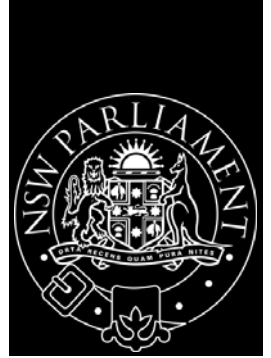


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 4 of 2009

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

### 8A Functions with respect to Bills

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

### 9 Functions with respect to Regulations:

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

## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

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

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 3).

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

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

### Part Two – Regulations

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

#### **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.

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## Appendix 1: Index of Bills Reported on in 2009

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

## Appendix 2: Index of Ministerial Correspondence on Bills for 2009

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

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

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

## Appendix 4: Index of correspondence on Regulations reported on in 2009

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

## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. Appropriation (Budget Variations) Bill 2009

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

#### 2. Hawkesbury-Nepean River Bill 2009

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

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

#### 3. Health Legislation Amendment Bill 2009

**Issue: Schedule 1.3 [18] amendment to *Health Care Complaints Act 1993* – proposed section 99B (disclosure of information to certain persons or bodies) – Privacy:**

34. The Committee concludes that there may be situations when the need to protect the health and safety of the public must be paramount and that such a public interest may justify overriding the right to privacy. Therefore, the Committee holds the view that the proposed section 99B (1) of Schedule 1.3 [18] does not trespass unduly on individual rights since subsection (2) guides the exercise of the Commission's discretion in disclosure of information to certain persons or bodies, including the balancing of public interest and the principle of the paramount consideration of the protection of public health and safety.

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

36. The Committee also notes that the Agreement in Principle speech explained that schedule 1.5 (proposed amendments to section 177 of the *Medical Practice Act 1992*) will commence on proclamation rather than assent, in order to allow for a code of conduct regarding the use of legal practitioners in proceedings before the professional standards committee to be developed so as to ensure that the proceedings will not become too legalistic. The Committee is of the view that these may be good reasons why such discretion is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.



#### 4. Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009

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

6. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.
7. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

#### 5. Real Property And Conveyancing Legislation Amendment Bill 2009

**Issue: Schedule 1 [14] amendment of *Real Property Act 1900* – proposed section 129 (2) (n) – Denial of Compensation:**

38. While the Agreement in Principle speech states that, '[t]he amendments this Bill proposes are intended to encourage due diligence in mortgagees' loan approval practices', the Committee is concerned with the broad scope of the proposed section 129 (2) (n): where the loss or damage arises from the improper exercise of a power of sale, will be added to the list of circumstances where compensation will not be payable from the Torrens Assurance Fund.
39. There may be impropriety of various kinds involving the mortgagee in the exercising of a power of sale. The majority judgment of Walsh J (concurring by Mason J), created a third category of conduct being more than mere negligence but less than actual fraud, as discussed by the High Court in *Forsyth v Blundell* (1973) 129 CLR 477, where Walsh J made the following observations:  
  
 ...There may be an improper exercise of a power of sale (that is one which constitutes a breach of duty owed to the mortgagor) where, although there is not any actual fraud (in the ordinary sense of that term), or any collusion between the mortgagee and the purchaser, there is improper conduct which goes beyond mere negligence in carrying out the sale. There may be impropriety of various kinds. What has sometimes been described as fraud on the power, and sometimes as wilful or reckless disregard of the interests of the mortgagor and sometimes as a sacrificing of the interests of the mortgagor does not necessarily involve, in my opinion, commission of actual fraud..."
40. The Committee, therefore, is concerned that a mortgagor's interests may be unduly trespassed if their right to compensation may not be adequately protected under the proposed section 129 (2) (n) such as in instances where a mortgagee has breached their duty owed to the mortgagor and has improperly exercised a power of sale which is more than mere negligence but less than actual fraud. Accordingly, the Committee refers this to Parliament.

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

42. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement of schedule 1 [4], [6] and [7] and schedule 2 [4] by proclamation and asks Parliament to consider whether the commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

**6. Surveillance Devices Amendment (Validation) Bill 2009**

**Issue: Clause 3 - Amendment of *Surveillance Devices Act 2007* – Schedule 1 Savings, transitional and other provisions – insertion of proposed clause 7 of Part 3 – Validation of certain listening device warrants – Retrospectivity:**

12. While it may be in the public interest to validate a Judge's authority, the Committee will always be concerned where the law will be retrospectively changed in a manner that adversely affects any person as an undue trespass on personal rights and liberties.
13. The Committee is of the view that the aim of this Bill is to retrospectively correct the validity of the warrants issued by a judge who at the time did not appear to have the authority to grant them in the absence of declaration that the judge is an eligible Judge for the purposes of the 1984 Act to grant such listening device warrants.
14. The Committee, nevertheless, notes that this amendment may not affect a defendant's general ability to defend himself or herself. However, the Committee is concerned that this Bill's retrospectivity sets a poor standard of practice, and may adversely affect the individual's right to specifically challenge the admissibility of the evidence obtained. Accordingly, the Committee refers this to Parliament.

## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. APPROPRIATION (BUDGET VARIATIONS) BILL 2009

Date Introduced:	25 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Eric Roozendaal MLC
Portfolio:	Treasurer

## Purpose and Description

1. This Bill appropriates additional amounts out of the Consolidated Fund for the years 2008–2009 and 2007–2008 for the purpose of giving effect to certain Budget variations required by the exigencies of Government.
2. The Bill has three main features. Firstly, it provides an account to Parliament on how the 2008-09 Treasurer's Advance has been applied towards recurrent and capital expenditure, and details of the 2007-08 allocation of Treasurer's Advance not previously reported to Parliament. Secondly, it seeks appropriations to cover expenditure approved by the Governor under section 22 of the *Public Finance and Audit Act 1983*. Thirdly, it seeks appropriation for payments that are intended to be made in the current financial year where no provision was made in the annual appropriation bill.

## Background

3. From the Agreement in Principle speech:

The *Appropriation (Budget Variations) Bill 2009* is a key part of the annual budget process. It is not always possible to seek Parliament's authority in advance for unforeseen and urgent expenditure, and provisions have been established for such situations. These include the Treasurer's Advance and section 22 of the *Public Finance and Audit Act 1983*. In the annual Appropriation Act an advance is appropriated to the Treasurer to cater for unforeseen and urgent expenditures that could not be forecast at budget time. This bill includes details of expenditure from the Treasurer's Advance, ensuring that there is a transparent accountability process to Parliament...Under section 22 of the *Public Finance and Audit Act 1983*, the Treasurer, with the approval of the Governor, determined that amounts were paid from the Consolidated Fund for exigencies of government, in anticipation of appropriation by Parliament. This bill provides details of those payments. The bill also seeks approval by the Parliament for the payment of additional appropriations in 2008-09 for which no provision was made in the annual Appropriation Act. These include the bringing forward of payments to the rail and housing sectors, as reported in the 2008-09 half-yearly review released in December 2008. The practice of seeking approval for supplementary funding to cover expenditure not provided for in the annual Appropriation Act has now become an important part of the annual budget process. This is a process that has been endorsed by the Auditor-General as well

Appropriation (Budget Variations) Bill 2009

as by the Legislative Council's General Purpose Standing Committee No. 1 in its report on appropriation processes.

4. In respect of the 2008-09 financial year, this Bill seeks appropriations of \$343.195 million in adjustment of the advance to the Treasurer; \$10.891 million for recurrent services approved by the Governor under section 22 of the *Public Finance and Audit Act 1983*; and an additional appropriation of \$520.505 million.
5. The payments for 2007-08 have been brought to account in agencies' audited financial statements.

## The Bill

6. The object of this Bill is to appropriate additional amounts from the Consolidated Fund for recurrent services and capital works and services for the years 2008–2009 and 2007–2008 for the purpose of giving effect to certain Budget variations required by the exigencies of Government. The additional amounts appropriated for the 2008–2009 year are:
  - (a) \$343,195,000 in adjustment of the vote “Advance to the Treasurer”, and
  - (b) \$10,891,000 for recurrent services in accordance with section 22 (1) of the *Public Finance and Audit Act 1983*, and
  - (c) \$520,505,000 for other additional recurrent services.

The additional amounts appropriated for the 2007–2008 year are:

- (a) \$303,144,000 in adjustment of the vote “Advance to the Treasurer”, and
  - (b) \$240,010,000 for recurrent services and capital works and services in accordance with section 22 (1) of the *Public Finance and Audit Act 1983*.
7. Schedule 1 has an account of how the Treasurer's Advance has been applied this year. Schedule 1 covers appropriations for 2008-09 and schedule 2 covers payments made in 2007-08.

