
  - (b) to increase the penalties applying to the offence under the NPW Act of contravening any condition or restriction attached to a licence or certificate issued under Part 6 (Licensing) of the Threatened Species Conservation Act 1995.
5. The new offence under the NPW Act will attract a maximum penalty of 2,000 penalty units (ie \$220,000) or imprisonment for 2 years, or both, which is, in most cases, substantially higher than the existing penalties for contravening a provision of the NPW Act or the regulations.
6. The maximum penalties applying to the offence under the NPW Act of contravening any condition or restriction attached to a licence or certificate issued under Part 6 of the

Threatened Species Conservation Act 1995 will be increased (in the case of an individual) from 100 penalty units (ie \$11,000) and 10 penalty units for each day the offence continues to 1,000 penalty units and 100 penalty units, respectively, and (in the case of a corporation) from 200 penalty units and 20 penalty units for each day the offence continues to 2,000 penalty units and 200 penalty units, respectively.

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
9. Schedule 1 [2] contains the amendment to the NPW Act described in paragraph (a) of the above Overview and Schedule 1 [1] contains the amendment to the NPW Act described in paragraph (b) of the Overview.

## ISSUES CONSIDERED BY COMMITTEE

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

## 7. Security Industry Amendment Bill 2012

Date introduced	13 June 2012
House introduced	Legislative Council
Minister responsible	The Hon Mike Gallacher MLC
Portfolio	Police and Emergency Services

### PURPOSE AND DESCRIPTION

1. This Bill amends the *Security Industry Act 1997* to make further provision for the licensing and regulation of persons in the security industry; and for other purposes.
2. The objects of this Bill are as follows:
  - (a) to expand the range of powers that can be exercised by police officers under the *Security Industry Act 1997* (the SI Act) and to authorise those powers to be exercised by other members of the NSW Police Force who are authorised by the Commissioner of Police (the Commissioner) to exercise enforcement officer functions,
  - (b) to abolish the provisional licensing system under the SI Act and to make provision for class 1 licences to be issued to persons who have not previously held such a licence, subject to certain conditions, including undertaking certain training and assessment,
  - (c) to declare that certain provisions of the SI Act and the *Security Industry Regulation 2007* are excluded from the application of section 9 of the *National Vocational Education and Training Regulator Act 2011* of the Commonwealth (the Commonwealth Act) so that the State provisions will continue to apply to certain organisations providing training, assessment or instruction in relation to security activities,
  - (d) to declare that certain provisions of the *Firearms Act 1996* (the Firearms Act) and the *Firearms Regulation 2006* are excluded from the application of section 9 of the Commonwealth Act so that the State provisions will continue to apply to certain organisations providing training, assessment or instruction in relation to use and possession of firearms,
  - (e) to provide for the renewal of licences under the SI Act,
  - (f) to amend provisions relating to master licences under the SI Act, including:
    - (i). introducing additional subclasses of master licence, and
    - (ii). creating permits allowing master licensees to provide more persons than authorised by their master licence in certain circumstances, and

- (iii).making it an offence for a master licensee to subcontract the provision of the master licensee's services to carry on certain security activities to another master licensee unless specific conditions are met,
- (g) to remove certain subclasses of class 1 and class 2 licences under the SI Act,
- (h) to abolish the Security Industry Council,
- (i) to make other amendments generally with respect to licences under the SI Act, including the introduction of additional grounds on which the Commissioner must refuse to grant a licence,
- (j) to extend the Commissioner's power under the SI Act to require that an applicant for a licence provide the Commissioner with fingerprints so that it also includes palm prints,
- (k) to create a new provisional pistol licence under the *Firearms Act* which holders of a class 1F licence under the SI Act who have not previously held such a licence will also be required to hold.

