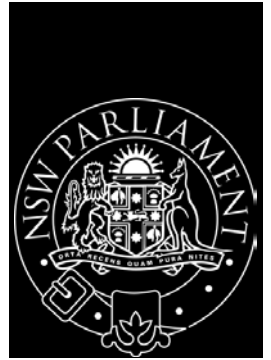


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

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TABLE OF CONTENTS

Membership & Staff	ii
Functions of the Legislation Review Committee.....	iii
Part One – Bills.....	1
SECTION A: Comment on Bills.....	1
1. Children (Detention Centres) Amendment Bill 2004	1
2. Fair Trading Amendment Bill 2004	4
3. Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	9
4. Stock Diseases Amendment (False Information) Bill 2004	13
5. Thoroughbred Racing Legislation Amendment Bill 2004	17
Part Two – Regulations	21
SECTION A: Regulations about which the Committee is Seeking Further Information.....	21
Appendix 1: Index of Bills Reported on in 2004.....	22
Appendix 2: Index of Ministerial Correspondence on Bills from September 2003.....	23
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004.....	25
* Denotes Private Member's Bill	

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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. CHILDREN (DETENTION CENTRES) AMENDMENT BILL 2004

Date Introduced:	12 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Diane Beamer MP
Portfolio:	Minister for Juvenile Justice

Purpose and Description

1. The object of this Bill is to provide that, when a child is arrested and detained under s 50(1) of the *Bail Act 1978* prior to coming before the Court, the child is to be detained in a detention centre under the *Children (Detention Centres) Act 1987* or, if it is impracticable to do so, in a police station.

Background

2. Section 50(1) of the *Bail Act 1978* provides that:

Where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition:

- (a) a police officer may arrest the person without warrant and take the person as soon as practicable before a court, or
- (b) an authorised justice may:
 - (i) issue a warrant to apprehend the person and bring the person before a court, or
 - (ii) issue a summons for the person's appearance before a court.

3. According to the Parliamentary Secretary's second reading speech:

If the juvenile is arrested during the night or on weekends, they must be detained overnight or over the weekend pending a court appearance to re-consider their bail agreement. Under section 50(1) of the *Bail Act* they can remain in the lawful custody of the police during this time.

However, it is preferable that the juveniles are instead detained in juvenile detention centres

Children (Detention Centres) Amendment Bill 2004

...it is not desirable for young people arrested on suspected breaches of bail to mix with adult offenders. The Department of Juvenile Justice is in the most appropriate position to provide detention that is in the best interests of alleged juvenile offenders.¹

4. Under s 9 of the *Children (Detention Centres) Act 1987*, detention centres have the authority to detain **persons on remand**² and **persons subject to control**³. A juvenile arrested under s 50(1) of the *Bail Act 1978* does not fall within either of these categories, and as such there does not currently exist any authority for a juvenile so arrested to be held in a detention centre.

The Bill

5. The Bill inserts into the *Children (Detention Centres) Act 1987* the following provisions [proposed s 42A]:

- (1) A child who is arrested or apprehended under section 50 (1) of the *Bail Act 1978*, and who is to be detained before being taken before a court, must be detained in a detention center rather than being detained in a police station.
- (2) Despite subsection (1), the child may be detained in a police station before being taken before a court if it is impracticable for the child to be detained in a detention centre before being taken before the court.
- (3) A child who is detained in a police station under subsection (2) must, so far as is reasonably practicable, be detained separately from any adults detained there.
- (4) While a child is detained in a detention centre under this section, the child is taken to be a person on remand for the purposes of this Act: Schedule 1[1].

¹ Mr Neville Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

² A **person on remand** is defined by s 3 of the *Children (Detention Centres) Act 1987* as:

- (a) a child who is an accused person within the meaning of the *Bail Act 1978* and who has not been released on bail under that Act;
- (b) a person who is an accused person within the meaning of the *Bail Act 1978* and who has not been released on bail under that Act, being a person who is charged before the Children's Court; or
- (c) a person who is an accused person within the meaning of the *Bail Act 1978* and who has not been released on bail under that Act, being a person who is a person on remand by virtue of an order referred to in paragraph (c) of the definition of detention order.