## Issues Considered by the Committee

- |   |
|---|
| <ol style="list-style-type: none"><li>8. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></li></ol> |
|---|

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

## 2. HAWKESBURY-NEPEAN RIVER BILL 2009

Date Introduced:	25 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Phillip Costa MP
Portfolio:	Water

### Purpose and Description

1. The objects of this Bill are as follows:
  - (a) to improve the co-ordination and implementation of management strategies in relation to the health of the Hawkesbury-Nepean river system,
  - (b) to improve public access to information about management strategies in relation to the health of the Hawkesbury-Nepean river system,
  - (c) to provide increased opportunities for public involvement in the development of management strategies in relation to the health of the Hawkesbury-Nepean river system,
  - (d) to improve the management of development in the Hawkesbury-Nepean Waters (*in-stream development*).
2. For that purpose, this Bill establishes the Office of the Hawkesbury-Nepean (***the Office***), as a statutory corporation, and confers functions on the Office in connection with maintaining or improving the health of the Hawkesbury-Nepean river system and the management of in-stream development. Other public authorities with functions in relation to the Hawkesbury-Nepean river system will be required to co-operate with the Office.

### Background

3. According to the Minister's Agreement in Principle Speech, the Bill has four objectives and it gives the Office of the Hawkesbury-Nepean the clearly defined functions it will need to achieve each of those objectives.
4. Firstly, the office will improve coordination and implementation of management strategies relating to the health of the Hawkesbury-Nepean river system. To achieve this, the office will coordinate the management of aquatic weeds and manage the implementation of any agreed arrangements between New South Wales and the Commonwealth, or local government, to improve the health of the Hawkesbury-Nepean river system.
5. Secondly, the office will improve public access to information and advice about management strategies concerning the health of the Hawkesbury-Nepean river system. To achieve this, the office will act as a single point of information and advice about management strategies, respond to inquiries for advice and provide advice about management strategies, and compile information on management strategies and provide that information to the public.

6. Thirdly, the office will provide increased opportunities for the public to be involved in the development of management strategies to improve the health of the Hawkesbury-Nepean river system. To achieve this, the office will carry out public consultation to determine the views of the public or stakeholders, and report to me, as the relevant Minister, and relevant public authorities on the results of any public consultation.
7. Finally, the bill provides for the office to improve the management of in-stream development in the Hawkesbury-Nepean waters. The bill provides for the office to do this by liaising with planning authorities to ensure they fulfil their responsibilities in an integrated and efficient manner, providing information and assistance on development to members of the public who propose to carry out in-stream development, and accepting development applications for developments in the Hawkesbury-Nepean waters and forwarding them to the relevant consent authority, together with associated documents and fees. Before elaborating on these functions, I will briefly outline the administrative arrangements established by the bill.

## The Bill

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

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

**Clause 3** provides for the objects of the proposed Act, as described in the Overview.

**Clause 4** defines certain words and expressions used in the proposed Act.

A **management strategy**, in relation to the health of the Hawkesbury-Nepean river system, means:

- (a) any policy, program or plan of the New South Wales Government or a public authority devised, adopted or implemented for the purposes of improving or maintaining the health of the Hawkesbury-Nepean river system, or
- (b) any agreement or arrangement entered into by the New South Wales Government with the Commonwealth or a local council for the purposes of improving or maintaining the health of the Hawkesbury-Nepean river system.

The **health of the Hawkesbury-Nepean river system** includes:

- (a) the quality and quantity of the waters within the Hawkesbury-Nepean river system, and
- (b) the management of aquatic weeds in the Hawkesbury-Nepean river system, and
- (c) the health of river dependent ecosystems and their components, and
- (d) such other matters relating to the Hawkesbury-Nepean river system as may be prescribed by the regulations.

The **Hawkesbury-Nepean waters** are the waters described in Schedule 1. This is the area in which the Office may exercise its functions with respect to in-stream development.

**Clause 5** enables the Governor, by order, to alter or replace the description of the Hawkesbury-Nepean waters in Schedule 1 to the proposed Act.

### **Part 2 Establishment of Office of Hawkesbury-Nepean**

**Clause 6** establishes the Office of the Hawkesbury-Nepean as a corporation.

**Clause 7** provides that the Office is a NSW Government agency.

**Clause 8** provides that the Office is subject to the control and direction of the Minister.

**Clause 9** makes the Director of the Office responsible for the day-to-day management of the affairs of the Office.

**Clause 10** establishes an Advisory Board for the Office, consisting of representatives from a number of public authorities with existing functions with respect to the Hawkesbury-Nepean river system.

**Clause 11** enables the Office to delegate its functions.

### **Part 3 Functions of Office**

**Clause 12** confers on the Office the function of co-ordinating and assisting with the implementation of management strategies in relation to the health of the Hawkesbury-Nepean river system. In particular, the Office may liaise with public authorities, and establish arrangements or procedures, for the purposes of co-ordinating works to manage aquatic weeds in the Hawkesbury-Nepean river system and managing the implementation of any arrangements agreed between the State and the Commonwealth or a local council for the recovery of the Hawkesbury-Nepean river system.

**Clause 13** confers on the Office the function of acting as a single point of public access to information and advice about management strategies in relation to the health of the Hawkesbury-Nepean river system. For that purpose, the Office may provide information and advice to the public in relation to management strategies.

**Clause 14** requires the Office to provide opportunities to the public to be involved in the development of management strategies in relation to the health of the Hawkesbury-Nepean river system. For that purpose, the Office may consult with the public about management strategies and report or provide advice to the Minister or any public authority about the results of its public consultation.

**Clause 15** requires the Office to promote the effective management of in-stream development. For that purpose, the Office may liaise with planning authorities for the purpose of ensuring that they exercise their functions with respect to in-stream development in an integrated and efficient manner and provide information or assistance to the public in connection with in-stream development.

**Clause 16** provides for supplementary functions of the Office.

### **Part 4 Interaction with other public authorities**

**Clause 17** requires other public authorities to co-operate with the Office in the exercise of its functions.

**Clause 18** enables the Office to enter into agreements or other arrangements with other public authorities for the purpose of achieving the objects of the proposed Act.

## **Issues Considered by the Committee**

### **Issue: Clause 2 – Commencement by Proclamation – Provide the Executive with unfettered control over the commencement of an Act**

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

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

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

## 3. HEALTH LEGISLATION AMENDMENT BILL 2009

Date Introduced:	25 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Della Bosca MLC
Portfolio:	Health

### Purpose and Description

1. This Bill makes miscellaneous amendments to various Acts administered by the Minister for Health; and for other purposes.
2. It proposes a range of minor amendments to various pieces of health legislation—the *Drug and Alcohol Treatment Act 2007*, the *Health Administration Act 1982*, the *Health Care Complaints Act 1993*, the *Health Services Act 1997*, the *Medical Practice Act 1992* and the *Mental Health Act 2007*.

### Background

3. In June 2008, the joint Parliamentary Committee on the Health Care Complaints Commission issued the "Report on the Investigations by the Health Care Complaints Commission into the Complaints Made Against Mr Graeme Reeves". The report followed an earlier review into the matter, conducted by retired Federal Court judge, Ms Deidre O'Connor.
4. The report noted that two of Ms O'Connor's recommended amendments to the *Health Care Complaints Act 1993* had not been implemented. They related to strengthening the Health Care Complaints Commission's powers under sections 21A and 34A with regard to the assessment and investigation of complaints.
5. The Health Care Complaints Commission's investigation of a complaint has two phases: the assessment phase, during which the commission determines if the complaint will be investigated, or managed in other appropriate manner; and the investigation phase. During the assessment phase, section 21A only gives the Commission a limited power to obtain hospital and medical records and documents relating to a health practitioner's practice. During the investigation phase, section 34A does not limit the documents and information the Commission may obtain, but does provide that the Commission is only able to obtain such information from a complainant, the person against whom the complaint was made or a health service provider.
6. Ms O'Connor recommended amending section 34A to give the Health Care Complaints Commission the power to compel any person to produce documents or information to the Commission during the investigation phase of a complaint. She also recommended amending section 21A to allow the Commission to exercise all of the powers under section 34A during the assessment phase of a complaint. This Bill



adopts these recommendations of both the joint parliamentary committee and Ms O'Connor.

