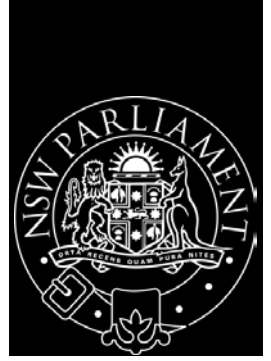


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

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Functions of the Legislation Review Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. BAIL AMENDMENT (FIREARMS AND PROPERTY OFFENCES) BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
 House: Legislative Council
 Minister: The Hon R J Debus MP
 Portfolio: Attorney General

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

- The Bill amends the *Bail Act 1978* (the Bail Act) to:
 - create a presumption against the granting of bail to persons charged with certain serious firearms and weapons offences;
 - create a presumption against the granting of bail to repeat property offenders charged with certain serious property offences (including burglary and car theft offences);
 - prohibit police bail from being granted to persons arrested on conviction warrants, except in exceptional circumstances;
 - enable information to be obtained so as to enable the return of sureties to those who provide them;
 - remove the prohibition on prosecuting a person for failing to appear in accordance with a bail undertaking where the original matter is dealt with on an ex parte basis;
 - provide for the automatic forfeiture of bail money where a person is convicted of the offence of failing to appear before a court in accordance with a bail undertaking;
 - provide for Local Courts to hear all objections to the confirmation of forfeiture orders;
 - provide for the consideration by courts of the disposition of bail sureties at the conclusion of proceedings; and
 - make other consequential amendments and enact provisions of a savings and transitional nature.
- The Bill also amends the *Criminal Procedure Act 1986* to require proceedings to be dealt with as expeditiously as possible where a person has been arrested on a conviction warrant.

Background

3. The Minister for Justice (the Minister) provided the following background in the Bill's Second Reading speech:

As announced by the Premier, these amendments [to the Bail Act] form stage two of bail amendments this year. They build upon previous amendments in relation to serious personal violence offenders and address certain community concerns in relation to recent firearms offences. The amendments were substantially adopted from a report produced by an internal working party.¹

The Bill

4. Currently under the Bail Act, there is a right to release on bail for a person accused of certain offences [s 8] and a presumption in favour of bail for other offences, with certain exceptions [s 9, s 9A and s 9B].
5. In some limited circumstances there is a presumption against the granting of bail [s 8A (drug-related offences) and s 9C and s 9D (murder and certain repeat offenders)].²
6. The Bill inserts into the Bail Act a new s 8B and s 8C, which provide for additional presumptions against the granting of bail.
7. Proposed s 8B provides that persons accused of certain serious firearms and weapons offences are *not* to be granted bail, unless they satisfy the person granting bail that it should not be refused.
8. Pursuant to proposed s 8B(3), the requirement for bail cannot be dispensed with for a person accused of an offence to which s 8B applies, and s 10(2) of the Bail Act does not apply with respect to any such offence.³
9. The offences concerned are offences under the *Crimes Act 1900* and the *Firearms Act 1996* relating to:
- possessing or using firearms in public places;
 - firing at dwelling-houses or other buildings;
 - firing in or into buildings or land;
 - possessing unregistered firearms in public places;
 - stealing firearms;
 - possessing or using firearms without any authorisation;
 - selling, purchasing, possessing or using unregistered firearms;
 - unauthorised manufacture, sale or purchase of firearms;

¹ Hon J Hatzistergos MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

² Section 9C and s 9D were introduced into the *Bail Act 1978* by the *Bail Amendment Act 2003*.

³ Section 10(2) of the *Bail Act 1978* provides that where, during an appearance by an accused person before a court, no specific order or direction is made by the court in respect of bail, the court shall be deemed to have dispensed with the requirement for bail.

- possession of 3 or more unregistered firearms; and
 - selling firearms and firearms parts on an ongoing basis.
10. The offences under the *Firearms Act 1996* (other than selling firearms or firearms parts on an ongoing basis) are limited to offences relating to prohibited firearms or pistols. Some of the offences included are to be enacted by the proposed *Firearms and Crimes Legislation Amendment (Public Safety) Act 2003*.⁴
11. Proposed s 8C of the Bail Act provides that if:
- a person is accused of 2 or more ***serious property offences***, not being offences arising out of the same circumstances, and
 - bail is sought in respect of one or more of those offences, and
 - the person has been convicted of one or more serious property offences within the last 2 years,
- the accused person is not to be granted bail, unless the person satisfies the authorised officer or court that bail should not be refused [Sch 1 [2]].
12. The offences concerned include offences under the *Crimes Act 1900*, and extend to attempts to commit those offences [proposed s 8C(4)(b)].⁵
13. As with s 8B, the requirement for bail cannot be dispensed with for a person accused of an offence to which s 8C applies, and s 10(2) of the Bail Act does not apply with respect to any such offence [proposed s 8C(3)].
14. The Bill makes it clear that s 32 of the Bail Act (which sets out matters to be considered in bail applications) does not prevent an authorised officer or court from considering matters accepted as being relevant to the question of whether bail should not be refused [Sch 1 [8]].⁶
15. The Bill requires an authorised officer or court to record, or cause to be recorded, the reasons for granting bail to a person accused of an offence to which the proposed provisions, and existing provisions, creating a presumption against the granting of bail apply [Sch 1 [9]].

⁴ The Legislation Review Committee has previously commented on the *Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003*. See *Legislation Review Digest*, No. 5, 10 November 2003, at 22.

⁵ They relate to relating to robbery or stealing from a person, armed robbery of a person or mail or mail vehicle, armed robbery and wounding of a person, demanding property with menaces, breaking and entering a place of worship, breaking out of a dwelling-house after committing an offence, entering a dwelling-house with intent to commit a serious indictable offence, breaking and entering a dwelling-house and committing, or intending to commit, a serious indictable offence or murder, stealing property in a dwelling-house with menaces, stealing a motor vehicle and car-jacking: new s 8C of the *Bail Act 1978*.

⁶ Otherwise, the factors to be considered under s 32 are exclusive, mandatory and exhaustive: *R v Hilton* (1987) 7 NSWLR 745 at 748 and 751; followed in *Wilson v The Queen* (1994) 34 NSWLR 1.

Persons arrested on conviction warrants

16. The Bill removes the right of police officers under s 17 of the Bail Act to grant police bail to persons arrested on a warrant to bring them before the court for sentencing, except in exceptional circumstances [Sch 1 [7]].

Failure to appear in accordance with bail undertaking

17. Currently, under s 52 of the Bail Act, a person may not be proceeded against for the offence of failing to appear in accordance with the person's bail undertaking, if the matter concerns an offence that may be dealt with summarily, and the court proceeds to determine the matter in the person's absence.
18. Schedule 1 [11] of the Bill removes this prohibition against proceeding against the person, by omitting s 52.

Forfeiture of bail money

19. Currently, s 51 of the Bail Act provides that a person who fails without reasonable excuse (proof of which lies upon the person) to appear before a court in accordance with the person's bail undertaking is, on summary conviction, guilty of an offence against the section.
20. The Bill inserts proposed s 53AA, which provides as follows:
- (1) On the conviction of a person for an offence under section 51, any bail money agreed to be forfeited under a bail agreement associated with the bail undertaking concerned is forfeited and a forfeiture order is taken to have been made under this Part by the court that convicted the person.
 - (2) This section does not affect any right to make a forfeiture order under section 53A in relation to a person accused of committing an offence under section 51.⁷
21. A right to object to the forfeiture within 28 days is conferred and, if the order is confirmed after the end of that period, it may not be enforced for a period of 12 months.
22. The Bill inserts proposed section 53DA, which enables objections to a forfeiture order under proposed section 53AA.
- The court may vary the order if it is satisfied that in the circumstances of the case it would be unjust for the order to be confirmed in full, ie, where the guarantor has taken all reasonable steps to ensure that the accused person complied with the relevant bail undertaking [Sch 1 [18]].
23. The Bill confers jurisdiction on Local Courts to hear all objections to forfeiture orders made by any court. Currently, an objection must be made to the court that made the forfeiture order. The amendment does not affect the right to object orally to the court

⁷ Section 53A was inserted into the *Bail Act 1978* by the *Criminal Procedure Legislation Amendment (Bail Agreements) Act 1998*.

that made the forfeiture order if the person affected by the order appears before that court [Sch 1 [14]].

Amendment of *Criminal Procedure Act 1986*

24. Schedule 2 of the Bill inserts a new s 317A into the *Criminal Procedure Act 1986*.
25. This requires a court that issues a warrant for the arrest of a person to be brought before the court for sentencing to deal with the proceedings as expeditiously as possible after the person is arrested and brought before the court.

Issues Arising Under s 8A(1)(b)

Clause 2: Commencement

26. The Bill provides that the Act is to commence on a day or days to be proclaimed.
27. The Committee notes that providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.
28. While there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.

29. The Committee has written to the Attorney General seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

Schedule 1[2]: Proposed ss 8B and 8C: Presumption against bail

Trespasses on personal rights and liberties

30. The Bail Act codified all bail legislation and established criteria to be considered when determining bail.⁸ As part of the common law notion of the presumption of innocence, the Bail Act originally prescribed a presumption in favour of bail for all but a small number of offences, being the more serious robbery offences.⁹
31. Subsequently, the Bail Act has been amended to increase the number of exceptions to this presumption. Nonetheless, in the Second Reading speech of the *Bail (Amendment) Act 1988*, which introduced the presumption against bail for certain drug related offences, the then Attorney General noted that:

it is important to bear in mind that what we are dealing with is an alleged crime by an unconvicted person. The right to liberty is one of the most fundamental and treasured concepts in our society and cannot be dismissed lightly. Under the *Bail Act* there is a

⁸ The NSW Court of Appeal has noted that there is no common law right in a person who has been arrested and charged with a serious crime to be at liberty or on bail pending the resolution of the charge: Gleeson CJ in *Chau v Director of Public Prosecutions* (1995) 37 NSWLR 639 at paragraph 32.

⁹ The law of bail generally arose from the provisions of the first *Statute of Westminster* of 1275, which defined bailable and non-bailable offences.

presumption in favour of bail for most offences. This is consistent with the presumption of innocence, which is a fundamental principle of criminal law.¹⁰

Report of the Judicial Commission

32. In November 2002, the Judicial Commission noted the following in respect of the diminution of the presumption in favour of bail:

The decision to grant or refuse bail is an extremely important one. Refusal of bail not only seriously infringes an individual's basic liberty, but also has broader ramifications in the subsequent criminal processing of that individual, such as lack of access to legal and rehabilitation resources.¹¹

33. In a leading High Court decision on bail, *Veen v The Queen (No 1)*, Stephen J said:

Predictions as to further violence, even when based upon extensive clinical investigation by teams of experienced psychiatrists, have recently been condemned as prone to very significant degrees of error when matched against actuality.¹²

34. By contrast, in the Bill's Second Reading speech, the Minister stated that the proposed changes are based on:

the strategy that by identifying certain categories of offences charged in combination with the criminal history of the person charged, high-risk persons may be identified and incapacitated, thereby preventing them from offending in the future... Incapacitation of repeat property offenders through remand in custody has the benefit to the community for the period that the offender is in custody.¹³

35. The Judicial Commission cited 2001 research into remand inmates in NSW from the Department of Corrective Services that showed that 56% of remand inmates received into NSW correctional centres during March 1999 were discharged without a custodial sentence, only 41% were given custodial sentences and 3% were still on remand after a year.¹⁴

International law obligations

36. Article 9(3) of the International Covenant on Civil and Political Rights [ICCPR], on the right to liberty and security of persons, states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

¹⁰ Hon J R A Dowd MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 25 May 1988.

¹¹ Julie Stubbs, "Bail or remand" (1991) 16 (6) *Legal Services Bulletin* 304 and K S Anderson and S Armstrong, *Report of the Bail Review Committee*, 1977, cited in G Brignell, "Bail: An Examination of Contemporary Issues", *Sentencing Trends & Issues*, 24, November 2002.

¹² *Veen v The Queen (No 1)* (1979) 143 CLR 458 at 464.

¹³ Hon J Hatzistergos MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

¹⁴ B Thompson, "Remand inmates in NSW — Some statistics", 2001, *Research Bulletin No 20*, NSW Department of Corrective Services.

37. Article 14(2) of the ICCPR, on equality before the courts and the right to a fair and public hearing by an independent court established by law, states:
- Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
38. The Office of the UN High Commissioner for Human Rights has noted in respect of Art 14(2) that in some instances:
- the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or *entails conditions which render it ineffective*. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.¹⁵
39. In 2001 the NSW Council of Civil Liberties published a report on the extent to which New South Wales criminal justice laws met internationally accepted human rights standards. It concluded that:
- provisions of s.8A and s.9 of the Bail Act 1978...most likely breach the Australian commitment to Article 9(3) (which prohibits a general rule for pretrial imprisonment) and 14 (2) (which recognises a person's presumption of innocence until proven guilty) of the *International Covenant on Civil and Political Rights*. They do so, to a greater (s.8A) or lesser (s.9) degree, by wrongly imposing a legal presumption for pretrial imprisonment.¹⁶
40. The Committee recognises that, while vitally important, the presumption of innocence is not an absolute right. Detaining a person awaiting trial may be appropriate when there is a high risk that a person charged with a serious offence will not appear at trial, or may commit further offences whilst bailed.
41. Indeed, s 32(c) of the Bail Act requires an authorised officer of court to take into account the protection and welfare of the community when making a decision whether or not to grant bail.
42. The Committee notes that while proposed s 8B and s 8C reverse the burden of proving whether bail should be granted, they do not provide that bail should only be granted in exceptional circumstances (see s 9C and s 9D of the Bail Act, applying to murder and serious personal violence offences).

- 43. The Committee notes that all persons who have been arrested and charged have the right to the presumption of innocence. This includes the right to be treated as though innocent.**
- 44. The Committee notes that the right to liberty is one of the most fundamental and treasured concepts in our society.**

¹⁵ [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+13](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+13). Emphasis added.

¹⁶ T Anderson and S Rosa, *Human Rights and Criminal Law in New South Wales: The International Context*, <http://www.nswccl.org.au/docs/rtf/CCBF%20Final%20Report.rtf>

- 45. The Committee considers that the extension of a presumption against bail in proposed s 8B and section 8C of the *Bail Act 1978* trespasses on these rights.**
- 46. The Committee notes that this presumption against bail is for serious firearms and weapons offences and certain repeat property offences.**
- 47. The Committee refers to Parliament the question as to whether, having regard to the aims and scope of the Bill and the provisions of section 32 of the *Bail Act 1978*, which requires that consideration be given to the protection of the community, this trespasses unduly on personal rights and liberties.**

Schedule 1 [7]: proposed s 17(3) and (4): Conviction warrants

Trespass on personal rights and liberties

48. Pursuant to s 17 of the Bail Act, police may grant bail to persons arrested on a warrant to bring them before the court for sentencing. The Bill removes this right, except in exceptional circumstances.
49. Currently, under s 196 of the *Criminal Procedure Act 1986*, a person may be convicted in his or her absence, if the court is satisfied that the accused person had reasonable notice of the first return date or the date, time and place of the hearing.
50. However, a local court may not make any of the following orders with respect to an absent offender:
- imprisonment;
 - periodic detention;
 - home detention;
 - community service;
 - a good behaviour bond;
 - non-association order or place restriction order; or
 - intervention program [s 25(2) of the *Crimes (Sentencing Procedure) Act 1999*].
51. Once convicted in his or her absence, the court may issue a warrant for the offender's arrest, for the purpose of having the offender brought before the court for conviction and sentencing, or for sentencing, as the case requires.
52. The aim of the amended s 17 of the Bail Act is to have a person awaiting sentence dealt with by a court as quickly as possible. However, although a police officer must bring such a person before a court as soon as is reasonably practicable, there may be instances where this will unavoidably involve custodial detention for some period.
53. On one view – and having regard to the fact that the ultimate sentence of such a person may be, eg, a good behaviour bond – the possibility of holding a person in

detention until such an order is made means that the punishment suffered may exceed the penalty commensurate with the seriousness of the offence.¹⁷

54. However, in the majority of cases, the person apprehended on such a warrant will be brought before a local court the same day or the following day. At that time the court will sentence the person arrested on a warrant.
55. The Committee also recognises the community interest in having persons appear before court for sentencing, and dealt with by the court as expeditiously as possible.

56. Given the precautions set out in s 196 of the *Criminal Procedure Act 1986*, the public interests in having criminal matters finalised as expeditiously as possible, and the objectives of the *Bail Act 1978*, the Committee considers that the amendment of s 17 of the *Bail Act 1978* does not, on balance, unduly trespass on personal rights and liberties.

Trespass on personal rights and liberties: Forfeiture of bail money

57. Section 36 of the Bail Act creates an expectation that if an accused person fails to comply with his or her bail undertaking, in circumstances where the accused person or another has deposited money as a condition of bail, the person who has deposited the money can expect to forfeit the specified amount [s 36(c)-(h)].
58. However, under the law as it stands, forfeiture will only take place if the court, in its discretion, makes a forfeiture order [s 53A].
59. The effect of proposed s 53AA is that if a person is convicted of the offence of failing to appear in accordance with a bail undertaking [s 51] any bail money provided in respect of that person is automatically forfeited. A specific forfeiture order is not required.
60. This forfeiture is not absolute, in that:
- a right to object to it within 28 days will be conferred; and
 - if the order is confirmed after the end of that period, it may not be enforced for a period of 12 months.
61. Also, a court may vary a forfeiture order if it is satisfied that in the circumstances of the case it would be unjust for the order to be confirmed in full [proposed s 53DA(3)]. The court may be so satisfied if it concludes that the guarantor took all reasonable steps to ensure that the accused person complied with the relevant bail undertaking [proposed s 53DA(4)].
62. Arguably, this procedure is a natural corollary of s 36, and consistent with common sense understanding of the consequences of an accused failing to appear. The automatic forfeiture procedure is a mechanism for increasing the likelihood that a person who agrees to forfeit money will be required to make good on that promise if the circumstances eventuate.

¹⁷ See, eg, G Brignell, "Bail: An Examination of Contemporary Issues", *Sentencing Trends & Issues*, 24, November 2002.

63. However, it is likely that the practical effect of proposed s 53AA is that forfeiture will occur more frequently as the court will have no discretion to *not* make a forfeiture order. Forfeiture may occur in circumstances in which this may be regarded as a harsh or unfair outcome for the accused or, more likely, a third party who has deposited bail money to secure the accused's release.
64. Implicit in proposed s 53AA is an assumption of fault on the part of the person who has provided bail money, justifying automatic forfeiture if the accused fails to appear. However, as the Judicial Commission noted in its 2002 report, the fact that an offender fails to appear does not necessarily mean he or she deliberately disobeyed the requirement to attend:
- An offender may not appear for a number of reasons, including forgetting the court attendance date (not an unlikely scenario for many offenders who find their lifestyles characterised by disorganisation) or running late...the statistics, which highlighted the increasing incidence of persons failing to attend at their next court date and were a major impetus for the introduction of the [*Bail Amendment (Repeat Offenders) Act 2002*], do not record whether an offender appeared the next time or how many offended after failing to attend court.¹⁸
65. The Government is cognisant of the chaotic lifestyles of many repeat property offenders. In the Bill's Second Reading speech, the Minister noted that:
- Repeat property offenders often have serious drug problems. That drug problem is usually the central cause of their offending behaviour where persons committed many property and theft-related offences in order to fund their drug habit... the Government also recognises that more long-term benefit can be gained if efforts are directed towards rehabilitating offenders once they have been identified. This may be achieved by addressing the cause of the person's offending, for instance a heroin dependency.¹⁹
66. The likely practical effect of proposed s 53AA is that more accused persons will be detained on remand because they are unable to provide the money, or give appropriate undertakings as to money or security, required for bail.
67. In making a determination as to the amount of money or security involved, the court will have regard to, among other things, the nature and seriousness of the offence and the circumstances of the accused.
68. Nonetheless, one effect of automatic forfeiture under s 53AA is that third parties may be less willing to deposit bail money, give undertakings, or provide appropriate security. The result may be an increase in the number of accused persons in detention awaiting the finalisation of their cases. This is likely to be particularly so in the case of repeat property offenders under the proposed s 8C.
69. On the other hand, the community is entitled to expect that those persons who are granted conditional liberty under the Bail Act (including on a condition of depositing of money or giving security) will appear at court, and meet those conditions.

¹⁸ G Brignell, "Bail: An Examination of Contemporary Issues", *Sentencing Trends & Issues*, 24, November 2002 at 1. The statistics were derived from M Chilvers et al, "Bail in NSW: characteristics and compliance" (2001) *Crime and Justice Statistics Bureau Brief*, Issues Paper 15, NSW Bureau of Crime Statistics and Research.

¹⁹ Hon J Hatzistergos MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

70. The Committee refers to Parliament the question of whether, in the circumstances, proposed s 53AA of the *Bail Act 1978* represents an undue trespass on personal rights and liberties.

Schedule 1 [27]: Savings and transitional provisions

Trespass on personal rights and liberties

71. The Bill amends Sch 1 of the Bail Act to provide that both s 8B and s 8C extend to a grant of bail in respect of an offence alleged to have been committed before the commencement of that section if a person is charged with the offence on or after that commencement.
72. Consequently, the Bill has a retrospective effect, in that the presumption against granting bail for offences referred to in s 8B and s 8C of the Bail Act relates to offences committed before the enacted Bill commences.

73. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights.

74. However, given the aims and scope of the Bill, the Committee is of the opinion that the retrospectivity is unlikely to unduly trespass on the rights of accused persons.

Schedule 1 [11]: No penalty for failure to appear if case dealt with *ex parte*²⁰

Trespass on personal rights and liberties: Double Jeopardy

75. The Bill omits s 52 of the Bail Act, thereby removing the prohibition against proceeding against a person for the offence of failing to appear in accordance with the person's bail undertaking, if the matter concerns an offence that may be dealt with summarily, and the court proceeds to determine the matter in the person's absence.
76. In the Bill's Second Reading speech the Minister noted that:
- This prohibition [under s 52] was based on a concept of double jeopardy, in that a person has received punishment for his or her failure to appear by way of being convicted for his or her substantive offence.²¹
77. The right not to be tried more than once for the same crime, which is generally referred to as the principle relating to double jeopardy, is regarded as a fundamental human right. It is recognised at common law,²² reflected in s 156 of the *Criminal Procedure Act 1986*, and enshrined in Article 14(7) of the ICCPR.²³

²⁰ *Ex parte* means an application made by one party in the absence of the other. In this instance, it is the Crown in the absence of the accused.

²¹ Hon J Hatzistergos MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

²² *R v Carroll* [2002] HCA 55.

²³ Article 14(7) provides that: No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. The Rome Statute for the International Criminal Court (ICC) is the most recent pronouncement by the international community on what it believes are the fundamental principles that must be adhered to in criminal trials. These include the double jeopardy rule (Article 20).

78. Double jeopardy generally relates to the institution of further proceedings in the wake of the acquittal of an accused. However, by removing the prohibition currently contained in s 52 of the Bail Act, a person who fails to appear will not only have been convicted of the matter heard in his or her absence, but will be convicted of failing to appear in respect of that charge.

79. The Minister's justification for the amendment is that:

It is clear that the two instances of criminality should be dealt with separately. There is an expectation in our society that if someone is required to turn up to court, that person should do so.

80. The Committee considers that the removal of s 52 of the *Bail Act 1978* with respect to matters dealt with *ex parte* is a trespass on the personal right not to be effectively penalised twice for the same offence.

81. The Committee refers to Parliament the question of whether this is an undue trespass.

The Committee makes no further comment on this Bill.

2. CIVIL LIABILITY AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 13 November 2003
 House: Legislative Assembly
 Minister: The Hon M Iemma MP
 Portfolio: Health

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. The object of this Bill is to amend the *Civil Liability Act 2002* concerning:
 - (i) public authorities;
 - (ii) criminals;
 - (iii) mentally ill persons;
 - (iv) childbirth; and
 - (v) proportionate liability.
2. This Bill also amends the *Mental Health Act 1990* to provide that a health care professional who, in good faith, exercises a function that is conferred or imposed on that person by or under that Act is excluded from personal civil liability for the exercise of that function.