## BACKGROUND

3. The Independent Commission Against Corruption (ICAC) in its Operation Columbia identified a lack of coordination and fragmentation in the regulation of the security industry. This Bill makes amendments to address the identification of risks surrounding the industry.
4. In 2009, the Australian Crime Commission (ACC) completed a national investigation into the private security industry. The ACC found that organised crime groups and outlaw motorcycle gangs have moved into the security industry in all mainland States. This highlighted the need to ensure that regulatory standards are enforced within the industry.
5. There are around 4,000 security firms operating in the New South Wales security industry across different sectors and occupations. Master licensees range from large multinational companies (such as Chubb Security), to sole traders. The conduct of compliance audits on these businesses will be based on risk assessments and intelligence reports gathered by the NSW Police Force. The Bill enables these compliance audits through the insertion in the Act of new part 3B, which deals with enforcement.
6. The provisional licensing scheme was introduced in New South Wales in 2007 to provide a pathway for new persons to enter the manpower sector of the security industry and work under supervision. The scheme was endorsed by the Council of Australian Governments in 2008. However, according to the Second Reading speech, New South Wales remains the only State that has fully implemented this scheme. The need to provide direct supervision along with the associated compliance costs has led to a general reluctance by master licensees to employ provisional licensees. This has led new entrants to obtain interstate security licences and use the mutual recognition scheme to bypass the New South Wales provisional licensing scheme.

7. The Second Reading speech explained that five years of industry and regulator experience showed that the provisional licensing scheme has not achieved its objectives, and has led to more problems. Stakeholder submissions highlighted this as a problem following a forum held with the security industry in August 2011. Therefore, the Bill abolishes the scheme by repealing sections 12A and 38B, which would reduce the number of mutual recognition applications for licences. A new provision for the grant of conditional class 1 licences is included to ensure that New South Wales meets the Council of Australian Governments agreement to "introduce a provisional, probational or conditional licence in the manpower sector for a duration of not less than six months." The provisional licensing scheme was also used to impose restrictions on new entrants to the armed guarding sector.
8. There is still a need to maintain a provisional system for armed guards. Therefore, the *Firearms Act 1996* will be amended to create a new provisional pistol licence and to make new armed guards subject to supervision and training requirements. Armed guards will be required to have a firearms licence under category H with the reason of "business/employment" under the *Firearms Act 1996* in addition to a class 1F security licence. Class 1F applicants will be able to work beyond the cash-in-transit companies to work as employees or appropriately trained and supervised volunteers in the static guarding of approved premises. The police commissioner will have the approval power to accept or reject an application.
9. The *Commonwealth National Vocational Education and Training Regulator Act 2011* commenced on 1 July 2011. It established a national regulator—the Australian Skills Quality Authority (ASQA), which replaced State-based regulators in New South Wales through a referral of powers to the Commonwealth. The Commonwealth Act renders those legislative provisions that support police regulation of security industry training, inoperative. This was an unintended consequence as training of the security industry is only one of the many industries to be regulated by the Australian Skills Quality Authority. The Bill contains amendments to address this consequence.
10. New master licence subclasses will be created for businesses employing one to three persons, four to 14 persons and 15 to 49 persons. Subcontracting is a significant problem within the security industry. At present, a business that secures contracts to provide security services and then subcontracts that work out is not required to hold a master licence, as the business is not employing any person to carry on security activities. Accordingly, this means that directors, shareholders and managers of the business are not subject to probity checks.

## OUTLINE OF PROVISIONS

11. Clause 1 sets out the name (also called the short title) of the proposed Act.
12. Clause 2 provides for the commencement of the proposed Act. A number of the amendments will commence on 1 November 2012. Other amendments (relating to the new enforcement powers given to persons exercising enforcement officer functions, the declaration that certain provisions of the SI Act and regulations are excluded from the application of the Commonwealth Act, a savings and transitional regulation-making power and other matters) will commence on the date of assent to the proposed Act.

