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Legislation Review Committee

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No 7 of 2008

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

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

Appendix 1: Index of Bills Reported on in 2008

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2008

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

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

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

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

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Australian Jockey Club Bill 2008

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

2. Building Professionals Amendment Bill 2008

Issue: Denial of Compensation – Schedule 1 [41] – proposed section 71C Exclusion of liability of the State and others:

17. The Committee is of the view that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so.

18. The Committee notes that the proposed section 71C is very broad in scope as it includes a member of a committee appointed under this Act or a person acting under the direction of the Board. It also excludes damages or other compensation in connection with the exercise of any functions under the proposed Division and excludes claims based on alleged negligence or other breach of duty (even statutory duty) arising because of the exercise or failure to exercise any function under this Division on approvals for certain certification work. The Committee, therefore, considers the proposed section may unduly trespass on individual rights to damages or compensation in the absence of a clear and compelling public interest to exclude the right to claim for damages or other compensation, and refers it to Parliament.

Issue: Absolute Liability – Schedule 1 [45] – proposed section 84A (1) Improper influence with respect to conduct of building professional:

21. The Committee notes that under Australian law, crimes are generally considered to have 2 aspects: a physical aspect (guilty act or actus reus) and a mental aspect (criminal intent or mens rea). At common law, there is a presumption that a prosecutor must show that an accused person had the requisite criminal intent to commit the offence.

22. The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence (no requirement for the prosecution to prove any mental element or intent), particularly one that does not allow for a defence or reasonable excuse and where the maximum penalty may attract a term of imprisonment for 2 years. The Committee, therefore, considers the proposed section 84A (1) as an absolute liability offence, with the absence of any defence of reasonable excuse, which may amount to an undue trespass on individual rights, and refers this to Parliament.

23. The Committee is also of the view that the proposed section 84A (1) could be amended with similar wording as subsection (2) so that the offence includes a reasonableness test on an understanding that a building professional will be acting in contravention of the EPA Act or regulations, such as: (1) A building professional must not seek or accept, or offer or agree to accept, any benefit of any kind, whether on his or her own behalf or on behalf of any other person, *on an understanding that he or she will be* acting in contravention of the EPA Act or the regulations under that Act in the exercise of the functions of a building professional.

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

25. 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. Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008

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

4. Environmental Planning and Assessment Amendment Bill 2008

Issue: Oppressive Official Powers – Schedule 2.1 [27] – Insertion of Part 4, Division 4 - Proposed section 89 (1) (a) and (b) Determination of Crown development applications and proposed sections 89A (1) (a), (b) and 89A (2) Directions by Minister:

77. The Committee notes that a consent authority cannot, without the approval of the Minister, refuse a Crown development application or impose a condition on its consent to a Crown development application. Although this re-enacts the current limitations on the power of consent authorities, however, in effect, it means that there is no opportunity for a person to make their case or representation to the consent authority if there is objection to the Crown development application. The Committee considers these official powers appear to unduly trespass on individual rights to have their views heard and represented by making the consent authority unable to refuse or impose conditions on a Crown development application without the prior approval of the Minister. Accordingly, the Committee refers this to Parliament.

Issue: Procedural Rights – Schedule 2.1 [19] – Proposed Section 79C (1A) Rejection of submissions – development (other than designated development) subject to objector review:

81. The Committee has concerns about procedural fairness and the right to review with respect to the proposed section 79C (1A), to be inserted by Schedule 2.1 [19], by legislating away the need to give notice and to the right of review, and considers individual rights and liberties may be unduly trespassed, and refers this to Parliament.

Issue: Access to Justice and Procedural Rights – Schedule 2.2 [73] - Proposed Section 152 Right to be heard:

83. The Committee will always be concerned about legislation or regulations that authorise administrative decision-making without providing for the right of those affected to be represented where there is a right to be heard, especially if there are to be no appeals from determinations of the Planning Assessment Commission after a public hearing, and persons qualified to apply for reviews for certain classes of development or determinations may be limited by regulations.

84. Therefore, the Committee considers this may be an undue trespass on the right of procedural fairness and access to justice, by proposing powers to remove the current unlimited right of a person to be represented arising from the proposed powers to make regulations prohibiting or limiting the right of persons under the Act to be represented at reviews by the Commission or before other planning bodies. Accordingly, the Committee refers this to Parliament.

Issue: Right To Property - Acquisition of land not on just terms – Schedule 5.1 [9] – Proposed insertion of Schedule 5 – Paper subdivisions – proposed clause 3 (2) (f); clause 3 (2) (g) and clause 3 (3) - subdivision orders:

88. The Committee is concerned that the proprietary rights of the remainder of the owners may be unduly trespassed and refers this to Parliament, since clause 3 (2) (g) is proposing to only require the consent of 60% of the owners of the land and owners of at least 60% of the land. The Committee further notes that proposed clause 3 (3) treats two or more owners of the same lot as only one owner for the above purposes, which may unduly trespass on the rights of another owner if not all owners of the same lot have consented but are nevertheless, treated as being only one owner.

90. The requirements that the acquisition of property be on just terms and be appropriately compensated as a result of acquisition are important safeguards of the right to property. The Committee is concerned about the Bill's departure from the *Land Acquisition (Just Terms Compensation) Act 1991* in respect to its provisions on the determination of compensation. Accordingly, the Committee is concerned that the proposed clause 3 (2)(f) may trespass unduly on personal rights and liberties, and refers this to Parliament.

95. **The Committee notes that the above clauses provide for the compulsory acquisition of subdivision land or interests in land without the application of the provisions (or modified application) of the *Land Acquisition (Just Terms Compensation) Act 1991* with regard to the valuation of land for compensation; determination of amount of compensation; interest on compensation; rate of interest on compensation; trust account; compensation in the form of land or works; payment of compensation arising from court proceedings; and provisions on the payment of compensation.**

96. **The Committee is concerned about the lack of protection the above clauses afford to property rights and interests, and their departure from the application of the *Land Acquisition (Just Terms Compensation) Act 1991*. The Committee considers personal rights and liberties could be unduly trespassed and refers this to Parliament.**

Issue: Rule Of Law - Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning Agreements - proposed clause 21 – Parties to planning agreements:

100. **The Bill proposes that a planning agreement can be registered if the agreement relates to land under the *Real Property Act 1900* or if the agreement does not relate to land under the Real Property Act, then where there is agreement to the registration by each person who has an estate or interest in the land (proposed clause 24)). Therefore, the proposed clause 21 (1) of enabling the Minister to approve the addition of any party to the planning agreement without specifying requirements for a relevant connection, appears to be very wide in scope and may erode the rule of law with regard to the principle on the privity of contract since the planning agreement can be registered by the Registrar-General under the Real Property Act or in the General Register of Deeds. Accordingly, the Committee considers this may unduly trespass on individual rights and liberties, and refers it to Parliament.**

Issue: Ill And Wide Defined Powers – Proposed Part 2, Division 2 in Schedule 1.1 [9] SEPPs – State Environmental Planning Policies:

103. **The Committee notes that the scope for policies that may be made "with respect to any matter that is, in the opinion of the Minister, is of State or regional environmental planning significance", appears to be extremely wide.**

104. **The Committee also considers that in the circumstances of where there is no requirement for consultation with other Ministers and public authorities (other than the Director-General of National Parks and Wildlife) in the drafting and preparing of the SEPPs, along with the wide power of the Minister to determine any matter that is, in the opinion of the Minister, of State or regional environmental planning significance, may make personal rights and liberties unduly dependent on an unfettered discretion on the making of SEPPs and an insufficiently defined administrative power. Accordingly, the Committee refers this to Parliament.**

Issue: Ill And Wide Defined Powers – Proposed Part 3, Division 4 in Schedule 1.1 [11] Local environmental plans - LEPs – Proposed section 56 (2) and sections 56 (3) and (4) - Gateway determination:

107. The Committee notes that the scope for the Minister's determination with regard to a gateway determination as set out in the above proposed section is very wide, including the extent for community consultation requirements and other consultation (or if any, depending on regulations to be made out for community consultation requirements for the categories of instruments).

108. The Committee considers that this may make individual rights and liberties unduly dependent on an insufficiently defined administrative power, and refers this to Parliament.

Issue: Ill and Wide Defined Powers - No default maximum of community infrastructure contributions for direct contributions and indirect contributions - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116J (3); 116K (3) (b); 116K (4); 116L (1) (b); 116L (1) (c):

110. The Committee considers that it is appropriate to vary any maximum contribution level by regulation as such variation would be disallowable by Parliament. However, the proposed sections 116K (4) and 116L of allowing the Minister, by direction, to vary the maximum percentage for contributions, appear to be very wide, and unlike a contribution level to be varied by regulation, would not be disallowable by Parliament.

111. The Committee further notes that no default maximum amount is set by the Bill in the event that the regulations do not prescribe an amount. The Committee is concerned that the failure of the Bill to provide a default maximum level of direct and indirect community infrastructure contributions may be an inappropriate delegation of legislative power, and refers this to Parliament.

Issue: Exclude Judicial Review – Schedule 2.1 [13] - Proposed Section 23F – No Appeals Against Decisions By Planning Assessment Commission After Public Hearing:

116. The Committee is of the view that the proposed section 23F is very broad, including a function delegated to the Commission under the Act. It has the potential to deny a person natural justice by removing the opportunity for appeal or review on any question of law. Taken together with the Committee's concerns with access to justice and procedural fairness where the other proposed section 23E (c) on making regulatory provisions that parties are not to be represented or are only to be represented in specified or limited circumstances, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Exclude Judicial And Merits Review – Schedule 2.1 [52] - Proposed Section 118AG and subsections (1); (2) (a), (b); (3); (4); (5) – Protection for exercise of certain functions by Minister:

119. The Committee is of the view that the proposed section 118AG is very broad. It has the potential to deny a person natural justice by removing the opportunity to even review any question of compliance or non-compliance by the Minister or the Minister's delegate to any function conferred or imposed on the Minister or a delegate of the Minister, relating to the appointment of a planning administrator or planning assessment panel or the conferral of functions on a regional panel. Accordingly, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] – insertion of Proposed Schedule 1 – Part 1 Community infrastructure contributions – proposed clauses 2 (2); (3) (a) and (b) - Appeals:

126. The Committee is of the view that the proposed clauses have the potential to deny a person natural justice by removing the opportunity for appeal or review on an indirect contribution as part of a condition of development consent determined in accordance with a contributions plan, or for appeal or review on contributions plan by a direction of the Minister under this Part, or for review of the reasonableness in the circumstances of a requirement for a community infrastructure contribution in accordance with a contributions plan. The Committee considers that individual rights and liberties appear to be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 2 of Schedule 1 – State infrastructure contributions - proposed clause 16 - Restrictions on appeals and changes to conditions:

128. The Committee considers that the proposed clause 16 has the potential to deny a person natural justice by removing the opportunity for appeal or review in respect of a Minister's determination or direction, or in respect of a condition imposed by a consent authority or the Minister with regard to State infrastructure contributions. The Committee is of the view that individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning agreements - proposed clause 26 91) - Appeals:

130. The Committee is of the view that the proposed clause 26 (1) has the potential to deny a person natural justice by removing the opportunity for appeal to the Court in respect of the failure of a planning authority to enter into planning agreement and with regard to the terms of a planning agreement, even if it may be on a question of law.

131. The Committee considers the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law, and is concerned if a Bill purports to oust the jurisdiction of the courts. Therefore, the Committee believes individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.

Issue: Henry VII Clauses – which allow amendment of an Act by a Regulation – Schedule 2.1 [35] - Proposed sections 96C, 96E (1) and 96E (9) Applications for review – objectors:

135. The Committee is concerned that allowing regulations to exclude objectors from applying for reviews and restricting the making of review applications by applicants and objectors, to certain classes of development or determinations, appear to be a significant delegation of legislative powers.

136. The Committee finds that allowing regulations to make such review rights of the legislation not apply in relation to certain classes of determinations or development, and to certain persons, could be an extremely broad power, which in theory, may enable regulations to be made to undermine the operation of the legislation.

137. The Committee notes that the ability of Parliament to effectively scrutinise the classes of development for reviews and the limiting of classes of persons to apply for reviews by such regulations, will be dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is of the view that such classes of determination and persons qualified to apply for reviews, could be more appropriately made in the Principal Act by an amending legislation rather than through the regulations.

Issue: Matters which should be regarded by Parliament – Schedule 3.1 [6] – Proposed Part 5B, Division 2 – Proposed sections 116I (1) (a); 116I (5) (a) – Councils limited to contributions for key community infrastructure; and proposed Part 5B, Division 4 - Proposed section 116V – Council planning agreements limited to key community infrastructure:

140. The Committee is concerned that key community infrastructure is to be prescribed by or defined in the regulations rather than be made in the legislation. The Committee notes that allowing for regulations to determine the kinds of key community infrastructure, may be delegating the power to make a main component of the legislative scheme. Therefore, the Committee considers that defining or prescribing key community infrastructure by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.

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

142. 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.

Issue: Enabling the issuing of directions to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116L and 116K (4) – Minister's directions about community infrastructure contributions:

144. The proposed sections 116K (4) and 116L of allowing Minister's directions, to vary the maximum percentage for contributions, or to direct the consent authority as to the requirement for a community infrastructure contribution, appear to be very broad. The Minister's directions would also not be disallowable by Parliament. The Committee considers these sections may be inappropriately delegating legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers this to Parliament.

Issue: Enabling the issuing of guidelines, policies or plans to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament – Matters which should be regarded by Parliament - Schedule 5.2 [1] and 5.3 – Concurrence and referral requirements:

147. The proposed Schedules of removing the requirement for the concurrence of the Minister for Climate Change and the Environment when carrying out development in the coastal zone for development that requires development consent; or is exempt development; or is done according to a coastal zone management plan, appear to be very broad. Such development in the coastal zone if carried out through a management plan or a development consent would not be disallowable by Parliament. The Committee considers this may be an inappropriate delegation of legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers it to Parliament.

148. The Committee is concerned that any removal of provisions on concurrence or referral requirements could be done through a State environment planning policy or through the guidelines, which may not be disallowable by Parliament or they may not be sufficiently subjected to parliamentary scrutiny. The Committee also has concerns with the requirements of concurrence or referral to be set out in regulations rather than be made in the legislation. Therefore, the Committee considers that prescribing the details of when concurrence requirements are not required by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.

5. First State Superannuation Amendment Bill 2008

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

6. Human Tissue Amendment (Children in Care of State) Bill 2008

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

7. Jury Amendment Bill 2008

Issue: Clause 53A and Clause 53C of Part 7A Discharge of Jurors

13. The Committee considers that the Bill's provisions are materially in the public interest and that the rights of parties to the court or coronial proceedings are more likely to be enhanced than prejudiced by the changes. The Bill provides a satisfactory avenue of appeal.