Background

3. According to the Minister's second reading speech²⁴, this Bill is to address issues arising from two recent courts cases - *Presland v Hunter Area Health Services and Anor* [2003] NSWSC 754 and *Cattanach v Melchior* [2003] HCA 38.
4. *Presland* concerned a mentally ill patient who killed his brother's fiancée. After a period of bizarre and violent behaviour, Presland was taken by police to John Hunter Hospital. He was later transferred to James Fletcher Hospital, a psychiatric institution, from where he was released into the company of his brother the next day.

 Presland was found not guilty of killing his brother's fiancée by reason of mental illness. He later sued the Hunter Area Health Service (which was responsible for the operations of the two hospitals concerned), and the doctor who discharged him, for negligence on the ground that he should have been detained as an involuntary patient under the *Mental Health Act 1900*.

 Presland was awarded \$225,000 damages for pain and suffering plus \$85,000 in lost earnings during his three years in detention as a result of the killing.
5. The second case that this Bill seeks to address is the high Court decision in of *Cattanach v Melchior*.

²⁴ The Hon M Iemma, *NSW Parliamentary Proceedings (Hansard)* Legislative Assembly, 13 November 2003.

6. The issue on appeal from the Queensland Court of Appeal was whether, following a failed sterilisation procedure, damages were recoverable for past and future costs of raising and maintaining child until the age of 18 years, and whether any award of damages should be reduced through reference to benefits and pleasures derived, or to be derived, from the child.

The Bill

7. This Bill amends the *Civil Liability Act 2002* by:
- Modifying the definition of **public or other authority** to include any persons having public official functions or acting in a public official capacity (whether or not employed as a public official), but only in relation to the exercise of the person's public official functions: [Schedule 1[1]];
 - Providing that a public or other authority's exercise of, or failure to exercise, a **special statutory power**²⁵ does not give rise to civil liability unless the act or omission was, in the circumstances, so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, power [Schedule 1[2]];
 - clarifying that the protection *against* civil liability in relation to acts of self defence in response to unlawful conduct applies to a person who injures a mentally ill person while acting in self defence [Schedule 1[3]];
 - Clarifying that the courts are *precluded* from awarding damages if:
 - the death, injury or damage to the person that is the subject of proceedings occurred at the time of, **or following**, conduct of that person; and
 - on the balance of probabilities, the conduct constitutes a serious offence; and
 - that conduct contributed materially to, or to the risk of the death, injury or damage [Schedule 1[4]];
 - precluding a person from recovering damages for:
 - (a) non-economic loss; and
 - (b) economic loss for loss of earnings [Schedule 1[5]]if that person's losses result from conduct of the person what would have constituted a **serious offence**²⁶ if the person had not been suffering from a mental illness (unless the conduct of the defendant was an offence); and

²⁵ *Special statutory power* is defined by the proposed s 48A(2) as a power:

(a) that is conferred by or under statute, and

(b) that is of the kind that persons generally are not authorised to exercise without specific statutory authority.

²⁶ Defined by the proposed s 54A(3) as an offence punishable by imprisonment for 6 months or more.

- To provide that in civil proceedings involving a claim for the birth of a child, the court is precluded from awarding damages for economic loss for:
 - (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future; and
 - (b) the loss of earnings by the claimant whilst the claimant rears or maintains the child [Schedule 1[6]].
8. This Bill also amends the *Civil Liability Act 2000* in relation to the currently unproclaimed sections inserted into that Act by the *Civil Liability Amendment (Personal Responsibility) Act 2002*.
- The Bill places a duty on a defendant in proceedings for an apportionable claim, to help identify other “concurrent wrongdoers” in relation to that claim.
- If the plaintiff unnecessarily incurs costs in the proceedings as a result of the *failure of the defendant* in this regard, the court may order the defendant to pay all or any of those costs of the plaintiff [Schedule 2[7]].
9. The Bill amends the *Mental Health Act 1990* to prevent a health care professional²⁷ incurring any personal liability for exercising a function under the Act in good faith.²⁸

Issues Arising Under s 8A(1)(b)

Clause 2 - Commencement

10. Clause 2 provides for the commencement of the proposed Act on a day or days to be commenced by proclamation.
11. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses or not to commence the Act at all.
12. Why there may be good reason why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

13. The Committee notes that a number of the Bill’s provisions have retrospective application (see below).

14. The Committee has written to the Minister seeking his advice as to the reasons why the proposed Act will not commence on assent and to ask for an indication of the likely date for commencement of this Bill.

²⁷ *Health care professional* means a person registered under a health registration Act within the meaning of the *Health Care Complaints Act 1993* [proposed s 294 of the *Mental Health Act 1990*].

²⁸ The proposed section 294 applies to both police officers and health care professionals. Currently this section only excludes liability for police officers.

Schedule 1[2]: s 43A: Proceedings against public or other authorities for the exercise of special statutory powers

Trespasses on personal rights

15. The proposed s 43A precludes a public or other authority from incurring civil liability in relation to their exercise of, or failure to exercise, a special statutory power unless the act or omission was in the circumstances so unreasonable that no public authority having such a power would consider it reasonable.

16. A “special statutory power” is a statutory power “of a kind that persons generally are not authorised to exercise without specific statutory authority.”

17. According to the second reading speech:

In the mental health context, the Presland case has created the risk that doctors will behave too conservatively, detaining patients unnecessarily, out of fear that they can be sued by the patient for anything he or she does if not detained. Other decision-makers may be similarly constrained when trying to decide how to exercise their powers in the public interest...

[The amendment] will not affect the exercise of “operational” functions of agencies, for example, where they are given general functions to provide particular services.

18. This provision lowers the “duty of care”²⁹ which, if breached, can give rise to damages when exercising a special statutory power. It is not intended to so lower the duty of care for the exercise of “operational” functions of agencies.

19. The Committee considers it is appropriate to reduce the right to recover damages in cases such as Presland, where the public authority, by failing to detain the plaintiff, in effect was held liable for his actions.

20. The Committee questions, however, whether the definition of “special statutory power” may include matters for which it is not intended or appropriate to reduce the duty of care.

Special statutory power is normally required to enable a person to make decisions for another person because that other person is deemed incapable or making appropriate decisions for themselves. Such persons are clearly in a very vulnerable position.

For example, the provision of treatment to a person against his or her will under the *Mental Health Act 1990* appears to be a special statutory power.

If that is the case, then a person who had no choice over the treatment and suffered injury as a result of the negligence (as defined by the *Civil Liability Act*) of the public official could not recover damages unless the negligence breached the lower standard of care set out in proposed s 43A.

²⁹ “Duty of care” in this sense only refers to the standard that, if breached would give rise to the right to recover damages. It does not reflect any professional or moral duty the public or other authority may have.

By contrast, a person who was able to decide for themselves whether the treatment was appropriate or desirable could recover damages regardless of whether that lower standard of care was breached.

21. The *Mental Health Act* provides for involuntary detention and treatment of mentally ill or disordered persons for the protection of others from serious physical harm.³⁰ This was the power relevant to the situation in *Presland*. That Act also provides for involuntary detention and treatment of such persons for the person's own protection from serious harm.³¹
22. It is not clear to the Committee why the precedent in *Presland* should lead to the reduction in the duty of care owed to persons who are only at risk to themselves.
23. The Committee notes that the *Civil Liability Act 2002* has already made significant changes to the duty of care of public and other authorities. As the Minister noted:

Existing provisions of the Civil Liability Act concerning the liability of public authorities may have prevented the court from making [the *Presland*] decision. However, the case was not determined according to that Act because the proceedings were commenced before the reforms applied.³²
24. The Committee also notes that the *Presland* decision is being appealed.
25. The Committee further notes that an amendment in schedule 4 of the Bill will remove the personal liability of health care professionals under the *Mental Health Act 1990*.

26. **The Committee has written to the Minister to seek clarification of the extent to which proposed section 43A reduces the duty of care owed to those deemed incapable of making decisions for themselves in relation to matters such as medical treatment or financial affairs.**
27. **The Committee has also asked the Minister to clarify what type of decisions (apart from the decision to detain a person) "special statutory power" is intended to encompass.**
28. **The Committee refers to Parliament the question of whether reducing the duty of care for the exercise of special statutory powers as set out in proposed section 43A unduly trespasses on personal rights and liberties.**

Schedule 1[3]: s 52: No civil liability for acts in self defence

Trespasses on personal rights

29. Schedule 1[3] removes civil liability for death, injury or property damage arising from acts of self-defence when the conduct to which the person was responding would have been unlawful had the other person not been suffering from a mental illness.
30. This provision balances the right to self-defence against the right to be compensated for injury suffered arising from the negligence from others.

³⁰ Ss 9(1)(b) and 10(1)(b) of the *Mental Health Act 1990*.

³¹ Ss 9(1)(a) and 10(1)(a) of the *Mental Health Act 1990*.

³² The Hon M Iemma, *NSW Parliamentary Proceedings (Hansard)* Legislative Assembly, 13 November 2003.

31. Given the importance of the right to defend oneself from, what is on its face, unlawful conduct, the Committee does not consider that this provision unduly trespasses on personal rights and liberties.

Schedule 1[5]: s 54A: Damages limitations if loss results from serious offence committed by mentally ill person

Trespasses on personal rights

32. Schedule 1[5] removes any right to an award of damages for
- non-economic loss or
 - loss of earnings arising from the death of, or injury or damage to a person,
- where conduct that, but for the mental illness of the person, would have constituted a serious offence materially contributed to that death, injury or damage.
33. The provision does not apply if the conduct of the *defendant* constitutes an offence, or would have constituted an offence, but for the mental illness of the defendant.
34. This provision balances two competing principles. First, that a person should not be entitled to compensation for injury arising from conduct that, on its face, is a serious offence.
- Secondly, that a person should not lose the right to compensation for injury arising from the negligence of others because of actions for which they were not legally responsible.
35. The balance achieved by the provision is to allow damages to be paid but to significantly limiting their scope by precluding non-economic loss and loss of earnings.

36. The Committee considers that the appropriate apportioning of liability for damages in such circumstances is a matter for the consideration of the Parliament.

37. The Committee considers that proposed section 54A does not trespass unduly on personal rights.

Schedule 1[6]: Part 11: Damages for the birth of a child

Trespasses on personal rights

38. In civil proceedings involving a claim for the birth of a child, Part 11 prohibits the award of damages for economic loss for the costs of rearing the child or consequential loss of earnings.
39. Part 11 *does not apply* to claims for damages by a child for personal injury sustained pre-natally or during birth or civil proceedings excluded under s 3B of the Act, except for 3B(1)(a).

40. Part 11 *does apply* to “civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct”.³³
41. The recovery of any additional costs associated with rearing or maintaining a child who suffers from a disability is not precluded.³⁴
42. In the Bill’s Second Reading speech it was asserted that:
- There is a strong moral objection to such damages because they classify the birth and existence of a child as an “injury” to the child’s parents. This moral objection was voiced by the community, which expressed serious concerns about the High Court decision.³⁵
43. In July 2003, in *Cattanach v Melchior* a majority of the High Court (Heydon J dissenting) found that damages could be made payable for the negligence of a medical practitioner in respect of the ongoing costs of raising a child, born as a result of that negligence.
44. The High Court noted that authority in Australia was sparse and divided. A number of Queensland decisions had held that damages could be awarded for the maintenance of a healthy child.³⁶ However, in New South Wales, in 1995 three justices of the Court of Appeal in *CES v Superclinics* failed to reach a majority on the issue as to whether damages could be awarded for the economic loss ensuing from an unplanned and unwanted pregnancy.³⁷
45. In *Cattanach v Melchior*, Gleeson CJ made reference to the type of community response referred to in the Second Reading speech, when he stressed that the Court’s responsibility was not to take an “intuitive” response, but to approach the issue as a question of the development of tort law.
46. His Honour noted that:
- [t]he differing responses given by courts throughout the world show that the relevant principles are not easy to identify, or apply.³⁸
47. In the decision, each Justice canvassed these differing responses to the question of damages for “wrongful life” in a range of common law jurisdictions, especially the United Kingdom and the United States.³⁹

³³ Proposed subsection 70(1)(3) and s 3B(1)(a).

³⁴ Proposed section 71(2).

³⁵ The Hon M Iemma MP, *NSW Parliamentary Proceedings (Hansard)* Legislative Assembly, 13 November 2003.

³⁶ *Dahl v Purnell* (1992) 15 Qld Lawyer Reps 33 per Pratt DCJ; *Veivers v Connolly* [1995] 2 Qd R 326 per de Jersey J.

³⁷ Meagher JA held that damages could not be (on the basis that the legal principle was “utterly offensive”); Kirby P held that they could; and Priestly JA held that while claims could be made with respect to the pregnancy and labour, after any decision to *keep* the child, a negligent doctor was not responsible. Kirby P agreed with Priestly JA, as expressing “the highest common denominator”, but recorded his dissent: *CES v Superclinics* (1995) 38 NSWLR 47.

³⁸ *Cattanach v Melchior* [2003] HCA 38 at paragraph 2.

³⁹ See, eg, McHugh and Gummow JJ at paragraph 196 and Kirby J at paragraph 118.

48. Nonetheless, as a question of basic legal principle, Hayne J held that:

the relevant inquiry which is to be made in a claim for damages for negligence is: what is the position of the plaintiff as a result of the defendant's tortious conduct compared with the position that would have obtained if the tort had not been committed? That is not answered by saying that parenthood brings both benefits and burdens.⁴⁰

49. Moreover, in support of his decision, Kirby J noted that:

the allowance for the costs of child-rearing is hardly exceptional in terms of common law principle. To deny it would be. Any such denial would be arbitrary. As such, denial is the business, if of anyone, of Parliament not the courts.⁴¹

50. The Committee notes the view of the majority of the High Court that, as a matter of law, a parent has a right to compensation for the economic costs or rearing a child which was born as a result of the tortious conduct of another.

51. The Committee further notes that, as a matter of policy and morality, there are divergent and strongly held views regarding whether this is appropriate.

52. The Committee considers that the question of whether it is appropriate to be able to recover damages in such circumstances is a matter for the consideration of the Parliament.

Schedule 3[6] – Retrospectivity

53. Schedule 3[6] provides that the amendments to Part 5 of the Act (relating to the liability of public and other authorities) and to Part 7 (self defence and recovery by criminals) apply in relation to civil liability whether arising before or after 13 November 2003, and extend to proceedings commenced *before* 13 November. However, these amendments do not apply in respect of:

- (a) Any decision of a court made before the commencement of this clause; or
- (b) any proceedings to which the Part did not apply immediately before the commencement of the clause.

54. In his second reading speech, the Minister stated:

These amendments will apply to proceedings that have already commenced, in order to ensure that the precedent set by the Presland case will not be followed. The Government recognises that affecting cases that are already before the courts should be done in only the most exceptional circumstances. The bill will not affect the appeal in the Presland case. It will, however, apply to existing cases. This is not being done lightly. As the strength of the community's reaction demonstrates, these are exceptional circumstances, and there are at least two cases comparable to that of Presland currently on foot. The bill will apply to them.⁴²

55. The Committee agrees with the Government's view that legislation should only affect cases already before the courts in exceptional circumstances and notes the Minister's view that such circumstances exist in relation to these provisions.

⁴⁰ *Cattanach v Melchior* [2003] HCA 38 at paragraph 196.

⁴¹ *Cattanach v Melchior* [2003] HCA 38 at paragraph 180.

⁴² The Hon M Iemma MP, *NSW Parliamentary Proceedings (Hansard)* Legislative Assembly, 13 November 2003.

56. Schedule 3[6] provides that the amendments inserted by Schedule 1[6] (relating to damages for the birth of a child) apply in relation to civil liability whether or not arising before 13 November 2003, although not to proceedings commenced in a court before 13 November 2003.
57. The Bill was introduced into the Legislative Assembly on 13 November 2003.
58. These provisions therefore treat the amendments as having taken effect from the date of the introduction of the Bill.

This is clearly to prevent any proceedings being instituted in response to the Bill's introduction but prior to its commencement.

59. The Senate Scrutiny of Bills Committee has held that legislation of this nature:
carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty... The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.⁴³

- 60. The Committee will always be concerned where legislation is taken to have commenced on the date it was introduced into Parliament, rather than on or after the date of assent.**
- 61. Schedule 3[6] provides that the proposed Part 11 will apply to civil liabilities that arose prior to the commencement of the clause.**
- 62. Schedule 3[6] also provides that the proposed Part 11 will apply to proceedings brought after 13 November 2003, which was the date of introduction of the Bill.**
- 63. The Committee notes that retrospective application is needed to prevent proceedings being commenced in response to the introduction of the Bill in order to avoid its provisions.**
- 64. The Committee notes that the Bill is to commence on a day or days to be proclaimed.**
- 65. The Committee refers to Parliament the question of whether the retrospective effects of these provisions trespass unduly on personal rights and liberties.**

The Committee makes no further comment on this Bill.

⁴³ Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, pp 12-13.

3. CIVIL LIABILITY AMENDMENT (MENTAL ILLNESS) BILL 2003*

Matters for comment raised by the Bill

Introduced: 20 November 2003
House: Legislative Assembly
Member: Mr A A Tink MP
Portfolio: Private Member

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

1. The object of this Bill is to amend the *Civil Liability Act 2002* to provide that the provisions precluding a criminal from being awarded damages extend to the criminal conduct of a person who, by reason of mental illness, is not guilty of an offence or unfit to be tried for that offence.

Background

2. This Bill seeks to address the situation which arose in the case of *Presland v Hunter Area Health Service and Anor* [2003] NSWSC 754.
3. *Presland* concerned a mentally ill patient who killed his brother's fiancée. After a period of bizarre and violent behaviour, Presland was taken by police to John Hunter Hospital. He was later transferred to James Fletcher Hospital, a psychiatric institution, from where he was released into the company of his brother the next day.

Presland was found not guilty of killing his brother's fiancée by reason of mental illness. He later sued the Hunter Area Health Service (which was responsible for the operations of the two hospitals concerned), and the doctor who discharged him, for negligence on the ground that he should have been detained as an involuntary patient under the *Mental Health Act 1900*.

Presland was awarded \$225,000 damages for pain and suffering plus \$85,000 in lost earnings during his three years in detention as a result of the killing.

4. The Member introducing this Bill explicitly stated that the Bill operates retrospectively to ensure that Presland is not entitled to receive the damages he was previously awarded.⁴⁴

The Bill

5. Section 54 of the *Civil Liability Act 2002* (the Act) provides that a court is not to award damages to a person who, at the time of the death, injury or damage giving rise

⁴⁴ Second reading speech, Mr A A Tink MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 20 November 2003.

to the action, was engaged in conduct that (on the balance of probabilities) constitutes a *serious offence*⁴⁵.

6. This Bill amends s 54 to provide that damages are not payable in this circumstance, notwithstanding that the person whose conduct is alleged to constitute an offence was mentally ill at the time of engaging in that conduct, irrespective of whether or not:
- the person is determined to be unfit to be tried for the offence; or
 - found not guilty of the offence by reason of mental illness.

Issues Arising Under s 8A(1)(b)

Clause 2: Commencement

Trespasses on personal rights and liberties

7. Clause 2 provides that:

This Act is taken to have commenced on 3 September 2003, being the date notice of motion for leave to introduce the Bill for this Act was given in the Legislative Assembly.

8. This effect of clause 2 is to prevent any proceedings instituted in response to the Bill's introduction but prior to its commencement avoiding the provisions of the Bill.

9. The Senate Scrutiny of Bills Committee has held that legislation of this nature:

carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.⁴⁶

10. Clause 2 of the Bill delimits the date of the retrospectivity not by reference to, eg, a Ministerial announcement, but by the date on which notice was given of an intention to introduce the Bill into the Legislative Assembly. Nonetheless, the principle remains the same, namely, that:

publishing an intention to process a bill through Parliament does not convert its provisions into law; only Parliament can do that.⁴⁷

11. The Committee will always be concerned where legislation is taken to have commenced on the date that notice was given of an intention to introduce a bill into Parliament, rather than on or after the date of assent.

12. The Committee notes that the Bill adversely affects individuals' rights by removing rights to compensation and that it does so retrospectively.

⁴⁵ *Serious offence* is defined by s 54(3) as an offence punishable by imprisonment for 6 months or more.

⁴⁶ Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, at 12-13.

⁴⁷ Senate Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament*, at 21.

- 13. The Committee is of the view that to change the law retrospectively in a manner that adversely affects any person is a significant trespass on personal rights and liberties.**
- 14. The Committee further notes that this retrospective commencement is aimed at preventing the instituting of proceedings in response to the introduction of the Bill in order to avoid its provisions.**
- 15. The Committee refers to Parliament the question of whether the retrospective commencement of the Bill trespasses unduly on personal rights and liberties.**

Schedule 1[1]: Amendment of *Civil Liability Act 2002*

Trespasses on personal rights and liberties

16. Schedule 1[1] amends s 54 of the *Civil Liability Act 2002* to remove any entitlement of a mentally ill person to compensation arising from civil liability for death, injury or damage to property if:
- at the time of the relevant incident the person engaged in conduct which, on the balance of probabilities, constitutes an offence; and
 - that conduct contributed materially to the risk of death, injury or damage.
17. Under the Act, the provision does not apply if the conduct of the *defendant* constitutes an offence, or would have constituted an offence, but for the mental illness of the defendant.
- For example, if “person A” were to assault “person B” while person B was committing a serious offence (and that assault was not in self-defence), s 54 would not prevent person A being liable to compensate person B for damages (whether or not persons A or B were mentally ill).
18. The Committee notes that removing a right to compensation is a significant trespass on personal rights.
19. The Committee considers that this trespass on rights is appropriate in the case of a person who actively engages in conduct that constitutes a serious offence. It appears to the Committee that in choosing to undertake such conduct a person forfeits the right to be compensated for consequent injury suffered.
20. However, the fact that a person engages in unlawful conduct does not legitimise negligent acts or omissions of others that may cause that person injury or damage (although it may give rise to a right to self-defence, which is addressed by s 52 of the Act).
21. Further, the Committee notes that the reason why a person will be found not guilty of a criminal act by reason of their mental illness is that the effect of that illness is such that they *cannot be held responsible for their conduct*.
22. In the Committee’s view, this circumstance gives rise to difficult questions regarding the apportionment of liability when conduct that would, but for the person’s mental

illness be criminal, materially contributes to injury caused by the negligence of another person.

23. However, it is not apparent to the Committee that a mentally ill person should forfeit the right to compensation for injury suffered from the negligence of another because of conduct for which he or she is not legally responsible.

24. The Committee notes that removing the right to be compensated for death, injury or damage suffered because of the negligence of another is a significant trespass on personal rights.

25. The Committee refers to Parliament the question as to whether the denial of such compensation for mentally ill persons in the circumstances as proposed in the Bill trespasses unduly on personal rights and liberties.

Schedule 1[2]: Savings and transitional provisions

Trespasses on personal rights and liberties

26. Schedule 1[2] of the Bill provides that s 54, as amended by the Bill, extends to civil liability arising before the commencement of that section, even if proceedings in respect of the liability were commenced in a court before the commencement of that section.