## Schedule 1 Amendment of *Security Industry Act 1997* No 157

### *Enforcement powers under the SI Act:*

13. The proposed amendments provide for the appointment of enforcement officers (which includes both police officers and certain members of the NSW Police Force who have been authorised by the Commissioner to exercise the functions of an enforcement officer) and confer certain powers of investigation on such officers (Schedule 1 [3] and [73]).
14. At present, police officers have the power to apply for a search warrant under the SI Act and have powers of inspection and seizure. The proposed amendments extend those existing powers to other members of the NSW Police Force who are enforcement officers. In addition, the proposed amendments confer power on enforcement officers to enter premises at which a security activity is being carried on, at any reasonable time, without a warrant. The powers exercisable by an enforcement officer upon entry (whether by virtue of a warrant or otherwise) have been clarified and expanded, for example, to include the power to require any person to produce documents or answer any question in relation to them. The amendments also require enforcement officers who are not police officers to be provided with identification cards, which they will be required to produce on request when exercising their functions as an enforcement officer. In addition to powers of entry and search of premises, enforcement officers are also given powers to obtain information and records. This includes, for example, the power to require, by notice in writing, a person to furnish information or records.
15. Schedule 1 [10] is a consequential amendment. The proposed amendment makes it clear that the SI Act applies to police officers and other members of the NSW Police Force when exercising their powers as enforcement officers under the SI Act. However, police officers and other members of the NSW Police Force will continue to be exempt from licensing and other requirements under the SI Act relating to the carrying on of security activities. Schedule 1 [75] and Schedule 2.3 are consequential amendments.

### *Abolition of provisional licensing system:*

16. Provisional licences under the SI Act are abolished (Schedule 1 [22] and [62]). Currently, provisional licences may be issued to a person to carry out the security activity authorised by the particular subclass of licence, subject to certain supervision requirements. Each provisional licence subclass corresponds to a subclass of class 1 licence, with the provisional licence requiring a licence holder to be supervised by a person who holds the corresponding subclass of a class 1 licence. Under the proposed amendments, a class 1 licence may now be granted to a person who has not, during the 3 years immediately before making an application for the licence, been authorised by a class 1 licence to carry on the relevant security activity. However, it will be a condition of a licence so issued that the licence holder undertake and complete such training, assessment or instruction as may be required by the Commissioner within 6 months (or such longer period as the Commissioner allows) of the licence being granted (Schedule 1 [48]). Current holders of provisional licences will, following the abolition of provisional licences, be taken to hold the corresponding subclass of class 1 licence (Schedule 1 [79] (proposed clause 28)), subject to the above condition. However, a period of 12 months (rather than 6 months) will be given to those persons to undertake the requisite training, assessment or instruction. References to provisional licences have been removed as a consequence of the proposed amendments (Schedule 1 [1], [8], [14], [16],

[36], [42]–[45], [47], [55], [63], [65], [67], [69], [70] and [77], Schedule 2.1 [7] and Schedule 2.4).

*Declaration excluding the operation of the National Vocational Education and Training Regulator Act 2011 of the Commonwealth:*

17. The Commonwealth Act provides that a training organisation registered by the National Vocational Education and Training Regulator (registered training organisation) which operates in New South Wales is not subject to New South Wales law in relation to certain matters, including the regulation of registered training organisations and investigative powers, sanctions and enforcement relating to such regulation. The application of the Commonwealth Act is, however, subject to any declaration made by New South Wales that a matter is an “excluded matter”, such that the Commonwealth Act will not apply to it.
18. Accordingly, Schedule 1 [11] declares that certain provisions under the SI Act and the regulations relating to registered training organisations providing training, assessment or instruction relating to any security activity and the exercise of ancillary investigative powers, sanctions or enforcement (State security industry regulation provisions) constitute an “excluded matter” for the purposes of the relevant section of the Commonwealth Act which makes all registered training organisations immune to New South Wales law. However, the State security industry regulation provisions only constitute an “excluded matter” to the extent that the Commonwealth Act prevents the application of those provisions to registered training organisations which are regulated by the Act. Accordingly, the effect of the declaration is that registered training organisations providing training, assessment or instruction relating to any security activity will not be immune to the State security industry regulation provisions and that both the State security industry regulation provisions and the Commonwealth Act will apply to them.