8. Strata Management Legislation Amendment Bill 2008

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

14. 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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. AUSTRALIAN JOCKEY CLUB BILL 2008

Date Introduced:	14 May 2008
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Graham West
Portfolio:	Minister for Gaming and Racing and Minister for Sport

Purpose and Description

1. The purpose of this Bill is to provide for the transfer of the business undertaking of the Australian Jockey Club to Australian Jockey Club Limited and for the granting of further leases of Randwick Racecourse and for other purposes.

Background

2. The Australian Jockey Club (the AJC) is an unincorporated club that was formed in 1842. It holds a lease of Randwick Racecourse that was granted to it under the Australian Jockey Club Act 1873. The AJC has the use of the land and is responsible for the management of the Racecourse. The AJC operates through the Chairman of the Committee of the AJC and through the Committee of the AJC.

3. In April 2008 the AJC Committee formed a public Company limited by guarantee known as Australian Jockey Club Limited so that the business undertaking of the AJC could be managed using a modern corporate structure. It is intended that members of the AJC will be offered the opportunity to become members of the newly incorporated AJC Limited. This process may take some time. The AJC will continue in existence into the future as a separate entity to AJC Limited to facilitate this process of membership transfer.

4. The proposed Act is intended to provide for the seamless transfer of the assets, rights, liabilities and regulatory authorisations of the unincorporated body to the new company. The Minister, in his Agreement in Principle speech in the Legislative Assembly on 14 May 2008, stated that once this transition has been made there will be a proper measure of protection and limited liability for the Australian Jockey Club chairman and the club officers and members.

The Bill

5. **Part 1** of the Bill deals with various preliminary matters, including the name of the proposed Act, its date of commencement and various interpretive provisions.

6. **Part 2** contains provisions relating to the use, management and maintenance of Randwick Racecourse by AJC Limited. These functions remain only while AJC Limited is lessee of Randwick Racecourse. Clause 7 enables the Racecourse

trustees to consent to the use of Randwick racecourse for additional activities. Clause 10 enables the racecourse trustees to grant further leases of Randwick racecourse to AJC Limited for periods not exceeding 99 years on surrender of the current lease.

7. **Part 3** deals with the transfer of the business undertaking of AJC to AJC Limited. Clause 16 of this Part transfers assets held by or on behalf of the AJC to AJC Limited on the day the proposed Act commences. Clause 17 transfers licenses, permits and other authorities held by on behalf of the AJC to AJC Limited. Under Clause 18 the liabilities of the AJC are transferred to AJC Limited. It also transfers the rights that might be exercised by on behalf of the AJC to AJC Limited. Under the provisions of Clause 25 employees of the AJC become employees of AJC Limited. This Clause preserves the terms and conditions of employment of the transferred employees. Accrued entitlements with the AJC are taken to be accrued entitlements with AJC Limited.

8. **Part 4** contains miscellaneous provisions including a provision repealing the Australian Jockey Club Act 1873 though without dissolving the AJC. Under Clause 34 State tax is not payable in respect of matters relating to the transfer of the AJC's business undertaking to AJC Limited.

9. **Schedule 1** contains savings, transitional and other provisions consequent on the enactment of the proposed Act. These authorise regulations of a savings or transitional nature, which, if necessary, can operate from the date of assent to the Act but not so as to prejudice the rights of any person or to impose liabilities upon them.

10. **Schedule 2** contains a number of amendments of other acts and statutory instruments.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

2. BUILDING PROFESSIONALS AMENDMENT BILL 2008

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

Purpose and Description

1. This Bill amends the *Building Professionals Act 2005* in relation to the accreditation of accredited certifiers and other building professionals, the investigation of complaints and the taking of disciplinary action; and for other purposes. It is cognate with the *Environmental Planning and Assessment Amendment Bill 2008.*

2. It makes changes to introduce accreditation of companies, council officers and fire safety engineers aim to strengthen the powers of the Building Professionals Board (the Board), and to strengthen the controls on accredited certifiers. It enables the Board to accredit corporate entities as accredited certifiers where they have an accredited certifier as a director and at least three employees who are accredited certifiers. This aims to ensure certifiers work together and to promote professional development within the industry.

3. Under the proposed Bill, any certification work carried out by a company will be done by an employee who holds the right level of accreditation. Accredited certifiers who are directors of accredited companies will have special responsibilities and the Board will have power to impose tough penalties on these new corporate certifiers.

4. Council officers carrying out building certification work on behalf of councils will have to be accredited by the Board under a modified scheme. The council employing the certifier will have to provide the Board with a recommendation as to the person's competence and skills, and the employee will be authorised only to carry out work on behalf of the council.

5. The Board’s investigation process and its disciplinary power will be reformed. Where the Board makes a finding of professional misconduct, it can impose fines of up to $110,000 and cancel or suspend accreditation without having to go to the Administrative Decisions Tribunal. The certifier or building professional will be able to appeal to the Tribunal from decisions of the Board.

6. The Board will be able to suspend an accredited certifier's certificate of accreditation while an investigation into their conduct is carried out where they have persistently breached the legislation and are likely to continue to do so. The regulations will be amended to enable the board to issue fines to certifiers in a broader range of circumstances, and higher fines will apply to breaches by corporate certifiers.

7. The Bill amends the rules to address perceived conflicts of interest between accredited certifiers and developers by limiting the amount of income a certifier can earn in a year from certification work involving the same person. For employee accredited certifiers, the number of certificates they can issue in one year for development involving the same person will be limited. The Board will require certifiers to report annually on their income and on whom they are carrying out work for. The Board will also have a new oversight role in relation to the appointment of accredited certifiers for complex buildings, in certain circumstances.

Background

8. According to the Agreement in Principle speech:

9. These reforms are aimed at further strengthening the accountability of the certification system and providing greater consistency in the regulation of building and complying development.

10. Implementation aims to ensure that existing experienced council employees can be accredited.

11. The Agreement in Principle speech explains that:

12. The policy statement sets out further details of the implementation of this new requirement and further discussions will occur before the accreditation scheme for council employees is finalised. This change will increase accountability of council staff and confidence in the qualifications of practitioners responsible for administering the certification system. To accommodate councils that do not have qualified staff, the board will be able to grant exemptions from the requirements in certain circumstances with the approval of the Minister. The board will also accredit fire safety engineers to complement the new requirement in the planning bill that certain complex fire safety designs must be designed by accredited fire safety engineers. These accredited building professionals will be subject to the same disciplinary rules as accredited certifiers and the accreditation scheme will set out the skills and experience required for accreditation by the board.

13. These reforms increase consistency and boost community confidence. The policy statement sets out the next steps in implementing these significant changes to accreditation. There will be further stakeholder consultation, through the Certification Liaison Committee that has been working with my department on these reforms, before the regulations supporting these amendments are finalised. The new accreditation scheme, which will set out the necessary skills and qualifications for accreditation of council officers and fire safety engineers, will be released for further public consultation before it is introduced.

The Bill

14. This Bill is cognate with the Environmental Planning and Assessment Amendment Bill 2008. The object of this Bill is to amend the Building Professionals Act 2005 (**the Principal Act**):

(a) to require councils to ensure that certain certification work done on their behalf is undertaken by appropriately accredited certifiers under the Principal Act, and

(b) to facilitate the accreditation of persons undertaking certification work only on behalf of councils, and
(c) to introduce accreditation of building professionals who will be required to undertake certain design work under the *Environmental Planning and Assessment Act 1979*, and
(d) to enable bodies corporate to be accredited as accredited certifiers and to impose requirements on them in relation to the carrying out of certification work, and
(e) to introduce a number of requirements with respect to accredited certifiers aimed at preventing improper conduct, and
(f) to enable the Building Professionals Board (***the Board***) to impose the full range of sanctions currently only available to the Administrative Decisions Tribunal against an accredited certifier or building professional found guilty of unsatisfactory professional conduct or professional misconduct and to make other changes to the disciplinary proceedings provisions of the Principal Act.

Schedule 1 Principal Amendments

Certification work carried out by councils and accreditation of persons to carry out such work

Schedule 1 [2] inserts a definition of ***certification work*** to mean the issuing of complying development certificates and Part 4A certificates under the *Environmental Planning and Assessment Act 1979* and strata certificates under the strata legislation, the carrying out of the functions of a principal certifying authority under the *Environmental Planning and Assessment Act 1979* and the carrying out of certain inspections under that Act. Currently, certification work can be undertaken by accredited certifiers or by councils.

Schedule 1 [44] inserts proposed Part 6A into the Principal Act consisting of the following provisions:

Proposed section 74A requires a council to ensure that prescribed certification work done on behalf of a council is done by an appropriately qualified accredited certifier.

Proposed section 74B requires councils to provide such information to the Board, and keep such records, relating to the carrying out of their certification functions as are prescribed by the regulations.

Proposed section 74C enables the Board, with the approval of the Minister, to exempt a council from the requirements of the proposed Part and the duty under section 109E (1AA) of the *Environmental Planning and Assessment Act 1979* of carrying out certification work

Schedule 1 [5] and [7] amend section 5 of the Principal Act to provide that an application for accreditation to carry out certification work only on behalf of a particular council may not be made except on the recommendation of that council. The amendments also enable regulations to be made in relation to the making of recommendations.

Schedule 1 [8] inserts proposed section 5A into the Principal Act which provides, among other things, that the regulations may prescribe categories of accreditation in relation to persons carrying out certification work only on behalf of councils.

Schedule 1 [11] inserts proposed section 6A into the Principal Act to provide that the Board may not refuse an application to accredit a person to carry out certification work only on behalf of a council on the grounds of qualifications or not being a fit and proper person unless it has information that gives it reason to believe it should refuse the application on those grounds.

Schedule 1 [17] amends section 8 of the Principal Act to enable the Board to cancel a certificate of accreditation that is subject to a condition that the holder may carry out

certification work only as the employee of a particular council if the holder ceases to be employed by the council or ceases to carry out certification work on behalf of the council.
Schedule 1 [38] amends section 66 of the Principal Act to ensure that a person does not commit an offence under that section by reason only of being employed or engaged by the council to do certain certification work.

Accreditation of building professionals and issue of design certificates
Proposed section 109IA is to be inserted into the *Environmental Planning and Assessment Act 1979* by the *Environmental Planning and Assessment Amendment Bill 2008* with which this Bill is cognate. That proposed section provides that a design certificate is to be obtained from a person appropriately accredited under the Principal Act before a Part 4A certificate can be issued in respect of an aspect of development, but only if the regulations under that Act so require.
Schedule 1 [8] inserts proposed section 5A into the Principal Act which, among other things, provides for a new class of accreditation for building professionals. It is intended that the new class of accreditation will include accreditation of appropriately qualified persons to issue design certificates.
Schedule 1 [3] amends section 4 of the Principal Act to enable the establishment of an accreditation scheme in relation to building professionals.
Schedule 1 [14] amends section 8 of the Principal Act as a consequence of the broadening of the accreditation under the Act to building professionals other than accredited certifiers.
Schedule 1 [42] substitutes section 72 of the Principal Act to extend the current offence in that section so that it prevents a building professional doing anything for which accreditation is required unless authorised by his or her certificate of accreditation.
Schedule 1 [45] inserts proposed section 84A into the Principal Act to include offences in relation to accredited building professionals (similar to the offences in section 84 in relation to accredited certifiers) prohibiting the offering to, or acceptance by, a building professional of benefits for acting in contravention of the *Environmental Planning and Assessment Act 1979* and the regulations under that Act in carrying out a building professional's functions.
Schedule 1 [46] amends section 85 of the Principal Act to make it an offence for a person to issue a design certificate under the *Environmental Planning and Assessment Act 1979* if the person is not authorised to issue such certificates, or make a false or misleading statement in connection with such a certificate.

Accreditation of bodies corporate
Currently, the Principal Act only provides for individuals to be accredited as accredited certifiers.
Schedule 1 [4] and [6] amend section 5 of the Principal Act to enable a body corporate to be accredited as an accredited certifier.
Schedule 1 [8] inserts proposed section 5A into the Principal Act to provide, among other things, that a certificate of corporate accreditation may be issued by the Board to a body corporate that has at least one director who is an accredited certifier and has as directors or employs at least two other persons who are accredited certifiers.
Schedule 1 [21] amends section 11 of the Principal Act to make a consequential amendment.
Schedule 1 [13] amends section 7 of the Principal Act to set out the circumstances in which the Board may refuse to issue or renew a certificate of corporate accreditation.
Schedule 1 [19] amends section 8 of the Principal Act to set out the circumstances in which the Board can suspend or cancel a certificate of corporate accreditation otherwise than where a complaint has been made.

Schedule 1 [37] amends section 61 of the Principal Act to require the holder of a certificate of corporate accreditation to notify the Board of certain matters.

Schedule 1 [39] amends section 66 of the Principal Act to provide for the way in which the offence currently contained in section 66 (1) (being an offence that prevents an accredited certifier issuing a Part 4A certificate or complying development certificate in certain circumstances) will apply to the issuing of such certificates by directors or employees of accredited bodies corporate.

Schedule 1 [42] inserts proposed sections 72A, 72B and 72C into the Principal Act. Proposed section 72A sets out the responsibilities of directors of an accredited body corporate who are accredited certifiers (***accredited certifier directors***). Those requirements include ensuring that the body corporate complies with the Principal Act in the carrying out of certification work and ensuring that certification work is undertaken by a director or employee who holds accreditation authorising the carrying out of the work.

Schedule 1 [48] inserts proposed section 93A into the Principal Act to provide that if a corporation contravenes a provision of the Principal Act or the regulations, a director of the corporation or a person concerned in the management of the corporation is also taken to have contravened the provision if he or she knowingly authorised or permitted the contravention.

Additional requirements with respect to accredited certifiers

Schedule 1 [18] amends section 8 of the Principal Act to enable the Board to suspend or cancel a certificate of individual accreditation if the Board is of the opinion that the holder is not a fit and proper person.

Schedule 1 [22] amends section 12 of the Principal Act to extend the circumstances in which the Board can take urgent action to suspend or place conditions on an accredited certifier's accreditation (and now a building professional's accreditation). The new circumstances are where the Board is satisfied that the accreditation holder concerned has persistently contravened the Principal Act, the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, or the regulations under those Acts, and is likely to continue to do so.

Schedule 1 [23] substitutes section 15 of the Principal Act to allow the Board to extend the period of suspension without the need to obtain the approval of the President or Deputy President of the Board (as is currently required).