The Bill also provides that the application of s 54 in respect of proceedings commenced in a court before 3 September 2002,⁴⁸ that section only applies for the purpose of:

- (a) any decision of the court in the proceedings that is made *after* the commencement of that clause; and
 - (b) any decisions of the court *on an appeal* in connection with those proceedings that is made after the commencement of this clause (even if the appeal was instituted before the commencement of this clause) and only if the decision appealed against was made after the commencement of s 54.
27. Schedule 1[2] therefore operates to affect civil liabilities occurring before the commencement of the clause and in proceedings already commenced. It also affects any decisions made or appeals commenced since 3 September 2002.
28. The main purpose of these retrospective clauses, as indicated in the Member's second reading speech, is to ensure that the case of *Presland* is captured by the amendments:

Last night the Minister for Health, on behalf of the Attorney General, made it clear that the Government's legislation covers Tremachi and Ray who have filed proceedings but whose proceedings have not at this stage proceeded to judgement. In that respect *Presland* is different but the Government has embraced the concept of retrospectivity

⁴⁸ Schedule 1[6] of the *Civil Liability Act 2002* provides that s 54, as inserted by the *Civil Liability Amendment (Personal Responsibility) Bill 2003*, applies to, and in respect of, proceedings commenced on, or after, 3 September 2002.

in this particular public policy area. In this bill I seek to extend the concept of retrospectivity back to and including *Presland*.⁴⁹

- 29. The Committee is of the view that to change the law retrospectively in a manner that adversely affects any person is a significant trespass on personal rights and liberties.**
- 30. The Committee notes that not only will this Bill retrospectively remove rights to compensation for acts or omissions already done, it also removes those rights in cases being considered in proceedings that have already commenced.**
- 31. Of greatest concern to the Committee is the fact that this Bill, seeks to remove these rights in a case where a court has finally determined the issues, given its judgement and made its orders.**
- 32. The Committee refers to Parliament the question of whether, in the circumstances, applying the amendments to section 54 retrospectively trespasses unduly on personal rights and liberties.**

Impact on personal rights and liberties - Rights associated with the rule of law.

33. The Committee notes that the decision in *Presland* is currently the subject of an appeal. The effect of this Bill, therefore, is to circumvent the appeal process in order to ensure that the desired outcome is obtained.
34. The doctrine of parliamentary supremacy provides that the legislative branch of government may make any laws it chooses to make (to the extent of its constitutional authority). This law-making supremacy extends to the enactment of legislation that operates retrospectively to effect the outcome of legal proceedings currently before the court.
35. However, in a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the separation of powers, and the rule of law. The rule of law embodies a set of principles for “legal restraint and fairness in the use of government power”.⁵⁰
36. Adherence to the rule of law is recognised as a key element in a democracy and for the protection of human rights. The *Universal Declaration of Human Rights* expressly recognises the relationship between the rule of law and the protection of human rights.⁵¹ The rule of law has been held to be implicit in the Australian Constitution (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1).
37. The Committee notes the advice of the Parliamentary Counsel in respect to this Bill, that was read onto the record as part of the Member’s second reading speech:
- the attempt to apply the bill in a way that effectively reverses a court decision in the case concerned rather than its future application is unprecedented (ordinary

⁴⁹ Second reading speech, Mr A A Tink MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 20 November 2003.

⁵⁰ G Walker, *The Rule of Law* (1988), p 3.

⁵¹ *Universal Declaration of Human Rights*, Preamble, para. 3.

retrospective legislation removed the prospect of success of litigants in pending proceedings that have not been decided by the initial court of trial).⁵²

38. However, it does not necessarily follow from these observations that the proposed Bill *unduly* trespasses on rights and liberties. Any trespass needs to be balanced with other public interests.

In this case, the Committee is of the view that the overall effect of the Bill undermines the rule of law, specifically by seeking to reverse the effect of a judicial decision.

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| <p>39. The Committee is of the view that erosion of the rule of law can only be justified as in the public interest in the most extreme circumstances.</p> <p>40. The Committee considers that this Bill infringes the rule of law by seeking to reverse the effect of a specific judicial decision that has been given, rather than merely change the operation of the law in general.</p> <p>41. The Committee refers to the Parliament the question as to whether this infringement of the rule of law unduly trespasses on personal rights and liberties.</p> |
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The Committee makes no further comment on this Bill.

⁵² Mr A A Tink MP, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 20 November 2003.

4. CLYDE WASTE TRANSFER (SPECIAL PROVISIONS) BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
 House: Legislative Council
 Minister: The Hon C J Knowles MP
 Portfolio: Infrastructure, Planning & Natural Resources

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

1. The object of this Bill is to enable the carrying out of development on certain land at the Clyde Rail Marshalling Yards for the purposes of a waste transfer terminal. The development is necessary because the development consent for the Woodlawn landfill facility requires that waste sourced from the Sydney region be transported by rail to an intermodal terminal near the landfill facility. This requirement was imposed to mitigate the environmental impacts of the transport of waste to Woodlawn by road.

Background

2. This Bill overturns the result of the recent decision of the Land and Environment Court (LEC) in *Drake & others; Auburn Council v Minister for Planning and Anor; Collex Pty Ltd.*⁵³ This was an appeal on the merits by two objectors against the Minister's decision on 29 August 2002 to give development consent for a development at Clyde for the compacting of putrescible waste for containerisation.
3. In the second reading speech, the Parliamentary Secretary referred to the commissioning, in 2000, of Mr Tony Wright to independently advise the Government on the availability of landfill capacity and the need or otherwise for the Woodlawn landfill.
4. According to the second reading speech, Mr Wright's report indicated that without the commissioning of the Woodlawn landfill, Sydney could face a "chronic landfill capacity shortage" in 2006. In 2002, Mr Wright confirmed his findings.
5. The second reading speech stated that:

[t]he Government is actively pursuing a statewide strategy of waste minimisation and resource recovery under current legislation. Alternative technologies for waste treatment and recovery have not yet reached the levels needed to alleviate the need for landfills.⁵⁴

⁵³ *Drake & others; Auburn Council v Minister for Planning and Anor; Collex Pty Ltd 2003] NSWLEC 270 (7 November 2003).*

⁵⁴ Second reading speech, Mr Henry Tsang MLC, Parliamentary Secretary, *Parliamentary Debates (Hansard)*, Legislative Council, 19 November 2003.

6. Development consent for the Woodlawn landfill was granted in 2000 subject to 161 conditions of consent relating mostly to minimising the detrimental environmental impact of the facility.
7. One such condition required that the waste from Woodlawn be sourced from Sydney and transported from Sydney by rail. According to the second reading speech, development of the Clyde waste transfer terminal is needed to fulfil this consent condition.
8. Another condition referred to by the Parliamentary Secretary requires Collex, the company developing Woodlawn, to pay \$4.9 million in outstanding entitlements owed to mining workers from the former Denehurst mine, which went into voluntary receivership.

According to the Parliamentary Secretary, Collex can only provide these entitlements when the landfill operation commences.⁵⁵

9. Since the decision in *Drake*, the department has looked at a number of options including the possibility of an appeal. It has also considered using existing transfer stations. However, according to the second reading speech, this has not proved feasible:

Collex and Waste Service New South Wales were unable to reach a commercial agreement for the transfer of waste to Woodlawn using the Waste Service's transfer stations. Neither the department nor the Minister has power through the planning system to impose commercial outcomes [on] Collex and Waste Service. Indeed, it would be improper for either the Minister or the Department to attempt such a course. In these circumstances the possibility of using existing transfer stations remains uncertain and dependent on the two parties reaching a commercial agreement where they have not been able to do so before.

10. In its decision in *Drake*, the LEC (Bignold J) held that the applicable local environmental plan (LEP) precludes the granting of development consent to the proposal as the activity proposed is *prohibited* under the terms of the LEP. In other words the case was determined on a matter of law (ie, the correct interpretation of the LEP).
11. The Government takes a different view. The second reading speech stated that LEC decision "is contrary to the department receiving the best possible advice on both legal and environmental matters".
12. Bignold J also gave his views on the *merits* of the particular proposal. He indicated that if it had been necessary to do so, he would have refused development consent for reasons that included the impact of odour, dust and noise emissions and the impracticality of these being mitigated by the 138 proposed conditions to be attached to the consent.

⁵⁵ Second reading speech, Mr Henry Tsang MLC, Parliamentary Council, *Parliamentary Debates (Hansard)* 19 November 2003.

He indicated that the proposed conditions were not a satisfactory solution for what in his view was an “unsuitable location for the proposed development which is an inherently unsuitable development for its environment” (para 170).

13. By contrast, the Parliamentary Secretary said that:

[t]he consent granted by the Minister, after an exhaustive environmental assessment, was subject to 130 stringent conditions. These conditions were imposed by the then Minister after wide consultation with the local community about their concerns regarding the proposal.

As a result of negotiations during the court proceedings, a further seven conditions were proposed to provide tighter controls on noise and odour. The 137 conditions tabled with this Bill provide one of the strictest regimes for compliance and monitoring in the country. Compliance with the consent conditions will minimise any adverse environmental impacts, ensure the adoption of best management practices and technology, and provide for continuing environmental monitoring and reporting.

Apart from any conditions, the development incorporates specific engineering controls that not only meet established Environment Protection Authority [EPA] criteria for odour, noise and dust emissions but are considered international best practice.

The Bill

14. The Bill overturns the decision by Bignold J by:

- deeming development consent to have been granted under the *Environmental Planning and Assessment Act 1979* (EPAA) [proposed s 4];
- exempting the Clyde development from certain provisions of the EPAA [proposed s 9]; and
- declaring ineffective any provisions of an environmental planning instrument that are inconsistent with the Bill [proposed s 10].

15. Clause 4 provides that development consent is taken to have been granted under the EPAA for the development of the Clyde Waste Transfer Terminal.⁵⁶

16. Clause 9 exempts the Clyde development from certain provisions of the EPAA, including provisions dealing with appeal to the LEC by an applicant for, or an objector to, a development application in certain circumstances (eg, sections 96(6), 98, 98A(1)(a) & 99).

17. Clause 10 provides that any applicable environmental planning instrument that is inconsistent with any provisions of the proposed Act has no effect to the extent of that inconsistency.

18. The Bill commences on Assent.

⁵⁶ Clause 6 provides that the development consent is taken to become effective and operate from the date of assent to this Act.

Issues Arising Under s 8A(1)(b)

Clauses 4, 9 & 10 - Trespass on personal rights and liberties

Rights associated with the Rule of Law

19. This Bill overturns a judicial decision in a manner that can be regarded as inconsistent with the right of citizens in a constitutional democracy to expect that governments will act in accordance with the rule of law when taking actions that affect citizens' interests.
20. The doctrine of parliamentary supremacy provides that the legislative branch of government may make any laws it chooses to make (to the extent of its constitutional authority). This law-making supremacy extends to the enactment of legislation that overturns the result of a judicial decision.⁵⁷
21. On the other hand, in a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the separation of powers and the rule of law. The rule of law embodies a set of principles for "legal restraint and fairness in the use of government power"⁵⁸, including consistency in the application of the law.
22. Adherence to the rule of law is recognised as a key element in a democracy and for the protection of human rights. The *Universal Declaration of Human Rights* expressly recognises the relationship between the rule of law and the protection of human rights.⁵⁹ The rule of law has been held to be implicit in the Australian Constitution (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1).
23. The argument that rights associated with the rule of law are infringed by the enactment of legislation which overturns the result of a judicial decision is strengthened when, as in the case of the current proposed Bill:
 - the legislation is enacted before the executive arm of government has exhausted judicial review opportunities (ie, appealing the decision of the LEC to the NSW Court of Appeal); and
 - the legislation does not prospectively and generally alter a judicially created or interpreted substantive legal rule or principle which the Parliament considers inappropriate, but rather gives effect to the Government's (and if passed, the Parliament's) preferred outcome in a particular instance of rule application,

⁵⁷ The High Court has held that the Commonwealth is empowered to enact retrospective legislation which specifically and deliberately impacts upon the rights of individuals: see *R v Kidman* (1915) 20 CLR 425, where the Court upheld the validity of the offence of "conspiracy to defraud the Commonwealth" being added to the *Crimes Act 1914* (Cth) by amendment in 1915, but deemed to have been in force from 29 October 1914. This was not overruled in *R v Polyukhovich* (1991) 174 CLR 501 (retrospective war crimes legislation). Despite the application to the States of an attenuated form of separation of powers in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 1, the absence of an express separation in the *Constitution Act 1902* (NSW) strengthens the ability of the NSW Parliament to pass retrospective and individualized legislation such as the Bill.

⁵⁸ G Walker, *The Rule of Law* (1988), p 3.

⁵⁹ Universal Declaration of Human Rights, Preamble, para. 3.

where that outcome differs from that which resulted from the judicial application of existing rules.

24. In other words, the Government has not used the normal procedure for seeking review of a judicial decision with which it disagrees, namely appealing to a higher court.
25. Nor has it made legislation to alter that part of the law which led the LEC to decide that the development did not fall into a category of development for which consent could be given (ie, the definitions in the LEP). The Government could have used the mechanisms available under the EPAA (for example, a State Environmental Planning Policy) to adjust the provisions in the LEP. Instead, the proposed legislation simply makes the provisions of the LEP inoperative in relation to this specific proposal [s 10].

The Bill then takes the further step of making a decision on the planning and environmental merits of the application that is directly contrary to the view indicated by Bignold J in *Drake* [s 4].

26. The enactment of legislation in these circumstances may be considered to be inconsistent with the rule of law. The specific aspects of the rule of law with which the proposed Bill could be said to be inconsistent are:
 - legal rules should be “sufficiently stable to allow people to be guided by their knowledge of the content of the rules”; and
 - government decisions in specific situations should be guided by applicable legal rules that are relatively general, stable and prospective.⁶⁰
27. The proposed Bill is neither general nor prospective in its operation. It applies only to one specific development – the Clyde waste transfer terminal – and it is retroactive in the sense that its primary purpose is to effectively ‘undo’ a judicial decision that has already been made.
28. There is the argument that the people of NSW are entitled to rely on the processes established by Parliament for the settlement of disputes. Being able to so rely is important for ensuring predictability in the application and enforcement of laws, which in turn is an essential feature of the rule of law. Predictability does not refer to a static application of the law, but rather to the need to apply the law in a consistent manner to ensure equality before the law and fairness – two vital aspects of the rule of law.
29. Further, the proposed Bill may be considered generally to diminish the quality of access to justice rights. Specifically, in the present context, it diminishes the right to participate in decisions affecting the environment, one of the objects of the EPAA. Section 5(c) of that Act states that one of its objects is to “provide increased opportunity for public involvement and participation in environmental planning and assessment”.

For these reasons, the proposed Bill may be considered to infringe, to some extent, on personal rights associated with the rule of law.

⁶⁰ See J Finnis, *Natural Law and Natural Rights* (1980) pp 270-271.

30. However, it *does not necessarily follow* from these observations that the proposed Bill *unduly* trespasses on rights and liberties. Any trespass needs to be balanced with other public interests, such as the need to have an effective waste management system in place for Sydney.

In justification for the need the Bill, the Government states that it is necessary to have the Clyde facility in place because of its potential to contribute to managing Sydney's significant waste management needs and to provide employment in Sydney and in the Goulburn region (at the Woodlawn waste facility).

31. Three factors can also be seen as mitigating the perceived gravity of the breach of the rule of law.

First, Bignold J's comments on the merits of the proposal did not form the basis of his decision and he dealt with the merit issue only briefly after hearing argument.

Second, it may be considered that the importance of the rule of law is not as significant where the issue relates to the merits of a particular development proposal. Local councils have frequently argued that the role of the LEC is controversial in that it hears appeals on matters which are inherently political, involving a balancing of social, economic and environmental considerations.

Third, there is a mechanism available under the existing legislation which would have allowed the Minister to give consent to a resubmitted application for the same development without challenging the primary basis for Bignold J's decision (ie, that the development proposed was "prohibited") while ensuring that the Minister made the final decision on the merits.⁶¹

- 32. The Committee is of the view that certainty, consistency and stability in law are vital elements of the rule of law, which is essential for the maintenance of personal rights and liberties.**
- 33. The Committee is of the view that erosion of the rule of law can only be justified as in the public interest in the most extreme circumstances.**
- 34. The Committee considers that this Bill infringes the rule of law by giving effect to a specific outcome at variance with a judicial interpretation of the law, rather than addressing a substantive legal rule or principle.**
- 35. The Committee also recognises the public interest in having an effective and sustainable waste management system for Sydney.**
- 36. The Committee refers to the Parliament the question whether this infringement of the rule of law unduly trespasses on personal rights and liberties.**

The Committee makes no further comment on this Bill.

⁶¹ Under s 89 of the EPAA, an application can be made to the Minister for consent to carry out *prohibited* development. Provided that the Minister makes a decision after considering the recommendations of a Commission of Inquiry, he can exclude the merit appeal jurisdiction of the LEC [s 89A(2) EPAA].

5. CRIMES LEGISLATION FURTHER AMENDMENT BILL 2003

Introduced: 20 November 2003
 House: Legislative Council
 Minister: Hon R J Debus MP
 Portfolio: Attorney General

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. The Bill's objects are to:
 - (a) amend the *Crimes Act 1900* so as to increase, from 2 years to 7 years, the age limit that applies to the offence of exposing or abandoning a child;
 - (b) amend the *Crimes (Sentencing Procedure) Act 1999* so as to modify the limits placed by that Act on the power of a Local Court to impose consecutive sentences of imprisonment;
 - (c) amend the *Criminal Appeal Act 1912* so as to:
 - (i) enable appeals to be made against certain decisions as to costs in summary proceedings before the Supreme Court, the Land and Environment Court or a Court of Coal Mines Regulation, and
 - (ii) allow the prosecution to appeal against a decision or ruling on the admissibility of evidence if the decision or ruling has the effect of eliminating or substantially weakening the prosecution's case in certain criminal proceedings before the Supreme Court, the Land and Environment Court or the District Court, and
 - (iii) allow the Court of Criminal Appeal to dispense with the requirement for the giving of notice of intention to appeal and notice of intention to apply for leave to appeal;
 - (d) amend the *Criminal Procedure Act 1986* so as to:
 - (i) clarify the rights of media representatives to inspect documents relating to criminal proceedings, and
 - (ii) effect minor law revision to Table 1 of the Schedule of indictable offences triable summarily, and
 - (iii) effect amendments consequent on the amendments referred to in paragraph (d);
 - (e) amend the *Firearms Act 1996* so as to clarify the operation of the offences under that Act with respect to the unlawful possession and use of firearms;
 - (f) amend the *Law Enforcement (Powers and Responsibilities) Act 2002* so as to:
 - (i) allow the expiry time for telephone crime scene warrants to be extended beyond their current expiry time of 24 hours, and

- (ii) simplify the requirements as to when police officers must give certain information and warnings with respect to the powers they exercise; and
- (g) amend the *Mental Health (Criminal Procedure) Act 1990* so as to allow the regulations under that Act to prescribe the form of an order under s 32 of that Act.

Background

2. The Bill is an omnibus Bill, designed to improve the administration of the criminal justice system.⁶²
3. The background to each Act amended will be dealt with individually below. Unless otherwise stated, the relevant background information is from the Bill's Second Reading speech in the Legislative Council.

The Bill

Crimes Act 1900

4. Section 43 of the *Crimes Act 1900* currently makes it an offence (punishable by imprisonment for up to 5 years) to expose or abandon a child under 2 years of age if to do so would endanger the child's life or health.
5. The Minister for Community Services has expressed concerns that the offence does not provide protection to children who, although over two years old, are still very vulnerable.
6. Accordingly, this offence has been extended to include all children under the age of seven years, following a similar provision in the Queensland *Criminal Code*.⁶³
7. The Bill amends s 43, to increase the relevant age limit from 2 years to 7 years [Sch 1].

Crimes (Sentencing Procedure) Act 1999

8. Section 58 of the *Crimes (Sentencing Procedure) Act 1999* currently prohibits a Local Court from imposing a sentence of imprisonment on a person who is currently serving two or more consecutive sentences of imprisonment, or who is serving a sentence which, together with the proposed sentence, would last for more than 3 years.
9. There is an exception to this prohibition in relation to:
 - offences involving assaults on custodial officers;
 - offences involving an escape from lawful custody committed by an offender while an inmate of a correctional centre, whether or not the escape was from a correctional centre;
 - where the offender's current sentence was imposed by a superior court; or
 - where the proposed sentence would result in the 3-year period being extended by no more than 6 months.
10. The Bill inserts a new s 58 which:

⁶² Hon A B Kelly, MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 20 November 2003.

⁶³ Hon A B Kelly, MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 20 November 2003.

- removes the prohibition with respect to offenders currently subject to consecutive sentences of imprisonment;
 - extends the 3-year period referred to above to 5 years, so that a Local Court will now be prohibited from imposing a sentence of imprisonment on a person so as to result in his or her being subject to consecutive sentences of imprisonment totalling more than 5 years; and
 - extends the exception referred to above to offences involving escape from lawful custody [Sch 2 [1]].
11. The impetus for this amendment was a submission from the Chief Magistrate that the restrictions contained in s 58 prevent magistrates from imposing effective sentences on offenders for discrete offences in the Local Court.

Criminal Appeal Act 1912

Appeal against costs order

12. Under s 5AA, s 5AB and s 5AC of the *Criminal Appeal Act 1912*, a person is entitled to appeal to the Court of Criminal Appeal against a conviction or order for costs made against the person in summary proceedings before the Supreme Court, the Land and Environment Court, or a Court of Coal Mines Regulation.
13. In the 1999 decision of *Willtara Constructions Pty Ltd v Owen*, the Court of Criminal Appeal held that there could be no appeal against a notice of motion seeking an order for costs which had been dismissed by the trial judge, because the party had not been convicted of an offence and had not been ordered to pay costs.
- Sperling J noted that this situation had the potential to cause injustice, and recommended an amendment to allow an appeal against the dismissal of an application for costs.⁶⁴
14. The Bill amends the relevant sections, to extend the right of appeal to any person whose application for an order for costs is dismissed, or in whose favour an (inadequate) order for costs is made.⁶⁵

Appeal against interlocutory judgment or order

15. The Court of Criminal Appeal has also held that an evidentiary ruling by a trial judge that effectively excludes the entire Crown case is a judgment or order for the purposes of s 5F(2) of the Act. This is because the ruling effectively stays the Crown case.
16. However, a ruling excluding Crown evidence that weakens, but does not destroy, the Crown case has been held *not* to be a judgment or order. Accordingly, it is not appellable under the existing s 5F(2).
17. The Bill amends s 5F so as to allow the Attorney General or the Director of Public Prosecutions to appeal against a decision or ruling on the admissibility of evidence, if the decision or ruling has the effect of eliminating or substantially weakening the

⁶⁴ [1999] NSWCCA 390 at paragraphs 15 and 19.

⁶⁵ An appeal with respect to an inadequate costs order will require the leave of the Court of Criminal Appeal [Sch 3 [1]–[7]].

prosecution's case in certain criminal proceedings before the Supreme Court, the Land and Environment Court or the District Court [Sch 3 [8]].⁶⁶

Notice of Appeal

18. Section 10 of the Act currently requires that a person who wishes to appeal, or apply for leave to appeal, to the Court of Criminal Appeal against a conviction or sentence must give the Court notice of intention to appeal, or notice of intention to apply for leave to appeal, within 28 days after the conviction or sentence. However, it also allows the Court to extend the period within which such a notice must be given.
19. The Bill amends s 10 so as to permit the Court of Criminal Appeal to dispense with the requirements for such notice, but only if permitted by the rules of court [Sch 3 [10]].

Criminal Procedure Act 1986

20. The Bill amends s 314 of the *Criminal Procedure Act 1986* regarding media access to court documents [Sch 4 [2] – [5]].
21. In the Second Reading speech it was noted that:

To clear up some misunderstandings that arose on commencement of this provision earlier this year, section 314 is amended by items [2] to [5] of Schedule 4 to clarify that the right to inspect these documents exists from the time the proceedings commence until two working days after they are finally disposed of.

In addition, the amendments clarify that the right of inspection given by section 314 is in addition to—and does not limit—any other law under which a person is permitted to inspect such documents. For example, after the period of two working days has expired, media representatives may make an application to the registrar to inspect documents, and the pre-existing regime for non-party access to court documents, contained in the court rules, will apply.

The amendment to delete section 314(5), relating to the suppression of witnesses names and addresses, removes uncertainty and confusion about the right of the media to access this information. Adequate protection is provided in other legislative provisions, such as the *Victims Rights Act 1996*, and thus is adequately addressed by section 314(4).⁶⁷

Firearms Act 1996

22. Section 7 of the *Firearms Act 1996* currently prohibits a person from possessing or using a firearm, unless the person is authorised to do so by a licence or permit under the Act.⁶⁸
23. The Bill amends s 7 to relate only to the unauthorised possession or use of a *prohibited firearm or pistol*. The maximum penalty will be the same as the existing penalty that applies in relation to prohibited firearms or pistols [Sch 5 [2]].
24. The Bill also inserts a new s 7A, which creates a separate offence of possessing or using a firearm without a licence or permit [Sch 5 [6]].⁶⁹

⁶⁶ The impetus for this change would appear to be the controversial exclusion of evidence in the 2002 murder trial of Jason Anthony Van den Baan before Greg James J.