## The Bill

7. The objects of this Bill are:

(a) **to amend the *Drug and Alcohol Treatment Act 2007*:**

(i) to remove the requirement that a medical practitioner who grants a person a leave of absence from a treatment centre must be satisfied that the person is medically fit, and

(ii) to include a transitional provision that allows persons who have been detained for treatment under the *Inebriates Act 1912*, within an area that is subsequently prescribed for the purposes of the *Drug and Alcohol Treatment Act 2007*, to continue to be detained under the *Inebriates Act 1912*, and

(b) **to amend the *Health Administration Act 1982*** to provide that members of the Medical Services Committee may be appointed for 3 terms of office, with each term of office being 4 years, and

(c) **to amend the *Health Care Complaints Act 1993*:**

(i) to provide that the Health Care Complaints Commission (the **Commission**) may compel a person to give information, produce documents or answer questions that would assist the Commission in assessing a complaint or carrying out an investigation, and

(ii) to provide that following the assessment of a complaint the Commission is not required to give notice of its decision to a person in certain circumstances, and

(iii) to provide that following the investigation of a complaint the Commission may provide the outcomes of the investigation to certain persons and a report of the outcome of the investigation to the complainant, and

(iv) to provide that in circumstances in which the Director of Proceedings determines that a complaint should not be prosecuted before a disciplinary body, the Director may refer the complaint to the Commission for alternative action, and

(v) to provide that the Director of Proceedings may give notice of the Director's decision about whether or not to prosecute a complaint to certain persons, and

(vi) to provide that the Director of Proceedings may delegate his or her functions with respect to a particular complaint to an officer of the Commission, and

(vii) to provide that the Director of Proceedings may undertake functions imposed on the Commission by Acts other than the *Health Care Complaints Act 1993*, and

(viii) to provide that a person cannot be compelled to give evidence about, or produce documents containing, information obtained in exercising a function under the Act except in limited circumstances, and

(ix) to provide that the Commission, or a member of staff of the Commission, may disclose information obtained in exercising a function under the Act to certain persons, and

(d) **to amend the *Health Services Act 1997*:**

(i) to provide that if a board governed health corporation under that Act has fewer than 50 staff members there is no requirement to appoint a member of the NSW Health Service to the health corporation's board, and

(ii) to clarify that if the position of chief executive of a board governed health corporation is an executive position within the meaning of Part 3 of Chapter 9 of that Act, the chief executive is to be appointed under that Part, and

(iii) to provide that the protection from liability given to a person who provides expert advice or assistance in a review of the conduct of a visiting practitioner or a member of the NSW Health Service extends to a review of the conduct of an employee of a non-declared affiliated health organisation who is employed in relation to a recognized establishment or recognised service of the organisation, and

(e) **to amend the *Medical Practice Act 1992*** to provide that at an inquiry conducted by a Professional Standards Committee, the medical practitioner concerned and any complainant are entitled to attend and to be represented by an Australian legal practitioner or another adviser, and

(f) **to amend the *Mental Health Act 2007*:**

(i) to clarify that, in respect of an application for a further community treatment order under that Act, the requirement to give 14 days notice does not apply, and

(ii) to provide that the President of the Mental Health Review Tribunal may be appointed as a full-time or part-time member. A consequential amendment is made to the *Statutory and Other Offices Remuneration Act 1975*.

**Other details of amendments to the *Health Care Complaints Act 1993*:**

8. Schedule 1.3 to the Bill contains amendments to the *Health Care Complaints Act 1993*. Amendments are proposed for the power of the Health Care Complaints Commission under sections 28 and 28A of the *Health Care Complaints Act 1993* to provide information to the parties to a complaint and to persons whose treatment is the subject of a complaint. Currently, sections 28 and 28A apply different rules to the provision of information by the Commission to a person who is a party to a complaint and a person whose treatment is the subject of a complaint. Under section 28, the Commission must, unless an exemption applies, give the parties to a complaint notice of the action taken or decision made by the commission following an assessment of a complaint.
9. Under section 28A, the Commission is to use its best endeavours to notify a person whose treatment is the subject of a complaint of the outcomes of the assessment of the complaint. The Bill amends section 28A of the *Health Care Complaints Act* to bring the relevant provisions into alignment and to ensure that the Commission can provide information to or withhold information from both a party to a complaint and a person whose treatment is the subject of a complaint.
10. It also contains amendments to sections 41 and 45 of the *Health Care Complaints Act* to provide that the Health Care Complaints Commission may provide the outcomes of an investigation report to any person to whom it could have provided its assessment decision under section 28A and to any other relevant person or organisation. Section 45 is to be amended to allow the Commission to provide a copy of its report to the complainant.
11. Section 41A of the *Health Care Complaints Act* is to be amended to ensure that the Commission may issue a prohibition order against an unregistered health practitioner if the practitioner imposes a risk to the public health or safety rather than just the health of members of the public.
12. The Bill sets out a series of amendments to part 6A of the *Health Care Complaints Act*. Part 6A establishes the position of the Director of Proceedings and sets out the

powers, duties and functions of the Director of Proceedings. The Director of Proceedings is the independent arbiter of whether complaints about health care practitioners are to be prosecuted before disciplinary bodies. When a decision is made to prosecute a complaint, the Director of Proceedings is responsible for undertaking that prosecution.

13. The functions of the Director of Proceedings are in some ways analogous to the functions of the Director of Public Prosecutions. Part 6A was inserted in the Act by the *Health Legislation Amendment (Complaints) Act 2004*, which commenced in 2005. In the four years, a few minor deficiencies with part 6A have been identified.
14. The proposed amendments to part 6A aim to address deficiencies by allowing the Director of Proceedings to refer matters back to the Commission where: the Director declines to prosecute a complaint before a disciplinary body; to allow the Director to notify parties of its decision regarding prosecution of a complaint; to allow the Director to delegate its functions to avoid conflicts of interest; and to allow the Director to exercise functions imposed on the Commission by Acts other than the Health Care Complaints Act.
15. Other amendments to the Health Care Complaints Act aim to ensure that the officers of the Health Care Complaints Commission may not be compelled in any legal proceedings to give evidence or produce documents in respect of any information obtained in exercising a function under the Health Care Complaints Act. The amendments to section 99A of the Health Care Complaints Act provide the Commission an exemption from being required to produce documents and information in legal proceedings, similar to those enjoyed by other investigative bodies such as the Legal Services Commission, the Independent Commission Against Corruption, the Police Integrity Commission and the Ombudsman.
16. The Commission will still be required to produce documents and information in respect of proceedings under the Royal Commissions Act, an inquiry under the Ombudsman Act, proceedings before the Independent Commission Against Corruption or proceedings under part 3 of the Special Commissions of Inquiry Act. While the amendments will ensure that the Commission is not compellable in legal proceedings, the Bill inserts a new section 99B to give the Commission a discretion to disclose information obtained in exercising a function under the Act to a number of relevant persons and bodies, such as the Minister for Health, a court or tribunal, the police or a prosecuting authority, any body regulating health service providers in Australia, a health practitioner the subject of a complaint, or the complainant. The proposed section 99B only allows the Commission to exercise its discretion if it is satisfied that the public interest in disclosing the information outweighs the public interest in protecting the confidentiality of the information and the privacy of the person to whom the information relates.

**Other details of amendments to the *Drug and Alcohol Treatment Act 2007*:**

17. Schedule 1.1 amends the *Drug and Alcohol Treatment Act 2007*. At present, section 21 of the Drug and Alcohol Treatment Act allows an accredited medical practitioner to grant a leave of absence to a person detained in a treatment centre under the Act if the person is medically fit. However, section 21 currently prevents a person being given a leave of absence for medical purposes. The Bill addresses this by amending section 21 so as to ensure that a leave of absence can be granted for the purpose of obtaining medical treatment. The Bill also inserts a new transitional provision into the

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Drug and Alcohol Treatment Act. The Drug and Alcohol Treatment Act allows for the short-term involuntary detention and treatment of a person with a substance dependence in a declared treatment centre.