Schedule 1 [36] substitutes section 60 of the Principal Act to enable the Board, when it requires an accreditation holder to provide copies of documents or records, to require also that the accreditation holder is to verify those documents or records in a specified manner.

Schedule 1 [40] inserts proposed sections 66A and 66B into the Principal Act.

Proposed section 66A makes it an offence for an accredited certifier to obtain income from certain certification work carried out for the same owner, principal contractor or person who engages the principal contractor if the income would exceed the limit prescribed by the regulations. The offence does not apply to income that an accredited certifier obtains when working on behalf of a council or as an employee of an accredited body corporate.

Proposed section 66B makes it an offence for an accredited certifier to issue more development certificates to the same owner, principal contractor or person who engages the principal contractor than the number prescribed by the regulations when carrying out certification work on behalf of a council or as an employee of an accredited body corporate.

Schedule 1 [41] inserts proposed Division 3A into Part 6 of the Principal Act containing proposed sections 71A–71C.

Proposed section 71A requires an accredited certifier to obtain the written approval of the Board before carrying out certification work in relation to development of a kind prescribed

by the regulations if the person for whom the development is carried out, or the contractor or other person carrying out the development, is a prescribed person. A prescribed person is defined as a person included on a list kept by the Board under proposed section 71B.

Proposed section 71B enables the Board to keep a list of prescribed persons. A person may only be included in the list in accordance with the regulations. The proposed section also provides for the procedure to be followed by the Board when including a person on the list or removing a person from the list.

Proposed section 71C protects the State, the Board and certain others from claims for damages or other compensation in connection with the exercise of functions under the proposed Division.

Schedule 1 [43] inserts proposed section 73A into the Principal Act to enable the regulations to provide that a contract relating to the appointment of an accredited certifier must contain certain provisions or may not contain certain provisions.

Schedule 1 [47] amends section 85 of the Principal Act to make it an offence for a person to falsely represent that he or she holds accreditation that authorises the doing of something under the *Environmental Planning and Assessment Act 1979*, the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986* for which such accreditation is required.

Changes to disciplinary proceedings

Schedule 1 [28]–[30] amend section 31 of the Principal Act to remove the current requirement that the Board must refer a complaint to the Administrative Decisions Tribunal (***the Tribunal***) if satisfied that there is a reasonable likelihood that the accreditation holder concerned will be found guilty of professional misconduct. Instead, the Board will be able to deal with those matters itself or may refer any such complaint to the Tribunal. The Board will be able to impose the same range of sanctions for professional misconduct or unsatisfactory professional conduct as are available to the Tribunal. Those sanctions include suspension or cancellation of accreditation. Also, the amendments recast the current sanctions to reflect the extension of the disciplinary provisions to accredited bodies corporate, accredited certifiers who are directors of accredited bodies corporate and building professionals.

Schedule 1 [31] amends section 34 of the Principal Act to recast the current sanctions available to the Tribunal to reflect the extension of the disciplinary provisions to accredited bodies corporate, accredited certifiers who are directors of accredited bodies corporate and building professionals.

Schedule 1 [24] and [25] amend section 21 of the Principal Act to make it clear that the Board may decline to consider a complaint until any further particulars that it has required are supplied by the complainant. The amendments also provide that the Board may use its powers to obtain evidence at a preliminary stage of its dealing with a complaint.

Schedule 1 [26] substitutes section 22 of the Principal Act to enable the Board, at any time in dealing with a complaint, to decide to take no further action. If the Board makes such a decision, it must give the complainant and the accreditation holder concerned written reasons for its decision.

Schedule 1 [27] substitutes section 29 of the Principal Act to provide that when an authorised officer prepares a report into an investigation of a complaint against an accreditation holder, a copy of the report is not to be given to the Board to consider until the accreditation holder has had a chance to make submissions. Those submissions are to accompany the copy of the report given to the Board. At present, a copy of the report is given to the Board at the same time as it is given to the accreditation holder.

Schedule 1 [33] substitutes section 45 of the Principal Act to make it clear that the Board may investigate the activities of a council in its capacity as a certifying authority whether or not a complaint has been made. The amendments also enable the Board to take action, as

if a complaint had been made, against an accreditation holder who, as a result of such an investigation, the Board thinks may be guilty of unsatisfactory professional conduct or professional misconduct.

Schedule 1 [34] amends section 46 of the Principal Act to enable the Board to investigate the work and activities of accredited certifiers when carrying out certification work on behalf of a council, accredited certifier directors of accredited bodies corporate and building professionals. Currently, the section only enables the Board to carry out investigations of certifying authorities.

Schedule 1 [35] amends sections 48, 49 and 57 of the Principal Act to make it clear that the investigation powers of the Board and its authorised officers extend to matters being dealt with in proceedings before the Tribunal on an application or referral under the Principal Act.

15.

Issues Considered by the Committee

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

Issue: Denial of Compensation – Schedule 1 [41] – proposed section 71C Exclusion of liability of the State and others:

16. This proposed section protects the State, the Board and certain others from claims for damages or other compensation in connection with the exercise of functions under the proposed Division.

17. **The Committee is of the view that the right to seek damages or compensation is an important personal right and that these rights should not be removed or restricted by legislation unless there is a compelling public interest in doing so.**

18. **The Committee notes that the proposed section 71C is very broad in scope as it includes a member of a committee appointed under this Act or a person acting under the direction of the Board. It also excludes damages or other compensation in connection with the exercise of any functions under the proposed Division and excludes claims based on alleged negligence or other breach of duty (even statutory duty) arising because of the exercise or failure to exercise any function under this Division on approvals for certain certification work. The Committee, therefore, considers the proposed section may unduly trespass on individual rights to damages or compensation in the absence of a clear and compelling public interest to exclude the right to claim for damages or other compensation, and refers it to Parliament.**

Issue: Absolute Liability – Schedule 1 [45] – proposed section 84A (1) Improper influence with respect to conduct of building professional:

19. Proposed section 84 (1) reads: A building professional must not seek or accept, or offer or agree to accept, any benefit of any kind, whether on his or her own behalf or on behalf of any other person for acting in contravention of the *Environmental Planning and Assessment Act 1979* or the regulations under that Act in the exercise of the functions of a building professional. Maximum penalty: 10,000 penalty units or imprisonment for 2 years, or both.

20. The proposed section 84 (1) does not include either expressly or by implication, any defence or reasonable excuse for a building professional nor any requisite knowledge or intent. This is in contrast to proposed subsection (2) which contains a reasonableness test on an understanding that a building professional will act in contravention of the *Environmental Planning and Assessment Act 1979* (the EPA Act) or the regulations under that Act if a person gives or offers or agrees to give any benefit, to the building professional or to any other person.

21. **The Committee notes that under Australian law, crimes are generally considered to have 2 aspects: a physical aspect (guilty act or actus reus) and a mental aspect (criminal intent or mens rea). At common law, there is a presumption that a prosecutor must show that an accused person had the requisite criminal intent to commit the offence.**

22. **The Committee considers that, except in extraordinary circumstances, it is inappropriate for an absolute liability offence (no requirement for the prosecution to prove any mental element or intent), particularly one that does not allow for a defence or reasonable excuse and where the maximum penalty may attract a term of imprisonment for 2 years. The Committee, therefore, considers the proposed section 84A (1) as an absolute liability offence, with the absence of any defence of reasonable excuse, which may amount to an undue trespass on individual rights, and refers this to Parliament.**

23. **The Committee is also of the view that the proposed section 84A (1) could be amended with similar wording as subsection (2) so that the offence includes a reasonableness test on an understanding that a building professional will be acting in contravention of the EPA Act or regulations, such as: (1) A building professional must not seek or accept, or offer or agree to accept, any benefit of any kind, whether on his or her own behalf or on behalf of any other person, *on an understanding that he or she will be* acting in contravention of the EPA Act or the regulations under that Act in the exercise of the functions of a building professional.**

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.

24. 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.

25. **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. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (BODY PIERCING AND TATTOOING) BILL 2008

Date Introduced:	16 May 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Minister for Community Services

Purpose and Description

1. The Object of the Bill is to amend the *Children and Young Persons (Care and Protection) Act* 1998 to prohibit the intimate body piercing of children under the age of 16 years and to require parental consent for non-intimate body piercing of children under the age of 16 years.

2. The Bill also extends the circumstances in which it is an offence to tattoo a child or young person under the age of 18 years to include procedures such as scarification, branding and beading.

Background

3. According to the Agreement in Principle Speech the bill will introduce a requirement of parental consent for all non-intimate body piercing of children under the age of 16 years. In giving their consent, the parent will need to specify the part of the child's body to be pierced. The bill will also legislate for a blanket ban on all intimate body piercing (piercing of nipples and genitals) of children under the age of 16 years with or without parental consent.

4. The bill also inserts a definition of tattooing into section 230 of the Act to expand the circumstances in which it is an offence to tattoo a person under 18 years of age to include procedures such as beading, branding and scarification. Beading refers to leaving a scar after cutting the skin of a person and the insertion of an object beneath the skin to produce a lump; branding refers to the application of heat to the skin of a person to produce scar tissue; and scarification refers to the cutting of the skin of a person to create scar tissue.

5. According to the Minister, the primary motivations for amendment to the Act regarding body piercing are twofold. Firstly, to affirm the rights of parents to be involved in decision making in relation to the care and protection of their children. Secondly, to offer greater protection of the wellbeing of children living in New South Wales. All piercing carries the possibility of the risk of infection. The health risks associated with intimate body piercing, in particular, can be quite severe.

6. A number of factors informed the final decision of 16 years including: broad community acceptance of mainstream body piercing; consistency with existing child protection law which recognises the greater independence of young people between the ages of 16 and 18 years, and other liberties available to young people, including the right to leave school and to enter the workforce.

7. The new offence of performing intimate body piercing on a child will reflect the seriousness of the offence and will carry a maximum penalty of 30 penalty units, which currently amounts to $22,000. The proposed offence of performing non-intimate body piercing on a child without parental consent will carry a maximum penalty of 30 penalty units or $3,300.

The Bill

8. The objects of the bill are to amend the *Children and Young Persons (Care and Protection) Act 1998* relating to body piercing and tattooing of children and young persons.

9. Schedule 1 [1] amends section 230 of the Act to widen the definition of tattooing to mean any procedure that makes a permanent mark on the skin of a person and to include the procedures known as scarification, branding and beading. It also specifies that parental consent must be obtained for persons under 18 years of age.

10. Schedule 1 [2] inserts a new section 230A into the Act to prohibit any intimate body piercing of persons under 16 years of age even with the consent of the parent and requires parental consent for any other type of body piercing on persons under 16 years of age.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT BILL 2008

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

Purpose and Description

1. This Bill amends the Environmental Planning and Assessment Act 1979 and other Acts and instruments to improve the NSW planning system. The Building Professionals Amendment Bill 2008 and the Strata Management Legislation Amendment Bill 2008 are cognate with this Bill.

Land Use Planning

2. The Bill deals with changes to plan making. Land use planning provides the guiding framework for balancing economic development and investment and infrastructure to meet State, regional and local needs as well as protecting sensitive environmental areas. To simplify the planning regime, one layer of plans—regional environmental plans—will be removed from the Act. The Bill also provides for some changes to the State Environmental Planning Policy process.

3. The Bill introduces a number of other amendments to the local plan making process. For example, in special circumstances, local environmental plan proposals will be able to be developed by the Director-General of the Department of Planning or other relevant planning authority rather than the local council. Other amendments allow for the conversion of an existing local environmental plan into a standard instrument format where there are no substantial policy changes from the existing local environmental plan. Specific consultation procedures in section 34A of the Environmental Planning and Assessment Act concerning threatened species are amended so that consultation with the Department of Environment and Climate Change will be required where a proposed instrument will or may adversely affect critical habitat, threatened species, populations, ecological communities or their habitats.

Gateway

4. One of the key changes is the introduction of the new Gateway process. This aims to ensure that there is sufficient justification early in the process to proceed with the planning proposal. If it is agreed in principle, the planning proposal then can proceed to a full assessment. The Gateway determination settles what assessment is required to develop the details of the plan, infrastructure needs, community or agency consultation, and whether a public hearing is required. The provisions aim to provide for flexibility and community consultation.

5. In response to community submissions on the exposure bill, the consultation provisions have been amended to clarify that a local environmental plan cannot be made unless the community consultation requirements agreed at Gateway have been complied with. Consultation will be tailored to the specific proposal. Under the current system, there is a one-size-fits-all approach, irrespective of the significance of the proposal.

6. Proposed provisions will establish a new approach for determining consultation with government agencies during the preparation of local environment plans. The Gateway process will determine on a case-by-case basis which agencies should be consulted and the time frames for consultation. There will be no fixed statutory referrals or concurrence requirements except for threatened species. With threatened species, the Bill changes the consultation time frames under section 34A of the Act from 40 to 21 days if threatened species are likely to be adversely affected. Regulations will be amended to reduce the time agencies have to provide their concurrence to councils from 40 to 21 days.

Development Process

7. This Bill also introduces five main changes in the development process: the introduction of new decision-making bodies, new assessment procedures, reducing unnecessary concurrences, changes to review and appeal provisions and extending exempt and complying development.

Planning Assessment Commission

8. It establishes two new decision-making bodies: the Planning Assessment Commission and the Joint Regional Planning Panels. The Planning Assessment Commission will have a chairperson and up to eight other part-time commissioners, and the members must have expertise in planning or related fields. Casual appointments to assist in assessment or advice will be allowed.

9. Provisions have been included regarding probity and accountability measures for commissioners. This includes members being subject to the *Ombudsman Act 1974* and the *Independent Commission Against Corruption Act 1988*.

10. The Bill enables the Minister to delegate decision-making powers to the Commission for Part 3A projects, which currently is not possible. However, this will not include critical infrastructure projects. The Commission will have determination powers, but the actual assessment of projects will continue to be done by the Department of Planning, which will make recommendations to the Commission. The Minister may also request that the Commission provide advice on other development or planning matters where appropriate, and they may hold a hearing or undertake other investigations. The Commission will also be responsible for determining regional development where no regional panel has been established.

Joint Regional Planning Panels

11. Provisions will deal with Joint Regional Planning Panels. Regional panels aim to ensure that projects of regional significance are determined by independent experts, particularly developments where the council has an interest in the proposal. Councils will continue to be responsible for undertaking the assessment of development

applications as they currently do. Regional panels are not subject to direction by the Minister for Planning or a council in the exercise of their functions. However, they will have to comply with procedural requirements set out in the Act, the Regulations and any relevant guidelines.

12. Regional panels will have five members: three State-appointed members and two members appointed by the relevant council. State members must have relevant expertise and experience and one of the two council nominees must also have relevant expertise.