⁶⁷ Hon A B Kelly, MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 20 November 2003.

⁶⁸ The penalty for such an offence is imprisonment for 14 years (if the firearm concerned is a prohibited firearm or pistol) or imprisonment for 5 years (in any other case).

Law Enforcement (Powers and Responsibilities) Act 2002

Telephone crime scene warrants

25. The *Law Enforcement (Powers and Responsibilities) Act 2002* makes provision for search warrants and crime scene warrants. The Act introduced new powers for police in relation to establishing crime scenes, enabling an officer to secure a crime scene for up to three hours. After this time a warrant may be applied for either in person or by telephone.
26. Either form of warrant may be granted by means of a written application made in person (a standard warrant) or by means of a telephone application (a telephone warrant).
27. A standard warrant can have effect for up to 72 hours, and may be extended for up to another 72 hours. A telephone warrant has effect for 24 hours, and cannot be extended.
28. The Second Reading speech noted that:
- The inability to extend a telephone warrant presents an unreasonable obstacle for police officers in relation to crime scenes.
- Police cannot determine when a crime will occur and therefore cannot determine when or where a crime scene may need to be established. Accordingly, it is likely that more crime scene warrants will be applied for at night by telephone than the other types of warrants. This is unlike search warrants and notices to produce, where police may better plan when they may be executed, and which, in any case, must normally be executed in daytime.
- It is in the interests of justice that police be permitted to secure a crime scene for the same maximum length of time that is available for other warrants, even where the crime scene warrant is originally applied for by telephone.
- There is, however, a safeguard which will ensure appropriate use of crime scene powers: that is, that the extension can only be applied for in person. This will not present practical problems to police, as the court can hear an application for an extension of the 24 hour telephone crime scene warrant at any time.⁷⁰
29. The Bill amends s 73 so as to allow a telephone crime scene warrant to be extended (on a written application made in person) for up to 60 hours at a time, but on no more than two occasions.
30. The maximum period for which such a warrant will be able to have effect will be 144 hours (24 plus 60 plus 60), which is the same as the maximum period for which a standard warrant can have effect (72 plus 72) [Sch 6 [1]–[4]].
31. The Bill also inserts a new Part into Schedule 5 of the Act, extending the amended s 73 to existing telephone crime scene warrants [Sch 6 [8]].

Provision of information and warnings

32. Section 201 of the Act sets out safeguards requiring a police officer to:
- identify him/herself as an officer;
 - state his/her name, rank, and station;

⁶⁹ The maximum penalty for this offence will be imprisonment for 5 years.

⁷⁰ Hon A B Kelly, MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 20 November 2003.

- explain why a power is being used; and
 - warn that it may be an offence to fail to comply.
33. Section 202 and s 203 currently provide that these requirements need *not* be complied with in relation to a power of arrest, or a power to search premises, if compliance:
- is impracticable; or
 - would frustrate the purpose for which the power is to be exercised.
34. The Bill amends s 201 so as to simplify those requirements, without altering their substance. As a consequence, those requirements can, if necessary, be complied with *after* a power of arrest or power to search premises is exercised [Sch 6 [5] & [6]].
35. This amendment renders s 202 and s 203 superfluous, and they are therefore omitted from the Act.

Mental Health (Criminal Procedure) Act 1990

36. Section 32 of the *Mental Health (Criminal Procedure) Act 1990* allows a Magistrate to make a variety of orders with respect to a person who, in any proceedings, appears to be developmentally disabled or suffering from mental illness. Such an order affects the way in which other persons may have to deal with the person.
37. The Bill amends s 32 to enable the regulations under the Act to prescribe the form of an order under that section, thereby standardising the way in which such an order may be expressed [Sch 7].
38. The aim of the proposed form is to:
- assist in educating non-practitioners about their requirements in a complex area of law;
 - facilitate the recording of conditions;
 - engender consistency of orders; and
 - assist an appeal court when reviewing a decision of a magistrate.

Issues Arising Under s 8A(1)(b)

Clause 2: Commencement

39. The Bill provides that the Act is to commence on a day or days to be proclaimed.
40. The Committee notes that providing that an Act commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.
41. While there may be good reasons why such a discretion may be required. It also considers that, in some circumstances, such discretion can give rise to an inappropriate delegation of legislative power.

42. The Committee has written to the Attorney General seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

Schedule 2 [1]; proposed s 58 of the *Crimes (Sentencing Procedure) Act 1999*

Trespasses on personal rights and liberties: Retrospectivity

43. The Bill amends Sch 2 of the *Crimes (Sentencing Procedure) Act 1999* to provide that the amended s 58 of that Act (extending the capacity of the Local Court to impose consecutive sentences) applies to offences committed before the commencement of that section, other than offences for which proceedings have commenced before its substitution.
44. Accordingly, proceedings underway at the date on which s 58 comes into effect will not be affected by the provision.

- 45. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights.**
- 46. However, given the nature and scope of the changes made to the *Crimes (Sentencing Procedure) Act 1999*, the Committee is of the opinion that the retrospectivity is unlikely to unduly trespass on the rights of persons being sentenced in a Local Court.**

Schedule 3 [8]; proposed s 5F(3A) of the *Criminal Appeal Act 1912*

Trespasses on personal rights and liberties: Appeal against interlocutory judgment or order

47. Currently, s 5F(2) of the *Criminal Appeal Act 1912* (CAA) provides that the Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against an interlocutory judgment or order given or made in proceedings to which the section applies. However, only decisions that have the effect of excluding key evidence necessary to establish the Crown case may be challenged.⁷¹
48. The Bill inserts a new s 5F(3A) into the CAA [Sch 3 [8]]. This provides that:
- The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.
49. Consequently, the Bill inserts a new s 5F(5) which provides that the Court of Criminal Appeal:
- (a) may affirm or vacate the judgment, order, decision or ruling appealed against, and
 - (b) if it vacates the judgment, order, decision or ruling, may give or make some other judgment, order, decision or ruling instead of the judgment, order, decision or ruling appealed against.
50. The current approach in s 5F of the CAA to appeals on evidential rulings at trial reflects the traditional common law concern that a criminal trial should not be unduly interrupted by related proceedings. This is based on the fundamental common law right of an accused to be tried without undue delay.⁷²
51. This concern was averted to in the Bill's Second Reading speech, where it was stated that:

⁷¹ See *Ridgeway v The Queen* (1995) 184 CLR 19.

⁷² *Jago v District Court (NSW)* (1989) 168 CLR 23.

It is not desirable that criminal trials be unnecessarily disrupted for the purpose of appealing evidentiary rulings. It is therefore anticipated that the Crown would exercise this new appeal power only sparingly.⁷³

52. Proposed s 5F(3A) of the CAA significantly widens the current exception that an appeal is only permissible in cases where the trial judge has effectively excluded the *entire* Crown case, which is tantamount to staying the trial.
53. The standard of *substantially weakened* in the proposed provision appears to be determined from the prosecution's standpoint, rather than from an objective judicial assessment.
54. The burden on the prosecution to establish the case beyond reasonable doubt is a heavy one, and the exclusion of any prosecution evidence could arguably "substantially weaken" the prosecution case.
55. Proposed s 5F(3A) of the CAA arguably confers a wide discretion on the prosecution regarding when to appeal such orders, with only limited guidance to the appeal courts as to when they should refuse to hear such matters.
56. Although the caselaw of the Court of Criminal Appeal will undoubtedly establish precedents for the exercise of this discretion, arguably the Bill could have allowed for more procedural certainty by including guidelines within the amended s 5F.

57. **The Committee considers however, that in the absence of clear guidelines as to the limitations on the Crown Appeal rights pursuant to the proposed amendment to s 5F of the *Criminal Appeal Act 1912*, allowing for appeals by the Attorney General or the Director of Public Prosecutions from an interlocutory judgment or order, has the potential to trespass on an accused's right to trial without undue delay.**
58. **The Committee also notes that the new provision may have the effect of impinging on the discretions traditionally exercised by a trial judge as to the admissibility of evidence.**
59. **The Committee refers to Parliament whether this constitutes an undue trespass on this right.**

Schedule 6 [1]-[4]; proposed s 73 of the *Law Enforcement (Powers and Responsibilities) Act 2002*
Trespass on personal rights and liberties: Telephone warrants

The current Law Enforcement Act

60. Section 94(1) of the Law Enforcement Act provides that a police officer may apply for a crime scene warrant if the police officer suspects on reasonable grounds that it is necessary to exercise crime scene powers at a crime scene for the purpose of preserving, or searching for and gathering, evidence of the commission of:
 - a serious indictable offence; or
 - an offence that is being, or was, or may have been, committed in connection with a traffic accident that has resulted in the death of or serious injury to a person.
61. If a crime scene is established for a period of 3 hours or less, there is no requirement on a police officer who establishes the crime scene to obtain a crime scene warrant. All the police officer must do is notify a senior police officer of that fact [s 93].

⁷³ Hon A B Kelly, MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 20 November 2003.

62. A crime scene warrant may be issued in respect of premises of any kind, whether or not a public place [s 90].
63. Pursuant to s 61 and s 59(1)(c), an application to an authorised officer for a crime scene warrant may be made by telephone. The crime scene warrant may be issued by an authorised officer, if he or she is satisfied that there are reasonable grounds for doing so [s 94(2)].
64. An *authorised officer* is defined in s 4 of the Law Enforcement Act as:
- a Magistrate or a Children’s Magistrate;
 - a Clerk of a Local Court; or
 - an employee of the Attorney General’s Department authorised by the Attorney General as an authorised officer for the purposes of this Act either personally or as the holder of a specified office.
65. Section 95 of the Law Enforcement Act provides a list of police powers that may be exercised at a crime scene. These include, but are not limited to, powers to:
- photograph or otherwise record the crime scene and anything in it;
 - seize and detain all or part of a thing that might provide evidence of the commission of an offence;
 - dig up anything at the crime scene; and
 - remove wall or ceiling linings or floors of a building, or panels of a vehicle.
66. There is no provision in either the Law Enforcement Act or the Bill for any compensation to be made in respect of damage done to a person’s property pursuant to the exercise of these extensive powers.
67. A telephone crime scene warrant is not required to conform to the prescribed procedures for standard warrants, including that they be verified before the authorised officer on oath or affirmation or by affidavit, as otherwise required by s 60(2).

The Amendments

68. The Bill amends s 73 of the Law Enforcement Act. Proposed s 73(1)(d) specifies that a telephone crime scene warrant ceases to have effect at the expiry of 24 hours after the time of its issue.
69. Proposed s 73(5A) and (5B) allow a telephone crime scene warrant to be extended for up to 60 hours at a time, but on no more than two occasions. Proposed s 73(6)(b) requires that such an extension must be made on the written application of, and made in person by, the person to whom the warrant was issued or any other person who is authorised to execute the warrant.
70. There is, however, no requirement that the application for an extension of a crime scene warrant be verified before an authorised officer on oath, or affirmation, or by affidavit.

71. The common law closely guards personal rights to property and considers that interference with them may only be justified by express legal authority. The courts will construe legislation that interferes with these property rights narrowly.⁷⁴
72. Similarly, the personal right to privacy is recognised in international instruments to which Australia is a signatory. Article 17 of the ICCPR provides:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
 2. Everyone has the right to the protection of the law against such interference or attacks.
73. The “trade-off” for relaxing the procedural protections which apply to warrants generally is that telephone warrants have limited duration, and are intended only to apply in exceptional circumstances of urgency.
74. The NSW Court of Appeal has held that a telephone warrant application is:
- not to be regarded as merely an alternative method of obtaining a search warrant which may be employed to suit the convenience of the applicant for the warrant.⁷⁵
75. The Bill’s Second Reading speech suggested that the current restriction “presents an unreasonable obstacle for police officers in relation to crime scenes”.⁷⁶ However, why this is considered to be the case was not explained.
76. The proposed amendments to s 73 appear to prioritise police practice over the property and privacy rights of individuals, particularly given the breadth of police powers under a crime scene warrant [s 95(1)]. However, as the High Court has noted:
- Practicability is not assessed by reference to the exigencies of criminal investigation; the right to personal liberty is not what is left over after the police investigation is finished.⁷⁷

- 77. The Committee notes that crime scene warrants convey substantial powers that may trespass significantly on rights to property and privacy.**
- 78. The Committee further notes that telephone crime scene warrants may be granted without the usual requirements for crime scene warrants in that applications, particularly, that applications must be made in person and verified on oath, or affirmation, or by affidavit.**
- 79. The Committee has written to the Attorney General requesting reasons why the Bill does not require application for extension of a telephone warrant to be verified on oath or affirmation or by affidavit.**
- 80. The Committee refers to Parliament whether the proposed power to extend telephone crime scene warrants constitutes an undue trespass on personal rights to property and privacy.**

⁷⁴ Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right: *Coco v The Queen* (1994) 179 CLR 427.

⁷⁵ *Commissioner of Police v Atkinson* (1991) 23 NSWLR 495 at 499.

⁷⁶ Hon A B Kelly, MLC, NSW Parliamentary Papers (Hansard), Legislative Council, 20 November 2003. See also A Haesler, *An Overview: The Law Enforcement (Powers and Responsibilities) Bill 2001*, Public Defenders Office, March 2002 <http://www.lawlink.nsw.gov.au/pdo.nsf/pages/PolicePowers>.

⁷⁷ *Williams v The Queen* [1987] HCA 36 per Mason and Brennan JJ.

Schedule 6 [9]

Trespasses on personal rights and liberties: Retrospectivity

81. The Bill amends Sch 5 of the Law Enforcement Act to provide that the amended s 73 of that Act extends to telephone crime scene warrants issued before the commencement of the amendments made to s 73 by the Bill [Sch 6 [8]].

82. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights.

83. However, having regard to the fact that the retrospectivity will only occur for a 24-hour period prior to the commencement of the provision, the Committee does not consider that this is an undue trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

6. DEVELOPER DONATIONS (ANTI-CORRUPTION) BILL 2003*

Matters for comment raised by the Bill

Introduced: 13 November 2003
 House: Legislative Council
 Minister: Ms L Rhiannon MLC
 Portfolio: Private Member

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

1. The stated object of this Bill is to amend the *Election Funding Act 1981*:
 - (a) to prohibit major developers and persons found guilty of offences involving bribery or corruption from making political contributions;
 - (b) to enhance the current provisions of that Act relating to the disclosure of political contributions by establishing ongoing requirements for parties, candidates, groups of candidates, independent members of Parliament and persons acting on their behalf to receive and lodge donors forms when accepting certain political contributions; and
 - (c) to enhance the current provisions relating to the disclosure of political contributions by candidates for election which operate in connection with certain periods that end after the return of the writs for an election by requiring certain disclosures to be made and published before the polling day for an election.

Background

2. This Bill seeks to address the concerns of the member that major developers are able to “buy influence” through political donations.⁷⁸

The Bill

Schedule 1.1 Amendment of *Election Funding Act 1981*

Prohibited political contributions

3. Schedule 1.1 [11] provides that major developers and persons who have been found guilty of an offence involving bribery or corruption must not, directly or indirectly, make political contributions.
4. Contravention of this provision is an offence attracting a maximum penalty of 20 penalty units (currently \$2,200).

⁷⁸ Ms Lee Rhiannon MLC, *Parliamentary Debates (Hansard)*, Legislative Council, 13 November 2003.

5. A **major developer** is defined in proposed section 82B as, subject to certain exceptions, a person who has, in the last 5 years, lodged a development application or applications for development, the estimated cost of which totals \$5,000,000 or more.

If a corporation is a major developer, every director of the corporation is taken to be a major developer.

Continuous disclosure of political contributions

6. Proposed section 89C makes it an offence for a party, group of candidates, independent member of Parliament, candidate or a person acting on behalf of any of them to accept political contributions from any person or organisation that exceed a total amount of \$1,000 over 12 months, unless the political contribution is accompanied by a donors form.
7. The donors form must state:
- (a) the amount (if a gift of money) or an estimated value (if a gift in kind) of the political contribution made by the person or organisation (the **donor**) to the party, person or group concerned, and
 - (b) details of all political contributions made by the donor to the party, person or group concerned in the 12-month period immediately preceding the donor's latest political contribution to that party, person or group, and
 - (c) the donor's postal address, and
 - (d) the donor's residential address (in the case of a natural person) or head office address (in the case of a corporation), and
 - (e) that the donor is not a major developer, and
 - (f) that the donor has not been convicted of an offence involving bribery or corruption, and
 - (g) that the donor is not making the political contribution concerned on behalf of a major developer or a person who has been convicted of an offence involving bribery or corruption, and
 - (h) whether the donor is making the political contribution on behalf of an unincorporated association and, if so, details regarding that association, and
 - (i) if the donor is a corporation, details of the corporation including the names of all directors of the corporation and a description of the corporation's main activities. [proposed s 89D]
8. The maximum penalty for contravention of this provision is 20 penalty units (currently \$2,200).
9. The Election Funding Authority must publish each donors form lodged with it in a public register and on the Internet within 14 days of its receipt.

Disclosure before election of political contributions to candidates

10. Schedule 1.1 [2] replaces section 85 of the *Election Funding Act 1981* (Obligation of candidates to make disclosure).

11. Section 85 currently requires registered official agents for candidates for election to lodge a declaration concerning political contributions received and electoral expenditure incurred during the specified period. The official agent must lodge the declaration *within 120 days after the day for the return of the writs for a general election or by-election* (the current election).

The specified period commences:

- (i) if the candidate was registered at any time in the Register of Candidates for the previous general election — on the 31st day after the polling day for that previous general election; or
- (ii) if the candidate was registered at any time in the Register of Candidates for a by-election (not being the current election) following the previous general election — on the 31st day after the polling day for that by-election; or
- (iii) on the day that is 12 months before the day on which the candidate was nominated for election at the current election;

whichever first occurs, and *ends on the 30th day after the polling day for the current election*.

12. The Bill changes s 85 in relation to *political contributions* so that:
- the specified period *ends on the day on which the candidate was nominated for election at the current election*; and
 - the declaration must be lodged *within 14 days after a person becomes a candidate*.
13. Under the proposed legislation, the registered official agent would still be required, within 120 days after the day for the return of the writs, to lodge a declaration relating to political contributions received during the remainder of the election period (post-nomination until the 30th day after the polling day for the election) and relating to electoral expenditure incurred during the whole election period [proposed subsections 85 (2) and (3)].

Schedule 1.2 Amendment of *Environmental Planning and Assessment Act 1979*

Certain decisions of Minister disallowable

14. Schedule 1.2 amends sections 76A, 88A and 89 of the *Environmental Planning and Assessment Act 1979* to provide that the following notices and directions are subject to disallowance by either House of Parliament under section 41 of the *Interpretation Act 1987*:
- (a) a notice under section 76A (7) published in the Gazette by the Minister administering that Act declaring that certain development is State significant development; and
 - (b) a direction under section 88A (1) or 89 (1) by that Minister that a particular development application is to be referred to the Minister for determination.

Schedule 1.3 Amendment of *Local Government Act 1993*

15. Schedule 1.3 amends the *Local Government Act 1993* to make it clear that Part 6 of the *Election Funding Act 1981* (as amended by the Bill) will apply to local government elections.

Clause 2: Commencement

16. The Bill is to commence on assent.

Issues Arising Under s 8A(1)(b)

Schedule 1.1 [1] & [11]: Proposed sections 82B and 89B(1)(a) and (2): Prohibited political contributions – Major Developers

Trespasses on personal rights and liberties

17. Proposed s 89B(1)(a) and (2) prohibit major developers from making political donations.
18. Proposed s 82B defines *major developer* to be, in general terms, any person who has lodged development applications totalling more than \$5,000,000 in the last 5 years.
19. These sections indirectly restrict freedom of speech in the form of freedom of communication about government or political matters.⁷⁹ They do so in two ways.

First, the capacity to engage in modern electoral campaigning depends upon access to funding. Less funding as a result of a law that prohibits political contributions by certain groups could therefore be said to indirectly burden (or limit) political communication by those who receive the funding.

The link between money and political communication was recognised by the Supreme Court of the United States in *Buckley v Valeo*:⁸⁰

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

⁷⁹ These provisions raise similar issues to those of the ACT *Gaming Machine (Political Donations) Amendment Bill 2003*. The Legislative Assembly for the Australian Capital Territory's Standing Committee on Legal Affairs *Scrutiny Report No. 33 – 2003*, pp 1 – 13 provides a lengthy discussion of the issues raised by that Bill regarding political communication and freedom of association.

⁸⁰ 424 US 1 at 19 (1976).

Second, it is arguable that the donation of money to political parties is itself a non-verbal (perhaps symbolic) act that is political communication by the persons or organisations seeking to make the political contribution.

Donation of money may express a preference for an ideological or party position (including on issues such as land development policies). Hence, a prohibition on certain monetary contributions to the political process could burden freedom of communication about government or political matters.

20. Freedom of political communication is an aspect of the freedom of speech that the High Court has recognised as being implied from the Commonwealth Constitution.
21. In *Lange v ABC*,⁸¹ the High Court stated:

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be “directly chosen by the people” of the Commonwealth and the States, respectively.
22. Although s 89B imposes a burden upon political communication, that does not necessarily mean that it should be seen to trespass *unduly* upon personal rights and liberties.
23. The section seeks, among other things, to limit the *perceived undue influence* on the political process caused by money contributions by major developers.
24. In *Australian Capital Television Pty Ltd v Commonwealth*,⁸² the High Court accepted that the object of Part IIID of the *Political Broadcasts and Political Disclosures Act 1991* (Cth) was legitimate in seeking to limit the corrupting influence of money within the political process:⁸³

a comparison or balancing of the public interest in freedom of communication and the public interest in the integrity of the political process might well justify some burdens on freedom of communication. [per Mason CJ]
25. However, it may be questioned whether proposed section 89B is reasonably appropriate and adapted (to use the test now applied by the High Court in assessing these issues) to achieving its object.
26. In its specific application to major developers, the provision is *not a general law* in regard to political contributions.

It is discriminatory in banning only the contributions made by certain third parties to the political process. It does not ban donations generally and no limits are imposed upon the donations that might be made by other organisations (including

⁸¹ (1997) 189 CLR 520 at 559.

⁸² (1992) 177 CLR 106.

⁸³ Part IIID envisaged that, during an election period, political broadcasts by governments were to be prohibited outright and that political broadcast by other person were to be subject to limited exception. While the court affirmed the object of minimizing the “risk of corruption of the Parliament and the reduction of an untoward advantage of wealth in the formation of political opinion” [per Brennan J], the majority found that Part IIID was nevertheless unconstitutional for impairing the implied freedom.

organisations that might also cause concern through their influence on the political process).

27. Further, as the Bill prohibits a certain form of political communication by one segment of the community, it may be seen as dealing with the character of the ideas or information rather than regulating an activity or mode of political communication.

28. The Committee notes that proposed subsections 89B(1)(a) and (2) trespass on personal rights and liberties by indirectly restricting the political communication of major developers and any parties they support.

29. The Committee notes that restrictions on political communication in order to limit undue influence on the political process may be justified in some circumstance.

30. The Committee further notes, however, that the provision discriminates against major developers rather than being a law applying generally to political contributions.

31. The Committee refers to Parliament the question as to whether prohibiting political donations by major developers trespasses unduly on personal rights and liberties.

Schedule 1.1 [11]: Proposed subsections 89B(1)(b) and (2): Prohibited political contributions – Persons guilty of offences involving bribery or corruption

Trespasses on personal rights and liberties

32. Proposed subsections 89B(1)(b) and (2) prohibit a person who has been found guilty of an offence involving bribery or corruption from making a political donation.

33. As noted above, prohibiting a person making political donations is a trespass on a person's right to political communication.

34. In contrast to the prohibition relating to major developers, the prohibition on political contributions by 'a person who has been found guilty of an offence involving bribery or corruption' may be seen as a ban of general application rather than a ban that targets one segment of the community, because any person from any part of the community with such a conviction would be prohibited from making political contributions.