³ A **person subject to control** is defined by s 3 of the *Children (Detention Centres) Act 1987* as meaning a person who is the subject of a detention order, but does not include a person who is a person on remand by virtue of an order referred to in paragraph (c) of the definition of detention order. A **detention order** is subsequently defined as

- (a) an order in force under s 19 of the *Children (Criminal Proceedings) Act 1987* whereby a court has directed that the whole or any part of the term of a sentence of imprisonment imposed on a person be served in a detention centre;
- (b) an order in force under s 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987* whereby the Children's Court, or some other court exercising the functions of the Children's Court under Division 4 of Part 3 of that Act, has committed a person to the control of the Minister; or
- (c) an order in force under s 10 of this Act whereby the Minister administering the *Crimes (Administration of Sentences) Act 1999* has directed the transfer of a person who is a prisoner from a prison to a detention centre.

6. The Bill is to commence on the date of assent [Clause 2].

Issues Considered by the Committee

7. 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.

2. FAIR TRADING AMENDMENT BILL 2004

Date Introduced:	12 March 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Fair Trading

Purpose and Description

1. The Bill amends the *Fair Trading Act 1987* [the Act] to:
 - (a) expressly authorise the Commissioner for Fair Trading (referred to as “the Director-General” in the Act) to disclose information to, and receive information from, fair trading agencies, law enforcement agencies and other relevant agencies;
 - (b) empower investigators, under the authority of a search warrant, to enter and search any place (which includes a vehicle) for evidence of a contravention of the Act and to seize anything that is connected with any such contravention;
 - (c) replace the current provisions that regulate pyramid selling with provisions that mirror those contained in the *Trade Practices Act 1974* of the Commonwealth [TPA]; and
 - (d) make other miscellaneous amendments of a minor or consequential nature.

Background

2. The Act is the principal statute protecting consumers in New South Wales from deceptive and dishonest commercial conduct. The Bill aims to enhance and clarify the Act’s enforcement regime.
3. One particular aspect of the Bill is facilitating the exchange of information and ensuring inter-jurisdictional consistency in enforcing consumer protection legislation.

The Bill

Exchange of information with other agencies

4. Under the Act, the Director-General has a general power to make available information with respect to the Act and other legislation administered by the Minister for Fair Trading, and with respect to matters affecting the interests of consumers [s 9(1)(b)].
5. The Bill specifically authorises the Director-General to disclose information to, and receive information from, other fair trading agencies⁴ and law enforcement agencies in

⁴ A **fair trading agency** is defined as an agency of the State, or of the Commonwealth, another State or Territory or an overseas jurisdiction, that exercises functions under an enactment with respect to fair trading: proposed s 9A(7) of the *Fair Trading Act 1987*.

Australia and overseas, as well as certain agencies that exercise functions with respect to matters affecting the interests of consumers.

This process is described as an **information sharing arrangement** [proposed s 9A(1)].

6. The information that may be the subject of an information sharing arrangement under proposed s 9A will be limited to:
 - information concerning investigations, law enforcement, assessment of complaints, licensing or disciplinary matters;
 - probity assessments and reference checks concerning persons who provide, or propose to provide, goods or services to consumers; and
 - any other information affecting the interests of consumers [proposed s 9A(2)].
7. The Director-General and the relevant agency are authorised to request and receive, and to disclose, information **only to the extent** that the information is reasonably necessary to assist in the exercise of functions under the Act (or any other Act administered by the Minister for Fair Trading, whether solely or jointly with another Minister) or the functions of the relevant agency concerned [proposed s 9A(3)].

Privacy issues

8. Part 2 of the *Privacy and Personal Information Protection Act 1998* [the Privacy Act] sets out a number of *information protection principles*. These principles regulate the manner in which public sector agencies may deal with personal information.⁵
9. A public sector agency is *not* required to comply with information protection principles where non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law.
10. The Bill's second reading speech notes that the Fair Trading *Privacy Code of Practice*, gazetted on 30 June 2000, currently provides relevant exemptions from the information protection principles of the Privacy Act.
11. According to the second reading speech:

The bill is consistent with that code of practice and will facilitate interagency co-operation, reduce duplication between agencies and enhance efficiency in law enforcement functions.⁶

Powers of entry, search and seizure under search warrant

12. Currently, the Act empowers an investigator to enter any place or land where goods are manufactured, prepared or supplied (or where services are supplied or arranged) and

⁵ Under the s 4 of the *Privacy and Personal Information Protection Act 1998*, *personal information* consists of information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.