18. The Act is being trialled as an alternative to the *Inebriates Act 1912* in treating persons with a substance dependence. The Drug and Alcohol Treatment Act applies only to the area prescribed by the regulations and the *Inebriates Act* will not apply to the prescribed area.
19. The Drug and Alcohol Treatment Act currently applies to the catchment area, apart from Cumberland Hospital, of Sydney West Area Health Service. Cumberland Hospital has been excluded from the prescribed area to allow those patients receiving treatment under the *Inebriates Act* prior to the commencement of the Drug and Alcohol Treatment Act to continue their treatment. However, if in the future, the prescribed area is expanded, patients who will be receiving current treatment under the *Inebriates Act* are not to be prevented from continuing their treatment under that Act. The Bill, therefore, inserts proposed new section 55A into the Drug and Alcohol Treatment Act, which will allow for people who have been detained for treatment under the *Inebriates Act* within an area subsequently prescribed to continue to be treated in accordance with that Act rather than the Drug and Alcohol Treatment Act, in order to ensure that patients receive continuity of care.

**Other details of amendments to the *Health Administration Act 1982*:**

20. Schedule 1.2 makes amendments to the *Health Administration Act 1982* relating to the appointment of members of the Medical Services Committee. The Medical Services Committee is established under section 20B of the *Health Administration Act* to provide advice to the Minister for Health and the department relating to matters affecting the practice of medicine in New South Wales, including existing and proposed legislation and administrative arrangements. Section 4 of the *Health Administration Act* provides that members of the Medical Services Committee may be appointed to a maximum of five two-year terms of office. The nomination and appointment process for appointment to the committee can take up to 12 months and the requirement to undertake this process every two years means there is almost a perpetual cycle of appointments underway. The proposed amendments to the *Health Administration Act* allow members of the Medical Services Committee to be appointed for a maximum of three four-year terms. These amendments aim to reduce the administrative burden associated with the appointment of members of the committee to allow for a more stable membership and also bring the terms of office of the committee into line with other similarly appointed bodies, such as the New South Wales Medical Board.

**Other details of amendments to the *Health Services Act 1997*:**

21. Schedule 1.4 amends the *Health Services Act 1997* in relation to board-governed health corporations and to protections offered to experts who assist in performance and conduct reviews within New South Wales Health. The *Health Services Act* establishes a number of board-governed health corporations, such as the Clinical Excellence Committee, HealthQuest and Justice Health. Section 49 of the Act provides that the Minister for Health must appoint a member of staff of New South Wales Health, who is employed in connection with a health corporation, to the board of that board-governed health corporation.

22. However, there are some difficulties in the smaller board-governed health corporations in requiring a member of the staff to be appointed to the board. In the smaller corporations, there may not be a staff member with both the skills and expertise to perform as an effective board member. A staff member may encounter difficulties in maintaining the strict confidentiality of board business and may experience a conflict of interests between their responsibilities as a board member and their responsibilities as an employee. Therefore, the Bill amends section 49 to provide that in the case of a board-governed health corporation with less than 50 staff members, the Minister is not required to appoint a member of staff of New South Wales Health. However, it will still be open to the Minister, if appropriate, to appoint a staff member to the board of a board-governed health corporation. This Bill also amends section 51 to clarify that where the position of chief executive for a board-governed health corporation is an executive position within the meaning of part 3 of chapter 9 of the Act, all provisions of part 3 of chapter 9 apply to the appointment and employment of the chief executive.
23. Another amendment to the Health Services Act relates to section 139. That section was inserted into the Health Services Act in December 2007 and provides protection from personal liability for any person who in good faith assists in a review of the performance or conduct of a member of New South Wales Health or a visiting practitioner. Any liability that arises attaches to the public health organisation concerned, or the director general of the Department of Health. Section 139 assists public health organisations in obtaining the assistance of health practitioners and other experts in assessing and reviewing the professional performance or conduct of visiting practitioners and employees within the public health system. However, section 139 currently does not apply to a person who in good faith assists in the review of the performance or conduct of an employee of a non-declared affiliated health organisation. This is because while non-declared affiliated health organisations are part of the public health system, their employees are not members of New South Wales Health. The Bill addresses this by amending section 139 to extend the protection provided in section 139 to persons who are employed by non-declared affiliated health organisations.

**Other details of amendments to the *Medical Practice Act 1992*:**

24. Schedule 1.5 amends section 177 of the Medical Practice Act. Section 177 deals with issues relating to representation of a medical practitioner and a complainant at proceedings before a professional standards committee. The professional standards committee is a body established under the Medical Practice Act to inquire into complaints of unsatisfactory professional conduct not amounting to professional misconduct against medical practitioners. Proceedings before a committee are inquisitorial, and following an inquiry a committee may take a variety of actions, including reprimanding a practitioner or imposing conditions on a practitioner's licence, but may not cancel or suspend a practitioner's registration.
25. Under the current section 177 of the Act, neither the complainant (being the Health Care Complaints Commission), nor the medical practitioner (the subject of a complaint) may be represented by a legal practitioner at an inquiry, although a legal practitioner is entitled to be present at the inquiry and may advise the practitioner. The Health Care Complaints Commission is generally represented by a person who has legal training but who is not a legal practitioner. The lack of legal representation before a professional standards committee has caused some concern among the medical profession, particularly in light of the 2008 amendments to the Medical

Practice Act which amended that Act to require hearings of a professional standards committee to be held in public and decisions of the committee to be published unless a committee forms the view that it is not in the public interest to do so.

26. The proposed amendments to section 177 will allow a practitioner or a complainant before a professional standards committee to be represented by a legal practitioner. The proposed amendment will bring section 177 into line with section 162, which allows a practitioner or complainant to be legally represented in proceedings before the medical tribunal. Schedule 1.5 to insert the proposed amendments to section 177 will commence on proclamation rather than assent to allow for a code of conduct regarding the use of legal practitioners in proceedings before the professional standards committee to be developed.

**Other details of amendments to the *Mental Health Act 2007*:**

27. The final amendments are contained in schedule 1.6 regarding sections 52 and 142 of the Mental Health Act. Section 52 of the Act relates to applications for community treatment orders. When an application for a community treatment order is made, section 52 requires an affected person to be given written notice of the application and a copy of the proposed treatment plan. It also provides that the application must be heard no earlier than 14 days after the notice is given. Section 52 (2) currently provides that, where an application is made in respect of a person the subject of a current community treatment order, section 52 does not apply.
28. The Bill amends section 52 (2) to make it clear that when an affected person is the subject of a current community treatment order, the requirement to give the person written notice of the application and a copy of the treatment plan applies, but a 14-day notice period does not apply. This amendment has been made because when an affected person is the subject of a current community treatment order, the requirement to give a 14-day notice period before determining the application may prevent continuity of care where, for example, an administrative oversight or error results in the 14-day notice period not being complied with. However, regardless of whether the person is the subject of a current community treatment order or not, it is appropriate to provide the person with written notice of the application and to provide a copy of the proposed treatment plan.
29. Proposed amendments to section 141 of the Mental Health Act provide that the President of the Mental Health Review Tribunal may be employed as a full-time or part-time member, which will bring the position of the president into line with the position of the deputy president, who may be appointed on a full-time or part-time basis. As a result of the amendments to section 141, the Bill also makes a consequential amendment to the *Statutory and Other Offices Remuneration Act 1975*.

## **Issues Considered by the Committee**

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

#### **Issue: Schedule 1.3 [18] amendment to *Health Care Complaints Act 1993* – proposed section 99B (disclosure of information to certain persons or bodies) – Privacy:**

30. The current *Health Care Complaints Act 1993* provides under section 99A:

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If a person discloses information obtained in exercising a function under this Act and the disclosure is not made:

- (a) with the consent of the person to whom the information relates, or
- (b) in connection with the execution and administration of this Act, or
- (c) for the purposes of any legal proceedings arising out of this Act or any report of any such proceedings, or
- (d) with other lawful excuse,

the person is guilty of an offence. Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

31. This Bill proposes to insert section 99B to allow for disclosure of information to certain persons or bodies:

(1) The Commission or a member of staff of the Commission may, at the Commission's discretion, disclose information obtained in exercising a function under this Act to any of the following:

- (a) the Minister,
- (b) any court, tribunal or other person acting judicially,
- (c) any person or body regulating health service providers in Australia,
- (d) any officer of, or Australian legal practitioner instructed by, any of the following: (i) any authority regulating health service providers in Australia, (ii) the Commonwealth or a State or Territory, (iii) an authority of the Commonwealth or of a State or Territory,
- (e) any investigative or prosecuting authority established by or under legislation,
- (f) a police officer if the Commission suspects on reasonable grounds that the information relates to an offence that may have been committed,
- (g) an investigator carrying out an investigation, examination or audit in relation to a health service provider,
- (h) a health service provider that is the subject of an investigation under this Act,
- (i) a client of a health service provider that has been the subject of an investigation under this Act, but only to the extent of the information relates to that client.