35. The provision takes no account of the time which has elapsed since any such offence may have been committed.

36. Under the *Criminal Records Act 1991*, it would appear that relevant convictions for which a sentence of more than six months has *not* been given would not be counted for the purposes of s 89B(1)(b) after a crime free period of 10 years.⁸⁴

37. However, any person who had been sentenced to six or more months' imprisonment for an offence involving bribery or corruption could never make a political

⁸⁴ The *Criminal Records Act 1991* provides, with certain exceptions, that an offence for which a sentence of more than six month's imprisonment has *not* been imposed may be *spent* after the relevant crime free period, which is normally 10 years. A "spent conviction" is not to be counted in the application to the person of a provision of an Act or statutory instrument.

contribution, regardless of any demonstrated rehabilitation by the person or how unrelated to the political process the offence may have been.

38. The term “an offence involving bribery or corruption” is not defined. Given the range of meanings that can be given to the word “corruption”, this could create uncertainty as to whether or not any such person could ever make a political donation.

39. The Committee notes that proposed subsections 89B(1)(b) and (2) trespass on personal rights and liberties by indirectly restricting the political communication of any person who has been found guilty of an offence involving bribery or corruption, regardless of the time elapsed since the offence was committed.

40. The Committee notes that restrictions on political communication in order to limit undue influence may be justified in some circumstances.

41. The Committee refers to Parliament the question as to whether prohibiting political donations by such persons trespasses unduly on personal rights and liberties.

Schedule 1.1: Proposed sections 82A, 85, 89C, 89D and 89E: Disclosure obligations

Trespasses on personal rights and liberties

42. Proposed sections 82A, 85, 89C, 89D and 89E *increase* the disclosure obligations upon donors and certain persons, including candidates, parties, and groups.

43. They do so by:

- requiring declarations of political contributions to candidates to be lodged *prior to* an election [proposed s 85];
- requiring donations totalling more than \$1,000 over a 12 month period from any person or organisation to be accompanied by a donors form, which includes certain information about the donor [proposed ss 89C and 89D];
- requiring a party, person or group (as prescribed) to lodge a donor form with the Authority within 21 days of receiving the donation [s 89C(2)]; and
- requiring the Authority to publish each donor form in a register and on the internet within 14 days of receipt [proposed s 89E].

44. These provisions affect the right to keep such information private.

45. Donors may wish to provide financial support to a candidate without being seen to make a public political statement. Such a donor may consider political preferences to be a private matter. Publicity regarding the support of a candidate might also conflict with other legitimate interests of the donor.

46. The disclosure of such information is consistent with the existing objects of the *Election Funding Act 1981* (NSW).

The Act already requires contributions:⁸⁵

- to a party of more than \$1,500;
- to a group of more than \$1,000, or
- to a candidate of more than \$200

to be disclosed, together with the name and address of the person making the contribution.

47. The regime proposed by the Bill would require donations to be disclosed soon after they were given, certain declarations to be lodged prior to elections,⁸⁶ and more details to be disclosed.

The information to be disclosed is still information that relates, or has the potential to relate, to the performance of an important public office.

Moreover, the regime would relate to a public office in which there is a high need for ongoing scrutiny and transparency in decision-making and of potential influences upon such decision-making.

<p>48. The Committee refers to Parliament whether requiring the contributions of donors to be made public prior to an election trespass unduly on personal rights and liberties.</p>

The Committee makes no further comment on this Bill.

⁸⁵ S 87 of the Election Funding Act 1981. Groups need only disclose donations from the day of nomination until the 30th day after polling day [s 84].

⁸⁶ The disclosure required under the current act are required to be made *120 days after the day for the return of the writs for a general election (or, where in certain cases, a by-election)*.

7. DUTIES AMENDMENT (LAND RICH) BILL 2003

Matters for comment raised by the Bill

Introduced: 14 November 2003
 House: Legislative Assembly
 Minister: The Hon M Egan MLC
 Portfolio: Treasurer

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

1. The object of this Bill is to repeal and re-enact the so-called “land rich” provisions in the *Duties Act 1997* (the Act), and in so doing to make the amendments set out below.
2. Unless otherwise noted, section numbers throughout this Report refer to the sections substituted by the Bill.

Background

3. According to the Bill’s Second Reading speech:

The land rich provisions of the Duties Act were introduced into stamp duties legislation in 1986. The provisions were introduced to deal with techniques that had developed at the time to avoid payment of transfer duty on acquisitions of interests in real estate. Instead of transferring title from owner to owner, the land was acquired by a company or trust set up primarily to hold the land, and the shares in the company or units in the trust were transferred. The owners of the company or unit holders in the trust achieved the same ability to control the use of the land as they would have if they had purchased the land directly. However, by transferring interests indirectly through the transfer of company shares or trust units, duty was reduced from up to 5.5 per cent to 0.6 per cent... The measures contained in this bill will restore the integrity of the land rich provisions to ensure the equitable treatment of transactions which in substance relate to the transfer of interests in land.⁸⁷

4. **Pursuant to a suspension of Standing Orders, the Bill passed all stages in the Legislative Assembly on 13 November 2003 and in the Legislative Council on 19 November 2003.**
5. **Under s 8A(2), the Committee is not precluded from reporting on a Bill because it has passed a House of the Parliament or become an Act.**

The Bill

6. The Bill replaces the current concept of a *private corporation* with the concept of a *landholder*, which includes private companies, private unit trust schemes and wholesale unit trust schemes [s 106(1)].

⁸⁷ Ms A P Megarrity, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 14 November 2003.

A **private unit trust scheme** is a unit trust scheme that is not a public unit trust scheme, or a wholesale unit trust scheme.

A **public unit trust scheme** means:

- a listed trust;
- a widely held trust; or
- an imminent public trust.

A **wholesale unit trust scheme** is, broadly, a unit trust scheme in which not less than 80% of the units are held by investors who are trustees of certain funds or trusts, and in which each such investor holds less than 50% of the units; or a unit trust scheme which it is anticipated will become a wholesale unit trust scheme within 12 months.

“Land rich” landholders

7. The test of whether a landholder is “land rich” is changed in two respects, namely:
 - the unencumbered value of the landholder’s New South Wales land holdings is increased from \$1,000,000 to \$2,000,000; and
 - the proportion of the total land holdings of a landholder to the unencumbered value of all its property is reduced from 80% to 60% [s 106].
8. In calculating the unencumbered value of a landholder’s property, the current duplication of discretions vested in the Chief Commissioner of State Revenue is removed [s 106(3) and (4)].

Land holding

9. For the purposes of Part 1 of the Act, a **land holding** is an interest in land other than the estate or interest of a mortgagee, chargee or other secured creditor or a profit à prendre.⁸⁸
10. An interest in land, however:
 - is not a land holding of a unit trust scheme, unless the interest is held by the trustees in their capacity as trustees of the scheme; and
 - is not a land holding of a private company, unless the interest of the private company in the land is a beneficial interest.
11. The amended Act will provide for the effect of uncompleted agreements for the disposal or acquisition of property other than land, in addition to the current provisions for uncompleted agreements relating to transfers of land [s 108(2)].
12. The constructive ownership of land and other property in the current provisions of the Act may be traced through a subsidiary of a private corporation, or through a discretionary trust. These provisions, in so far as they apply to subsidiaries, are

⁸⁸ *Profit à prendre* is a right of taking the produce or part of the soil from the land of another person, eg, rights of common, of pasture, or vesture and herbage.

replaced with provisions that enable the ownership trail to be traced through *linked entities* [s 109].

13. A *linked entity* of a unit trust scheme or private company is defined as a person:
- (a) who is part of a chain of persons:
 - (i) which includes the principal entity, and
 - (ii) which is comprised of one or more links, and
 - (iii) in which a link exists if a person would be entitled to receive not less than 20% of the unencumbered value of the property of another person if the other person were to be wound up, and
 - (iv) in which the principal entity would be entitled to receive not less than 20% of the unencumbered value of the property of the person if all the persons in the chain (other than the principal entity) were to be wound up, and
 - (v) which does not include in any of the links between the person and the principal entity, a public unit trust scheme, a wholesale unit trust scheme or a company whose shares are listed on the Australian Stock Exchange or an exchange of the World Federation of Exchanges; and
 - (b) who is not a public unit trust scheme, a wholesale unit trust scheme or a company whose shares are listed on the Australian Stock Exchange or an exchange of the World Federation of Exchanges [s 109(2)].

Acquiring an interest in a landholder

14. The Bill makes changes to the way in which interests in a landholder may be acquired.⁸⁹
15. It replaces the requirement for the acquisition of a majority interest – which was an entitlement to more than 50% of the property of a private corporation in the event of a distribution of all of the property of that corporation – with the requirement for the acquisition of a *significant interest* in a landholder.

A *significant interest* is an entitlement, in the event of a distribution of all of the property of the landholder, to 20% or more of the property in the case of a private unit trust scheme, or 50% or more of the property in the case of a wholesale unit trust scheme or private company [s 111].

16. The manner in which an interest may be acquired is updated to accord with current business practice [s 112]. In the Bill's Second Reading speech it was stated that:

[t]he property industry has moved on since 1986. Changing business practices have resulted in the increased use of indirect holdings in land becoming a recognised method of investment in real estate rather than direct holdings. In addition, many large investors have become more sophisticated and deals more complex, avoiding the land rich provisions in an increasing number of cases. In recent years direct ownership of large commercial properties by one entity has become rare. The values of the deals are too great, and investors are more aware of the need to diversify their risk. In this

⁸⁹ An *interest* is defined as where a person has an entitlement (otherwise than as a creditor or other person to whom the landholder is liable) to a distribution of property from the landholder on a winding up of the landholder or otherwise: new s 111(1) of the *Duties Act 1997*.

environment unit trusts have emerged as the preferred investment vehicle for indirect investment in such real estate. They enable a number of investors to pool their resources and share the benefits of high-value properties without attracting duty. Unit trusts are also more flexible than companies as there is no fixed number of shares, so new investors can be more easily accommodated.⁹⁰

Relevant acquisitions

17. Liability for duty is incurred when a person makes a **relevant acquisition** in a landholder [s 113]. A relevant acquisition is made when a person acquires:
- a significant interest in a landholder; or
 - an interest which, when aggregated with interests of the person or associated persons, amounts to a significant interest; or
 - an interest which, when aggregated with other interests acquired by the person or other persons acting under transactions that comprise substantially one arrangement between the acquirers, amounts to a significant interest.

A relevant acquisition is also made when a person who has a significant interest in a landholder, or an interest which, when aggregated with interests of the person or associated persons, amounts to a significant interest, acquires a further interest in the landholder [s 114].

18. Some further information concerning acquisitions will now be required to be included in acquisition statements lodged with the Chief Commissioner, eg, the unencumbered value of the property of the landholder at the date of the relevant acquisition [s 115(2)].
19. A concession is made for primary producers. If a landholder is a primary producer when a relevant acquisition is made and the landholder's land holdings in all places, whether within or outside Australia, comprise less than 80% of the unencumbered value of all its property, no duty is chargeable in respect of the acquisition.⁹¹
20. However, duty will become chargeable if the landholder ceases to be a primary producer at any time within 5 years after the relevant acquisition is made [s 118(8)].

Exemptions

21. Various changes are made to the exception of interests from the land rich provisions. The exception of an acquisition comprising a transaction that is not liable for transfer duty under the general provisions of the Act is removed.
22. Exceptions are made in relation to, eg, intergenerational rural transfers; the acquisition of interests by certain charitable or benevolent societies or institutions; and financial agreements under the *Family Law Act 1975* (Cth) [s 119].

⁹⁰ Ms A P Megarrity, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 14 November 2003.

⁹¹ Pursuant to s 118(10), **primary producer** means a landholder whose land holdings in all places, whether within or outside Australia, wholly or predominantly comprise land used for primary production, as defined in s 274 of the *Duties Act 1997*.

23. The current provision for the phasing-in of duty in s 122 of the Act is repealed, and is not replaced.
24. Other provisions in Parts 1 and 2 of Chapter 3 are re-enacted without amendment, except for minor amendments or consequential amendments.
25. The Schedule of amendments to the Act also includes savings and transitional provisions necessitated by the amendments.

Issues Arising Under s 8A(1)(b)

Clause 2

Trespass on personal rights and liberties - Retrospectivity

26. Clause 2 of the Bill provides that:

This Act is taken to have commenced on the day on which the Bill for this Act was introduced into the Legislative Assembly.
27. This means in effect, that the Bill is not only retrospective, but is treated by its proposer as being the law from the time the intention to introduce it is made public.
28. The Senate Scrutiny of Bills Committee has held that legislation of this nature:

carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement.⁹²
29. Clause 2 of the Bill delimits the date of the retrospectivity not by reference to, eg, a Ministerial announcement, but by the date of the Bill's introduction to the Legislative Assembly. Nonetheless, the principle remains the same, namely, that:

publishing an intention to process a bill through Parliament does not convert its provisions into law; only Parliament can do that.⁹³

30. **The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights.**
31. **The Committee refers to Parliament the question of whether the retrospective effect of the amendments to the *Duties Act 1997* to the date which they were introduced into the Legislative Assembly unduly trespasses on personal rights and liberties.**

The Committee makes no further comment on this Bill.

⁹² Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, at 12-13.

⁹³ Senate Scrutiny of Bills Committee, *The Work of the Committee during the 37th Parliament*, at 21.

8. DUTIES AMENDMENT (STAMP DUTY REDUCTION) BILL 2003*

Matters for comment raised by the Bill

Introduced: 20 November 2003
 House: Legislative Assembly
 Member: Mr J Brogden MP
 Portfolio: Private Member

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The object of this Bill is to amend the *Duties Act 1997*:
 - (a) to reduce, in stages, the general rate of duty chargeable on dutiable transactions; and
 - (b) to remove the distinction in the First Home Plus scheme between the Metropolitan Area and other areas.

The Bill

2. Schedule 1[1] of the Bill replaces s 32 of the *Duties Act 1997* (the Act) to provide for the staged annual reduction of the general rate of duty chargeable on a **dutiable transaction**⁹⁴ as follows:

Dutiable value of the dutiable property subject to the dutiable transaction	Current Rate	Proposed Rate		
		Rate of duty from 1 July 2004 to 30 June 2005	Rate of duty from 1 July 2005 to 30 June 2006	Rate of duty from 1 July 2006
Not more than \$14,000	\$1.25 for every \$100, or part, of the dutiable value	\$1.19 for every \$100, or part, of the dutiable value	\$1.16 for every \$100, or part, of the dutiable value	\$1.13 for every \$100, or part, of the dutiable value

⁹⁴ A **dutiable transaction** is defined by s 8 of the Act as:

- (a) a transfer of dutiable property, and
- (b) the following transactions:
 - (i) an agreement for the sale or transfer of dutiable property,
 - (ii) a declaration of trust over dutiable property,
 - (iii) a surrender of an interest in land in New South Wales,
 - (iv) a foreclosure of a mortgage over dutiable property,
 - (v) a vesting of dutiable property by or as a consequence of a court order,
 - (vi) the enlargement of a term in land into a fee simple under section 134 of the *Conveyancing Act 1919*.

Dutiable value of the dutiable property subject to the dutiable transaction	Current Rate	Proposed Rate		
		Rate of duty from 1 July 2004 to 30 June 2005	Rate of duty from 1 July 2005 to 30 June 2006	Rate of duty from 1 July 2006
More than \$14,000 but not more than \$30,000	\$175 plus \$1.50 for every \$100, or part, by which the dutiable value exceeds \$14,000	\$166.60 plus \$1.43 for every \$100, or part, by which the dutiable value exceeds \$14,000	\$162.40 plus \$1.39 for every \$100, or part, by which the dutiable value exceeds \$14,000	\$158.20 plus \$1.35 for every \$100, or part, by which the value exceeds \$14,000
More than \$30,000 but not more than \$80,000	\$415 plus \$1.75 for every \$100, or part, by which the dutiable value exceeds \$30,000	\$395.40 plus \$1.66 for every \$100, or part, by which the dutiable value exceeds \$30,000	\$384.80 plus \$1.62 for every \$100, or part, by which the dutiable value exceeds \$30,000	\$374.20 plus \$1.58 for every \$100, or part, by which the dutiable value exceeds \$30,000
More than \$80,000 but not more than \$300,000	\$1,290 plus \$3.50 for every \$100, or part, by which the dutiable value exceeds \$80,000	\$1,225.40 plus \$3.33 for every \$100, or part, by which the dutiable value exceeds \$80,000	\$1,194.80 plus \$3.24 for every \$100, or part, by which the dutiable value exceeds \$80,000	\$1,164.20 plus \$3.15 for every \$100, or part, by which the dutiable value exceeds \$80,000
More than \$300,000 but not more than \$1,000,000	\$8,990 plus \$4.50 for every \$100, or part, by which the dutiable value exceeds \$300,000	\$8,551.40 plus \$4.28 for every \$100, or part, by which the dutiable value exceeds \$300,000	8,332.80 plus \$4.16 for every \$100, or part, by which the dutiable value exceeds \$300,000	\$8,094.20 plus \$4.05 for every \$100, or part, by which the dutiable value exceeds \$300,000
More than \$1,000,000	\$40,490 plus \$5.50 for every \$100, or part, by which the dutiable value exceeds \$1,000,000	\$38,511.40 plus \$5.23 for every \$100, or part, by which the dutiable value exceeds \$1,000,000	\$37,442.80 plus \$5.09 for every \$100, or part, by which the dutiable value exceeds \$1,000,000	\$36,444.20 plus \$4.95 for every \$100, or part, by which the dutiable value exceeds \$1,000,000.

3. This Bill also removes the distinction between the *Metropolitan Area*⁹⁵ and other areas for the purposes of the First Home Plus Scheme, so that persons acquiring homes in non-metropolitan areas will be entitled to the same concessional rates of duty that currently apply to persons acquiring homes in the Metropolitan Area.

Currently under the First Home Plus Scheme, eligible first home buyers do not pay duty on homes costing up to \$200,000 in the metropolitan area or up to \$175,000 in other parts of the State.

⁹⁵ Currently defined in the Dictionary to the Act as meaning the County of Cumberland and the following local government areas: Blue Mountains City, Camden, Gosford City, Lake Macquarie City, Newcastle City, Penrith City, Shellharbour City, Wollondilly, Wollongong City and Wyong.

Concessions on duty are on a sliding scale between \$200,000 and \$300,000 in the metropolitan area and between \$175,000 and \$250,000 in other parts of the State.

Additionally, an exemption from duty is provided for first home buyers purchasing a vacant block of land in the metropolitan area valued up to \$95,000, with concessions on a sliding scale up to \$140,000.

4. This Bill is to commence on the date of assent, except for Schedule 1[1] which will commence on 1 July 2004, which is the date that the proposed new rate of stamp duty will come into force.

Issues Arising Under s 8A(1)(b)

5. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

9. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (PLANNING AGREEMENTS) BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
 House: Legislative Council
 Minister: The Hon C J Knowles MP
 Portfolio: Infrastructure, Planning and Natural Resources

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
			✓	

Purpose and Description

- The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* to extend the means by which planning authorities (ie, councils and the Minister) may obtain contributions from developers to be applied for the provision of public benefits.

Specifically, developers and consent authorities will be able to enter voluntary contribution agreements.

Background

- Section 94 of the Act provides that if a consent authority is satisfied that a development is likely to require the provision of, or increase the demand for, public amenities or public services within the area, the consent authority may grant consent to the application subject to a condition requiring:

- the dedication of land free of cost;
- the payment of a monetary contribution; or
- both

to be applied towards meeting the cost of providing those amenities or services.

- In the second reading speech,⁹⁶ the Parliamentary Secretary stated that:

[t]he development industry generally accepts that levying of contributions to local infrastructure is legitimate. However, section 94 is seen by both the development industry and councils to be too inflexible.

- The second reading speech states that this Bill is “the first step in the legislative reform in New South Wales of the provision of public infrastructure through the planning system”. It also states that:

[i]n January 2000 a review committee recommended to the [then] Minister for Planning a range of significant reforms. The Minister had the report published in May 2000 and submissions were invited from interested stakeholders. The majority of the recommendations of the review committee were widely supported. Progress on these

⁹⁶ Mr Henry Tsang MLC, Parliamentary Secretary, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2003.

matters was suspended during the discussions on Planfirst, which the Minister has since had reviewed. Following on from the formation of the new Department of Infrastructure, Planning and Natural Resources, and the review of Planfirst, the Minister asked Gabrielle Kibble, the former head of the Department of Urban Affairs and Planning, to chair a task force to look more closely at the way section 94 and the compulsory developer contribution system currently operates. Her task force is due to report next year.⁹⁷

5. The Parliamentary Secretary in the second reading speech said that “in these circumstances it would be premature to bring forward the wider package of reforms set out in the report of the review committee that more directly relate to the way compulsory developer contributions are levied under section 92.”
6. In the meantime, this Bill introduces *voluntary developer contributions* as an additional means by which planning authorities can fund public works necessitated by development.

The Bill

7. The Bill amends the Act to:

recognise for the first time that planning authorities — that is, councils and the Minister administering the Act — may enter into *voluntary* agreements to obtain a development contribution to be applied for a public purpose...

The practice of entering into planning agreements in addition to, or as an alternative to section 94 contributions, is well established... By recognising the reality in legislation, the Government is able to both regulate the nature and extent of the agreements and also regulate the way in which the agreements are entered into and publicised.⁹⁸

8. The principal amendment is made by Schedule 1, clause 3, which inserts sections 93C – 93I into the Act.

These amendments enable a consent authority or a planning authority⁹⁹ to obtain a development contribution to be used for any public purposes by entering into a *planning agreement* with a developer under new section 93E or by imposing a condition on a development consent under (current) section 94 [proposed s 93C].

9. ***Public purpose*** is defined to include:

- any purpose for which land, a monetary contribution or a material public benefit may be used or applied under section 94;
- the provision and maintenance of affordable housing;
- the provision of public amenities or services comprising infrastructure; and
- monitoring the impacts of development proposed [s 93D].

⁹⁷ Second Reading Speech, Mr Henry Tsang MLC, Parliamentary Secretary, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2003.

⁹⁸ Second Reading Speech, Mr Henry Tsang MLC, Parliamentary Secretary, Legislative Council, *Parliamentary Debates (Hansard)*, 19 November 2003.

⁹⁹ “***Planning authority***” is defined for the purposes of section 93E as a council, the Minister or a corporation.

10. Proposed s 93C(2) provides that these amendments do not derogate from, or otherwise affect, any provision of an environmental planning instrument.
11. The amendments prescribe the contents of planning agreements [proposed s 93E(3)] and require that a planning agreement must not be entered into, amended or revoked unless public notice of it has been given.

Copies of the proposed agreement must be available for public inspection for a minimum of 28 days [proposed s 93E(8)].

12. The key features of the proposed planning agreement are set out in the second reading speech.

... planning agreements between a developer and council will be voluntary—it is important to understand that no planning authority can compel a developer to enter into a planning agreement; once a planning agreement has been made it will be legally binding—and run with the land and so be enforceable by planning authorities against subsequent purchasers to whom all or part of the land is on-sold by the developer; the agreement would clearly state whether it is an alternative to or coexists with the usual section 94 contribution; planning agreements would normally provide for at least an equivalent level of services or amenities to those reasonably expected under a contributions plan; planning agreements can provide for infrastructure for a range of public purposes, not just those permitted by section 94; the substance of proposed agreements must be the subject of community consultation before they are made, amended or revoked; and recognising that a properly entered into planning agreement is a relevant consideration for a consent authority when determining a development application or rezoning land.

13. A planning agreement will be void to the extent that it requires or allows anything to be done that would breach an environmental planning instrument or an applicable development consent [proposed s 93E(9)].
14. The amendments provide for planning agreements to be registered by the Registrar-General if those persons with an interest in the land agree to the registration [proposed s 93F(1)]. Once registered, a planning agreement binds the owner of the land to which it applies and any successor in title to the land [proposed s 93F(3)].
15. Proposed s 93G requires a council to include in its annual report particulars of current planning agreements to which it is a party.
16. Proposed s 93I provides that:

A provision of a planning agreement...is not invalid by reason only that there is no connection between the development and the object of expenditure of any money required to be paid by the provision.