13. There are accountability provisions proposed for the operation of panels, including provisions dealing with meeting procedure, quorum, voting requirements, appointment of alternatives; requirements for the disclosure of pecuniary interests; and panel members being subject to the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974*.

Independent Hearing And Assessment Panels

14. Standard provisions for the establishment and operation of independent hearing and assessment panels will be introduced. The Bill provides that a council may establish a panel where it feels it is appropriate to do so and a council must establish a panel where an environmental planning instrument requires it, which is similar to the current arrangements that apply under State Environmental Planning Policy No. 65.

15. Amendments to the Act concerning the assessment system will be supported by consequential amendments to the regulations. Currently, deemed refusal time frames are based on net days to undertake an assessment and exclude the time when the council or an agency stops the clock. The regulations are to be amended to remove the ability for agencies or councils to stop the clock. To balance this, deemed refusal time frames will be extended from the current 40 or 60 days to 50, 70 or 90 days, depending on the class of development.

Crown Development

16. This Bill deletes the Part 5A Crown development division of the Act. These provisions currently provide for agencies to refer Crown development applications to the Minister for Planning when there is a dispute between a council and a government agency. Regional panels will be the consent authority for certain types of Crown development and minor Crown development applications will remain with councils. Where applications have not been determined within the required time or the relevant consent authority wishes to refuse the application or impose conditions of consent, the application will be referred to the regional panel. In all cases, the Minister's approval will be needed if there is a dispute between the consent authority and the State agency, which is currently the same.

Lapsing Of Development Consent

17. The Act currently provides that a consent lapses five years after the date the consent was issued unless development has physically commenced. Case law establishes that physical commencement includes such minor works as the placing of survey pegs. This Bill will allow a regulation to be made setting out what can reasonably be considered to constitute physical commencement. It provides that a development

consent lapses if it has not substantially commenced a higher threshold within a subsequent two years. This will be supported by a regulation setting out what reasonably can be considered to constitute substantial commencement.

18. It also provides that an applicant may seek a one-year extension to the lapsing period of a consent, subject to a deferred commencement condition. These amendments are to ensure that the consent holder must demonstrate a real intention to act on their consent. Under the transitional arrangements, this will only apply to consents that are issued after the relevant provisions have commenced.

Reviewable Conditions

19. Amendments to the Act and regulations will provide that certain conditions such as extended hours of operation or the number of occupants allowed in certain premises can be easily reviewed. This provision is a response to consents having been structured so that a development application was required each time an applicant wished to continue with extended hours of operation. The new provisions, based on a New Zealand model, will allow for only the reviewable condition to be reviewed when considered necessary by the consent authority without the need for regular new applications. The Bill provides that the reviewable condition provisions can only be used to regulate the extended hours of operation, not core hours of operation, and an extended number of people, not core numbers of people. The regulations will require the consent authority to identify that the consent is subject to a reviewable condition and if an applicant is dissatisfied with the review undertaken by the consent authority, it can appeal the decision to the Land and Environment Court.

Concurrence Time Frames

20. The concurrence time frames will be shortened from 40 to 21 days. Where advice is not received from concurrence authorities within 21 days, it will be deemed that the concurrence or approval is granted.

Review And Appeal – Planning Arbitrators

21. Changes are being proposed for the review and appeal provisions. Planning arbitrators will provide the opportunity to have a council decision reviewed and their concerns considered without the costs of the court system. Arbitrators aim to provide a quick, non-legalistic review option. This provision replaces the current section 82A review where a council gets to review its own decision. Matters that can be arbitrated will include single or dual occupancy residential dwellings not exceeding two storeys and a specified height; alterations and additions to such dwellings; commercial or retail premises under nine metres in height or with a gross floor area of less than 2,000 square metres—but excluding bulky good and licensed premises; and a change of a permissible use in commercial or retail premises with a gross floor area of less than 2,000 square metres.

22. Certain categories of development may be excluded, such as designated development, integrated development and Crown development. An applicant may seek a review of a council determination including any condition of consent if it is a class of development listed in the regulations. When an applicant seeks a review the council must notify the Department of Planning. Existing council planning staff may

be appointed as planning arbitrators to undertake reviews in another local government area.

23. The Bill provides that the Director-General of Planning will maintain a register of planning arbitrators. A person may be appointed to the register if they have demonstrated expertise in areas such as planning, architecture, heritage and urban design, and when the Minister has approved their appointment. Planning arbitrators will be appointed for up to three years but may apply for reappointment. Planning arbitrators will be subject to oversight by the ICAC and the Ombudsman. Section 123 administrative appeals will apply to arbitrators.

Review – Third Party Objector

24. A new type of third-party objector review (neighbourhood reviews), will be introduced. Currently, the Act allows third party objector appeals to the Land and Environment Court only with respect to designated development. These provisions will not be changed. However, a new type of third-party review will be available for people directly affected by certain types of development—for example, where the proposed development would exceed development standards by more than 25 per cent.

25. The types of development to which these neighbourhood reviews will apply will be listed in the regulations and will include: development for residential purposes that exceeds two storeys or contains at least five separate dwellings on a site of more than 2,000 square metres where development standards for height or floor space ratio would be exceeded by more than 25 per cent; and development for commercial, retail or mixed-use purposes that is greater than nine metres in height and has an area of more than 2,000 square metres where development standards for height or floor space ratio would be exceeded by more than 25 per cent.

26. Reviews will not be available where the development is a planning arbitrator matter, designated or integrated development, or Crown development. A person will be able to seek a review within 28 days of a determination only if they made a submission objecting to the proposed development and if they own or occupy land within a one-kilometre radius of the subject land.

Reviews And Appeals – Other Changes

27. This Bill includes provisions to ensure that commercial competitors are not able to take advantage of the reviews for the purpose of securing a direct financial advantage over a competitor. When the original decision was made by a council, the review will be undertaken by the relevant regional panel. The Planning Assessment Commission will undertake these reviews when the original decision was made by a regional panel or where no regional panel has been established for an area.

28. It provides that in a class 1 appeal before the Land and Environment Court where the court allows an applicant to amend a development application (other than a minor amendment), the court must order that applicant to pay the consent authority's costs as a consequence of the amendment. This aims as a disincentive to applicants seeking to amend their proposals before the court without community consultation or input from councils and other relevant authorities.

Complying Development

29. Under certain conditions, this Bill allows exempt and complying development to be considered in environmentally sensitive areas. However, environmental constraints will be integrated into the exempt and complying codes as appropriate for the particular classes of development. A State environmental planning policy [SEPP] will give effect to the codes. The SEPP will contain general limitations on what may be included as exempt and complying development. The SEPP will exclude exempt and complying development in certain environmentally sensitive areas or only permit certain types of exempt or complying development in those areas.

30. Regulations will be introduced to further clarify complying development procedures. The time limit for determining a complying development certificate will be increased from the current 7 days to 10 days.

Developer Contributions – Key Considerations

31. Part 5B is a new part for developer contributions. The Bill sets out key considerations for determining, collecting and spending contributions. The considerations are: infrastructure should be delivered within reasonable times, the impact of the contribution on whether the development is affordable, is the contribution based on a reasonable apportionment of new demand and existing demand, has a reasonable estimate of the cost of infrastructure been used and are the estimates of demand reasonable.

32. Councils will still be able to seek a direct contribution, the former section 94, or an indirect contribution, the former section 94A flat rate 1% levy, but not both. This aims to end the double dipping between subdivision approval and the grant of development consent for a subsequent dwelling or other development. While an indirect levy will generally remain limited to 1% of the development cost, the Bill provides that councils can seek a higher rate from the Minister for Planning in the same way as they can for additional community infrastructure. A council must demonstrate that a legitimate case exists for the increase in the maximum percentage of the levy by providing a business plan and an independent assessment of the proposed contribution that addresses the key considerations.

33. The Bill carries forward the existing direction powers of the Minister for Planning to councils so that, if necessary, the Minister can limit infrastructure contributions by kind, type or maximum amount by tailoring appropriate limits on a regional or subregional basis. Those powers can enable the Minister to approve an additional contribution over and above the maximum amount in specified circumstances. It also enables the Minister to direct councils to use the unspent contributions to provide infrastructure to new and existing communities within reasonable time frames.

Key Community Infrastructure

34. It establishes a two-tier system for local council contributions. Councils can levy for key community infrastructure without approval, as they currently do. The list of key community infrastructure is set out and includes land works and buildings; drainage and water management works; local roads; bus stops; sporting, recreational, cultural and social facilities; parks; and car parking. It also includes district facilities that have a direct connection with the development that is the subject of the contribution.

35. However, councils will have to obtain the approval of the Minister for Planning if they want to get a contribution for any other kind of community infrastructure. A council must demonstrate that a legitimate case exists for the extra contribution by doing a business plan and getting an independent assessment of the proposal. This business plan and independent assessment must address the key considerations above. The same approval requirement will apply when councils use a voluntary planning agreement to get the extra contribution. In this case, the approval of the Minister for Planning will be required not just for additional community infrastructure but also for the provision of any public infrastructure that could be obtained under a planning agreement beyond key community infrastructure.

36. The Bill adopts new terms such as "public infrastructure" and "the provision of public infrastructure". It preserves the range of infrastructure and other public benefits that local councils and other planning authorities can legally obtain under a voluntary planning agreement. The Bill also leaves untouched the range of infrastructure that the State can require a contribution for in a State contributions area.

Growth Centres

37. Councils will continue to hold and manage their community contributions except for the one exception. For Sydney's north-west and south-west growth centres, this Bill amends the *Growth Centres (Development Corporations) Act 1974* to establish a Community Infrastructure Trust Fund to be managed by the Treasury. In these areas, the Government has committed to providing $7.9 billion in infrastructure, of which $2 billion will be funded by New South Wales taxpayers.

Community Infrastructure Trust Fund

38. The Community Infrastructure Trust Fund is to be established to enable the Government to manage the delivery of infrastructure. The Bill provides for a transition to the new regime for contributions. Councils will have until 31 March 2009 to identify those plans where they have entered into legally binding arrangements for the provision of infrastructure that would not be key community infrastructure under the new provisions. Councils will have to remake all their plans by 31 March 2010 to comply with the new requirements.

Paper Subdivisions

39. There are a number of paper subdivisions throughout the State where the landowners cannot develop their land for residential use because of a lack of essential services. This Bill introduces a scheme to enable landowners in these areas to come together with the assistance of a council or a State government agency to agree on a plan to enable the orderly and economic development of their land. The scheme will require at least 60% of the owners of land in the area and the owners of at least 60% of the land in the area to agree to the plan before the council or State agency can be given the necessary powers to facilitate the redevelopment. The scheme enables the landowners and agencies to work together to ensure that subdivision works such as roads, electricity, drainage and sewerage works are funded and provided to enable the land to be rezoned so that it can be developed. This new scheme aims to be useful to unlock old subdivisions in parts of Western Sydney.

Certification Of Development

40. Schedule 4 introduces reforms related to certification of development. It aims to clarify the roles of councils and certifiers, councils' enforcement powers, and strengthens the certification system.

41. Councils will be given powers to enforce development consents, with new investigation powers and mechanisms to recover costs of enforcement action. Consent authorities will be able to issue stop-work orders to immediately stop unauthorised work or work that affects the support of adjoining land. Councils will be able to require certifiers and people carrying out development to answer questions to assist councils in exercising their functions under the Act. A consent authority will be able to require payment of an enforcement bond as a condition of consent. Compliance cost notices will also allow consent authorities to recoup the costs of ensuring compliance with orders issued under the Act.

42. The Environmental Planning and Assessment Regulation will be amended so that where a council is asked to issue a building certificate for unauthorised work completed in the past two years, council will be able to recover the full costs of assessing the application. This will also be a deterrent to people who carry out building works without consent and then ask council to approve the development once it is finished. The regulation will be amended to enable councils to issue penalty infringement notices for new offences and to enable higher fines to be issued to companies and for breaches involving more complex development.

43. It amends the regulations to tighten the test for the issue of a construction certificate so that the design and construction of the building must be consistent with the development consent. A new requirement will be introduced so that the design and construction of a building must be consistent with the consent before a final occupation certificate can be issued. In relation to interim occupation certificates, the current "fit for purpose" test remains. A new mechanism is provided for certifying authorities to seek advice from a consent authority regarding consistency with development consent.

44. Accredited certifiers will not be given new powers. However, certifying authorities will be required to issue a non-compliance notice to a person carrying out development where a condition of consent is not being complied with or work is not consistent with the consent. If the notice is not complied with, the certifying authority will be required to forward it to council. The council will then be able to consider how it will deal with the non-compliance.

45. This Bill also introduces a new type of certificate—a design certificate—that will promote confidence in building design and to ensure that qualified and experienced people are responsible for designing complex fire safety systems. The regulations will set out the process for issuing a design certificate. The Bill provides a mechanism for ensuring that where the regulations require a complex fire safety system to be designed by a qualified designer, a Part 4A certificate cannot be issued for that aspect of development unless a design certificate has been issued.

46. These changes to the certification system in the Environmental Planning and Assessment Act will be complemented by changes to the Building Professionals Act by the cognate *Building Professionals Amendment Bill 2008*.

Background

47. Investigations by the Independent Pricing and Regulatory Tribunal (IPART) and the Productivity Commission into red tape produced some recommendations concerning development approvals and planning. In New South Wales, Priority P3 State Plan looks at removing unnecessary red tape and improving the regulatory framework for investment in New South Wales. South Australia, Victoria, Queensland and Western Australia have responded to the national reform agenda and are reviewing their planning systems.

48. The Local Development Performance Monitoring Report 2006-07 provides analysis of the development system in New South Wales—the first analysis of its kind. In 2006-07, councils dealt with 112,000 development proposals made up of 86,000 development applications, 14,000 modifications and 11,000 complying development certificates. This represents investments worth almost $22 billion — 97% have a capital value of less than $1 million; 67% have a capital value of less than $100,000. The average time for projects was 76 days; the average time for projects between $500,000 and $1 million was 168 days, and 29 councils took greater than 100 days on average.

49. This Bill and the cognate bills (*Building Professionals Amendment Bill 2008* and the *Strata Management Legislation Amendment Bill 2008*) have been developed after consultation. Based on a discussion paper released last November, there have been forums, meetings and consultative processes working with stakeholders with regard to the Bill and the cognate bills.

50. According to the Agreement in Principle speech:

> The reforms are being driven by what people are telling us about the system: it takes too long to get a simple development approved. The system is too complex for simple developments—only 11 per cent of development applications are dealt with as complying development in New South Wales compared with well over 50 per cent in Victoria. It takes too long to zone land for new housing and new jobs—often over two years for a simple local environmental plan. Concern has been expressed about a possible perception that political donations may influence decisions. Concern has been expressed about the accountability of private certifiers and possible conflict of interest.