32. The Committee notes the importance of protecting a person's right to privacy. However, the Committee further notes that under the proposed section 99B (2), the Commission may exercise its discretion under subsection (1) to disclose, or authorise a member of the Commission's staff to disclose information only if:

- (a) The Commission considers the public interest in disclosing the information outweighs the public interest in protecting the confidentiality of the information and the privacy of any person to whom the information relates, and

- (b) the Commission has had due regard to the principle set out in section 3 (2).
33. Section 3 (2) of the *Health Care Complaints Act 1993* provides the principle that: In the exercise of functions under this Act the protection of the health and safety of the public must be the paramount consideration.

**34. The Committee concludes that there may be situations when the need to protect the health and safety of the public must be paramount and that such a public interest may justify overriding the right to privacy. Therefore, the Committee holds the view that the proposed section 99B (1) of Schedule 1.3 [18] does not trespass unduly on individual rights since subsection (2) guides the exercise of the Commission's discretion in disclosure of information to certain persons or bodies, including the balancing of public interest and the principle of the paramount consideration of the protection of public health and safety.**

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

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

35. The Committee notes that the proposed Act is to commence on the date of assent except as provided by subsection (2) where schedule 1.5 is to commence on a day to be appointed by proclamation. This may delegate to the government the power to commence schedule 1.5 on whatever day it chooses or not at all.

**36. The Committee also notes that the Agreement in Principle speech explained that schedule 1.5 (proposed amendments to section 177 of the *Medical Practice Act 1992*) will commence on proclamation rather than assent, in order to allow for a code of conduct regarding the use of legal practitioners in proceedings before the professional standards committee to be developed so as to ensure that the proceedings will not become too legalistic. The Committee is of the view that these may be good reasons why such discretion is required, and the Committee considers that, in these circumstances, this may not give rise to an inappropriate delegation of legislative power.**

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



## 4. INDUSTRIAL RELATIONS AMENDMENT (JURISDICTION OF INDUSTRIAL RELATIONS COMMISSION) BILL 2009

Date Introduced:	25 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Hatzistergos MLC
Portfolio:	Attorney General

### Purpose and Description

1. The object of this Bill is to amend the *Industrial Relations Act 1996* and certain other legislation to confer on the Industrial Relations Commission in Court Session (otherwise known as the Industrial Court of New South Wales) the criminal and civil jurisdiction that is currently exercised by Industrial Magistrates under that legislation.

The Bill also provides that:

- (a) certain civil jurisdiction exercised by Industrial Magistrates will be retained by Local Courts sitting at various places (referred to as **designated places**) outside of the Sydney metropolitan area, and
- (b) Local Courts will cease to exercise criminal jurisdiction in relation to offences under the *Industrial Relations Act 1996*, the *Occupational Health and Safety Act 2000* and certain other industrial legislation, and
- (c) existing Industrial Magistrates will continue in office as Local Court Magistrates.

### Background

2. According to the Agreement in Principle speech, the work of the Industrial Relations Commission has significantly decreased since the introduction of the Commonwealth WorkChoices legislation and it is not envisaged that it will return to former levels even after changes are made to the WorkChoices scheme.
3. This Bill is part of a number of strategies that have been progressed to address the reduced workloads currently being experienced in the Industrial Relations Commission as a result of WorkChoices.
4. In particular, the Bill transfers the jurisdiction of Industrial Magistrates to the Industrial Relations Commission and abolishes the positions of Chief Industrial Magistrate and Industrial Magistrate. The abolition of the position of Chief Industrial Magistrate and Industrial Magistrate will free the Chief Industrial Magistrate to return to the general bench to deal with the core business of the Local Courts. The transfer of jurisdiction from Industrial Magistrates to the Industrial Relations Commission is subject to the exception that the civil jurisdiction of Industrial Magistrates to deal with recovery of wages will be retained by magistrates of the Local Court in locations outside the metropolitan area.

5. The purpose of this exception is to avoid inconvenience to parties that are geographically remote from the Industrial Court in Sydney and preserve easy access to justice for parties seeking to recover minor claims in relation to recovery of wages and salaries.

## The Bill

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

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

### **Schedule 1 Amendment of Industrial Relations Act 1996**

At present under Part 1 of Chapter 7 of the *Industrial Relations Act 1996 (the Act)*, both the Industrial Court and a Local Court constituted by an Industrial Magistrate have jurisdiction in relation to breaches of industrial instruments (including ordering a person to pay a civil penalty for such a breach and granting injunctions to restrain further contraventions of industrial instruments).

**Schedule 1 [6]–[10]** remove the jurisdiction of Industrial Magistrates under Part 1 of Chapter 7 so that only the Industrial Court will have jurisdiction in relation to breaches of industrial instruments.

**Schedule 1 [2] and [3]** are consequential amendments.

**Schedule 1 [11]** will provide that the civil jurisdiction of a Local Court under Part 2 of Chapter 7 of the Act (which relates to orders for the recovery of remuneration and other amounts payable by employers) will be exercised by a Local Court sitting at a designated place and not by an Industrial Magistrate.

**Schedule 1 [4] and [13]** are consequential amendments. The amendment made by Schedule 1 [11] does not affect the jurisdiction of the Industrial Court under Part 2 of Chapter 7 of the Act.

**Schedule 1 [12]** makes it clear that a Commissioner of the Industrial Relations Commission or a Deputy President of the Commission may undertake conciliation on behalf of the Industrial Court in relation to proceedings under Part 2 of Chapter 7 of the Act and make orders to give effect to the terms of any settlement resulting from the conciliation.

**Schedule 1 [14]** is consequential on the amendment made by Schedule 1 [11] but will also enable the Industrial Commission to refer applications for orders for the recovery of money that are made during proceedings before the Commission to Local Courts sitting at designated places.

**Schedule 1 [15]** removes provisions relating to the appointment and jurisdiction of Industrial Magistrates (including the Chief Industrial Magistrate).

**Schedule 1 [1]** is a consequential amendment.

**Schedule 1 [16]** removes the criminal jurisdiction of Local Courts (whether or not constituted by an Industrial Magistrate) under the Act so that only the Industrial Court will have jurisdiction to deal with offences under the Act.

**Schedule 1 [5]** is a consequential amendment. The amendment made by Schedule 1 [4] also removes the provision for appeals to be made to the Industrial Court against a conviction or penalty imposed by a Local Court for an offence under the Act.

## Issues Considered by the Committee

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

6. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.
7. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

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

## 5. REAL PROPERTY AND CONVEYANCING LEGISLATION AMENDMENT BILL 2009

Date Introduced:	25 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Lands

### Purpose and Description

1. This Bill amends the *Real Property Act 1900* and other legislation to make further provision with respect to indefeasibility of title, compensation, identification requirements and duties of mortgagees; and for other purposes.
2. To limit and to clarify the extent of the statutory exceptions, this Bill proposes to amend section 42—the main section of the *Real Property Act 1900*—which establishes the features of indefeasibility.
3. The amendment provides that section 42 is to prevail over any inconsistent provision of any other Act or law unless the inconsistent provision provides otherwise. The Department of Lands undertook a review of New South Wales legislation to identify any existing provisions that could potentially impact on the principle of indefeasibility. An amendment is to be made to those Acts that are intended to create unrecorded statutory interests in land to confirm that the provisions of the identified Act will override section 42 of the *Real Property Act 1900*. About 20 Acts have been identified as requiring amendment. These Acts, which include the Land Tax Management Act and the Local Government Act, are set out in schedule 3 to the Bill.
4. This Bill proposes to amend the *Real Property Act 1900* to require mortgagees (the lenders), to take reasonable steps to confirm the identity of the mortgagor (the borrowers), before presenting a mortgage for lodgement and registration.