*Renewal of licences:*

19. Currently, the SI Act does not allow for the renewal of licences. The proposed amendments give the Commissioner power to renew licences, applications in respect of which may be lodged by a licence holder no earlier than 8 weeks before the expiry of a licence (Schedule 1 [27]). The Commissioner may also grant an application for renewal lodged within a period of up to 90 days after the expiry of the licence if the applicant pays a late fee. The current procedures and requirements under the SI Act relating to licence applications will also apply to applications to renew. For example, the Commissioner may refuse an application to renew a licence if satisfied that, if the applicant were applying for a new licence, the Commissioner would be required under the SI Act to refuse the application. Consequential amendments have also been made to accommodate the new process of renewing licences (Schedule 1 [28], [31], [32], [35], [37], [38], [49]–[53] and [56]–[59]). Licences granted prior to the insertion of the provision for renewal of licences may be renewed under that provision (Schedule 1 [79] (proposed clause 35)).

*Miscellaneous amendments to master licence provisions:*

20. The proposed amendments create new subclasses of master licence which further segment the numbers of persons authorised to be provided by a master licensee under a master licence (Schedule 1 [17]). Currently, a different subclass of master licence is required to authorise a master licensee to provide no more than 10 persons, between

11 and 50 persons and more than 50 persons to carry on security activities. The proposed amendments restructure the subclasses so that there is now a separate subclass of master licence to authorise master licensees to provide no more than 3 persons, between 4 and 14 persons, between 15 and 49 persons and 50 or more persons. In addition, the proposed amendments clarify that:

- (a) the number of persons authorised to be provided by the master licence refers to the number of persons provided on any one day. This means that, for example, a master licensee may employ more than the number of persons authorised to be provided under the licence, as long as the master licensee only provides the number of persons authorised to be so provided per day, and
  - (b) the number of persons authorised to be provided by the master licence includes persons with whom a master licensee subcontracts or arranges by contract, franchise or otherwise for the purpose of that other person employing or providing persons to carry on a security activity on the master licensee's behalf.
21. The savings and transitional provisions provide for the conversion of existing subclasses of master licences to the new subclasses (Schedule 1 [79] (proposed clause 24)). Consequential amendments are also proposed (Schedule 1 [2], [5], [9], [12], [13], [18], [41], [46], [71] and [72]).
22. In addition, a master licensee will be able to apply to the Commissioner for a temporary excess provision of services permit, which authorises a master licensee to provide more persons than the number authorised by the master licence on a specified day, or on each day within a period, specified in the permit (Schedule 1 [74]).
23. A permit may be subject to conditions imposed by the Commissioner and may be revoked if such conditions are contravened. Schedule 1 [15] is a consequential amendment which ensures that the holder of a temporary excess provision of services permit does not commit an offence of providing more persons than is authorised under that person's master licence.
24. The proposed amendments also create a new offence relating to subcontracting undertaken by a master licensee for the provision of security services (Schedule 1 [68]). On the commencement of the new offence provision, it will be an offence for a master licensee (principal) who has entered into a contract to provide persons to carry on certain security activities with a client to engage a subcontractor on the principal's behalf unless the client has expressly agreed to the provision of persons by a subcontractor and the principal provides the client with certain particulars (such as the name and master licence number of each subcontractor) before requiring payment from the client. It will also be an offence for a subcontractor to further subcontract to provide persons to carry on a security activity unless the principal expressly agrees to the provision of persons by a further subcontractor and the subcontractor provides the principal with the above mentioned particulars. The maximum penalty for both offences is 200 penalty units (in the case of a corporation) or 100 penalty units or 6 months' imprisonment (in the case of an individual). Schedule 3 repeals an uncommenced Act that contained an amendment creating a similar offence.