51. The review process is costly, legalistic, adversarial and not accessible to ordinary people. The planning process adds to the cost of delivering infrastructure and impacts on affordability. In this context the proposed reforms are a measured response. We want to ensure our planning system is transparent, rigorous, accountable and efficient. We need to bring our planning system into the twenty-first century and better equip it to deal with the challenges of population growth, increasing urbanisation and transport needs, complex natural resource and climate change issues, the realignment of employment markets, and changing community expectations. These reforms are also intended to cut red tape and make the system simpler and more accessible, especially for mums and dads and small business. The major areas of reform relate to plan making, development assessment, certification, development contributions, arbitration and reviews.

52. The establishment of regional panels with both State members and local nominees aims to address a key concern expressed by the Independent Commission Against Corruption in relation to corruption risks associated with local council decision making.

53. The Agreement in Principle speech explains that:

> The local council nominees will rotate depending on the location of the proposed development. As an example, if a Central Coast Regional Panel were established a development application on a site in Wyong would be processed by Wyong Council staff and determined by the panel comprising the three State nominees and two Wyong nominees. If it were in Gosford, it would be processed by Gosford Council staff and determined by a panel comprising the same three State nominees and two Gosford nominees. This will lead to improved transparency and increased consistency by taking local politics out of the decision-making process…Further details on regional panels are set out in this policy statement, which I will place on the table for the information of members.

54. A concern raised during the consultation was that the bill does not provide specific details on the types of development that will be dealt with by regional panels. The types of development will be spelled out in a State environmental planning policy rather than the Act. It is proposed that the following classes of development will be included in the State environmental planning policy: designated development; Crown development and private infrastructure greater than $5 million—for example, hospitals, educational facilities, and waste facilities; commercial or retail development over $20 million; residential and mixed use development over $50 million; development where the council is the proponent or has a significant financial interest in the proposal; and certain subdivisions and other development in the coastal zone that are currently dealt with under part 3A of the Act, which will transfer some decisions back to regional areas. The panel will also be responsible for undertaking reviews of council determinations where a third party has a right to seek a review.

55. Currently, provisions in environmental planning instruments and legislation require councils to seek advice or approvals from State agencies during the plan-making process or prior to determining a development application. To improve the efficiency of the planning system, the reforms are also removing the need for redundant or duplicated concurrences and referrals and, where required, to reduce the time taken to obtain concurrence.

56. In September 2004, the New South Wales Government removed 1,130 concurrence provisions. The current review identified an additional 1,240 remaining concurrence provisions. It is proposed to remove approximately 1,100 of these by deleting clauses that duplicate other regulatory provisions; replacing referral and concurrence provisions with heads of consideration for the consent authority to consider; and replacing the referral and concurrence provisions with reference to approved guidelines. A State environment planning policy will be used to remove or amend the concurrence provisions and will be exhibited for public comment.

57. The exposure draft of the bill proposed that applicants, other than for planning arbitrator matters, would be able to seek a review by the Planning Assessment Commission or Regional Panel or appeal to the Land and Environment Court. However, during the exhibition period, concerns were raised that this may undermine the role of the court and lead to forum shopping. Therefore, having considered the

submissions received, this provision will no longer proceed. In addition, the Bill reduces the time for making an appeal to the court from 12 months to 3 months.

58. Complying development provisions were introduced into the planning system in 1997. These provisions allow people to obtain a complying development certificate to show that the development complies with the predetermined criteria and meets the requirements of the Building Code of Australia. However, only about 11% of developments across the State are dealt with as complying development. It is an approach that has been endorsed at the national level and is accepted practice in other States. In response to community submissions, the proposal allowing minor non-compliance with complying development codes has been removed from the reform package.

59. According to the Agreement in Principle speech:

> The department has established a Complying Development Expert Panel to oversee the development of statewide codes. The first of the draft codes has been prepared for the following types of development: single-storey dwelling houses on lots of land of 600 square metres and over; internal alterations for two-storey dwelling houses; and internal fit-outs and change of use for certain commercial and industrial uses. A myth has been circulating claiming all development less than $1 million will be exempt from complying development. This is clearly not the case. Another myth doing the rounds claimed that the bill would create a one-size-fits-all system. Again, this is clearly wrong. Particular code provisions are being developed for different classes of development and will be able to be augmented in certain circumstances to take into consideration locational differences.

60. The first suite of draft codes will be on exhibition until 4 July 2008 and during this time there will be a series of workshops across the State to explain the codes and seek feedback. Ten councils have also agreed to review the codes against their current development applications to see whether those matters could be dealt with as exempt or complying development under the codes. We have set a target of 30 per cent of development to be dealt with as complying development in two years and 50 per cent in four years. The Government would like to acknowledge the councils that are already achieving the target of 50 per cent. They are: Cobar, Warrumbungle, Coolamon, Port Macquarie-Hastings, Conargo, Junee, Murrumbidgee, Coonamble and Narrabri. To achieve a similar result across New South Wales will significantly reduce the regulatory burden on small business and homeowners.

61. Under current legislation, local developer contributions vary widely between councils. In metropolitan Sydney, contributions vary from between $57,000 per lot to nothing. There is no clear definition of the kinds of infrastructure that contributions should fund, and as a result some councils are using contributions to fund things such as council administration buildings, cat and dog pounds, and computer upgrades. Many councils are also retaining funds and not spending an increasing amount of levied money.

62. There are already 6 regulations included in the Bill, which will give more detailed information about key community infrastructure, planning arbitrator matters, reviewable conditions, procedures for planning arbitrators and review bodies, public notice of planning agreements, and certification.

63. Five policy statements are tabled to show the Government policy intent to be delivered in further regulations, planning instruments and guidelines in relation to the following matters: joint regional planning panels, arbitrators, complying development, State agency concurrences and certification.

64. The Minister for Planning has released the first set of complying development codes with more to follow and be subjected to public consultation.

65. There will be three implementation consultative bodies. The existing Complying Development Experts Panel will continue to develop the suite of codes. This panel is made up of representatives of local council, certifiers, professional bodies and government agencies. The existing Certifier Liaison Committee will continue to provide stakeholder input into implementation of the reform provisions. This committee is made up of representatives of local council, private certifiers and government agencies. An Implementation Advisory Group will be established with a representation of stakeholders to provide input on the broader implementation issues.

66. The Agreement in Principle speech provides the following summary:

> This bill makes very significant gains in increasing the objectivity and consistency of decision making by regional panels depoliticising development decisions and ensuring they are consistent across council boundaries within the same region, by using independent experts on the Planning Assessment Commission for a range of planning and development matters, by replacing self-review under the current section 82A with planning arbitrators and providing independence in reviewing small local matters where neighbours are in dispute, and by introducing uniform complying codes to provide mums and dads, architects, planners and neighbours with rules that will protect neighbour amenity by encouraging greater compliance with development codes.

67. The system will be fairer, less costly and more accessible for ordinary people through low-cost arbitrations on small matters avoiding expensive court processes, the expanded use of complying development codes giving more people a decision within 10 days rather than many months, new low-cost neighbourhood review rights, and shifting a number of regionally significant development decisions back to the local region through the use of joint regional planning panels.

68. The system will also strongly enhance accountability through new third party neighbourhood initiated reviews of decisions involving significant variation to planning rules, much stronger provisions governing certifiers and the certification process, the use of independent arbitrators to review decisions on small projects, greater discipline being required of councils in how they levy for and deliver vital community infrastructure, and, finally, a simpler plan-making process that includes a gateway test, which will mean unsolicited proposals will be dealt with in a more accountable way earlier in the process.

The Bill

69. The object of this Bill is to reform the planning system, and for that purpose to amend the *Environmental Planning and Assessment Act 1979* (the ***EPA Act***) and other Acts and instruments.

70. Environmental planning

The environmental planning reforms in Schedule 1 to the Bill seek to simplify and provide flexibility to the plan-making process, while retaining community and related consultation procedures. In particular, the reforms:

(a) make provision for a gateway determination at an early stage of the process so that early decisions are made on whether a planning proposal will proceed, on the detailed community and other consultation required, on the time-frames for further stages of the process and on whether the final making of the plan can be delegated to the council, Director-General or other relevant planning authority, and
(b) require explanations and justifications for planning proposals for gateway determination and consultation purposes, rather than technical legally drafted documents, and
(c) enable comprehensive and other major plans to be provided with more detailed community and agency consultation than minor plans, and
(d) enable independent advice to be obtained to deal with planning proposals that have stalled, and
(e) place on a permanent footing in the EPA Act provisions contained in a regional environmental plan to prevent development consent being granted in Sydney hydrological drinking water catchment unless it has a neutral or beneficial effect on the quality of water, and
(f) make other amendments to simplify and improve the plan-making process.

71. Development assessment

The objects of the development assessment reforms in Schedule 2 to the Bill are as follows:

(a) to establish the Planning Assessment Commission (the ***PAC)*** and to give the PAC approval and planning functions relating to projects under Part 3A of the EPA Act and other planning, development consent, advisory and review functions,
(b) to enable the establishment of joint regional planning panels (***regional panels***) and to enable them to be given planning and development consent functions for parts of the State, the planning and other functions of councils whose functions are removed under the EPA Act and other development consent, advisory and review functions,
(c) to enable councils to appoint independent hearing and assessment panels to advise them about development applications and other planning matters,
(d) to provide a right for applicants to seek reviews by planning arbitrators of determinations by councils relating to certain development applications and development consents (***planning arbitrator matters***) and to provide for a new third party right to seek a review of development determinations about certain residential and commercial and mixed use developments,
(e) to restrict appeals to the Land and Environment Court relating to planning arbitrator matters unless they have been reviewed by a planning arbitrator or the council consents to the appeal being made and to generally reduce the period for making an appeal to that Court in a development assessment matter from 12 months to 3 months,
(f) to re-enact the current limitations on the power of consent authorities to refuse or impose conditions on Crown developments, with certain procedural changes, and confer on regional panels power to determine disputes about council determinations about Crown developments,

(g) to enable development consents relating to extended hours of operation of certain premises to be subject to later review and change,
(h) to add to the council functions that may be removed from councils for misconduct reasons and exercised by a planning administrator, planning assessment panel or regional panel,
(i) to prevent administrative law and other proceedings being taken in respect of the exercise by the Minister of certain functions relating to the appointment of planning administrators or planning assessment panels or conferral on regional panels of certain council functions,
(j) to require the Director-General of the Department of Planning to consult public authorities on environmental assessment requirements for projects under Part 3A of the EPA Act only if required to do so by applicable guidelines,
(k) to enable the Independent Commission Against Corruption to recommend the removal from office of members of the PAC or regional panels and planning arbitrators on corruption grounds,
(l) to apply the provisions of the *Ombudsman Act 1974* to planning arbitrators,
(m) to make other amendments relating to development assessment, development consents and complying development.

72. Development contributions

Schedule 3 to the Bill replaces existing provisions of the EPA Act for development contributions with a new Part 5B that provides for community infrastructure contributions, State infrastructure contributions, planning agreements and development contributions for affordable housing.

Significant features of the new provisions are as follows:
(a) local infrastructure contributions (currently known as section 94 and 94A contributions) will be replaced by community infrastructure contributions,
(b) local councils will be limited to community infrastructure contributions for ***key community infrastructure*** (as prescribed by the regulations) and any additional community infrastructure approved for the council by the Minister, with provision for a council seeking such an approval to provide the Minister with a business plan and independent report in support of the application,
(c) councils, the Minister and other planning authorities will be required to have regard to specified key considerations for development contributions, including affordability, in relation to community infrastructure contributions, State infrastructure contributions and planning agreements,
(d) the Minister will be able to give directions as to the time within which community infrastructure contributions must be applied,
(e) the regulations will be able to impose requirements for reporting by planning authorities about the determination, collection, application and use of development contributions and the provision of public infrastructure by them,
(f) transitional provisions will revoke all existing contributions plans on 31 March 2010, with provision for the Minister to remake existing contributions plans on behalf of councils to cover contributions for infrastructure that is not key community infrastructure when there are binding arrangements in place for the provision of the infrastructure concerned,
(g) a Community Infrastructure Trust Fund is established under the control of the Treasurer to fund the provision of public infrastructure by public authorities out of community infrastructure contributions levied in the North West and South West Growth Centres of Sydney.

73. Certification of development

Schedule 4.1 to the Bill amends the EPA Act:

(a) in relation to the requirements applying to the issue of Part 4A certificates and complying development certificates, and

(b) in relation to the obligations of certifying authorities and, in particular, the obligations of certifying authorities to give directions with respect to certain matters involving the carrying out of development and to report on those matters, and

(c) to require design certificates from appropriately accredited persons for certain aspects of development, and

(d) to strengthen the powers under the EPA Act to prevent or deal with development that contravenes that Act, including enabling the issue of orders to cease building work or subdivision work, enabling authorised persons to ask questions of accredited certifiers and others involved in development and enabling consent authorities to require security to ensure compliance with development consents in the carrying out of building work and subdivision work, and

(e) to provide for the Minister to take action to suspend a council's certification functions following an adverse report from the Building Professionals Board on the results of an investigation, and

(f) to make other amendments to improve the certification processes. Schedule 4.2 to the Bill amends the *Environmental Planning and Assessment Regulation 2000* (the ***EPA Regulation***) in relation to applications for, and the issue of, Part 4A certificates and complying development certificates, critical stage inspections and fees for building certificates in certain circumstances.

Schedule 4.3 amends the *Strata Schemes (Freehold Development) Act 1973* in relation to the issue of strata certificates under that Act.

Schedule 4.4 amends the *Strata Schemes (Leasehold Development) Act 1986* in relation to the issue of strata certificates under that Act.

74. Miscellaneous amendments

Schedule 5 to the Bill contains miscellaneous amendments, including amendments:

(a) to enact a scheme for the development of paper subdivisions, and

(b) to omit provisions relating to places of public entertainment that are no longer necessary following the integration of separate licensing provisions under the *Local Government Act 1993* into the planning approvals and control processes of the EPA Act, and

(c) to remove or modify some requirements for concurrence and referrals in relation to planning matters, and

(d) to provide for the making of consequential savings and transitional regulations.

Issues Considered by the Committee

75. While acknowledging the intent of the Minister for Planning to reform the State planning process, it must be noted that the issues considered by the Committee are based entirely on the provisions outlined in the Sections 8A and 9 of the *Legislation Review Act 1987* and the proposed *Environmental Planning and Assessment Amendment Bill 2008* only and not specifically the planning practices which currently exist.