### Background

5. According to the Agreement in Principle speech:

The Real Property and Conveyancing Legislation Amendment Bill 2009 makes a number of significant reforms in the area of land law that will protect the Torrens Assurance Fund from unreasonable claims, combat identity fraud, streamline procedures for removal of abandoned easements and impose a duty on mortgagees when exercising a power of sale...The Torrens Register, which records current title ownership and other interests affecting land. All land recorded in the register is guaranteed by the State Government as to its accuracy and completeness of title. A person who has an interest recorded in the register can rest assured that, subject to a few exceptions, the interest cannot be defeated by another unregistered interest nor can the person's title be set aside because of some defect in the history of the title prior to the registration of the interest. This is known as the principle of indefeasibility and is the cornerstone of the Torrens system...The Real Property Act, like any other Act, is subject to partial or total repeal by later legislation. Such legislation, often quite unconnected to the Real Property Act, can impose statutory exceptions onto a registered proprietor's otherwise indefeasible title. As

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a result the register can be misleading, for although the Real Property Act purports to make the register conclusive, the registered title may in fact be subject to interests that are not required to be disclosed on the register. In some instances this is inevitable. A person's interest in land is, after all, a private right that must defer to the public interest. There are occasions when certain statutory interests must take priority over private interests recorded on the register. An example is land tax. Section 47 of the *Land Tax Management Act 1956* imposes a statutory first charge on the land that has priority over all other encumbrances until the land tax is paid.

6. The Agreement in Principle speech continued further to explain:

...the most significant amendment that this bill proposes to make to the Real Property Act, and that is the section that deals with mortgages. As members of the House may be aware, identity fraud is one of the fastest-growing crimes in Australia and costs the Australian community billions of dollars every year. Protecting the community from identity fraud is an important task that we take seriously. The department has been involved in an increasing number of claims for compensation relating to mortgage fraud involving what appears to be a lack of due diligence by some lenders in verifying the identity of borrowers. While the Torrens Assurance Fund may be available to compensate innocent landowners who are the victims of a fraudulent mortgage, it is preferable if the fraudulent mortgage can be avoided in the first place. The mortgagee, who is dealing directly with the fraudster, has the best opportunity to prevent a fraud. The amendments this bill proposes are intended to encourage due diligence in mortgagees' loan approval practices.

7. The majority of cases of fraudulent mortgages in which the Registrar-General has been involved are with those mortgages that are commonly known as low-doc loans. These loans are usually offered by lenders at excessively high interest rates. These types of loans are usually not covered by the consumer credit code and the lender has not performed due diligence. The nature of these loans may present an opportunity for fraudsters to perpetrate their crime. The department has many examples of claims of compensation based on these types of loans.

8. The Agreement in Principle speech provided the following example:

...a few years ago the department was involved in a claim for compensation made by elderly property owners whose title was encumbered by registration of a mortgage they did not sign and knew nothing about. The son of the property owners, together with an accomplice, obtained a loan of \$750,000 at upwards of 12.5 per cent interest per month, pretended to be the owners of the property and purported to give a mortgage over it as security for this loan. The lender appears to have done little or nothing to confirm that the borrowers were the persons recorded in the freehold land register as the owners of the then unencumbered property and to verify that the borrowers were able to service the loan. It appeared that the value of the property alone—more than \$1 million—was enough to satisfy the grant of the loan. Soon the borrowers defaulted on the loan and it was only when the mortgagee came to exercise its power of sale that the true owners found out that a mortgage was registered on their title. The fraudsters were apprehended and sent to jail, but in the end the Torrens Assurance Fund had to compensate not only the owners but also other parties that were affected by the fraud. This included paying the lender's legal costs. This claim resulted in payment of in excess \$2 million from the Torrens Assurance Fund. As this example indicates, there is clearly potential for our State to be liable for payment of large amounts of compensation for fraud. Questionable lending practices or wilful disregard of matters that might raise doubts in a prudent person's mind unfortunately do not currently disentitle a lender from recovering its loss under the *Real Property Act 1900*.

9. Further on, the Agreement in Principle explained:

Cases of mortgage fraud usually result in default in payment since the fraudsters never have any intention of repaying the loan. At this time the lender who has now registered his mortgage wishes to exercise his right to sell the property to recover the money owing. However, this money includes interest at rates well above the standard interest rate, and since there has been no fraud by the mortgagee this interest is indefeasible. The usual consequence of this is that the Torrens Assurance Fund is liable to pay the principal and the interest. In this regard the bill proposes to amend the *Real Property Act 1900* to limit the amount of compensation, in particular the interest and costs component of a claim payable by the Torrens Assurance Fund in respect of a mortgage obtained by fraud. The limit will be 2 per cent above the interest rate charged on most loans by reputable lenders in Australia. This amendment will benefit the landowner who is a victim of the fraud and who wants to retain ownership of the property, in most cases because it is the family residence. The mortgagee will not be able to recover interest at exorbitant rates by exercising its power of sale, and the landowner will be able to negotiate with the mortgagee to obtain a discharge of the mortgage in exchange for the amount of compensation to which he or she is entitled.

## The Bill

10. The objects of this Bill are as follows:

- (a) to reaffirm the principle of indefeasibility of title as contained in section 42 of the *Real Property Act 1900*,
- (b) to facilitate the removal of abandoned easements,
- (c) to introduce additional identification requirements to the *Real Property Act 1900* in relation to mortgagees and witnesses,
- (d) to limit the amounts recoverable from the Torrens Assurance Fund and the circumstances in which compensation will be available and make other miscellaneous amendments in respect of compensation, the Torrens Assurance Fund, the obligations placed on claimants and subrogation rights,
- (e) to amend the *Conveyancing Act 1919* to provide a further exception to the requirement that certain transactions refer to lots shown on a current plan to enable the conversion of Crown land to Torrens title as part of a Crown Title conversion project,
- (f) to require a mortgagee or chargee, in exercising a power of sale in respect of mortgaged or charged land, to take reasonable care to ensure that the land is sold for not less than its market value,
- (g) to make provision in relation to other miscellaneous matters.

### Other details of amendments to the *Real Property Act 1900*:

- 11. If the mortgagee fails to comply with the requirement to confirm the identity of the mortgagor and the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land, the Registrar-General may cancel any recording in the register with respect to the mortgage. The reasonable standard required to be taken by mortgagees for identification under the proposed amendments will be established by the guideline to be known as the Registrar-General Directions. In most cases, the minimum reasonable standard will be the equivalent to the 100-point check common to financial institutions.
- 12. It will also be necessary for the mortgagee to keep a written record of the steps taken to comply with this requirement and a copy of any associated documents. The

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Registrar-General may require the mortgagee to answer questions and produce documents in determining whether the mortgagee has complied with their obligation to verify the identity of the borrower. If a mortgagee refuses to comply with a request of this nature, the Registrar-General will have the power to either put a notation on the title to alert anyone dealing with the property that the mortgagee has not complied with the requirement to verify the identity of the borrower or, if the mortgage has not yet been registered, refuse to accept the mortgage for lodgement.

13. The Registrar-General will have the power to cancel any recording of a mortgage if the mortgagee has failed to comply with the Registrar-General's request to answer questions or provide documentation and the Registrar-General considers that the mortgage is fraudulent. The Registrar-General will notify the mortgagee of its intended action before it cancels the recording, as well as anyone who the Registrar-General thinks appropriate. A mortgagee whose mortgage has been cancelled under these provisions will not have any recourse to compensation from the Torrens Assurance Fund.
14. The Bill proposes to amend the *Real Property Act 1900* to give power to the Registrar-General to rectify the register where a person has been deprived of an estate or interest in land as a result of fraud.
15. In order to limit the opportunity for identity fraud, the Bill places stricter obligations on persons acting as a witness in signing documents relating to land. It is proposed to clarify the obligation on attesting witnesses to provide that a person who witnesses an instrument executed by an individual must have either known the person for at least 12 months or taken reasonable steps to identify the person signing. The reasonable steps will be the same steps that mortgagees will require to identify mortgagors.
16. The Registrar-General may refuse to register any dealing that does not bear a certificate by the attesting witness or where in the circumstances it appears that the certificate is false.
17. The Bill proposes to amend the *Real Property Act 1900* to address the issue of excessively high interest rates that are applied to some of the low-doc loans that have subsequently been shown to be fraudulent.
18. Amendments to the *Real Property Act 1900* are proposed with regard to the Torrens Assurance Fund by excluding certain claims. Firstly, the amendments seek to provide that any claim for compensation is limited to the market value of the land plus any legal valuation or other professional costs. There have been cases where a claim for compensation by a developer included future economic loss, insurance costs and depreciation costs of cars. The amendments make it clear that these types of claims are not claimable under the Torrens Assurance Fund.
19. Amendments will make it clear that compensation payable from the Torrens Assurance Fund does not extend to compensation for personal injury. There have been cases where a claimant has sought compensation for nervous shock and emotional stress, for items that are not compensable under the Torrens Assurance Fund.
20. The Bill also proposes to amend the *Real Property Act 1900* to make it clear that proceedings for compensation for loss or damage suffered as a result of the

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operation of the Act are to be commenced in the Supreme Court rather than any court of competent jurisdiction, which is currently the case, and that such proceedings may only be taken against the person whose acts or omissions have given rise to the loss or damage claimed in the proceedings, or the Registrar-General.