*Changes to subclasses of class 1 and 2 licences:*

25. Schedule 1 [19]–[21] and [79] (proposed clauses 25–27 and 29–31) provide for certain subclasses of class 1 and class 2 licence to be abolished and taken to be licences of existing subclasses as follows:
- (a) a class 1G licence (which authorises the licensee to patrol, protect or guard any property while carrying on retail loss prevention) will be taken to be a class 1A licence (which authorises the licensee to patrol, protect or guard any property while unarmed (whether static or mobile)),
  - (b) the following subclasses of licence will be taken to be a class 2C licence (which, following the proposed amendments, authorises a licensee to sell, install, maintain, repair and service, and provide advice in relation to, security equipment (including electronic security equipment and barrier equipment) and to act as a locksmith):
    - (i) a class 2E licence (which authorises a licensee to protect assets or other property by selling, installing, maintaining, repairing and servicing, and providing advice in relation to, barrier equipment),
    - (ii) a class 2F licence (which authorises a licensee to sell, install, maintain, repair and service, and provide advice in relation to, electronic security equipment).

*Miscellaneous provisions relating to licences and carrying on a “security activity”:*

26. The proposed amendments also make some general and consequential amendments relating to licences (Schedule 1 [4], [6], [23]–[26], [39], [40], [54], [60], [61], [64], [66] and [69]). These include, for example, the following:
- (a) clarification that for the purposes of the SI Act “security equipment” and “security activity” do not include equipment and activity used simply for watching (as opposed to guarding) property,
  - (b) the inclusion of further mandatory and discretionary grounds on which the Commissioner is to refuse to grant an application for a licence, including the ground that an applicant has not undertaken and completed the requisite training, assessment (for example, testing) and instruction for the class of licence sought by the applicant or that an applicant has a conviction that is not capable of being spent under section 7 of the *Criminal Records Act 1991*,
  - (c) that it is now a condition of every class 1 or 2 licence (including licences granted before the insertion of the new provision) that the licensee undertake the training, assessment and instruction required by the Commissioner to ensure that the licensee has continuing knowledge and competency in relation to the security activity to which the licence relates,
  - (d) changes to the mandatory requirements for the form of a licence and the inclusion of some non-mandatory requirements,
  - (e) clarifying that the Commissioner may have regard to certain criminal intelligence reports or other criminal information for the purpose of determining whether a

licence should be revoked and that the Commissioner's reasons for revoking a licence may be withheld if such reasons would disclose the existence or content of such a report or information,

- (f) making it clear that a licensee is not, in specified circumstances, required to produce, or wear, a licence that has been lost, stolen, destroyed, defaced or mutilated.

- 27. Schedule 1 [7] clarifies that the carrying on of a security activity in relation to patrolling, protecting or guarding any property includes, but is not limited to, control room operations, monitoring centre operations, retail loss prevention, or patrolling, protecting or guarding cash, an airport or any other infrastructure.

#### *Abolition of Security Industry Council:*

- 28. Schedule 1 [76] abolishes the Security Industry Council.

#### *Extension of the Commissioner's power to require an applicant for a licence to provide the Commissioner with palm prints:*

- 29. Schedule 1 [29], [30], [33] and [34] extend the Commissioner's power to require fingerprints in connection with a licence application so that palm prints may also be required. The provisions of the SI Act that apply to the use and destruction of fingerprints will also apply to palm prints. Schedule 1 [79] (proposed clause 34) validates the previous collection and use of palm prints by the Commissioner, to the extent that the Commissioner's actions would have been valid if the amendments had been in force.