⁶ Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

exercise certain powers such as taking goods for which the investigator pays a fair price [s 19].

13. Section 19 also empowers an investigator, with the written authority of the Director-General, to enter certain premises and to inspect, and make copies of or take extracts from, documents evidencing conduct in contravention of the Act.
14. The Bill enables an investigator, under the authority of a search warrant⁷, to enter and search any place (which will include a vehicle, vessel or aircraft) and seize anything that the investigator believes on reasonable grounds is connected with a contravention of a provision of the Act [proposed s 19A].

An investigator who is exercising powers under a search warrant issued under proposed s 19A must show his or her identification as an investigator if required to do so [amended s 18(2)].

15. The Bill provides that the power to seize anything that is connected with a contravention of the Act includes a power to seize anything that will *provide evidence* of the contravention [s 19(5)].⁸
16. The second reading speech noted that this amendment is a response to two current enforcement issues, namely that:
 - the Act makes no provision for seizing computer records⁹; and
 - an investigator may enter premises and take any goods, or partly manufactured goods, *only when the investigator pays a fair price*. Accordingly, a person selling goods may thwart the intention of the Act simply by refusing to sell the goods in question to an investigator [s 19(3)(b)].¹⁰

⁷ Part 3 of the *Search Warrants Act 1985* applies to a search warrant issued under proposed s 19A of the *Fair Trading Act 1987*. Sch 2 to the Bill makes consequential amendments to a number of Acts.

⁸ Provision is made for the return of anything seized that is not required as evidence in proceedings for an offence: proposed s 19A(6) of the *Fair Trading Act 1987*.

⁹ The Parliamentary Secretary noted that:

Clearly, most businesses today use computers and this is not recognised in the current drafting. Any evidence stored in a computer could disappear before the investigators returned. The loss of computerised records is a critical concern for the Office of Fair Trading...In an application to the Supreme Court for injunctions and other orders against the first internet-based pyramid selling scheme operating in this State, orders were sought requiring the defendant to deliver up a personal computer to the Office of Fair Trading for computer forensic examination. The court refused to exercise its discretion to make the order on the basis that the Office of Fair Trading had no powers to seize articles: Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

¹⁰ "In another example of the need for these provisions, a trader was subject to a compliance program under which toys and specified other products were required to be removed from sale and tested to the appropriate Australian standard. However, examples of unsafe or non-compliant toys were subsequently detected in the defendant's stores. On one occasion, the defendant refused to sell the item to an investigator and the powers in section 19 were rendered ineffective. It is clearly not appropriate for enforcement powers to be reliant on the co-operation of the trader under investigation, as this could effectively subvert the operation of the law": Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

Prohibition on pyramid selling

17. *Pyramid selling* refers to a sales scheme which focuses on recruiting new salespeople into the scheme, rather than selling the actual products.

Currently, certain pyramid selling schemes are prohibited by s 56 of the Act.

18. In 2002, the Commonwealth Government amended the TPA to include new provisions in relation to pyramid selling.¹¹

19. The Bill substitutes proposed Part 5D for s 56 of the Act, to mirror the Commonwealth's new pyramid selling provisions under the TPA. For example, proposed s 60T contains an identical definition of pyramid selling scheme to that in s 65AAD of the TPA:

a ***pyramid selling scheme*** is a scheme that has both of the following characteristics:

- (a) to take part in the scheme, some or all new participants must make a payment (a *participation payment*) to another participant or participants in the scheme,
- (b) the participation payments are entirely or substantially induced by the prospect held out to new participants that they will be entitled to a payment (a *recruitment payment*) in relation to the introduction to the scheme of further new participants.

20. The Bill prohibits both participation in, and inducing a person to participate in, a pyramid selling scheme, although it does not include a specific penalty for such participation [proposed s 60U].

21. Currently, any person who contravenes a provision of the Act for which a penalty is not otherwise provided is liable to a penalty not exceeding 200 penalty units for individuals [currently \$22,000] or not exceeding 1,000 penalty units for bodies corporate [currently \$110,000] [s 62(2)].