21. Amendments are introduced to the *Real Property Act 1900* regarding information brokers. An information broker is a person who has entered into an agreement with the Registrar-General to make information in the register available to the public. Given that the State guarantees interests recorded in the register, any information from the register that is inaccurate or false can entitle a person to a compensation claim if loss or damage occurs as a result of error in the register. The Bill adds a provision to the Act to make it clear that compensation is not payable from the Torrens Assurance Fund in respect of loss or damage that is a consequence of any fraudulent, wilful or negligent act or omission by any information broker.
22. The Bill proposes to amend the *Real Property Act 1900* to provide that compensation is not payable where the loss or damage arises from the execution of an instrument by an attorney, under a power of attorney, acting contrary to or outside the authority conferred on him or her by the power of attorney. The Act already expressly excludes liability for acts by trustees. This amendment is intended to protect the Torrens Assurance Fund from claims against victims of unscrupulous attorneys who abuse their position and act outside their powers and the best interests of the principal. Compensation for loss or damage in land through the actions of an attorney could be taken in the appropriate manner that is provided for under the *Powers of Attorney Act 2003*, in either the Supreme Court or the Guardianship Tribunal.
23. Amendment to the *Real Property Act 1900* will provide that no compensation is payable where the loss or damage arises from the recording of a Registrar-General's caveat or the removal of such a caveat by the Registrar-General. As the State guarantees recordings in the register, where a doubt is raised concerning the validity or authenticity of any transaction with land or a genuine fear exists that land may be the subject of an unauthorised transaction, the Registrar-General has a means of preserving the register in its current form while any doubts are resolved.
24. Amendment will provide that no compensation is payable where the loss or damage is the result of an easement not being recorded in the register—except where the easement is not recorded in the register due to an error on the part of the Registrar-General.
25. Amendment also provides that no compensation is payable where the loss or damage arises from the improper exercise of a power of sale and where the loss or damage arises from the operation of section 129 of the *Corporations Act 2001* of the Commonwealth.
26. The Bill proposes to amend the *Real Property Act 1900* with regard to the obligations of a person making a claim for compensation for loss or damage. Currently, a claim for compensation may be made on an administrative basis and it is intended to resolve claims without the need for the parties to go to court to save time and costs. In many cases, the obligation placed on claimants by the Act has not been sufficient to ensure compliance to allow the claim to be dealt with expeditiously. Therefore, amendments will provide that the person making a claim must provide information to the Registrar-General that the Registrar-General may require to enable the



assessment of all aspects of the claim. A person making a claim may be required by the Registrar-General to verify any information he or she has given by way of statutory declaration. The Registrar-General will have the power to refuse a person's claim of compensation if this requirement is not met after a period of notice of two months.

27. The Bill proposes to amend the Act to provide that penalties may be imposed by the Supreme Court on the claimant if court proceedings are commenced by the claimant following a refusal of the administrative claim by the Registrar-General. This is to ensure compliance with the Registrar-General's request to the person making a claim to provide information. These penalties will also apply in instances where a claimant fails to cooperate fully with the Registrar-General where court proceedings are commenced by the claimant with the leave of the court or the consent of the Registrar-General under section 132 (2).
28. The Bill amends the Act to make it clear that court proceedings for the recovery of compensation from the Torrens Assurance Fund may only be commenced if the administrative proceedings have been commenced and determined, or by leave of the court, or with the consent of the Registrar-General. If court proceedings are commenced following the determination of administrative proceedings, then the court proceedings must be commenced within three months of the date of the determination, rather than the current period of 12 months.
29. Amendments to the Act regarding the Registrar-General's right of subrogation are proposed, in order to make it clear that the Registrar-General may also claim against any person against whom the compensated person would have a claim in relation to the loss (and not just persons who caused or contributed to the fraud). This includes, for example, claims in negligence, claims pursuant to any contractual indemnity and claims on insurance. The Bill will allow the Registrar-General to recover any payment of compensation from a claimant who has received a further payment on account of the compensable loss from another source. This aims to ensure that a person who has suffered loss does not double-dip and receives only what he or she is entitled to.
30. The last of the amendments on claims for compensation are claims relating to easements. In general terms, an easement may be described as a right belonging to a parcel of land for the owner of that parcel to use a parcel of land owned by someone else. A common example of easements is for drainage, sewerage and transmission lines. Easements are one of the exceptions to indefeasibility. As a result, the Torrens Assurance Fund has been subject to claims for compensation for loss because the register did not disclose the existence of an easement affecting a person's title.
31. The Bill proposes to amend the *Real Property Act 1900* to provide that the Torrens Assurance Fund is not liable for easements that are not recorded in the register, unless the easement is not recorded due to an error caused by the Registrar-General. The error of the Registrar-General in not recording an easement in the register, however, does not extend to a failure to make searches or inquiries as to the existence of any easement in relation to the creation of a qualified folio of the register. The Bill proposes to amend the Act to bar any claims for compensation relating to abandoned easements in situations where the person making the claim had notice that the Registrar-General intended to cancel a recording of the easement but did not lodge a caveat to prevent the easement from being cancelled.

**Other details of amendments to the *Conveyancing Act 1919*:**

32. The first of these amendments to the *Conveyancing Act 1919* are to clarify the standard of care owed by a mortgagee who exercises its power of sale over real estate. There is a concern in the community that lenders do not always take steps to achieve the highest possible sale price.
33. The Bill proposes to impose a duty of care on mortgagees and chargees when exercising a power of sale in respect of mortgaged or charged land, requiring the mortgagee to take all reasonable care to ensure that the property is sold for not less than its market value at the time of the sale. The proposed amendment will be similar to a provision in the Commonwealth Corporations Act, which requires that where property of a corporation is sold by a controller—defined to include a mortgagee—the controller must take all reasonable care to sell the property for not less than the market price.
34. The Bill amends the *Conveyancing Act 1919* that deals with abandoned easements. Easements that have not been used for at least 20 may be considered abandoned. Under section 49 of the *Real Property Act 1900* a person may apply to have an easement removed from the register if it can be proven that the easement is abandoned.
35. However, if someone disputes an application to the Registrar-General for abandonment of easement, the issue will be dealt with by the Supreme Court under section 89 of the *Conveyancing Act 1919* and not section 49 of the *Real Property Act 1900*. In the small number of cases that have been litigated under section 89 of the *Conveyancing Act 1919*, that there is a conflict between section 49 of the *Real Property Act* and section 89 of the *Conveyancing Act 1919*. In adjudicating on a disputed application for abandonment of easement, the Supreme Court under section 89 of the *Conveyancing Act 1919* applies the common law rules of abandonment that require an applicant to establish that the owner of the easement intended to abandon the easement.
36. The difficulties in supplying such evidence to the court make it almost impossible for an applicant seeking abandonment to succeed. This difficulty was part of the reason for the introduction of the objective test of 20 years non-use that is applied in section 49. Therefore, it is also proposed to remove the inconsistency between the two sections by providing that the court may apply the same criteria as that applied by the Registrar-General under section 49 of the *Real Property Act 1900*. This may be achieved by providing in section 89 of the *Conveyancing Act 1919* that where an application is made to the court for an order extinguishing an easement, abandonment may be inferred if the court is satisfied that the easement has not been used for at least 20 years.

## Issues Considered by the Committee

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

#### Issue: Schedule 1 [14] amendment of *Real Property Act 1900* – proposed section 129 (2) (n) – Denial of Compensation:

37. Currently, section 129 (1)<sup>1</sup> of the *Real Property Act 1900* sets out the circumstances in which compensation is payable from the Torrens Assurance Fund including subsection (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud. However, the current section 129 (2)<sup>2</sup> also provides a list of circumstances where compensation is not payable. The amendments - proposed sections 129 (2) (j) to (o), add a further set of circumstances where compensation will not be payable.