### Schedule 2 Amendment of other legislation

#### *Provisional pistol (business/employment) licences:*

- 30. The proposed amendments to the Firearms Act introduce a new kind of category H (business/employment) pistol licence which is to be issued to a person who has never previously held such a licence (provisional pistol (business/employment) licence) (Schedule 2.1 [1], [4] and [5]). The term of a provisional pistol (business/employment) licence is 12 months (unless sooner surrendered, revoked or the licence otherwise ceases to be in force) (Schedule 2.1 [6]). The Commissioner is only able to issue such a licence if certain employment arrangements are in place (Schedule 2.1 [4]).
- 31. Schedule 2.1 [2] makes a declaration and excludes provisions of the Commonwealth Act in relation to certain provisions relating to training, assessment or instruction in relation to the use and possession of firearms similarly to the declaration and exclusion described above in relation to the security industry.
- 32. In addition to the general conditions imposed on licences by the Firearms Act, a provisional pistol (business/employment) licence is subject to further specific conditions outlined in the proposed provision which relate to the licensee's required employment arrangements, as well as requirements relating to the licensee's training, supervision and so on. For example, it will be a condition of a provisional pistol (business/employment) licence that, for the first 6 months of the term of the licence, a licensee is required to be under the direct supervision of a natural person who has continuously held, for a period of more than 12 months, both a category H (business/employment) licence and a class 1F licence issued under the SI Act. If this condition is contravened by the licensee, the master licensee who is the employer of the

licensee will be guilty of an offence, the maximum penalty for which is 200 penalty units (in the case of a corporation) or 100 penalty units (in the case of an individual).

33. Schedule 2.1 [3] makes it clear that a genuine reason of business or employment includes work undertaken voluntarily but only if such work relates to the static guarding of premises.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Retrospectivity:*

34. Schedule 1 [11] - Clause 6A (3): This section is taken to have had effect from 1 July 2011. The Committee will be concerned with any retrospective effect of legislation which may impact on personal rights. This section proposes that the State security industry regulation provisions be declared to be an excluded matter for the purposes of section 10 of the *National Vocational Education and Training Regulator Act 2011* (Commonwealth) to the extent only that section prevents the application of the State security industry regulation provisions to an NVR registered training organisation in relation to security activities.
35. Similarly, Schedule 2 [2] - Clause 6AA (3): This section is taken to have had effect from 1 July 2011. This relates to the State firearms regulation provisions and training.

**The Committee notes clause 6A will ensure that the *Security Industry Act 1997* powers of the NSW Police Force be retained, to oversight registered training organisations in New South Wales, and to ensure that the NSW Police Force can continue to regulate registered training organisations alongside the national regulator. The Second Reading speech explained that advice from the Commonwealth indicated that it will support this approach. Accordingly, the Committee is satisfied that the retrospectivity of clause 6A of Schedule 1 [11] does not, in this case, unduly trespass on individual rights. For the same reason, the retrospectivity of clause 6AA of Schedule 2 [2], does not unduly trespass on individual rights.**

#### *Presumption of Innocence:*

36. Schedule 1 [27] - Clause 17 (10): Section 12 of the *Criminal Records Act 1991* does not apply in relation to an application for the renewal of a licence. Section 12 of the *Criminal Records Act* deals with the consequences of a conviction becoming spent such that if a conviction of a person is spent:
- (a) the person is not required to disclose to any other person for any purpose information concerning the spent conviction, and
  - (b) a question concerning the person's criminal history is taken to refer only to any conviction of the person which are not spent, and
  - (c) in the application to the person of a provision of an Act or statutory instrument:
    - (i) a reference in the provision to a conviction is taken to be a reference only to any convictions of the person which are not spent, and

- (ii) a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of spent convictions.

37. The proposed clause means that any application for a renewal of a licence will be subject to section 15 (1) of the Act, where the Commissioner must refuse an application if the Commissioner is not satisfied that the applicant is a fit and proper person to hold the licence as references will be made to include any conviction even for a spent conviction of the person.

**The Committee recognises the right to a presumption of innocence and considers whether clause 17 (10) in allowing records on past spent convictions, may undermine such a right. However, the Committee strongly appreciates the public interest in ensuring compliance and accepts the need for renewal applicants to be fit and proper persons in the security industry.**