Issues Arising Under s 8A(1)(b)

Clause 2 – Commencement by proclamation

17. This Bill is to commence on a day or days to be appointed by proclamation.

18. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

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| <p>19. The Committee has written to the Minister seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Bill.</p> |
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The Committee makes no further comment on this Bill.

10. LOCAL GOVERNMENT AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 20 November 2003
 House: Legislative Council
 Minister: The Hon A B Kelly MLC
 Portfolio: Local Government

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
		✓	✓	

Purpose and Description

1. This Bill amends the *Local Government Act 1993* to, among other things:
 - (a) introduce a scheme for formulating and implementing proposals for the structural reform of local government areas and councils;
 - (b) preserve and make amendments to the existing provisions relating to the constitution, dissolution, amalgamation and boundary alterations of local government areas; and
 - (c) amend arrangements regarding the discipline of councillors, council staff and council delegates.
2. The Bill also makes consequential amendments to the *Independent Commission Against Corruption Act 1988* with regard to the jurisdiction of the Independent Commission Against Corruption to deal with conduct that could constitute or involve a substantial breach of a code of conduct applying to a council.

Background

3. In his second reading speech,¹⁰⁰ the Minister stated:

The bill introduces amendments that will encourage councils to examine their operations and plan for the future without financial burden.

The amendments will clarify existing structural reform mechanisms in relation to amalgamations and boundary alterations within the *Local Government Act 1993* and improve community consultation, making the process open and inclusive.

Overall, the amendments will provide a more streamlined process to facilitate structural reform of local government.

This bill is designed to increase community consultation in regard to local government reform without burdening the public with expensive and time-consuming processes.
4. In regard to the discipline of councillors, council staff and council delegates, the Minister noted:

The reputations of an entire council should not be tarnished because of the actions of one or a couple of councillors.

Most councillors are community-minded people who do a fantastic job for their communities. The Government wants to ensure these councillors are protected.

¹⁰⁰The Hon Tony Kelly MLC, Minister for Local Government, *Parliamentary Debates (Hansard)*, Legislative Council, 20 November 2003.

At present there are limited circumstances in which an individual councillor ceases to hold civic office due to misbehaviour.¹⁰¹ ...

Yet there have been a number of cases in recent years where, because of serious misbehaviour from a small number of councillors, the Minister has had little option but to dismiss the entire council.

There are other cases where, while the council has not been dismissed, the behaviour of a few councillors has had a serious impact on the efficiency and effectiveness of the council.

5. According to the second reading speech, the Bill contains a number of provisions aimed at redressing this situation.

The Bill

Amendments relating to local government areas and structural reform [Schedule 1]

6. Proposed section 209 enables a proclamation constituting an area to include provisions making determinations about any of the following:
- (a) the division of the area into wards;
 - (b) ward boundaries and ward names;
 - (c) the number of councillors to be elected at the next ordinary election;
 - (d) the popular election of the mayor;
 - (e) the initial term of office of the mayor;
 - (f) establishing a community consultative committee;
 - (g) a scheme for limiting the council's general income for a period of up to 7 years; and
 - (h) directing the Remuneration Tribunal to make a remuneration determination for the councillors or mayor.
7. Schedule 1 also makes amendments:
- to enable the dissolution of an area without a public inquiry if the Boundaries Commission recommends the dissolution of the area [section 212];
 - to enable a proclamation:

¹⁰¹Proposed section 440F provides that:

(1) "**Misbehaviour**" of a councillor means any of the following:

(a) a contravention by the councillor of this Act or the regulations,

(b) a failure by the councillor to comply with an applicable requirement of a code of conduct adopted under this Act,

(c) an act of disorder committed by the councillor at a meeting of the council or a committee of the council, but does not include a contravention of the disclosure requirements of Part 2.

Note. A contravention of the disclosure requirements of Part 2 is dealt with under other provisions of this Chapter.

(2) A reference in this Division to *misbehaviour* or an *incident of misbehaviour* includes a reference to misbehaviour that consists of an omission or failure to do something.

- constituting or dissolving an area to include provisions authorising the Minister to make determinations about the transfer or apportionment of assets, rights and liberties and the transfer of staff [s 213];
 - to implement a proposal for the constitution of an area [s 218];
 - implementing an amalgamation or boundaries proposal to contain provisions of the kind referred to in proposed s 209 for redetermining ward boundaries, ward names and abolishing wards; and
- to authorise the Director-General of the Department of Local Government (the Director-General) to make proposals for the constitution of areas to the Minister [s 215].

Disciplinary action for misbehaviour of councillors [Schedule 2]

8. Schedule 2 amends the *Local Government Act 1993* in regard to the disciplinary action which may be taken against a local councillor, including:
- allowing a council by resolution at a meeting to censure a councillor for misbehaviour [proposed s 440G];
 - allowing a council to apply to the Director-General to suspend a councillor for one month for serious misbehaviour [proposed sections 440H – 440L];
 - prohibiting the payment of remuneration to a councillor who is suspended from civil office, or whose right to receive remuneration is suspended [Schedule 2, clause 1, proposed s 248A]; and
 - removing the requirement that the negligence for which a councillor or member of council staff can be surcharged has to be “culpable” negligence [Schedule 2, clause 2, proposed s 435(2)(a)].
9. A councillor facing suspension must be given the right to respond to the allegation of misbehaviour and may appeal to the Local Government Pecuniary Interest and Disciplinary Tribunal (the Tribunal) for review of the Director-General’s decision to suspend him or her [s 440M].

However, the proposed amendment to section 485(1) provides that a decision of the Tribunal made pursuant to s 440M may *not* be appealed to the Supreme Court [Schedule 2, clause 15].

10. The power of the Local Government Pecuniary Interest Tribunal (renamed under this Bill the *Local Government Pecuniary Interest and Disciplinary Tribunal*) has been expanded.

In addition to considering appeals against suspension, the Tribunal will be able to discipline those councillors previously suspended for one month for misbehaviour but who have not ceased their misbehaviour.

11. In such a case, the Tribunal can:

reprimand or counsel a councillor, suspend payment of a councillor's fees for up to six months, suspend the councillor's right to participate in meetings for up to six months, or suspend both fees and rights to attend meetings for up to six months.¹⁰²

This will ensure that that a serious breakdown in council operations caused by the serious misbehaviour of a councillor, can be dealt with without having to dismiss the entire council.¹⁰³

Code of conduct

12. The Bill substitutes section 440, empowering the regulations to prescribe a model code of conduct. The code "will set a minimum set of behavioural standards. It will be mandatory for councils to adopt this code as a minimum code of conduct. Councils will be able to tailor their code to meet their individual circumstances where necessary, so long as any supplementations are not inconsistent with the model code"¹⁰⁴ [Schedule 2, clause 3].

13. Councillors and staff will be obliged to comply with the code of conduct [proposed subsection 440(5)].

A serious or substantial breach of this code will be a disciplinary matter such as to attract the jurisdiction of the ICAC.¹⁰⁵

14. According to the second reading speech, the code is currently being drafted in consultation with a "reference group" including the Local Government and Shires Association, the Local Government Managers Association, and Councillors.

15. New schedule 6A, sets out a list of conduct that may be included in the model code, including improper or unethical conduct, abuse of power, discrimination in employment and an act of disorder¹⁰⁶ [Schedule 2, clause 19].

Miscellaneous amendments [Schedule 3]

16. The Bill prohibits a councillor from directing or influencing a staff member in the performance of his or her duties [Schedule 3, clause 4, proposed s 352].

17. Schedule 3, clause 2, inserts new Parts 5 [proposed ss 265H – 265J] and 6A [proposed ss 318A – 318C] into Chapter 10 of the Act, providing, among other things, that the Minister may:

- approve a reduction in the number of councillors if a council applies for a reduction [proposed s 265H];

¹⁰²See Schedule 1, clause 13, proposed section 482A.

¹⁰³the Hon Tony Kelly MLC, Minister for Local Government, *Parliamentary Debates (Hansard)*, Legislative Council, 20 November 2003.

¹⁰⁴the Hon Tony Kelly MLC, Minister for Local Government, *Parliamentary Debates (Hansard)*, Legislative Council, 20 November 2003.

¹⁰⁵the Hon Tony Kelly MLC, Minister for Local Government, *Parliamentary Debates (Hansard)*, Legislative Council, 20 November 2003.

¹⁰⁶An "act of disorder" is defined in section 490A [Schedule 2, clause 17]:

...a councillor commits an **act of disorder** if the councillor, at a meeting of the council or a committee of the council, does anything that is prescribed by the regulations as an act of disorder for the purposes of this Chapter and Schedule 6A.

- change the number of councillors of a council or the number of wards in an area, on the advice of the Boundary Commission [proposed s. 265I];
- order the postponement of election requirements in relation to a council in connection with:
 - (a) an amalgamation, boundaries or structural reform proposal affecting the council; or
 - (b) an investigation or public inquiry being held into a council; or
 - (c) a matter affecting the boundaries of the council's areas that is under consideration by the Boundaries Commission [proposed s 318A – 318C].

Issues Arising Under s 8A(1)(b)

Clause 2 - Commencement

18. This Act is to commence on a day or days to be appointed by proclamation.
19. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

20. **The Committee understands from the Minister's office that there are a number of matters that need to be finalised before the amendments can commence, including the making of the new model code of conduct for councillors.**
21. **The Committee has written to the Minister asking for a timeframe in which these matters will be finalised and the Bill proclaimed.**

Schedule 2[4] - Appeals against suspension

22. The proposed s 440M provides that a councillor against whom an order of suspension is made by the Director-General may appeal against that order to the Local Government Pecuniary Interest and Disciplinary Tribunal.
23. However, the proposed amendment to s 485(1) provides that a decision of the Tribunal made pursuant to s 440M *may not* be appealed to the Supreme Court.

This appears to have the effect of precluding the review of the merits of the decision of the Tribunal. This is justifiable on the ground that the Tribunal is the appropriate expert body to determine whether suspension is appropriate.

24. The amendment to section 485(1) does not, however, appear to preclude judicial review. This is because judicial review is taken not to be precluded unless there is a clear and express legislative determination to the contrary.

In *Darling Casinos Ltd v NSW Casino Control Authority* it was held that a legislative intention to effectively preclude judicial review of a particular class of decisions should be expressed sufficiently clearly.¹⁰⁷

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| <p>25. The Committee considers that the Tribunal is the appropriate body to conduct a review of a suspension of a councillor and that providing that the merits of the Tribunal's decision is not reviewable does not unduly subject rights, liberties or obligations to non-reviewable decisions.</p> <p>26. In reaching this conclusion, the Committee notes that judicial review of the Tribunal's decision is not revoked by the operation of subsection 485(1) as amended.</p> |
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The Committee makes no further comment on this Bill.

¹⁰⁷ *Darling Casinos Ltd v NSW Casino Control Authority* (1997) 143 ALR 55.

11. REGISTERED CLUBS AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 14 November 2003
 House: Legislative Assembly
 Minister: The Hon Grant McBride MP
 Portfolio: Gaming and Racing

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. This Bill amends the *Registered Clubs Act 1976*. Among other things, it imposes various reporting and disclosure requirements on registered clubs, members of their governing bodies, top executives and employees.

These requirements relate to the disclosure of financial and other interests held by such persons and the contracts entered into by the club, including for consultancy services.

2. The Bill also requires clubs to report certain matters annually to members and places new controls on certain contracts and arrangements entered into by clubs.
3. The Bill makes the secretary and members of the governing body of a registered club liable (with certain defences available) if the club enters into a contract in contravention of the new requirements.

Background

4. The Government "Club Industry Taskforce" completed Stage One of its inquiry into registered clubs and reported its recommendations on 26 October 2003.¹⁰⁸

The Task Force comprises representatives of Clubs NSW, the Services Clubs Association, the New South Wales Bowling Association, the Clubs Managers Association of Australia, the Leagues Clubs Association of New South Wales, the Liquor, Hospitality and Miscellaneous Workers Union, the Department of Gaming and Racing and members of the Minister's staff.

5. The Minister said in his second reading speech that:

the aim of the task force was to develop a set of recommendations that would clearly identify and articulate what is expected of the club industry in New South Wales in the future. Particular emphasis was placed on the importance of transparency and accountability. The proposals that resulted from this process represent a significant

¹⁰⁸Stage 2 of the Task Force's deliberations will deal further with governance issues, as well as club elections and constitutions, codes of conduct, industry benchmarking and community service provision. The Task Force is expected to provide legislative proposals for Stage two in the 2004 autumn session of Parliament.

step in addressing the concerns not only of many club members but also of the general community.¹⁰⁹

6. According to the Minister, the work of the task force and the amendments made in this Bill respond to a number of repeated criticisms of the way in which many of the financial and related aspects of clubs are managed. The Minister stated that the amendments address a perception that many clubs in NSW do not meet basic transparency standards in their financial accounting and reporting to members and “that something is not quite right” with some of the clubs financial activities.¹¹⁰
7. This Bill deals specifically with the recommendations of the task force that relate to club governance, probity and various reporting requirements.
8. The Minister has stated that the industry supports the review process and “actively sought the Government’s involvement in this reform process.”¹¹¹

The Bill

Managers of registered clubs

9. According to the Minister, clubs are increasingly operating from more than one premises. In some cases, no one person is responsible for the daily management of secondary premises. To address this situation, the Bill introduces a requirement that a registered club with more than one set of premises appoint a different manager for each set of premises at which the secretary of the club is not in attendance [proposed s 34A]¹¹².

The appointment of a person as manager must be approved by the Liquor Administration Board (the Board). Failure to seek the Board’s approval is an offence with a maximum penalty of 20 penalty units (currently \$2,200).¹¹³

The Board cannot approve the appointment of a person as manager of a secondary premises unless it is satisfied that, among other things, the person is a *fit and proper person* for the job and that they understand their responsibilities for the responsible sale and supply of liquor and conduct of gambling on the premises [proposed s 34C].¹¹⁴

The introduction of this requirement does not relieve a secretary of a registered club of their obligation to comply with the requirements of the *Registered Clubs Act* and the *Gaming Machines Act* [proposed section 34E(3)].

¹⁰⁹the Hon Grant McBride MP, Minister for Gaming and Racing, *Parliamentary Debates (Hansard)*, 14 November 2003.

¹¹⁰the Hon Grant McBride MP, Minister for Gaming and Racing, *Parliamentary Debates (Hansard)*, 14 November 2003.

¹¹¹the Hon Grant McBride MP, Minister for Gaming and Racing, *Parliamentary Debates (Hansard)*, 14 November 2003.

¹¹²This requirement does not apply to premises of a registered club that has two premises only, and where they are within 10 kilometres of each other in metropolitan areas or within 50 kilometres of each other in a non-metropolitan area [proposed s 34A(2)].

¹¹³Proposed section 34D(1).

¹¹⁴These responsibilities are further spelt out in proposed section 34E.

Accountability of registered clubs

10. A new Part 4 is inserted into the Act, creating new requirements relating to the disclosure by members of the governing body and top executives of a registered club of personal interests or conflicts of interest they may have with the affairs of the club.
11. These include requiring such persons to declare to the secretary of the club:
 - their material personal interests in the affairs of the club (punishable by a maximum of 50 penalty units, currently \$5,500) [proposed s 41C];
 - any financial interest they may have acquired in a hotel within 14 days of acquiring the interest (punishable by a maximum of 50 penalty units, currently \$5,500) [proposed s 41D];¹¹⁵ and
 - any gift received after the commencement of the amendment from an affiliated body¹¹⁶ if the value of the gift exceeds \$500 (failure is punishable by a maximum of 50 penalty units, currently \$5,500) [proposed s 41E(1)].¹¹⁷

It is a defence to a prosecution of this offence if the defendant shows that they did not know, and could not reasonably be expected to have known, that the body from which the gift was received was an affiliated body [proposed s 41E(3)].

Register of interests and reporting requirements of registered clubs

12. Proposed sections 41G – 41I introduce a number of disclosure and reporting requirements for registered clubs themselves. These include requiring:
 - the secretary of a club to maintain a register of disclosures, declarations and returns made to the club under the proposed sections referred to above and to make the register available for inspection by a member of the club upon written request (failure to do so is punishable by a maximum of 100 penalty units or \$11,000) [proposed s 41G];
 - a registered club to report annually to each of its members on:
 - the disclosures, declarations and returns received by the club from members of the governing body, top executives and employees;
 - the number of top executives whose total remuneration exceeds \$100,000 and by how much;
 - details of any official overseas travel undertaken in the reporting period by members of the governing body or an employee, including any costs met by the club;

¹¹⁵If they already have such an interest when this amendment commences, they must give written notice of the interest to the secretary within 14 days of the commencement of the amendment. Similarly, if a person becomes a member of the governing body or a top executive of a club and they hold a financial interest in a hotel, they must notify the secretary of the interest within 14 days of becoming a member of the governing body or a top executive [proposed s 41D(2) and (3)]. Failure to comply with these requirements is punishable with maximum 50 penalty units (\$5500).

¹¹⁶An **affiliated body** refers to a related body corporate within the meaning of the *Corporations Act 2001* (Commonwealth), or any other body that within the period of 12 months immediately preceding the receipt of the gift obtained a grant or subsidy from the club [proposed s 41E (4)].

¹¹⁷A similar rule applies to an employee. See proposed section 41F.

- details of any loans made to an employee of the club during the reporting period;
- the name of any employee of the club whom the club is aware is a close relative of a member of the governing body or a top executive and the amount of the remuneration package paid to the employee;
- details of any amount in excess of \$30,000 paid by the club to any one consultant and the overall amount paid to consultants by the club in the reporting period;
- details of any settlement made with a member of the governing body or an employee as a result of a legal dispute and the amount of any associated legal fees incurred by the member or employee that were or are to be paid by the club (unless subject to a confidentiality order);
- total amount of the profits from the operation of approved gaming machines in the club; and
- the amount paid by the club during the relevant period to community development and support as required under Part 4 of the *Gaming Machine Tax Act 2001*.

Contracts with a registered club

Disposal of club lands

13. Under these amendments, a registered club cannot dispose of any of the club's land without prior approval of a general meeting of the ordinary members of the club. The disposal must be by way of public auction or open tender conducted by an independent real estate agent or auctioneer. The club must also obtain a valuation of the land from an independent registered real estate valuer [proposed s 41J].
14. If land is *not* disposed of in accordance with these requirements, the Director of Liquor and Gaming may apply to the Supreme Court for an order in relation to the disposition of the land [proposed s 41Q].
15. If the Supreme Court is of the opinion that the disposal of land was *not* to the benefit of the club members it may make an order:
 - (a) declaring the contract for the disposal of land void;
 - (b) directing that the land be transferred back to the club;
 - (c) directing the payment of an amount by the person to whom the land was disposed or any person who benefited from the disposal of land; and
 - (d) any other orders the Court considers appropriate or necessary.
16. The Supreme Court cannot make an order under s 41Q if it considers that to do so:
 - (a) would unfairly and materially prejudice an interest or right of a person who acted in good faith and with no reasonable grounds to suspect that the disposal of the land concerned was in contravention of this Act, or
 - (b) would result in the extinguishment of an interest in the land (without proper compensation) held by a person who had no knowledge that the land had been

disposed of in contravention of this Act or no means of preventing the disposal of the land.

Entering into contracts with club officials

17. Proposed s 41K prohibits a club from entering into a contract with a member of the governing body, a top executive of a club or with a company or body in which such a member or executive has a pecuniary interest, unless the contract is first approved by the governing body of the club.
18. Subsection 41K(2) requires the club to make all reasonable inquiries to ensure that it does not contravene this provision.
19. Similarly, a registered club cannot enter into a contract with:
 - the secretary of the club;
 - a manager of any premises of the club;
 - any close relative of either the secretary or a manager; or
 - a company or other body in which the secretary or a manager has a controlling interest¹¹⁸ [proposed section 41L].

Before entering into a contract, the club must make all reasonable inquiries to ensure that it does not contravene this provision.

Approval of remuneration packages of top executives

20. Proposed section 41M requires a club to obtain the approval of the governing body for any contract for the remuneration of a top executive of the club.

Lending money to officials and employees

21. A club cannot lend money to a member of the governing body of the club. It may lend money to an employee of the club, if the amount of the loan (together with any amount of unpaid loan) does not exceed \$10,000 and the governing body of the club has approved the making of the loan.

Termination of contracts

22. Proposed section 41R authorises the Director of Liquor and Gaming to terminate certain contracts where they have been entered into in contravention of the Act.¹¹⁹ The

¹¹⁸ **Controlling interest** refers to an interest a person has if they have the capacity to determine the outcome of decisions about the financial and operating policies of the company or body [proposed section 41L(3)]. A person is taken to have a controlling interest in a company or body if:

- (a) their interest, when added to the interest held by one or more of their close relatives, is a controlling one; and
- (b) a close relative of the person's is taken to have a controlling interest in a company or body if the relative's interest when added to the interest held by any other close relative of the person, is a controlling interest in the company or body [proposed section 41L(2)].

¹¹⁹ Proposed section 41S saves certain interests in a terminated contract. These include a right acquired or a liability incurred before the termination by a person who was a party to the contract.

provision allows parties to the contract to make a submission to the Director as to why the contract should not be terminated.

The Director must not terminate a contract if the Director considers that to do so would adversely affect the club concerned.

It is an offence to continue to give effect to a terminated contract (20 penalty units, currently \$2,200) [proposed s 41T].

Liability of secretary and members of the governing body of a registered club

23. The Bill makes the secretary, the members of the governing body or a close associate of a club guilty of an offence for the contravention by the club of any of the provisions of new Division 4 (ss 41J – 41U) governing the making of contracts [proposed section 41V].

This offence is punishable by a maximum 100 penalty units (\$11,000).

24. However, it is a defence if a person satisfies the court that:

- (a) the club contravened the provision without the actual, imputed or constructive knowledge of the person, or
- (b) the person was not in a position to influence the conduct of the club in relation to its contravention of the provision, or
- (c) the person, if in such a position, used all due diligence to prevent the contravention by the club.

25. A “close associate of the club” is defined in the Act at section 4A.

Issues Arising Under s 8A(1)(b)

Clause 2-Commencement by proclamation

26. The Bill commences on a day or days to be proclaimed.

27. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

28. **The Committee understands from the Minister’s office that regulations must be prepared before this Bill can commence.**
29. **The Committee has written to the Minister asking for a timeframe in which the regulations will be made and the Bill proclaimed.**

Schedule 1, Clause 9, Proposed section 41V – Trespass on rights

30. Proposed section 41V makes the secretary, members of the governing body or a close associate of a club guilty of any offence committed by the club in relation to the making of contracts.
31. Guilt, which is otherwise attributed to such persons under the Bill, can be avoided if they can satisfy the court that:
- (a) the club contravened the provision without their actual, imputed or constructive knowledge; or
 - (b) they were not in a position to influence the conduct of the club in relation to its contravention of the provision; or
 - (c) they, if in such a position, used all due diligence to prevent the contravention by the club.
32. The Committee notes that this provision reverses the onus of proof. The secretary, members of the governing body and close associates of a club are deemed guilty of offences by the club under this provision, and are effectively required to prove their innocence.
33. The onus for proving all the elements of an offence against an accused person is traditionally borne by the prosecutor, consistent with the presumption of innocence. These principles are fundamental to the protection of human rights.¹²⁰ Undermining or eroding these principles will only be justifiable if there are clear and compelling public interest reasons for doing so.

34. The Committee notes that proposed section 41V reverses the onus of proof, deeming the secretary, members of the governing body and close associates of a club guilty of a contravention of the Act by the club, unless they can prove their innocence.

35. The Committee is strongly of the view that the principle that the prosecutor should bear the onus of proving all the elements of an offence against an accused person, consistent with the presumption of innocence, is fundamental to the maintenance of personal rights. This right should not be eroded unless there are clear and compelling public interest justifications for doing so.

36. The Committee refers to Parliament the question whether the reversal of the onus of proof in proposed section 41V unduly trespasses on individual rights and liberties.