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

Issue: Oppressive Official Powers – Schedule 2.1 [27] – Insertion of Part 4, Division 4 - Proposed section 89 (1) (a) and (b) Determination of Crown development applications and proposed sections 89A (1) (a), (b) and 89A (2) Directions by Minister:

76. The proposed Division prohibits a consent authority from refusing development consent to, or imposing a condition on, a development application made by or on behalf of the Crown except with the approval of the Minister or the applicant (in case of a condition). This re-enacts the current limitations on the power of consent authorities to refuse or impose conditions on Crown developments but with some procedural changes such as conferring power on regional panels to determine disputes about council determinations about Crown developments.

77. **The Committee notes that a consent authority cannot, without the approval of the Minister, refuse a Crown development application or impose a condition on its consent to a Crown development application. Although this re-enacts the current limitations on the power of consent authorities, however, in effect, it means that there is no opportunity for a person to make their case or representation to the consent authority if there is objection to the Crown development application. The Committee considers these official powers appear to unduly trespass on individual rights to have their views heard and represented by making the consent authority unable to refuse or impose conditions on a Crown development application without the prior approval of the Minister. Accordingly, the Committee refers this to Parliament.**

Issue: Procedural Rights – Schedule 2.1 [19] – Proposed Section 79C (1A) Rejection of submissions – development (other than designated development) subject to objector review:

78. This amends section 79C of the *Environmental Planning and Assessment Act 1979* (EPA Act) to enable a consent authority to reject a submission by an objector to a development application in respect of which new third party applications for review may be made, if the consent authority considers the objection has been made primarily to secure or maintain a direct or indirect commercial advantage.

79. The Committee notes that the effect of this rejection by the consent authority is that the objection is taken not to have been made at all, so that notification and review rights under the Act will not apply.

80. The Committee will always be concerned about legislation that authorises administrative decision-making without providing for the right of notification to those affected and any legislation that purports to oust the jurisdiction of the courts to exclude review rights.

81. **The Committee has concerns about procedural fairness and the right to review with respect to the proposed section 79C (1A), to be inserted by Schedule 2.1 [19], by legislating away the need to give notice and to the right of review, and considers individual rights and liberties may be unduly trespassed, and refers this to Parliament.**

Issue: Access to Justice and Procedural Rights – Schedule 2.2 [73] - Proposed Section 152 Right to be heard:

82. This amends section 152 of the EPA Act to remove the unlimited right of a person to be represented where there is a right to be heard under the Act, as a consequence of the proposed insertion of powers to make regulations prohibiting or limiting the rights of persons under the Act to be represented at reviews by the Planning Assessment Commission or before certain other planning bodies.

83. **The Committee will always be concerned about legislation or regulations that authorise administrative decision-making without providing for the right of those affected to be represented where there is a right to be heard, especially if there are to be no appeals from determinations of the Planning Assessment Commission after a public hearing, and persons qualified to apply for reviews for certain classes of development or determinations may be limited by regulations.**

84. **Therefore, the Committee considers this may be an undue trespass on the right of procedural fairness and access to justice, by proposing powers to remove the current unlimited right of a person to be represented arising from the proposed powers to make regulations prohibiting or limiting the right of persons under the Act to be represented at reviews by the Commission or before other planning bodies. Accordingly, the Committee refers this to Parliament.**

Issue: Right To Property - Acquisition of land not on just terms – Schedule 5.1 [9] – Proposed insertion of Schedule 5 – Paper subdivisions – proposed clause 3 (2) (f); clause 3 (2) (g) and clause 3 (3) - subdivision orders:

85. The proposed Schedule 5 (Paper subdivisions) is to be inserted in the EPA Act, which contains a scheme to enable the development of existing subdivisions (that exist on paper) but because of the size or location of the lots or other factors, have never been developed as subdivisions. The Minister will be able to commence the scheme by the making of a subdivision order specifying an authority as the relevant subdivision authority, the planning purpose, the functions and the subdivision land. The Minister must be of the opinion that the order is desirable to promote and coordinate the orderly and economic use of the land (clause 3 (20 (a)).

86. The Committee notes that an order can only be made if there is or will be a development plan for the land and under proposed clause 3 (2) (g), at least 60% of the owners of the land, and the owners of at least 60% of the land, have consented to the development plan.

87. Proposed clause 3 (2) (b) reads: the Minister may make a subdivision order only if the land has been subdivided and is held by more than one owner and the Minister is satisfied that the land is land for which no provision or inadequate provision has been made for subdivision works. However, under proposed clause 3 (3): two or more owners of the same lot are to be treated as one owner for the purposes of the subclauses (2) (b) and (g) above.

88. **The Committee is concerned that the proprietary rights of the remainder of the owners may be unduly trespassed and refers this to Parliament, since clause 3 (2) (g) is proposing to only require the consent of 60% of the owners of the land and owners of at least 60% of the land. The Committee further notes that proposed clause 3 (3) treats two or more owners of the same lot as only one owner for the above purposes, which may unduly trespass on the rights of another owner if not all owners of the same lot have consented but are nevertheless, treated as being only one owner.**

89. Proposed clause 3 (2) (f) refers to provisions of a development plan may modify or disapply the provisions of Division 4 of Part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* with regard to the determination of amount of compensation.

90. **The requirements that the acquisition of property be on just terms and be appropriately compensated as a result of acquisition are important safeguards of the right to property. The Committee is concerned about the Bill's departure from the *Land Acquisition (Just Terms Compensation) Act 1991* in respect to its provisions on the determination of compensation. Accordingly, the Committee is concerned that the proposed clause 3 (2)(f) may trespass unduly on personal rights and liberties, and refers this to Parliament.**

Issue: Right To Property - Acquisition of land not on just terms – Schedule 5.1 [9] – Proposed insertion of Schedule 5 – Paper subdivisions – proposed clauses 7 (3) (a); (b) 7 (4); 7 (7) – Land acquisition powers:

91. The proposed Schedule 5 also sets out powers that may be conferred on a relevant authority, including land acquisition powers, contribution powers, powers to carry out subdivision works, road powers and other ancillary powers. The proposed Schedule provides for voluntary contributions agreements between owners of subdivision land and the relevant authority and for the registration of such agreements so that the terms of the agreement can bind successive land owners.

92. It refers to a development plan as containing a proposed plan of subdivision, costs and how the costs are to be borne by owners of the land. A development plan may also contain a scheme for land trading or for compulsory acquisition of land for payment of subdivision costs and the calculation of compensation of land if acquired by the relevant authority.

93. Clause 7 (1) on land acquisition, proposes that: A relevant authority may, for a planning purpose specified in a subdivision order, acquire subdivision land by agreement or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991*.

94. However, the Committee notes that the operation of the *Land Acquisition (Just Terms Compensation) Act 1991* relating to provisions on valuation of land for compensation purposes; interest on compensation; rate of interest on compensation; trust account; compensation in form of land or works; payment of compensation arising from court proceedings; and provisions on the payment of compensation, may be disapplied or modified by a development plan (clauses 7 (3) (a); (b) 7 (4); 7 (7)).

95. **The Committee notes that the above clauses provide for the compulsory acquisition of subdivision land or interests in land without the application of the provisions (or modified application) of the *Land Acquisition (Just Terms Compensation) Act 1991* with regard to the valuation of land for compensation; determination of amount of compensation; interest on compensation; rate of interest on compensation; trust account; compensation in the form of land or works; payment of compensation arising from court proceedings; and provisions on the payment of compensation.**

96. **The Committee is concerned about the lack of protection the above clauses afford to property rights and interests, and their departure from the application of the *Land Acquisition (Just Terms Compensation) Act 1991*. The Committee considers personal rights and liberties could be unduly trespassed and refers this to Parliament.**

Issue: Rule Of Law - Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning Agreements - proposed clause 21 – Parties to planning agreements:

97. The proposed clause 21 (1) reads: Any Minister, public authority or other person approved by the Minister is entitled to be an additional party to a planning agreement and to receive a benefit under the agreement on behalf of the State.

98. The Committee is concerned that this clause appears to be very broad and does not require there be any connection between the additional party (any Minister, public authority or other person approved by the Minister) and the relevant State infrastructure or contributions land area that is the subject of the planning agreement.

99. The Committee is of the view that certainty and consistency in law and the principle on the privity of contract are vital elements of the rule of law, which are essential for the maintenance of individual rights and liberties. The Committee is also of the view that the erosion or undermining of the rule of law can only be justified in the public interest in the most extreme circumstances.

100. **The Bill proposes that a planning agreement can be registered if the agreement relates to land under the *Real Property Act 1900* or if the agreement does not relate to land under the Real Property Act, then where there is agreement to the registration by each person who has an estate or interest in the land (proposed clause 24)). Therefore, the proposed clause 21 (1) of enabling the Minister to approve the addition of any party to the planning agreement without specifying requirements for a relevant connection, appears to be very wide in scope and may erode the rule of law with regard to the principle on the privity of contract since the planning agreement can be registered by the Registrar-General under the Real Property Act or in the General Register of Deeds. Accordingly, the Committee considers this may unduly trespass on individual rights and liberties, and refers it to Parliament.**

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

Issue: Ill And Wide Defined Powers – Proposed Part 2, Division 2 in Schedule 1.1 [9] SEPPs – State Environmental Planning Policies:

101. The Bill is proposing to substitute Division 2 of Part 3 of the current EPA Act relating to the making of SEPPs by the Governor for the purpose of environmental planning by the State. The new Division 2 of Part 3 will be ensuring that policies may be made with respect to any matter that is, in the opinion of the Minister, of regional as well as State environmental planning significance.

102. The current requirement for consultation with other public authorities as the Director-General determines or the requirement that the Minister may after consultation with such Ministers as the Minister determines for drafting the SEPPs will be removed. However, section 34A of the current EPA Act with regard to consultation with the Director-General of National Parks and Wildlife about preparation of studies or instruments will still apply.

103. **The Committee notes that the scope for policies that may be made "with respect to any matter that is, in the opinion of the Minister, is of State or regional environmental planning significance", appears to be extremely wide.**

104. **The Committee also considers that in the circumstances of where there is no requirement for consultation with other Ministers and public authorities (other than the Director-General of National Parks and Wildlife) in the drafting and preparing of the SEPPs, along with the wide power of the Minister to determine any matter that is, in the opinion of the Minister, of State or regional environmental planning significance, may make personal rights and liberties unduly dependent on an unfettered discretion on the making of SEPPs and an insufficiently defined administrative power. Accordingly, the Committee refers this to Parliament.**

Issue: Ill And Wide Defined Powers – Proposed Part 3, Division 4 in Schedule 1.1 [11] Local environmental plans - LEPs – Proposed section 56 (2) and sections 56 (3) and (4) - Gateway determination:

105. Proposed section 56 enables a planning proposal to be forwarded to the Minister for a gateway determination. Proposed subsection (2) includes that after a review of the planning proposal, the Minister is to determine the following as to whether the matter is to proceed or should be resubmitted; as to the community and other consultation requirements before the instrument is made and whether there should be a public hearing by the Public Assessment Commission; the time limits for the stages of the procedure for making the instrument and who is to make the instrument. Regulations may be made to set out the community consultation requirements for categories of instruments (proposed section 56 (4)). The Minister may also arrange for a review of a planning proposal to be undertaken by the Commission or a regional panel.

106. Proposed section 56 (3) reads: A determination of the community consultation requirements includes a determination under section 73A (or other provision of this Act) that the matter does not require community consultation. Section 73A of the current Act looks at minor amendments of environmental planning instruments.

107. **The Committee notes that the scope for the Minister's determination with regard to a gateway determination as set out in the above proposed section is very wide, including the extent for community consultation requirements and other consultation (or if any, depending on regulations to be made out for community consultation requirements for the categories of instruments).**

108. **The Committee considers that this may make individual rights and liberties unduly dependent on an insufficiently defined administrative power, and refers this to Parliament.**

Issue: Ill and Wide Defined Powers - No default maximum of community infrastructure contributions for direct contributions and indirect contributions - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116J (3); 116K (3) (b); 116K (4); 116L (1) (b); 116L (1) (c):

109. Proposed section 116J sets out the nexus requirements for direct community infrastructure contributions. Proposed section 116K provides that no nexus is needed for indirect community infrastructure contributions. It contains a regulation making power for estimating cost and imposing a maximum percentage. A new power is proposed to allow the Minister to vary the maximum percentage by direction and provide for public notification.

110. **The Committee considers that it is appropriate to vary any maximum contribution level by regulation as such variation would be disallowable by Parliament. However, the proposed sections 116K (4) and 116L of allowing the Minister, by direction, to vary the maximum percentage for contributions, appear to be very wide, and unlike a contribution level to be varied by regulation, would not be disallowable by Parliament.**

111. **The Committee further notes that no default maximum amount is set by the Bill in the event that the regulations do not prescribe an amount. The Committee is concerned that the failure of the Bill to provide a default maximum level of direct and indirect community infrastructure contributions may be an inappropriate delegation of legislative power, and refers this to Parliament.**

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

Issue: Exclude Judicial Review – Schedule 2.1 [13] - Proposed Section 23F – No Appeals Against Decisions By Planning Assessment Commission After Public Hearing:

112. The Bill is proposing that an appeal may not be made in respect of a decision of the Planning Assessment Commission in exercising a function conferred on the Commission by or under the Act (including a function delegated to it under the Act) if the decision was made by the Commission after a public hearing.

113. The Committee notes the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts.

114. The Committee also notes that the proposed section 23E (c) provides for regulations to make provisions that parties are not to be represented (whether by an Australian legal practitioner or any other person) or are only to be represented in specified circumstances. Equivalent provisions (proposed sections 23H (c), 23J (b), 23K (c)) are also put forward in the contexts for joint regional planning panels, independent hearing and assessment panels and planning arbitrators.

115. The Committee considers the right to be legally represented is an integral part of access to justice and procedural fairness. This is important particularly in the circumstances where the decision by the Commission after a public hearing cannot be appealed.

116. **The Committee is of the view that the proposed section 23F is very broad, including a function delegated to the Commission under the Act. It has the potential to deny a person natural justice by removing the opportunity for appeal or review on any question of law. Taken together with the Committee's concerns with access to justice and procedural fairness where the other proposed section 23E (c) on making regulatory provisions that parties are not to be represented or are only to be represented in specified or limited circumstances, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.**

Issue: Exclude Judicial And Merits Review – Schedule 2.1 [52] - Proposed Section 118AG and subsections (1); (2) (a), (b); (3); (4); (5) – Protection for exercise of certain functions by Minister:

117. The proposed section excludes administrative law and other proceedings being taken in respect of the exercise by the Minister of function relating to the appointment of a planning administrator or planning assessment panel, or conferral of functions on a regional panel, under Division 1AA of Part 6 of the EPA Act.