**38. While the Agreement in Principle speech states that, '[t]he amendments this Bill proposes are intended to encourage due diligence in mortgagees' loan approval practices', the Committee is concerned with the broad scope of the proposed section 129 (2) (n): where the loss or damage arises from the improper exercise of a power of sale, will be added to the list of circumstances where compensation will not be payable from the Torrens Assurance Fund.**

**39. There may be impropriety of various kinds involving the mortgagee in the exercising of a power of sale. The majority judgment of Walsh J (concurring by Mason J), created a third category of conduct being more than mere negligence but less than actual fraud, as discussed by the High Court in *Forsyth v Blundell* (1973) 129 CLR 477, where Walsh J made the following observations:**

<sup>1</sup> Current section 129 of the *Real Property Act 1900* – Circumstances in which compensation payable: (1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from: (a) any act or omission of the Registrar-General in the execution or performance of his or her functions or duties under this Act in relation to the land, or (b) the registration (otherwise than under section 45E) of some other person as proprietor of the land, or of any estate or interest in the land, or (c) any error, misdescription or omission in the Register in relation to the land, or (d) the land having been brought under the provisions of this Act, or (e) the person having been deprived of the land, or of any estate or interest in the land, as a consequence of fraud, or (f) an error or omission in an official search in relation to the land, is entitled to payment of compensation from the Torrens Assurance Fund.

<sup>2</sup> Section 129 (2) of the current *Real Property Act 1900*: Compensation is not payable in relation to any loss or damage suffered by any person: (a) to the extent to which the loss or damage is a consequence of any act or omission by that person, or (b) to the extent to which the loss or damage: (i) is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent, and (ii) is compensable under an indemnity given by a professional indemnity insurer, or (c) to the extent to which that person has failed to mitigate the loss or damage, or (d) to the extent to which the loss or damage has been offset by some other benefit to that person that has arisen from substantially the same circumstances as those from which the loss or damage has arisen, or (e) to the extent to which the loss or damage arises because of an error or miscalculation in the measurement of land, or (f) to the extent to which the loss or damage arises from: (i) the breach by a registered proprietor of any trust (whether express, implied or constructive), or (ii) the inclusion of the same land in two or more grants, or (g) to the extent to which the loss or damage arises from the recording, or the omitting to record, in the Register of an approved determination of native title or other matter relating to native title rights and interests, or (h) to the extent to which the loss or damage arises from circumstances in respect of which this Act provides that proceedings against the Registrar-General do not lie, or (i) to the extent to which the loss or damage arises from an error contained in a plan lodged in accordance with Division 3c of Part 2 of the *Conveyancing Act 1919*.

...There may be an improper exercise of a power of sale (that is one which constitutes a breach of duty owed to the mortgagor) where, although there is not any actual fraud (in the ordinary sense of that term), or any collusion between the mortgagee and the purchaser, there is improper conduct which goes beyond mere negligence in carrying out the sale. There may be impropriety of various kinds. What has sometimes been described as fraud on the power, and sometimes as wilful or reckless disregard of the interests of the mortgagor and sometimes as a sacrificing of the interests of the mortgagor does not necessarily involve, in my opinion, commission of actual fraud...<sup>3</sup>

40. The Committee, therefore, is concerned that a mortgagor's interests may be unduly trespassed if their right to compensation may not be adequately protected under the proposed section 129 (2) (n) such as in instances where a mortgagee has breached their duty owed to the mortgagor and has improperly exercised a power of sale which is more than mere negligence but less than actual fraud. Accordingly, the Committee refers this to Parliament.

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

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

41. The Committee notes that the proposed Act is to commence on the date of assent except as provided by subsection (2) where schedule 1 [4], [6] and [7] and schedule 2 [4] are to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence these schedules on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

42. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement of schedule 1 [4], [6] and [7] and schedule 2 [4] by proclamation and asks Parliament to consider whether the commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

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

<sup>3</sup> (1973) 129 CLR 477 at 496

## 6. SURVEILLANCE DEVICES AMENDMENT (VALIDATION) BILL 2009

Date Introduced:	26 March 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

### Purpose and Description

1. This Bill amends the *Surveillance Devices Act 2007* to validate certain warrants granted under the *Listening Devices Act 1984*.
2. Before its repeal by the *Surveillance Devices Act 2007*, the *Listening Devices Act 1984* prohibited the use of listening devices to record private conversations (except in circumstances set out in that Act) without the use of a warrant granted by an eligible Judge. An eligible Judge was a Judge of the Supreme Court who had consented to being involved in the grant of warrants and in respect of whom a declaration was in force declaring the judge to be an eligible Judge for the purposes of that Act.
3. The object of this Bill is to amend the *Surveillance Devices Act 2007* to validate certain warrants purporting to have been granted between 3 March 2008 and 7 March 2008 under the 1984 Act by an eligible Judge when the judge had given the consent but in respect of whom a declaration was not yet in force.
4. It retrospectively approves the warrants issued at the time when the declaration had not been in force to declare the judge to be an eligible Judge for the purposes of that Act, in order to validate the warrants so the cases could not be challenged on the grounds of technical invalidity that the evidence obtained under the surveillance was inadmissible.

### Background

5. A Supreme Court judge did not have the authority at the time, to issue search warrants in five serious criminal cases currently before the courts. This Bill is introduced to validate those search warrants issued last year in March, after the discovery that the warrants were issued by a judge who did not have the authority to issue them at the time.
6. This Bill confines its effect to the warrants issued by the one judge during a specific period. The Agreement in Principle speech explained that this Bill does not seek to validate any other warrants on any other grounds, or seek to enlarge the scope to issue warrants or the bases on which they may be valid.
7. The warrants were to tap suspects' phones related to a \$50 million fraud investigation, two sexual assault cases, a child sexual assault and a drug manufacturing case, all scheduled for trial in 2009. The cases could challenge the admissibility on which the evidence was obtained under the warrants.

8. According to the Agreement in Principle speech:

There is no suggestion that the technical invalidity in any way affected the level of scrutiny given to the warrant applications or the ultimate decision to grant them. Nor is there any suggestion that the applications were not made in good faith, or anything other than the mistaken belief that the Judge was an eligible Judge for the purposes of the Act.

## The Bill

9. The object of this Bill is to amend the *Surveillance Devices Act 2007* to validate certain warrants purporting to have been granted between 3 March 2008 and 7 March 2008 under the 1984 Act by an eligible Judge when the judge concerned had given the requisite consent but in respect of whom a declaration was not yet in force. The validation puts beyond doubt the use of listening devices pursuant to the warrants and ensures that evidence obtained by the use of the listening devices will not be inadmissible solely on the ground of any technical invalidity.

### 10. Outline of provisions

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

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

**Clause 3** amends the *Surveillance Devices Act 2007* as described in the Overview.

## Issues Considered by the Committee

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

**Issue: Clause 3 - Amendment of *Surveillance Devices Act 2007* – Schedule 1 Savings, transitional and other provisions – insertion of proposed clause 7 of Part 3 – Validation of certain listening device warrants – Retrospectivity:**

11. This Bill retrospectively approves the warrants granted at the time between 3 March 2008 and 7 March 2008 under the *Listening Devices Act 1984* when the declaration had not been in force to declare the particular judge to be an eligible Judge for the purposes of that Act, in order to validate those warrants so that cases could not be brought on the grounds of the evidence obtained under the surveillance was inadmissible.

12. **While it may be in the public interest to validate a Judge's authority, the Committee will always be concerned where the law will be retrospectively changed in a manner that adversely affects any person as an undue trespass on personal rights and liberties.**

13. **The Committee is of the view that the aim of this Bill is to retrospectively correct the validity of the warrants issued by a judge who at the time did not appear to have the authority to grant them in the absence of declaration that the judge is an eligible Judge for the purposes of the 1984 Act to grant such listening device warrants.**

- 14. The Committee, nevertheless, notes that this amendment may not affect a defendant's general ability to defend himself or herself. However, the Committee is concerned that this Bill's retrospectivity sets a poor standard of practice, and may adversely affect the individual's right to specifically challenge the admissibility of the evidence obtained. Accordingly, the Committee refers this to Parliament.**

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

# Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Appropriation (Budget Variations) Bill 2009	4
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Biofuel (Ethanol Content) Amendment Bill 2009	3
Children and Young Persons (Care and Protection) Amendment (Children's Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Education Amendment Bill 2009	3
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Food Amendment (Meat Grading) Bill 2008*	1
Hawkesbury-Nepean River Bill 2009	4
Health Legislation Amendment Bill 2009	4
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Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1



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Transport Administration Amendment (CountryLink Pensioner Booking Fee Abolition) Bill 2009	3
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## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
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Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	6/02/09		9	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
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Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N,		N	N	
Parking Space Levy Bill 2009				N	N, C
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Western Lands Amendment Bill 2008				R	

### Key

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

## Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
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Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	