The Committee makes no further comment on this Bill.

¹²⁰For example, see the International Covenant on Civil and Political Rights, Article 14(2); Universal Declaration of Human Rights, Article 11.

12. ROADS AMENDMENT (TRANSFER OF CROWN ROADS) BILL 2003*

Matters for comment raised by the Bill

Introduced: 20 November 2003
House: Legislative Assembly
Member: The Hon G Souris MP
Portfolio: Private Member

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The object of this Bill is to amend the *Roads Act 1993* to provide that an order transferring a Crown road to a roads authority may not be made except with the consent of the roads authority to which it is being transferred.

The Bill

2. This Bill amends s 151(3) of the *Roads Act 1993* to provide that any transfer of a Crown road to a **roads authority**¹²¹ must not be made without the consent of that roads authority.
3. According to the second reading speech:¹²²

The circumstances which have led to this Bill are as follows. I have been advised by councils in my electorate and elsewhere that in some parts of the State the Department of Land and Water Conservation has been transferring Crown roads to local Councils, without the councils having any right to accept or reject the transfers... This Bill confers on local government the same powers as are ascribed to agencies such as the Roads and Traffic Authority, that is, the right to consultation, negotiation and concurrence... If that does not occur, the dedications represent a significant cost-shifting exercise from the State Government to a lower-tier of government.
4. This Bill is to commence on the date of assent.

¹²¹Section 7 of the *Roads Act 1993* provides:

- (1) The RTA is the roads authority for all freeways.
- (2) The Minister is the roads authority for all Crown roads.
- (3) The regulations may declare that a specified public authority is the roads authority for a specified public road, or for all public roads within a specified area, other than any freeway or Crown road.
- (4) The council of a local government area is the roads authority for all public roads within the area, other than:
 - (a) any freeway or Crown road, and
 - (b) any public road for which some other public authority is declared by the regulations to be the roads authority.
- (5) A roads authority has such functions as are conferred on it by or under this or any other Act or law.

¹²²The Hon George Souris MP, *Parliamentary Debates (Hansard)*, Legislative Assembly, 20 November 2003.

Issues Arising Under s 8A(1)(b)

5. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

13. STATE REVENUE LEGISLATION FURTHER AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 14 November 2003
 House: Legislative Assembly
 Minister: The Hon M R Egan MLC
 Portfolio: Treasurer

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓				

Purpose and Description

- This Bill amends the *Duties Act 1997*, the *Fines Act 1996*, the *First Home Owner Grant Act 2000*, the *Land Tax Management Act 1956*, the *Payroll Tax Act 1971*, the *Taxation Administration Act 1996* and the *Unclaimed Money Act 1971*.

Background

- The amendments in this Bill are intended to:
 - clarify a number of provisions in revenue Acts that impose a liability to tax;
 - clarify a number of exemptions from State taxes;
 - strengthen and clarify administrative and offence provisions;
 - provide for the transfer of the Infringement Processing Bureau from NSW Police to the Office of State Revenue; and
 - make a number of amendments in the nature of statute law revision.

The Bill

- Some of the amendments made in this Bill are set out below.

Amendments to the *Duties Act* [Schedule 1]

Transfer duty

- The amendments impose transfer duty on a statutory vesting of land in NSW. According to the second reading speech, this amendment is made to:

overcome the current situation where a change of ownership occurs but duty is not currently payable. Mergers of entities and statutory vesting are increasingly being used as mechanisms for changing ownership of land. The bill will ensure that such transactions will become liable to duty.¹²³

The amendment exempts from duty the vesting of dutiable property in a legal personal representative of a deceased person (ie, an executor of a will).

¹²³Mr Bryce Gaudry MP, Parliamentary Secretary, Legislative Assembly, *Parliamentary Debates (Hansard)*, 14 November 2003.

5. The current Act [s 26] provides a discretion for the Chief Commissioner to disregard the value of goods if satisfied that it would not be just and reasonable to charge duty. According to the second reading speech, this has the potential for abuse in the case of transfer of goodwill of little or no value.

Accordingly, the Bill removes this discretion in cases where goods are used in connection with a business and goodwill forms either the whole or part of the other dutiable property in the transfer.

6. The Bill “clarifies the anti-avoidance provisions relating to arrangements that prevent the value of property being artificially reduced for duty purposes.”¹²⁴

In particular, s 24 of the Act is amended to clarify that any interest, agreement or arrangement that has the effect of reducing the dutiable value of the property is to be disregarded unless the Chief Commissioner is satisfied that it did not have the purpose of reducing duty payable on a transaction.

The amendment sets out the factors to be taken into account by the Chief Commissioner in determining if the value of property has been artificially reduced for duty purposes. These include:

- (a) the duration of the interest, agreement or arrangement before the dutiable transaction;
- (b) whether the interest, agreement or arrangement has been granted to or made with an associated person;¹²⁵
- (c) whether there is any commercial efficacy to the granting of the interest or the making of the agreement or arrangement other than to reduce duty; and
- (d) any other matters the Chief Commissioner considers relevant.

Lease Duty

7. According to the second reading speech, a practice has emerged whereby splitting of leases by the term of the lease or by parties has resulted in a reduction in the duty payable. This is because no duty is payable on leases when the total rent is less than \$20,000.

¹²⁴Mr Bryce Gaudry MP, Parliamentary Secretary, Legislative Assembly, *Parliamentary Debates (Hansard)*, 14 November 2003.

¹²⁵“**Associated person**” means a person who is associated with another person in accordance with any of the following provisions:

- (a) persons are associated persons if they are related persons,
- (b) natural persons are associated persons if they are partners in a partnership to which the *Partnership Act 1892* applies,
- (c) private companies are associated persons if common shareholders have a majority interest in each private company,
- (d) trustees are associated persons if any person is a beneficiary common to the trusts (not including a public unit trust scheme) of which they are trustees,
- (e) a private company and a trustee are associated persons if a related body corporate of the company (within the meaning of the *Corporations Act 2001*, Commonwealth) is a beneficiary of the trust (not including a public unit trust scheme) of which the trustee is a trustee,

and, for the purposes of Part 2 of Chapter 3 (Certain transactions treated as transfers), a public company and a subsidiary of a public company are taken to be associated persons. Dictionary, *Duties Act*.

To counter this practice, the Bill introduces provisions “to aggregate leases between the same or associated parties for consecutive terms over the same property. In these situations the combined leases will be subject to duty.”¹²⁶

Mortgage Duty

8. The Bill clarifies that security interests in land are not liable to mortgage duty.
9. Subsection 218B(1) of the Act provides:
 - Duty is not chargeable on the amount or part of the amount secured by a collateral mortgage¹²⁷ that is the same money as is secured by:
 - (a) a mortgage or instrument of security that is duly stamped under this Act or stamped under a corresponding Act, or
 - (b) a mortgage package that has been duly stamped under section 217 or stamped as a mortgage package under a corresponding Act.
10. Schedule 1, clause 22 amends this section in relation to the charging of duty on collateral mortgages. In particular, this amendment affects a collateral mortgage forming part of a package of securities that applies to land in NSW and land in other jurisdictions.¹²⁸ If, at the time an advance or further advance is made under such a mortgage the mortgage has not been duly stamped under the Act, that mortgage ceases to be a collateral mortgage and is chargeable with duty.

This amendment commences on 1 January 2003 [cl 2(2)].

General

11. The Bill provides an *exemption from stamp duty* for the joint government enterprise being established to allocate funds from the New South Wales, Victorian and Commonwealth governments for water savings projects to facilitate environmental flows for the Murray and Snowy Rivers.

Amendments to the *Fines Act* [Schedule 2]

12. The State Debt Recovery Office and the Infringement Processing Bureau within NSW Police became part of the Office of State Revenue on 1 October 2003. Those agencies were involved in the recovery of amounts payable under penalty notices issued for breaches of Acts and regulations.
13. The Bill amends this Act in connection with this transfer of function, including:
 - expanding the functions of the State Debt Recovery Office to enter into arrangements for the collection and recovery of money payable under penalty notices; and
 - adding the Treasurer and the Director of the State Debt Recovery Office as parties to service agreements in force as at 1 October 2003 and which were

¹²⁶Mr Bryce Gaudry MP, Parliamentary Secretary, Legislative Assembly, *Parliamentary Debates (Hansard)*, 14 November 2003.

¹²⁷“**Collateral mortgage**” means a mortgage that secures all or part of the same money as another mortgage, instrument of security or mortgage package, Dictionary, *Duties Act*.

¹²⁸See Explanatory note, page 4.

entered into by the Infringement Processing Bureau for the recovery of penalties payable under penalty notices.

Amendments to the *First Home Owner Grant Act* [Schedule 3]

14. This Act is amended to:

- make it clear that an applicant cannot obtain a grant under the Act on the transfer of a fractional interest in a home;
- allow more than one grant to be paid in cases where multiple homes are purchased by, or built for, separate purchasers under a single contract or where multiple homes on a single parcel of land will be separately occupied;
- ensure that the first home owner grant is not payable when a part owner of a home increases his or her interest in the property;
- introduce a period-based residency requirement that the home is to be occupied as the principal place of residence for 6 consecutive months to commence at any time within 12 months after completion of the eligible transaction in order to receive the grant;
- remove the requirement that the interest in land acquired by a purchaser under a terms contract be registered before the grant is paid; and
- remove the requirement that the NSW Land and Housing Corporation be a party to applications involving share ownership schemes.

Amendments to the *Land Tax Management Act* [Schedule 4]

15. The Bill amends the provisions of this Act relating to land tax concessions for an owner's principal place of residence. Specifically, the Bill:

- restores the exemption provided to a deceased estate for the first tax year following the death of the owner of the land or, where the land has not been distributed under the will by the expiration of that time, for such longer period as may be approved by the Chief Commissioner;
- allows an owner to claim the concession for two residences where the owner has bought a new residence and is in the process of selling the existing residence, but has not been able to complete the sale by the taxing date (ie, 31 December 2003);
- removes certain restrictions on the current exemption on land where a new family residence is being built or an existing one is being refurbished, provided the owner takes up residence in the completed house within two years and remains in residence for at least six months;
- allows a principal residence to be used for incidental business purposes, such as the use of one room as a home office or workshop, without losing the principal place of residence exemption from land tax;
- extends the existing concession to include circumstances where the owner is absent from the home for extended periods, but resumes occupation within six

years, allowing the owner to rent the home for a period of up to six months in any tax year before the concession ceases to apply;¹²⁹

- allows each family, including dependents under 18, a concession for only one property, except when buying a new principal place of residence and selling their existing residence;¹³⁰
- grants an exemption from land tax in respect of the land of a joint government enterprise that has the function of allocating funds for water savings projects.

Amendments to the *Payroll Tax Act* [Schedule 5]

16. The amendments to this Act:

- close a loophole that allows an employer to avoid payroll tax on wages paid outside Australia to an employee who provides services in two or more States;
- grant an exemption from payroll tax for the joint government enterprise being established to allocate funds from the New South Wales, Victorian and Commonwealth Governments for water saving projects to facilitate environmental flows for the Murray and Snowy rivers; and
- delete Part 5A of the Act, which provides that directors and former directors of corporations are liable for failure of the corporation to pay tax. (This amendment is made as a consequence of the inclusion of corresponding provisions in the *Taxation Administration Act 1996*.)

Amendments to the *Taxation Administration Act* [Schedule 6]

17. This Act is amended to recover tax from directors and former directors of corporations. Specifically, the amendments insert a new Division 2 into Part 7 of the Act.

The new Division 2 of Part 7 applies the provisions relating to so-called “Phoenix companies”¹³¹ that are contained in the *Pay-roll Tax Act* and the *Commonwealth Income Tax Assessment Act 1936*¹³² to all the revenue laws to which the *Taxation Administration Act* applies.

The new Division 2 includes provisions governing:

- a failure to comply with a notice to a director or former director to pay unpaid tax; and

¹²⁹The amendments also impose a condition that the owner must occupy the home for at least six months after resuming occupation or forfeit the concession for the entire period of the owner's absence from the home.

¹³⁰This amendment restricts tax minimisation practices, such as transferring small interests in land to tenants, particularly family members. It also removes uncertainty by denying the exemption for two properties where a couple claim exemptions for different principal places of residence. This restriction will not apply to couples who are permanently separated or to family members over 18 years of age.

¹³¹“*Phoenix companies*” are companies that are wound up by the directors to avoid paying debts, which may include State taxes. The same directors may immediately start up another company to carry on the same sort of business.

¹³²See sections 222AOA-222AOE.

- the right of a director or former director liable to pay an *assessment amount*¹³³ in discharge of their liability for unpaid corporate tax to be indemnified for payment of that amount by the corporation and to recover a contribution from another director or former director who is also liable as if the director or former director had jointly guaranteed payment of the assessment amount.
18. Proposed section 47E provides that it is a defence to the recovery of an assessment amount if the director or former director establishes that:
- (a) they took all reasonable steps to ensure that the corporation rectified the failure to pay the assessment amount; or
 - (b) because of illness or other similar good reason, they were unable to take steps to ensure that the corporation rectified the failure to pay the assessment amount.
19. The amendments also extend the prohibition on secondary disclosures of information under s 82 of the Act to ensure that information obtained under, or in the administration of, a taxation law cannot be further disclosed without the consent of the Chief Commissioner.
20. Section 82 is further amended to allow disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training. This amendment has retrospective effect from 1 July 2003 [see clauses 6 and 12].
21. The amendments create consistency with the *Administrative Decisions Tribunal Act 1997* by providing that the decisions of the Chief Commissioner that are subject to review under that Act are “decisions” within the meaning of that Act.

Amendments to the *Unclaimed Money Act* [Schedule 7]

22. The amendments increase, from \$20 to \$100, the minimum amount required to be returned to the Office of State Revenue by a business in its unclaimed money return.

According to the second reading speech, this amendment brings NSW into line with the Commonwealth, Victoria and South Australia.

Issues Arising Under s 8A(1)(b)

Schedule 1, clause 26; Schedule 6, Clause 12 – Trespass on rights

Retrospectivity

Duties Act

23. Schedule 1, clause 26, amending the *Duties Act*, provides that the amendment to section 218B applies to existing mortgages if an advance or a further advance is made

¹³³“*Assessment amount*” is defined in proposed section 47A as “the amount of tax that a corporation has been assessed as being liable to pay, as set out in a notice of assessment, including any interest or penalty tax specified in the notice of assessment as being payable by the corporation”.

after the commencement of the amendment on 1 January 2003 as provided in clause 2(2) of the Bill.

An effect of this is that such mortgages will cease to be collateral mortgages and will be chargeable with duty.

Taxation Administration Act

24. Schedule 6, clause 12 amending the *Taxation Administration Act*, amends s 82 of that Act to allow disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training. This amendment has retrospective effect from 1 July 2003.
25. This has the effect of retrospectively authorising any disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training that would otherwise have been unlawful where that disclosure took place on or after 1 July 2003.

26. The Committee has written to the Treasurer for advice as to the reasons for the retrospective application of these amendments.

The Committee makes no further comment on this Bill.

14. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2003

Introduced: 14 November 2003
House: Legislative Assembly
Minister: The Hon R J Carr MP
Portfolio: Premier

Matters for comment raised by the Bill

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
✓			✓	

Purpose and Description

1. The objects of this Bill are:
 - (a) to make minor amendments to various Acts and statutory rules;
 - (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision; and
 - (c) to repeal certain Acts and provisions of Acts.

Background

2. Pursuant to suspensions of Standing Orders, the Bill passed the Legislative Assembly on 18 November 2003 and the Legislative Council on 20 November 2003.
3. Under s 8A(2) of the *Legislation Review Act 1987*, the Committee is not precluded from reporting on a Bill because it has passed through a House of Parliament or become an Act.

The Bill

4. The Bill is set out as follows:
 - Schedule 1 - makes minor amendments to a number of Acts and statutory rules;
 - Schedule 2 - amends certain Acts and instruments for the purpose of effecting statute law revision;
 - Schedule 3 - repeals:
 - a number of amending Acts enacted in 2002 or earlier that contain no substantive provisions that need to be retained;
 - certain provisions that merely effect amendments to other legislation; and
 - Acts that are no longer of any practical utility;
 - Schedule 4 - contains savings, transitional and other provisions of a more general effect than those set out in Schedule 1.

Issues Arising Under s 8A(1)(b)

Schedules 1.6[6] and [7], 1.7, 1.12, 1.20, 1.21[1] and [2] and 1.23[2] - Commencement

5. The provisions contained in these Schedules are taken to commence with the commencement of complementary State or Commonwealth legislation.
6. All other provisions commence on assent, except as provided below.

Schedule 1.11 - Retrospectivity

7. Schedule 1.11 amends the *Crimes (Local Courts Appeal and Review) Act 2001* to reinstate the right of appeal against a sentence imposed by a local court or the Land and Environment Court, where the appellant either pleaded guilty or was convicted in their absence.
8. This right of appeal previously existed under the *Justices Act 1902*.
9. The amendments are taken to have commenced on 7 July 2003, which is the date that the Act commenced.

<p>10. The Committee considers that, as no person is detrimentally affected by the retrospective operation of this amendment, this provision does not trespass personal rights or liberties.</p>

Schedule 1.12 - Henry VIII Clause

11. Section 40B(2)¹³⁴ of the *Fair Trading Act 1987* provides for the regulations to exclude kinds of **direct commerce contracts**¹³⁵ from the operation of Part 4, Division 3¹³⁶ of the Act. This Schedule includes a further provision stipulating that the regulations may exempt any direct commerce contract, or class of direct commerce contracts, from the operation of *particular provisions* of Part 4, Division 3 of that Act.

¹³⁴Inserted into the *Fair Trading Act 1987* by the *Fair Trading Amendment Act 2003*. This provision has yet commenced.

¹³⁵A **direct commerce contract** is defined by s 40B(1) of the *Fair Trading Act 1987* as a contract:

- (a) for the supply of goods or services to a consumer who is an individual, and
- (b) negotiations leading to the making of the contract (whether or not they are the only negotiations that precede the making of the contract) take place between the dealer and the consumer:
 - (i) in each other's presence at a place other than the business or trade premises of the supplier, or
 - (ii) over the telephone, and
- (c) the dealer has called at that place or made that telephone call in the course of direct commerce, and
- (d) the consumer did not invite the dealer to call at that place or make that telephone call for the purpose of entering into those negotiations, and
- (e) the total consideration payable by the consumer under the contract:
 - (i) is not ascertainable at the time of the making of the contract, or
 - (ii) is ascertainable at the time of the making of the contract (but is more than \$100 or such other amount as may be prescribed by the regulations for the purposes of this section).

¹³⁶This division relates to **direct commerce**, which has been defined under s 40A of the Act as the practice under which a person goes from place to place, or makes telephone calls, seeking out persons who may be prepared to enter, as consumers, into contracts for the supply of goods or services, and that person (or some other person) enters into negotiations with those prospective consumers with a view to the making of such contracts.

This means that, whereas previously the regulations could *only* exclude direct commerce contracts from *all* the provisions of the Division, they can now exclude *only some* of the provisions with respect to contracts of this nature.

12. This provision therefore allows the regulations to override the operation of part of an Act.

Such provisions have come to be referred to as Henry VIII clauses.

As such provisions derogate from the legislative authority of the Parliament, the Committee considers that they should be used as sparingly as possible.

The Committee acknowledges, however, that there are circumstances where the use of such provisions is appropriate.

13. The Committee considers that it would be impractical for the Act itself to exclude particular direct commerce contracts, or classes of direct commerce contracts, from the operation of parts of that Act. Consequently, regulations are the appropriate mechanism to facilitate provisions of this nature.

14. The Committee therefore considers that providing for the regulations to exclude part of the operation of the Act which respect to particular direct commerce contracts is not an inappropriate delegation of legislative power.

Schedule 1.17[2]- Retrospectivity

15. This Schedule amends s 358 of the *Local Government Act 1993* to provide that if a Minister grants approval for a local council to form or participate in the formation of a corporation, or acquire a controlling interest in a corporation, this approval may be subject to such conditions, if any, that the Minister specifies.

16. This amendment is taken to have commenced on 1 July 1993, being the date that the *Local Government Act 1993* commenced.

17. The Minister for Local Government's office advised that the reason this amendment is backdated to the commencement of the Act is because the various Ministers for Local Government had routinely attached conditions to their approval for a local council to form, or to participate in, the formation of a corporation, or to acquire a controlling interest in a corporation.

Retrospectivity is therefore required to ensure that conditions previously imposed remain valid.

18. The Committee considers that providing for this amendment to commence on the date that the Act was introduced in order to ensure the validity of conditions previously imposed does not trespass unduly on personal rights and liberties.

Schedule 1.23 - Search and seizure without a warrant

19. Section 20 of the *Pawnbrokers and Second-hand Dealers Act 1996* provides that an authorised officer may, at any reasonable time, enter any premises where a licensed

pawnbroking or second hand dealer's business is conducted and inspect goods kept at that premises.

20. This Bill inserts a provision that, for the purposes of such an inspection, the authorised officer may open any unlocked cupboard, drawer, container or other form of storage found at the premises, and may require a person apparently in charge of the premises to open any form of storage (including a safe) that is locked.

21. The committee notes that the power to enter and search private premises without a warrant is a trespass on personal rights and liberties, and such a power should only be given when it is overwhelmingly in the public interest to do so.

22. The Committee recognises, however, that the right of entry and search is a pre-existing power under the Act, and that the purpose of this amendment is to clarify the extent of an authorised officer's powers when conducting such a search.

23. The Committee notes the public interest in preventing trafficking in goods which are stolen or unlawfully obtained.

24. The Committee therefore does not consider that allowing an authorised officer to open a cupboard, drawer, container or other form of storage or requiring that any locked form of storage, including a safe, be opened trespasses unduly on personal rights and liberties.

The Committee makes no further comment on this Bill.

15. TOTALIZATOR LEGISLATION AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
 House: Legislative Council
 Minister: The Hon G A McBride MP
 Portfolio: Gaming and Racing

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
			✓	

Purpose and Description

1. The Bill's object is to provide an exemption for a ***nominated company***, in relation to its shareholdings in TAB Limited (the privatised Totalizator Agency Board), from the operation of certain provisions of the *Totalizator Act 1997* (the Act) and the *Totalizator Agency Board Privatisation Act 1997* (the TABP Act). These prohibit a person from entitlement to such number of voting shares in TAB Limited as would constitute more than 10% of the total number of voting shares in that company.
2. The nominated company will be either Unitab Limited (formerly TAB Queensland Limited) or TABCORP Holdings Limited (formerly TABCORP Limited) registered in Victoria.
3. The exemption will apply only if:
 - (a) there is a similar prohibition to that referred to above in place in respect of voting shares in the nominated company; and
 - (b) the nominated company is listed on the Australian Stock Exchange; and
 - (c) TAB Limited is wholly owned by the nominated company; and
 - (d) TAB Limited is controlled by the nominated company.
4. An exemption for the nominated company is also provided from the operation of the provision of the Act that prohibits the holder of a licence under that Act and certain associated persons from also holding a casino licence under the *Casino Control Act 1992*.

Background

5. In 1997 the New South Wales Totalizator Agency Board was sold by public float and listed on the Australian Stock Exchange.
6. At that time the new company, TAB Ltd, was issued with exclusive licences to conduct on- and off-course totalisator betting and limited forms of gaming.
7. The sale was part of a larger reform of the Government's relationship with the racing, wagering and gaming industries in New South Wales.