118. The Committee notes the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law. The Committee will always be concerned if a Bill purports to oust the jurisdiction of the courts.

119. **The Committee is of the view that the proposed section 118AG is very broad. It has the potential to deny a person natural justice by removing the opportunity to even review any question of compliance or non-compliance by the Minister or the Minister's delegate to any function conferred or imposed on the Minister or a delegate of the Minister, relating to the appointment of a planning administrator or planning assessment panel or the conferral of functions on a regional panel. Accordingly, the Committee draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.**

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] – insertion of Proposed Schedule 1 – Part 1 Community infrastructure contributions – proposed clauses 2 (2); (3) (a) and (b) - Appeals:

120. This sets out the limitations on appeals for direct and indirect community infrastructure contributions. It sets out that there can be no appeal including any action under section 123 of the current Act where the Minister has approved or directed the amendment of a contribution plan. Section 123 of the EPA Act refers to appeals and proceedings in the Court for an order to remedy or restrain a breach of the Act.

121. Proposed clause 2 (2) reads: A condition of development consent that imposes an indirect contribution that is of a kind allowed by, and determined in accordance with, a contribution plan (or a direction of the Minister under this Part) may not be disallowed or amended by the Court on appeal, or by a reviewing body on a review under section 96E.

122. Proposed clause 2 (3) reads: A person cannot appeal to the Court under this Act (despite section 123 or any other provision of this Act) in respect of:

123. the approving, amending or repealing of a contributions plan by the Minister under clause 7 (Minister's directions about contributions plans), or

124. the reasonableness in the particular circumstances of a requirement for a community infrastructure contribution that is determined in accordance with any such contribution plan.

125. The Committee considers the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law, and will be concerned if a Bill purports to oust the jurisdiction of the courts.

126. **The Committee is of the view that the proposed clauses have the potential to deny a person natural justice by removing the opportunity for appeal or review on an indirect contribution as part of a condition of development consent determined in accordance with a contributions plan, or for appeal or review on contributions plan by a direction of the Minister under this Part, or for review of the reasonableness in the circumstances of a requirement for a community infrastructure contribution in accordance with a contributions plan. The Committee considers that individual rights and liberties appear to be unduly dependent on non-reviewable decisions, and refers this to Parliament.**

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 2 of Schedule 1 – State infrastructure contributions - proposed clause 16 - Restrictions on appeals and changes to conditions:

127. The proposed clause 16 sets out the restrictions on appeals against determinations and conditions and for modification of conditions. Clause 16 (1) reads: A person cannot appeal to the Court under this Act (including section 123) or make a review application under Division 7A of Part 4 in respect of a determination or direction or the Minister, or a condition imposed by a consent authority of the Minister, under Division 3 of Part 5B or under this Part.

128. **The Committee considers that the proposed clause 16 has the potential to deny a person natural justice by removing the opportunity for appeal or review in respect of a Minister's determination or direction, or in respect of a condition imposed by a consent authority or the Minister with regard to State infrastructure contributions. The Committee is of the view that individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.**

Issue: Exclude Judicial And Merits Review – Schedule 3.1 [7] - Proposed insertion of Part 3 of Schedule 1 – Planning agreements - proposed clause 26 91) - Appeals:

129. Proposed clause 26 (1) reads: A person cannot appeal to the Court under this Act against the failure of a planning authority to enter into a planning agreement or against the terms of a planning agreement.

130. **The Committee is of the view that the proposed clause 26 (1) has the potential to deny a person natural justice by removing the opportunity for appeal to the Court in respect of the failure of a planning authority to enter into planning agreement and with regard to the terms of a planning agreement, even if it may be on a question of law.**

131. **The Committee considers the importance of judicial review for protecting individual rights against oppressive administrative action and in upholding the rule of law, and is concerned if a Bill purports to oust the jurisdiction of the courts. Therefore, the Committee believes individual rights and liberties may be unduly dependent on non-reviewable decisions, and refers this to Parliament.**

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

Issue: Henry VII Clauses – which allow amendment of an Act by a Regulation – Schedule 2.1 [35] - Proposed sections 96C, 96E (1) and 96E (9) Applications for review – objectors:

132. This proposed section applies to development applications of a class prescribed by the regulations for the purposes of this section.

133. Schedule 2.1 [35] inserts proposed Division 7A of Part 4 into the EPA Act. There will be a right for objectors to certain classes of development prescribed by regulations (proposed section 96C) to apply for reviews by planning arbitrators (in the case of development applications determined by a council) or by the Planning Assessment Commission (in the case of development applications determined by regional panels) (proposed section 96E).

134. However, the regulations may also limit the persons who are qualified to apply for reviews under this section (proposed section 96E (9)).

135. **The Committee is concerned that allowing regulations to exclude objectors from applying for reviews and restricting the making of review applications by applicants and objectors, to certain classes of development or determinations, appear to be a significant delegation of legislative powers.**

136. **The Committee finds that allowing regulations to make such review rights of the legislation not apply in relation to certain classes of determinations or development, and to certain persons, could be an extremely broad power, which in theory, may enable regulations to be made to undermine the operation of the legislation.**

137. **The Committee notes that the ability of Parliament to effectively scrutinise the classes of development for reviews and the limiting of classes of persons to apply for reviews by such regulations, will be dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is of the view that such classes of determination and persons qualified to apply for reviews, could be more appropriately made in the Principal Act by an amending legislation rather than through the regulations.**

Issue: Matters which should be regarded by Parliament – Schedule 3.1 [6] – Proposed Part 5B, Division 2 – Proposed sections 116I (1) (a); 116I (5) (a) – Councils limited to contributions for key community infrastructure; and proposed Part 5B, Division 4 - Proposed section 116V – Council planning agreements limited to key community infrastructure:

138. Proposed section 116I provides that contributions plan can require contributions only for key community infrastructure (as prescribed by or defined in the regulations) or for additional community infrastructure approved by the Minister. Proposed section 116I (5) (a) enables regulations to limit the kinds of infrastructure that may be the subject of an approval or direction of the Minister of additional community infrastructure for the purposes of the section.

139. Proposed section 116V provides a council can enter into a voluntary planning agreement for key community infrastructure as defined in the regulations without ministerial approval, but contributions cannot be required for additional community infrastructure as defined in the regulations without prior ministerial approval. Proposed section 116V (5) (a) enables regulations to limit the kinds of infrastructure that may be the subject of an approval or direction of the Minister.

140. **The Committee is concerned that key community infrastructure is to be prescribed by or defined in the regulations rather than be made in the legislation. The Committee notes that allowing for regulations to determine the kinds of key community infrastructure, may be delegating the power to make a main component of the legislative scheme. Therefore, the Committee considers that defining or prescribing key community infrastructure by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.**

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

141. 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.

142. **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.**

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

Issue: Enabling the issuing of directions to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament - Schedule 3.1 [6] – Part 5B, Division 2 – Proposed Sections 116L and 116K (4) – Minister's directions about community infrastructure contributions:

143. A new power is proposed to allow the Minister to vary the maximum percentage of community infrastructure contributions by direction (proposed section 116K (4)). The proposed section 116L also allows the Minister to direct a consent authority as to the requirement for a community infrastructure contribution that may or may not be imposed; the means by which or the factors in relation to which the amount of the direct contribution may or may not be calculated; the maximum amount of a direct contribution; the maximum percentage or maximum amount of the indirect contribution; the things that may or may not be accepted as a material public benefit for the purpose of a requirement for a direct contribution; the type or area of development in respect of which a community infrastructure contribution may or may not be imposed.

144. **The proposed sections 116K (4) and 116L of allowing Minister's directions, to vary the maximum percentage for contributions, or to direct the consent authority as to the requirement for a community infrastructure contribution, appear to be very broad. The Minister's directions would also not be disallowable by Parliament. The Committee considers these sections may be inappropriately delegating legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers this to Parliament.**

Issue: Enabling the issuing of guidelines, policies or plans to influencing the exercise of executive powers without any obligation for them to be tabled in Parliament – Matters which should be regarded by Parliament - Schedule 5.2 [1] and 5.3 – Concurrence and referral requirements:

145. Schedules 5.2 [1] and 5.3 remove the requirement for the concurrence of the Minister for Climate Change and the Environment when carrying out development in the coastal zone but only if it is development that requires development consent under the EPA Act, is exempt development under that Act or is carried out in accordance with a coastal zone management plan under Part 4A of the *Coastal Protection Act 1979*.

146. The Agreement in Principle speech explains that approximately 1,100 of the concurrence provisions will be removed by deleting clauses that duplicate other regulatory provisions, replacing referral and concurrence provisions with heads of

consideration for the consent authority to consider, but also replacing the referral and concurrence provisions with reference to approved guidelines. It refers to a State environment planning policy will be used to remove or amend the concurrence provisions.

147. **The proposed Schedules of removing the requirement for the concurrence of the Minister for Climate Change and the Environment when carrying out development in the coastal zone for development that requires development consent; or is exempt development; or is done according to a coastal zone management plan, appear to be very broad. Such development in the coastal zone if carried out through a management plan or a development consent would not be disallowable by Parliament. The Committee considers this may be an inappropriate delegation of legislative powers and could be insufficiently subjecting their exercise to parliamentary scrutiny; and accordingly, refers it to Parliament.**

148. **The Committee is concerned that any removal of provisions on concurrence or referral requirements could be done through a State environment planning policy or through the guidelines, which may not be disallowable by Parliament or they may not be sufficiently subjected to parliamentary scrutiny. The Committee also has concerns with the requirements of concurrence or referral to be set out in regulations rather than be made in the legislation. Therefore, the Committee considers that prescribing the details of when concurrence requirements are not required by regulation rather than in the legislation, appears to be an inappropriate delegation of legislative power, and refers this to Parliament.**

The Committee makes no further comment on this Bill.

5. FIRST STATE SUPERANNUATION AMENDMENT BILL 2008

Date Introduced:	16 May 2008
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Minister Transport/Finance

Purpose and Description

1. The purpose of this Bill is amend the *First State Superannuation Act 1912* to exempt employers from being required to make superannuation contributions for certain employees. It requires employers to pay employees exempted under the proposed amendments an amount equal to the superannuation contribution they would have received but for the proposed amendments.

Background

2. The Minister in his Agreement in Principle speech in the Legislative Assembly on 16th May 2008 states that the Bill applies to two groups of public sector employees. The first group is one- off short-term employees earning less than a specified amount in a particular month. The second group is employees over the age of 70.

3. With respect to one-off short-term employees, employers under the *First State Superannuation Act* are generally required to make superannuation contributions for every dollar earned by the employee. The Minister says that this contrasts with the Commonwealth superannuation guarantee legislation, which requires that employers make superannuation contributions only for their employees earning $450 or more in that month.

4. The present Bill targets the concerns of some staff such as those engaged on a one-off basis, for example, at State elections. The Minister says that some staff have raised the issue of the undue red tape involved in the erosion by fund fees and premiums of the small amount of superannuation received. Most of them received a superannuation contribution for that employment of about $30. The Minister says the NSW Electoral Commission has encountered significant administrative problems and costs in making these payments as superannuation contributions. Polling staff have suggested to the Government that it would be better if the 9% amount was paid to them as salary. The Bill therefore allows payment of the 9% contribution amount as an additional amount of salary rather than as a contribution to superannuation if the employment is prescribed in the regulations.

5. The Minister states that alternative arrangements are also needed for employees over the age of 70 because Commonwealth superannuation laws prevent superannuation funds from accepting employer contributions on behalf of employees over the age of 70 except in special circumstances. To maintain equity for employees over 70 and for consistency with Commonwealth provisions the Bill authorises these

employees to receive the 9% amount as salary. The Minister states that the changes made by the Bill are supported by the First State Superannuation Fund.

The Bill

6. **Clause** 1 sets out the name of the proposed Act.

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

8. **Clause 3** is a formal provision that gives effect to the amendment to the Act set out in Schedule 1.

9. **Clause 4** provides for the repeal of the proposed Act after the amendment made by the proposed Act has commenced.

10. **Schedule 1** inserts proposed subsections (5) – (8) into section 8 of the Act. Proposed subsection (5) provides that where employment is of a kind prescribed by the regulations and the employee is either earning less than the amount prescribed by the relevant Commonwealth legislation, or is aged 70 or over, the employer is not required to pay superannuation contributions in relation to the employee. Proposed subsection (6) provides that those employees exempted under proposed subsection (5) are to be paid an amount equivalent to the superannuation contribution that would have been paid were they not exempted. Proposed subsection (7) makes it clear that the amount payable is in addition to any salary or wages able to the employee. Proposed subsection (8) defines relevant Commonwealth legislation to mean the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

6. HUMAN TISSUE AMENDMENT (CHILDREN IN CARE OF STATE) BILL 2008

Date Introduced:	18 May 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Reba Meagher
Portfolio:	Minister for Health

Purpose and Description

1. The object of the Bill is to allow for the removal of tissue from the body of a deceased child who was in the care of the State for the purpose of its transplantation to the body of a living person if the principal care officer in relation to the child has consented.

Background

2. In the Agreement in Principle speech of the Minister1 she advised that the Bill removes thIe current blanket prohibition on the donation of organs and tissues by children who are in the care of the State. These changes will allow the organs of children who are in the care of the State to be donated for transplantation into the body of another person in a manner similar to that applying to all other children.

3. Part 4 of the Human Tissue Act 1983 currently allows for a child's organs to be donated in circumstances where the child during his or her lifetime has not expressed an objection to donation and the child's senior available next of kin gives consent. The Minister said the proposed amendments to the Act will allow the organs of a child in the care of the State to be donated if the child during his or her lifetime has not expressed an objection to donation and the principal care officer for the child gives his or her consent. The principal care officer will be required to consult with relevant interested parties before giving his or her consent. The principal care officer will also be precluded from giving consent if any of the relevant interested parties do not agree to the donation.

4. The Minister in her Agreement in Principle speech addressed the sensitive community issue of determining the persons who qualified as relevant interested parties. She said the family situations of children who come to be in the care of the State could be extremely complex and that a wide range of people could have played an important role in these children's lives and have strong concerns for their welfare. These included birth parents, grandparents, foster parents and brothers and sisters, and in the case of indigenous children may also include community elders. She said the legislation did not seek to define who is a relevant interested party and that the Children's Guardian would consult widely to develop guidelines to assist principal care officers for that purpose.

[1] Legislative Assembly, 16 May 2008

The Bill

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

6. **Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by Proclamation. The Minister has advised that this will allow the Children's Guardian to consult all interested stakeholders and to develop appropriate guidelines for the exercise of the functions of principal care officers.