*Procedural Fairness:*

38. Schedule 1 [54] - Clause 26 (5), Clause 26 (6) and Schedule 1 [61] - Clause 29: Clause 26 (6) proposes that the Commissioner is not, under this or any other Act or law, required to give any reasons for revoking a licence if the giving of those reasons would disclose the existence or content of any criminal intelligence report or other criminal information as referred to in subsection (5).
39. Similarly, clause 29 inserts a note referring to sections 15 (7), 17 (5) and 26 (6) of the Act that will ensure that the Commissioner is not, under this or any other Act or law, required to give any reasons for not granting or renewing a licence or revoking a licence if the giving of those reasons would disclose the existence or content of any criminal intelligence report or other criminal information referred to in section 15 (6) or 26 (5). Part 2 of Chapter 5 of the *Administrative Decisions Tribunal Act 1997* does not apply then to any such decisions based on information to the extent that it would require disclosure of the existence or content of any criminal intelligence report or other criminal information.

**Clause 26 (5) refers to improper conduct rather than unlawful conduct and as such, the amendments may raise some potential concerns about an applicant's right to procedural fairness, such as, the right to know the reasons and information in order for the applicant to challenge the grounds of the decision when seeking a review. The Committee, however, takes into account subclauses (a1), (2) and (3) of clause 29, which will still provide for a right to seek review from the Administrative Decisions Tribunal.**

*Privacy and Property – Powers of Entry Without Warrant:*

40. Schedule 1 [73] - new Part 3B - Clause 39I: This clause enables an enforcement officer to enter any premises at which a security activity is being carried on, or at which the enforcement officer reasonably believes such an activity is being carried on, at any reasonable time for: (a) determining whether there has been compliance with, or a contravention of, this Act or the regulations, (b) generally for administering the Act. An enforcement officer in the Bill is defined as: (a) a police officer, or (b) any other member of the NSW Police Force who is authorised by the Commissioner in writing to exercise the functions of an enforcement officer under this Act.

The power to enter premises without consent or warrant trespasses on the right to privacy and property. However, a sufficient public interest may justify such a trespass such as ensuring compliance with the legislation in the security industry. The Committee observes that there are some limitations on the exercise of the enforcement officers' powers of entry without warrant. For instance, entry is only permitted at a reasonable time and entry to premises (or part of premises) used for residential purposes still requires consent of the occupier or the authority of a search warrant. The Committee also notes the Second Reading speech referred to how compliance auditing is carried out by a range of New South Wales government agencies where there are powers of entry without warrants and powers of inspection for civilian inspectors (such as under the *Gaming and Liquor Administration Act 2007*).

## Part Two - Regulations

### 1. Electricity Supply (General) Amendment (Solar Feed-in Tariffs) Regulation 2012

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Electricity Supply (General) Regulation 2001* to remove the entitlement of a customer to credits under the solar bonus scheme if the customer applied under that scheme to have a complying generator connected to the distribution system before 29 April 2011 and the generator is not connected on or before 30 June 2012.
2. This Regulation is made under the *Electricity Supply Act 1995*, including sections 15A (8F) and 191 (the general regulation-making power).

#### ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Reliance*

3. Clause 3 amends Clause 104M of the regulation to limit entitlements for credit under the solar bonus scheme to only applicants who applied before 29 April 2011 and were connected on or before 30 June 2012.
4. The Committee notes that the time limitation with respect to customers being connected may not be adequate. As customers are unable to connect themselves to the grid they are reliant on a third party, the electricity provider, to be able to establish the connection within the short time allowed by the regulation.

**The Committee notes that adequate time may not have been provided for customers to have a complying generator connected to the distribution system to enable the customer to receive credits under the solar bonus scheme. However, the Committee notes that customers have had over 12 months to obtain a connection prior to the amendment and as such makes no further comment.**

# Appendix One – Index of Ministerial Correspondence on Bills

The Committee is not in receipt of Ministerial Correspondence with respect to Bills.

## Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

1. In Digest 9/55, the Committee reported on the Work Health and Safety (Savings and Transitional) Regulation 2011, and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 17 April 2012 which addresses to the Committee's satisfaction the issues raised.
2. In 12/55, the Committee reported on the Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
3. In 16/55, the Committee reported on the Home Building Amendment (Threshold for Home Warrant Insurance) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.