8. The objectives were to put the racing industry on a sound financial footing and to create a strong New South Wales based wagering and gaming business, TAB Ltd, capable of dealing with the rigors of national and international competition.¹³⁷
9. The Government placed a 5% limit on the size of shareholdings in the company to ensure that shares were widely held and to prevent anyone from obtaining control, or a significant influence, over TAB Ltd.¹³⁸ The shareholding limit, which was enshrined in the Act and the TABP Act, was reviewed in 2002 upon application by TAB Ltd. It was raised to 10%, having regard to the initial policy objectives of the sale.
10. According to the second reading speech:

Recently, an in-principle agreement was reached between the boards of TAB Ltd and the Queensland-based UNiTAB Ltd to merge their respective companies. In essence, the proposal involves a reverse takeover. The company would retain the name of UNiTAB and acquire the holdings of current TAB Ltd shareholders by the issue of shares in the merged company. TAB Ltd would then be delisted and become a wholly owned subsidiary of UNiTAB.
11. TABCORP has subsequently made a bid for TAB Ltd that, if successful, would result in TAB Ltd becoming a fully owned subsidiary of TABCORP and being delisted.¹³⁹

The Bill

Schedule 1 Amendment of *Totalizator Agency Board Privatisation Act 1997*

12. The Bill inserts new s 37A in Division 2 (*Maximum shareholding restrictions*) of Part 8 (*Sale of TAB Limited by public float*) of the TABP Act [Sch 1 [1]].
13. New s 37A provides that the other provisions of Division 2 do not apply to, or in respect of, the nominated company. Otherwise, Division 2 would prohibit the nominated company from holding voting shares in TAB Limited which would exceed 10% of the total number of the voting shares.
14. However, new s 37A also provides that the exemption applies *only if*:
 - the nominated company is listed on the Australian Stock Exchange;
 - TAB Limited is wholly owned by the nominated company;
 - the nominated company controls TAB Limited; and
 - there is in existence a prohibition, similar to that set out in Division 2 of Part 8 of the TABP Act, in respect of the holding of voting shares in the nominated company.¹⁴⁰

¹³⁷Hon A B Kelly MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

¹³⁸At that time the then-Minister for Gaming and Racing, the Hon J R Face, stated that:

[t]he TAB corporation will be sold by a public float...individual shareholding will be limited to 5 per cent of issued shares. Organisations with significant gaming or wagering interests will be excluded. This is an important element. The TAB's wagering opportunities will not be able to be hijacked by a future owner and moved offshore or interstate.

Hon J R Face MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 21 May 1997.

¹³⁹Hon A B Kelly MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003.

¹⁴⁰Such a prohibition could, eg, be imposed by the nominated company's constitution.

15. If the Minister administering the Act (the Minister) is satisfied that:
- the relevant prohibition is no longer in existence; or
 - the nominated company is no longer listed on the Australian Stock Exchange; or
 - the nominated company does not wholly own or control TAB Limited,
- the Minister is to serve a notice on the nominated company declaring that the exemption will be suspended on and from a specified day.
16. Any such notice is to be revoked (and the suspension terminated) by a further notice if the Minister is satisfied that the relevant omission has been rectified.
17. New s 37A defines *nominated company*, as either Unitab Limited or TABCORP Holdings Limited, as nominated by the Minister by an irrevocable notice published in the Gazette.¹⁴¹

Schedule 2 Amendment of *Totalizator Act 1997*

18. Division 3 (*Maximum shareholding restrictions on licensees*) of Part 3 (*Licences to conduct totalizators*) of the Act contains provisions of the same kind as those in Division 2 of Part 8 of the TAB Act referred to above.
19. These provisions relate to shareholdings in companies that are holders of licences authorising the conduct of off-course totalizators.
20. The Bill amends s 20 of the Act so as to exempt the nominated company from the operation of s 20(1)(a), which would otherwise prohibit a licensee under the Act, a subsidiary of the licensee, and a related body corporate (such as a holding company) of the licensee, from also holding a casino licence under the *Casino Control Act 1992* [Schedule 2 [2]].
21. The reason for this amendment is that TABCORP is the licensee of Star City Casino.
22. The Bill inserts new s 32A into the Act so as to provide an exemption for the nominated company, in relation to its shareholding interest in TAB Limited, from the operation of Division 3 of the Act [Sch 2 [3]].
23. Without this exemption, Division 3 would prohibit the nominated company from holding more than 10% of the total number of voting shares in TAB Limited.
24. These exemptions will apply only while the exemption proposed to be granted by new s 37A of the TABP Act (proposed to be inserted by Schedule 1 [1] above) is in force.
25. The Bill inserts two new subsections in s 43 (Conditions of licence) of the Act:
- s 43(2B) provides that it is a condition of every licence granted to TAB Limited that no person holds such number of voting shares in the nominated company

¹⁴¹Once published in the Gazette, such a notice cannot simply be rescinded by the Minister. Any change would require further amending legislation.

as would constitute more than 10% of the total number of voting shares in that company. However, the condition has effect only while the exemption granted by new s 32A is in force [Sch 2 [4]].

- s 43(2C) makes it clear that s 43(2), which relates to certain commercial arrangements of a licensee with the racing industry, extends to such commercial arrangements entered into from time to time.

Issues Arising Under s 8A(1)(b)

Clause 2, Commencement

26. The Act is to commence by proclamation.
27. The office of the Minister for Gaming and Racing has advised the Committee that the delay in commencing the Bill is due to the current uncertainty as to whether the nominated company under the ensuing Act will be Unitab Limited or TABCORP Holdings Limited.

<p>28. Having regard to the basic reason for the amending legislation, the Committee considers that awaiting the outcome of the negotiation process relating to Tab Limited is an appropriate reason to delay commencement.</p>
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The Committee makes no further comment on this Bill.

16. TRANSPORT ADMINISTRATION AMENDMENT (SYDNEY FERRIES) BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
House: Legislative Council
Minister: The Hon M Costa MLC
Portfolio: Transport Services

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny
		✓	✓	✓

Purpose and Description

- The Bill's objects are to:
 - constitute Sydney Ferries, a statutory State owned corporation, and to confer on it the State Transit Authority's functions of providing Sydney ferry services and related functions;
 - make consequential amendments and provision of a savings and transitional nature consequent on the proposed Act.

Background

- The Bill restructures the State Transit Authority (STA) and constitutes Sydney Ferries Corporation (Sydney Ferries).
- The Minister stated in the Second Reading speech that in the last financial year Sydney Ferries carried just over 13 million passengers, comprising 0.5% of the total commuters in the Sydney central business district.
- The Minister noted that while this is a small percentage, it takes critical pressure off other busy transport infrastructure such as Victoria Road, Military Road, The Spit Bridge, and Old South Head Road. Accordingly, he aimed at full use of the existing ferry capacity.¹⁴²

The Bill

- The Bill inserts new Part 3A into the *Transport Administration Act 1988* (TAA) [Sch1 [7]].
- New Part 3A of the TAA constitutes Sydney Ferries as a statutory State owned corporation [SOC] under the *State Owned Corporations Act 1989* (the **SOC Act**). As a result, the provisions of the SOC Act relating to functions, constitutions and other

¹⁴²The Hon M Costa MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 19 November 2003. The Minister announced the corporatisation on 29 October 2003: *Minister of Transport Services Media Release*, <http://www.sydneyferries.info/corporatisation.html>.

matters of such corporations will, except as provided by the proposed Part, apply to Sydney Ferries¹⁴³ [new s 35A of the TAA].

7. The Bill provides that the principal objective of Sydney Ferries is delivering safe and reliable Sydney ferry services in an efficient, effective and financially responsible manner [new s 35B(1)].

Sydney ferry services are ferry services provided in Sydney Harbour or the Parramatta River.

8. Other objectives of Sydney Ferries include being a successful business and exhibiting a sense of social responsibility by having regard to the interests of the community in which it operates [new s 35B(2)]. The other objectives of Sydney Ferries are of equal importance, but are not as important as the principal objective of the corporation [new s 35B(3)].
9. The primary function of Sydney Ferries is to operate Sydney ferry services [new s 35C].
10. The Bill amends s 38(3) of the TAA to ensure that, as far as practicable, Sydney ferries consult with the Director-General of the Department of Transport Services before making any major changes, or initiating any major action, affecting passenger services [Sch 1 [8]].
11. The Bill also provides for:
- acquisition of land by Sydney Ferries [new s 35F];
 - the establishment of corporate structure of Sydney Ferries [new s 35H – 35K];
 - preparation of a statement of corporate intent by Sydney Ferries [new s 35O]; and
 - consequential amendments to the TAA, including transfer of certain assets, rights and liabilities of STA to Sydney Ferries by way of Ministerial Order [new s106D].¹⁴⁴

Issues Arising Under s 8A(1)(b)

Clause 2 commencement

12. The Act is to commence by proclamation.
13. The office of the Minister for Transport Services has advised the Committee that the commencement of the Bill is delayed due to the process of establishing a new State owned corporation by way of transfer of staff, assets and liabilities of the STA to Sydney Ferries.

¹⁴³Exceptions include that the new corporation will not be subject to the dividend provisions of s 20S of the *State Owned Corporation Act 1989*: new s 35N of the *Transport Administration Act 1988*.

¹⁴⁴Thus, new s 35P of the *Transport Administration Act 1988* provides that fines and penalties for certain ferry-related offences are to be paid to Sydney Ferries.

14. It is intended that Sydney Ferries will commence operations by no later than 1 July 2004, and earlier if possible.

15. The Committee considers that the establishment of the infrastructure of a State owned Corporation pursuant to the provisions of the *State Owned Corporations Act 1989* is an appropriate reason to delay commencement of the ensuing Act.

Insufficient parliamentary scrutiny

16. The Bill amends the TAA to provide Sydney Ferries [s 35F] with the power to acquire land for any purpose [new s 35F].¹⁴⁵
17. Such land (including an interest in land) may be acquired by agreement, or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (Land Acquisition Act) [s 35F(1)].¹⁴⁶
18. Section 3(a) of the Land Acquisition Act provides a guarantee that, when land affected by a proposal for acquisition by Sydney Ferries is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition.¹⁴⁷

This guarantee must be provided when written notice is given to an owner of land to the effect that the land is affected by a proposal for acquisition [Land Acquisition Act, s 10].

19. Sydney Ferries may not give a proposed acquisition notice under the Land Acquisition Act without the approval of the Minister for Transport Services [s 35F(4)].
20. For the purposes of the *Public Works Act 1912* (PWA), any such acquisition of land is taken to be for an authorised work, and Sydney Ferries, in relation to that authorised work, is taken to be the Constructing Authority [s 35F(3)].
21. However, works constructed by Sydney Ferries pursuant to this power to purchase are not subject to compliance with Part 3 of the PWA. Section 34(1) of the PWA provides that:

No public work of any kind, the estimated cost of completing which exceeds \$1,000,000, and whether such work is a continuation, completion, repair, reconstruction, extension, or a new work, shall be commenced, unless sanctioned as [provided by Part 3].¹⁴⁸

¹⁴⁵Pursuant to new s 35F(2) the purposes for which Sydney Ferries may acquire land include for the purposes of a future sale, lease or disposal, ie, to enable Sydney Ferries to exercise its functions in relation to land under the *Transport Administration Act 1988*.

¹⁴⁶There is, otherwise, no obligation on a State Legislature to provide just compensation: *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

¹⁴⁷The Act does *not* apply to an acquisition of land if the acquisition consists of the taking of a mortgage, charge or other similar security over an interest in land: s 6(b) of the *Land Acquisition Act (Just Compensation) 1991*.

¹⁴⁸Exceptions include where the proposed work is:

- a work of water supply, sewerage or drainage [s 34(4) *Public Works Act 1912*];
- a public school, a teachers' college, a technical college or a detention centre within the meaning of the *Children's (Detention Centres) Act 1987*;

Part 3 of the PWA provides that every such proposed work must be submitted to the Legislative Assembly by the appropriate Minister. The Minister's explanation of the proposed work must comprise an estimate of the cost of such work when completed, together with such plans and specifications or other descriptions as the Minister deems proper, and an estimate of the probable revenue which the proposed work will generate [s 34(1)(a)].

The proposed work is then referred to the Public Works Committee, which must report back to the Legislative Assembly [s 34(1)(b)-(d)]. The Legislative Assembly then approves or rejects the proposed work [s 34(1)(e)]. If approved, the Minister must then introduce a Bill to sanction the carrying out of the work [s 37].

22. Under proposed s 35F(6) any land purchase that exceeds \$1,000,000 would not be subject to the Parliamentary scrutiny otherwise provided for by the PWA.

23. The Committee notes that the proposed subsection 35F(6) enables Sydney Ferries to undertake works in excess of \$1,000,000 without reference to the Legislative Assembly or the Public Works Committee and without the passing of a Bill to sanction the work as required by Part 3 of the *Public Works Act 1912*.

24. The Committee refers to the Parliament the question of whether this provision inappropriately delegates legislative powers or insufficiently subjects the exercise of such powers to parliamentary scrutiny.

Proposed s 35I: Power to remove the chief executive officer of Sydney Ferries

Makes rights, liberties or obligations dependent upon non-reviewable decisions.

25. The Bill amends the TAA by inserting new s 35I(3). This provides that:

The board [of Sydney Ferries] may remove a person from office as chief executive officer, at any time, for any or no reason and without notice, but only after consultation with the voting shareholders and the portfolio Minister.¹⁴⁹

26. This section purports to exclude the requirement to afford natural justice or procedural fairness to persons sought to be removed. That is, it purports to exclude the opportunity for such persons to be heard in relation to that decision.¹⁵⁰

27. Parliament may exclude procedural fairness if it makes its intention sufficiently clear.¹⁵¹

A statutory provision¹⁵² expressly stating that the requirements of natural justice do not apply is conclusive.

-
- a hospital, or a mental hospital, or an institution for the treatment of the physically or mentally ill; or
 - public offices or a public building [s 34(6) *Public Works Act 1912*].

¹⁴⁹Proposed s 35J(2) of the *Transport Administration Act 1988* provides similar powers with respect to acting chief executives of Sydney Ferries respectively.

¹⁵⁰*Kioa v West* (1985) 159 CLR 550.

¹⁵¹See, eg, s 141(4) of the *Casino Control Act 1992*, which provides that in the exercise of its functions, the New South Wales Casino Control Authority is not required to observe the rules of natural justice (except to the extent that it is specifically required to do so by that Act).

28. However, the Bill does not expressly exclude natural justice. Accordingly, whether it has done so by way of implication requires evidence of a manifest clear intention to do so by way of plain words or necessary intendment.¹⁵³ The issue, therefore, is whether the enactment of the words “for any or no reason and without notice” provide such a manifest intention.
29. Sydney Ferries is a statutory body representing the Crown in right of New South Wales.¹⁵⁴ Therefore, where the Crown is the employer and the office is *not* an ancient one with special incidents, the common law principle of *employment or pleasure* applies.
- Accordingly, the chief executive officer referred to in proposed s 35I may be dismissed at any time without notice.¹⁵⁵
30. The “*dismissal at pleasure*” principle was recently unanimously upheld in the Court of Appeal decision of *Commissioner of Police for New South Wales v Jarratt*.¹⁵⁶ In that case, the Court of Appeal held that the common law dismissal at pleasure principle is not qualified by a common law implication of procedural fairness.¹⁵⁷
31. The dismissal at pleasure principle can likewise only be legislatively abrogated by clear and unambiguous statutory language.¹⁵⁸ The wording of new s 35I(3) demonstrates an express intention by the legislature that the principle is in fact to apply. The expression “for any or no reason and without notice” emphatically includes the dismissal at pleasure principle in the amended TAA.¹⁵⁹
32. Moreover, there is nothing in either the Bill’s Explanatory Memorandum or Second Reading speech that supports a contrary interpretation of s 35I(3).
33. In summary, Sydney Ferries, as a State owned statutory corporation, represents the Crown. The dismissal at pleasure principle therefore applies to the persons against whom the power of removal may be exercised, displacing any common law right of procedural fairness that would otherwise apply.

34. The Committee considers that the power to remove the Chief Executive Officer of Sydney Ferries contained within proposed s 35I(3) makes the rights of those chief executive officers dependent upon non-reviewable decisions.

¹⁵² *Abebe v Commonwealth* (1999) 197 CLR 510.

¹⁵³ *Kioa v West* (1985) 159 CLR 550 at 584 and *Annetts v McCann* (1990) 170 CLR 597 at 598.

¹⁵⁴ Pursuant to proposed s 35A of the *Transport Administration Act 1988*.

¹⁵⁵ *Browne v Commissioner for Railways* (1935) 36 SR(NSW) 21 at 24 per Jordan CJ.

¹⁵⁶ [2003] NSWCA 326.

¹⁵⁷ *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraphs 66, 79 and 102.

¹⁵⁸ *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 at 576; *Barton v The Commonwealth* (1974) 131 CLR 477 at 488 and 501; *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraph 87.

¹⁵⁹ *Coutts v Commonwealth* (1985) 157 CLR 91 at 104 and 105 and *Kelly v Commissioner of the Department of Corrective Services* (2001) 52 NSWLR 533. That there is no stipulation of a right to remove “at pleasure” is irrelevant: *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraph 80.

35. The Committee refers to Parliament the question of whether those rights are unduly dependent upon non-reviewable decisions.

The Committee makes no further comment on this Bill.

17. WINE GRAPES MARKETING BOARD (RECONSTITUTION) BILL 2003

Matters for comment raised by the Bill

Introduced: 20 November 2003
 House: Legislative Council
 Minister: The Hon I M Macdonald MLC
 Portfolio: Agriculture and Fisheries

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The objects of this Bill are:
 - (a) to provide for the abolition of the Wine Grapes Marketing Board (*the former Board*) established under the *Marketing of Primary Products Act 1983* and its reconstitution as an agricultural industry services committee (*the Board*) under the *Agricultural Industry Services Act 1998*;
 - (b) to provide temporarily for the regulation of the terms and conditions of payment for Murrumbidgee Irrigation Area (MIA) wine grapes sold to wineries by wine grape growers;
 - (c) to amend the *Agricultural Industry Services Act 1998* so as to enact savings and transitional provisions consequent on the constitution of the Board; and
 - (d) to amend the *Marketing of Primary Products Act 1983* so as to repeal the provisions of that Act relevant solely to the former Board.

Background

2. The Board represents wine grape growers in the MIA, an area consisting of the city of Griffith and the shires of Leeton, Carrathool and Murrumbidgee.
3. Until 31 July 2000, all grapes grown in the MIA were vested in the Board.
 The Board used its powers to act on behalf of the growers to negotiate a yearly price for each variety of wine grape, and to set terms and conditions of payment for wine grapes to growers.
4. In 2001, a review of the Board was carried out under National Competition Policy. The review recommended that the Board be allowed to continue with the power to set terms and conditions of payment but only as a default position in cases where growers had not developed their own contracts with wineries.
5. According to the Minister,

with the end of vesting in 2000, the *Marketing of Primary Products Act 1983* is no longer suitable legislation under which to provide these powers. In any case the intention is to grant these powers only as a transitional measure until 31 December 2007, when it is expected that most sales will be made under individual contracts. In

this case, it is more appropriate to achieve this aim under specific legislation than try to use the *Marketing of Primary Products Act 1983*, which is based on the concept of vesting.¹⁶⁰

The Bill

6. Clause 26 contains a sunset clause providing that this Act expires on 31 December 2007. Until that time, the Board will continue to exercise some of its existing functions and some new ones.
7. The Bill empowers the Board to assist growers in the drawing up and negotiation of individual contracts for the sale of their grapes to wineries.
8. Where no individual contracts are made, the Bill enables the Board to set default terms and conditions for payment for MIA wine grapes. These are to be published in the Gazette [cl 5].
9. It also enables the Board to provide growers with various agricultural industry services, such as:
 - developing a code of conduct for contract negotiations between wine growers and wineries;
 - developing draft contract provisions for the sale of MIA wine grapes;
 - promoting private contracts for the sale of MIA wine grapes;
 - collecting and disseminating market and price information to growers;
 - providing education and training in relation to grape production and marketing;
 - supporting viticultural research and development;
 - facilitating access to education and training in relation to viticulture; and
 - supporting promotion of the region's wine products [cl 7].
10. Part 2 of the Bill establishes prices, and terms and conditions of payment for MIA wine grapes, regulates deliveries and payments for MIA wine grapes and deals with other related matters in cases not governed by contract.
11. Part 3 governs the appointment of persons as Departmental Inspectors and sets out the powers they may exercise. These include functions under the *Agricultural Industry Services Act* and other powers such as requiring a person to give certain information (eg, to establish whether or not a document is a complying contract).
12. Clause 21 in Part 3, provides that if a corporation contravenes a provision of the Act, a director of, or a person concerned in the management of, the corporation will be treated as having contravened that provision.

The director or person must have knowingly authorised or permitted the contravention.

¹⁶⁰The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, *Parliamentary Debates, (Hansard)*, 20 November 2003.

In such cases, the director or person may be prosecuted and convicted for the contravention regardless of whether or not the corporation itself has been prosecuted and convicted.

13. Clause 22 provides that Schedule 1 is taken to be, and has the effect of, a regulation, namely, the *Agricultural Industry Services (Wine Grapes Marketing Board) Regulation 2003*, made under the *Agricultural Industry Services Act*.

The Board

14. This Regulation (Schedule 1) establishes the Board and sets out its functions, membership and the services it may provide.

Clause 3(2) provides that the Board is a continuation of the former Board.

The Board will continue to consist of 7 members. Of these members, five are to be elected by the Board's constituents (ie, all wine grape growers in the MIA who harvest more than 20 tonnes of grapes a year, except wineries that also grow grapes) and two are to be appointed by the elected members.

15. When the proposed Act is automatically repealed on December 2007, the Board will be constituted under the *Agricultural Industry Services Act 1998* and thus only have the powers of an agricultural industry services committee under that Act.

However,

[t]here will be an opportunity for the Board, before its current powers expire, to request the Government of the day to undertake a further review of these powers under National Competition Policy principles. If the Board can establish that some or all of its powers in relation to the setting of terms and conditions of payment, provide a net public benefit, the Parliament could be asked to extend the sunset date in respect of those powers.¹⁶¹

Issues Arising Under s 8A(1)(b)

16. The Committee did not identify any issues under section 8A(1)(b) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

¹⁶¹Second reading speech, The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, *Parliamentary Debates, (Hansard)*, 20 November 2003.

18. WORKERS COMPENSATION AMENDMENT (TRAINEES) BILL 2003

Matters for comment raised by the Bill

Introduced: 19 November 2003
House: Legislative Assembly
Minister: The Hon J J Della Bosca MLC
Portfolio: Commerce

Trespasses on rights	Insufficiently defined powers	Non - reviewable decisions	Delegates powers	Parliamentary scrutiny

Purpose and Description

1. The objects of this Bill are:
 - (a) to repeal section 158 of the *Workers Compensation Act 1987* (the 1987 Act) to remove the current exemption of employers of trainees from the insurance requirements imposed under section 155 of that Act;
 - (b) to amend the 1987 Act so that employers who currently benefit from the exemption will have up to a year to comply with those requirements;
 - (c) to amend the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) to put it beyond doubt that trainees are workers for the purposes of the Acts; and
 - (d) to make consequential amendments to the 1987 Act, the 1998 Act and the *Workers Compensation Regulation 2003*.

Background

2. In his second reading speech, the Parliamentary Secretary stated:

This bill gives effect to a measure announced by the Treasurer in his Budget Speech on 24 June 2003. From 1 January next year employers taking on trainees will be required to pay their workers compensation premiums in the same way as employers of apprentices are already required to. The New South Wales Government has paid the workers compensation premiums of trainees since 1989.¹⁶²

The Bill

3. The Bill repeals s 158 of the *Workers Compensation Act 1987*. That section exempts employers from having to hold a policy of insurance for trainees [Sch 1[3]].

Section 158 also deems employers to hold a policy of insurance for trainees with the NSW Insurance Ministerial Corporation¹⁶³. This has the effect of the State providing insurance for trainees.

¹⁶²Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)*, Legislative Assembly, 19 November 2003.

¹⁶³The Insurance Ministerial Corporation is a corporation constituted under Part 5 of the *Government Insurance Office (Privatisation) Act 1991*.

4. The Bill also provides transitional arrangements so that employers of trainees immediately before the repeal of s 158 will continue to be covered under that section until 31 December 2004 [Sch 1[8]].
5. The Bill puts it beyond doubt that trainees are workers for the purposes of the 1987 Act and the 1998 Act and makes consequential amendments to those Acts and the *Workers Compensation Regulation 2003*.
6. The Bill is to commence on 1 January 2004 [cl 2].

Issues Arising Under s 8A(1)(b)

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

The Committee makes no further comment on this Bill.