7. **Clause 3** is a formal provision that gives effect to the amendments to the Human Tissue Act 1983 set out in Schedule 1.

8. **Clause 4** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.

9. **Schedule1(7)** amends section 34A of the Principal Act to enable a person to authorise the removal of tissue from the body of a deceased child who was in the care of the State only for the purpose of its transplantation to the body of a living person.

10. **Schedule 1(3) and (5)** insert proposed sections 23A, and 24A and 24B respectively, to provide for the authorisation process for the removal of tissue from the body of a deceased child who was in the care of the State. The proposed sections are consistent with the current requirements in respect of the removal of tissue from other deceased children, except in relation to who gives consent.

11. **Proposed section 23A** enables a designated officer for a hospital to authorise the removal of tissue from the body of a deceased child who was in the care of the State, and whose body is at or brought to a hospital, for the purpose of its transplantation to the body of a living person. Such an authorisation may only be given if it appears that the deceased child had not during their lifetime objected to the removal of tissue from the child's body and the principal officer of a designated authority that had supervisory responsibility for the child has consented to the removal.

12. **Proposed section 24A** enables a principal care officer for a deceased child who was in the care of the State, whose body is not at a hospital, to authorise the removal of tissue from the body of the deceased child for the purpose of its transplantation to the body of a living person.

13. **Proposed section 24B** provides that a principal care officer may give a consent or grant an authority only if it appears that the deceased child had not during their lifetime objected to the removal of tissue from the child's body and the officer had used reasonable efforts to consult with such persons as the officer considers might be appropriate and, where the officer considers such a person's approval should be obtained, has obtained that approval.

14. **Schedule 1 (10)** inserts a savings provision to provide that the proposed amendments only apply in respect of the death of a child on or after the commencement of the amendments.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

7. JURY AMENDMENT BILL 2008

Date Introduced:	15 May 2008
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Hatzistergos
Portfolio:	Attorney General and Minister for Justice

Purpose and Description

1. This Bill has two main objects. The first is to amend the Jury Act 1977 to implement (with minor modifications) certain recommendations of the NSW Law Reform Commission in Chapter 11 of its Report 117, "Jury selection" which was released in January 2008. The second object is to amend the Criminal Appeal Act 1912 to enable appeals to be made, with the leave of the Court of Criminal Appeal, about decisions concerning the discharge of a jury.

Background

2. The Minister in his Second Reading speech in the Legislative Council on 15 May 2008 said the purpose of the Bill is to confer express powers on judges to discharge jurors for cause or due to irregularities in empanelment, and to allow trials to continue in appropriate circumstances. He anticipates that the reforms contained in the Bill will reduce the need to hold retrials and thereby maximise court resources. He states the following organisations were consulted during the development of the Bill: the New South Wales Law Reform Commission, the Supreme Court of New South Wales, the District Court or New South Wales, the Office of the Director of Public Prosecutions, the Law Society of New South Wales, the Bar Association, the Public Defenders Office, and the Legal Aid Commission of New South Wales.

The Bill

3. **Clause 1** sets out the name of the proposed Act.

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

5. **Clause 3** is a formal provision that gives effect to the amendments to the Jury Act 1977 set out in Schedule 1.

6. **Clause 4** is a formal provision that gives effect to the amendments to the Criminal Appeal act 1912 set out in Schedule 2.

7. **Clause 5** provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced.

8. **Schedule 1 Amendment of the *Jury Act 1977* -** this Schedule clarifies the power of a court or coroner to discharge a juror by expressly setting out the circumstance in

which a court or coroner must, or may, discharge a member of the jury during a trial or coronial inquest**.** It also sets out the circumstance in which a court or coroner that discharges a juror must discharge the remaining jurors or may instead continue the trial or coronial inquest with the remaining jurors. This Schedule gives a court or coroner express power to order that a trial or coronial inquest continue if a juror dies. Its provisions also ensure that the verdict of a jury is not invalidated if a juror who was summonsed for jury service is empanelled irregularly or by mistake or becomes disqualified from serving, or ineligible to serve, as a juror during a trial or coronial inquest. The Schedule also expressly enables jurors and former jurors to report misconduct and other irregularities in the conduct of other jurors and former jurors respectively.

9. **Schedule 2 Amendment of the *Criminal Appeal Act 1912* -** this Schedule amends the Criminal Act 1912 to enable appeals to be made, with the leave of the Court of criminal Appeal, about decisions concerning the discharge of a jury.

Issues Considered by the Committee

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

Issue: Clause 53A and Clause 53C of Part 7A Discharge of Jurors

10. The Committee considered whether a change to the existing law in the manner proposed would trespass unduly on the rights of parties to proceedings. The catalyst for the recommended changes is outlined in the Report of the Law Reform Commission. At Paragraph 11.4 of Chapter 11, the Report states that questions of wasted resources arise where the discharge of one juror leads to the discharge of the entire panel. It says this is compounded when it occurs well into the trial, particularly in circumstances where it leads to significant hardship to the victims and other witnesses, for example, in the case of sexual assault trials. The Commission says that the ability of the judge to discharge a jury in NSW is not the subject of any express grant of power in a Jury Act, but it is implied by reason of the existence of the statutory power to order that the trial continue with a reduced number of jurors where a juror has been discharged.

11. The Commission recommends for greater certainty, that there should be an express provision dealing with the discharge of a juror broadly in line with the provisions in other Australian jurisdictions, but which also identifies more precisely the circumstances in which that may be exercised. These circumstances are set out in the proposed new Part 7A.

12. Under section 53A of that Part it is mandatory for the court or coroner to discharge a juror if, in the course of a trial or coronial inquest, the juror has been irregularly empanelled or engaged in misconduct in relation to the trial or coronial inquest. " Misconduct" is defined in that section and includes conduct that, in the opinion of the court or coroner, gives rise to the risk of a substantial miscarriage of justice in the trial or inquest. It is evident that these provisions are directed towards the discharge of a juror when the miscarriage of justice is material. However, the provisions appear to produce the anomalous situation that under section 53A the court or coroner must discharge a juror where he or she has been irregularly empanelled but cannot do so where the juror has engaged in conduct that, in the opinion of the court or coroner, gives rise to the risk of a miscarriage of justice though not one amounting to a

"substantial miscarriage of justice." Similar remarks apply in relation to the discharge of a jury under section 53C. The wording of these provisions appear to warrant review.

13.	**The Committee considers that the Bill's provisions are materially in the public interest and that the rights of parties to the court or coronial proceedings are more likely to be enhanced than prejudiced by the changes. The Bill provides a satisfactory avenue of appeal.**

The Committee makes no further comment on this Bill.

8. STRATA MANAGEMENT LEGISLATION AMENDMENT BILL 2008

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

Purpose and Description

1. This Bill amends the *Strata Schemes Management Act 1996* and the *Home Building Act 1989* to provide further rights and protections for owners of lots who are not developers; and for other purposes.

2. It is cognate with the Environmental Planning and Assessment Amendment Bill 2008.

3. The existing provisions in the Strata Schemes Management Act that govern on-site caretakers will be amended to make it clear that the provisions apply to anyone undertaking the role of a caretaker. The amendment address concerns that people may use another title such as "building manager" to avoid the provisions.

4. This Bill introduces measures to prevent the developer or a person connected with them from being given power of attorney, and being appointed as a proxy or casting a proxy vote pursuant to the terms of a sale contract.

5. To ensure greater transparency in the operation of executive committees, the Bill also requires that persons standing for election to the executive committee must disclose any connection they have with the developer or caretaker.

6. There is an amendment to the Home Building Act to clarify that an owner in a strata or community scheme can notify the Office of Fair Trading of a building dispute in relation to common property or community association property. Currently, only an owners corporation can give consent for a Fair Trading inspector to access common property or association property.

Background

7. From the Agreement in Principle speech:

> The Act prevents a developer from making exclusive-use by-laws during the initial period of the scheme. However, there is currently an exemption in section 56 that allows the developer to make by-laws relating to the parking of vehicles on the common property. The initial period of a strata scheme begins when the scheme and its by-laws are registered with the Department of Lands and finishes when the developer has sold one-third of the unit entitlements. The end of the initial period generally signifies the point at which strata lot owners start playing a greater role in the management of the scheme.

8. This exemption has led to complaints from buyers who are not aware until after they have moved in that the right to permanently occupy visitor parking has been sold or kept for the developer's exclusive use. The amendment will remove this exception so that such by-laws can be made only after the expiry of the initial period, when other owners besides the developer are able to vote on the proposal. Of great concern to many strata owners and the Government is the practice of including conditions in sale contracts requiring a potential buyer to give the developer unconditional proxy voting rights or power of attorney. An attempt by the owner to change their proxy or vote in person would be a breach of contract that could lead to financial or legal penalties. In some cases the contract goes even further and requires the owner to ensure that any future buyer of the unit also gives the developer unconditional proxy voting rights.

9. These types of contract conditions are, in effect, an attempt to override the proxy voting provisions in the Act and deprive owners of their right to participate in the decision-making process. This contractual voting power can be, and has been, used to prevent action being taken to address defective building work or to assign lucrative service contracts to firms connected with the developer. This is a highly questionable practice…I emphasise that this will not stop owners from appointing a proxy, even if they want to appoint the developer, but this can only be done voluntarily and unconditionally.

10. Some cases have involved developers using their influence over owners corporations to prevent owners from getting assistance from the Office of Fair Trading to address disputes about serious building defects, such as faults in fire safety systems or water penetration to a building. This Bill aims to ensure that a Fair Trading inspector cannot be prevented from carrying out an assessment of disputed building or specialist work if requested to do so by an owner. Caretakers and other persons who control access to areas of the common property will also be required to cooperate with officers from Fair Trading.

The Bill

11. This Bill is cognate with the *Environmental Planning and Assessment Amendment Bill 2008*. The object of this Bill is to amend the *Strata Schemes Management Act 1996* (**the Principal Act**):

> (a) to make it clear that the provisions in that Act relating to the appointment of caretakers extend to persons who fall within the description of caretaker in that Act regardless of what they are called, and
> (b) to remove the ability of an owners corporation to make by-laws during the initial period authorising parking on common property, and
> (c) to place certain restrictions on the casting of votes by original owners and certain persons connected with them by using proxies and powers of attorney, and
> (d) to require members of executive committees of strata schemes and candidates for membership of such committees to disclose connections with original owners and caretakers of those schemes.

12. The Bill also amends the *Home Building Act 1989* to enable owners of lots in strata schemes and schemes under the *Community Land Management Act 1989* to request

the investigation of building disputes and allow access to common property for the purposes of such an investigation.

Schedule 1 Amendment of *Strata Schemes Management Act 1996*

Schedule 1 [1] amends section 40A of the Principal Act to make it clear that the caretaker provisions of the Principal Act extend to a person who meets the description of caretaker contained in that section regardless of whether the position to which the person was appointed is called something else, for example, building manager.

Schedule 1 [2] repeals section 56 of the Principal Act which enables the owners corporation, with the approval of the local council, to make a by-law during the initial period authorising an owner to park a vehicle on the common property of the strata scheme concerned.

Schedule 1 [3] amends clause 11 of Schedule 2 to the Principal Act to prevent an original owner or a person connected with an original owner from casting a vote by means of a proxy or power of attorney given by another owner of a lot in the strata scheme concerned if the proxy or power of attorney was given pursuant to a term of the sale contract for the lot or an ancillary contract or arrangement. The amendment does not prevent a proxy or power of attorney being given by a person to another person connected with him or her. **Schedule 1 [9]** amends the Dictionary to the Principal Act to define when a person is to be taken to be connected with another person.

Schedule 1 [4] inserts clause 3A into Schedule 3 to the Principal Act to require a person to disclose that he or she is connected with the original owner or caretaker of a strata scheme before standing for election as a member of the executive committee for the strata scheme or being appointed to act as such a member. The proposed clause also requires a person who is a member of an executive committee or is acting as such a member to disclose if he or she becomes connected with the original owner or caretaker.

Schedule 1 [5] amends clause 4 of Schedule 3 to the Principal Act to place certain limitations on the voting by an original owner on a motion that a member of the executive committee should vacate office.

Schedule 2 Amendment of *Home Building Act 1989*

Schedule 2 [1] amends section 48C of the *Home Building Act 1989* to make it clear that an owner of a lot in a strata scheme or scheme under the *Community Land Management Act 1989* may notify the Commissioner for Fair Trading about a building dispute relating to common property or association property in the relevant scheme.

Schedule 2 [2] amends section 48D of the *Home Building Act 1989* to enable an inspector to enter common property in a strata scheme or association property in a scheme under the *Community Land Management Act 1989* at the request of an owner of a lot in the scheme concerned for the purpose of investigating a building dispute.

Issues Considered by the Committee

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

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

13. 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.

14. **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.

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Australian Jockey Club Bill 2008	7
Board of Adult and Community Education Repeal Bill 2008	5
Building Professionals Amendment Bill 2008	7
Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008	7
Clean Coal Administration Bill 2008	5
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	5
Conveyancing Amendment (Mortgages) Bill 2007*	1
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes Amendment (Rock Throwing) Bill 2008	6
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Fines Amendment Bill 2008	4
First State Superannuation Amendment Bill 2008	7
Food Amendment (Public Information on Offences) Bill 2008	2
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Gas Supply Amendment Bill 2008	4

	Digest Number
Growth Centres (Development Corporations) Amendment Bill 2008	4
Hemp Industry Bill 2008	6
Higher Education Amendment Bill 2008	5
Housing Amendment (Tenant Fraud) Bill 2008	4
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Jury Amendment Bill 2008	7
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Local Government Amendment (Election Date) Bill 2008	2
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National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
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Peak Oil Response Plan Bill 2008*	6
Port Macquarie-Hastings Council Election Bill 2008*	5
Public Sector Employment Management Amendment Bill 2008	4
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	Digest Number
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Appendix 2: Index of Ministerial Correspondence on Bills

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

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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Board of Adult and Community Education Repeal Bill 2008	N, R				
Building Professionals Amendment Bill 2008	N, R			N, R	
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes Amendment (Rock Throwing) Bill 2008	N, R			N, R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Criminal Case Conferencing Trial Bill 2008	N, R				
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Hemp Industry Bill 2008	N, R		N, R	N, R	
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Jury Amendment Bill 2008	N				
Medical Practice Amendment Bill 2008	N, R				
Mining Amendment Bill 2008	N				
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Public Sector Employment and Management Amendment Bill 2008	R				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Strata Management Legislation Amendment Bill 2008				N, R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Workers Compensation Amendment Bill 2008	N, R				

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

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

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2007
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