22. According to the Bill's second reading speech, the insertion of new Part 5D will make the Act's interpretation easier, and enforcement more effective.¹²

Defences under the Act

23. The Bill amends s 71 of the Act by restating the defences available to a person subject to prosecution under Part 6 of the Act [amended s 71(a)].¹³

¹¹ See *Trade Practices Amendment Act (No.1) 2002* (Cth), inserting, *inter alia*, new s 65AAA- s 65AAAE into the *Trade Practices Act 1974* (Cth).

¹² Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

¹³ Currently, s 71 of the *Fair Trading Act 1987* provides that in a prosecution under Part 6 in relation to a contravention of a provision of Part 3, 4, 5, 5A, 5B, 5C or 8 of that Act, it is a defence if the defendant establishes:

- (a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake,
- (b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person, or
- (c) that:

24. In line with recent amendments to the corresponding provisions of the TPA¹⁴, it will be a defence to a prosecution under the Act if:

the contravention in respect of which the proceedings were instituted was caused by a reasonable mistake of fact, including a mistake of fact caused by reasonable reliance on information supplied by another person.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

25. The ensuing Act is to commence on a day or days to be appointed by proclamation.
26. 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.
27. The Minister's office has advised the Committee that the delay in commencement is necessary to update the Practice and Procedures Manual used by inspectors, etc, in enforcing the Act. It is expected that this updating will be completed in approximately one month, after which time the new provisions will be proclaimed.

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| <p>28. The Committee considers that updating the <i>Fair Trading Act 1987</i> Practice and Procedures Manual is an appropriate reason to delay commencement.</p> |
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The Committee makes no further comment on this Bill.

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- (i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant's control, and
- (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

¹⁴ See s 85 of the *Trade Practices Act 1974* (Cth), amended by the *Trade Practices Amendment Act (No. 1) 2002* (Cth).

3. PREVENTION OF CRUELTY TO ANIMALS AMENDMENT (TAIL DOCKING) BILL 2004

Date Introduced: 10 March 2004
House Introduced: Legislative Council
Minister Responsible: The Hon Ian Macdonald MP
Portfolio: Agriculture and Fisheries

Purpose and Description

1. The object of this Bill is to amend the *Prevention of Cruelty to Animals Act 1979* (the Act) to allow the docking of a dog's tail only if the procedure is performed by a veterinary surgeon in the interests of the dog's welfare.

Background

Consultation

2. According to the second reading speech, the Minister for Agriculture and Fisheries:
met with, or received and considered representations and submissions from, interested stakeholder groups. These include the New South Wales RSPCA, the New South Wales Division of the Australian Veterinary Association, the New South Wales Animal Welfare League, the Animal Societies Federation, the Animal Welfare Advisory Council, the Pet Industry Joint Advisory Council of Australia, the Royal New South Wales Canine Council, the Council of Docked Breeds, the Dog Body, and a range of dog breed societies as well as dog owners.
All animal welfare organisations and the Australian Veterinary Association are strongly in favour of a ban on the routine or cosmetic docking of dogs. However, it is apparent that many dog breeders, particularly those with an interest in breeds that are traditionally docked, are vehemently opposed to any amendment that would prohibit cosmetic tail docking.¹⁵

History

3. In the second reading speech, the Minister states:
The practice became common in the Middle Ages in Britain and Western Europe.
A number of theories have been advanced that seek to explain the origins of tail docking. They include the prevention of rabies, the prevention of back injury, increasing the speed of the tail-docked dog, and the prevention of tail damage due to fighting, baiting or ratting. Docking of tails on farmers' or drovers' dogs, used for herding or driving cattle and sheep, originated in early Georgian times in England as it exempted the owner from a tax levied upon working dogs with tails.
Many other types of dogs were also similarly docked to avoid this luxury tax, and although this imposition was repealed in 1796 the habit of docking particular breeds

¹⁵ The Hon I M Macdonald MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 10 March 2004.

Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004

remained. Given the variety of historical reasons for the practice of tail docking, and the fact that none of them appears to have any continued significant application in a modern, animal-welfare-oriented society, there are no compelling reasons to continue this practice, unless it is done specifically in the best interests of the dog.¹⁶

Other States

4. According to the Minister's second reading speech:

The other States and territories either already have bans on cosmetic tail docking in place or are well on the way to doing so. From October 2003 Queensland legislation has restricted this procedure to veterinarians and only when it is in the interests of a dog's welfare. It is expected that this wording will essentially restrict the procedure to therapeutic use only.

Amendments are proposed for the Victorian animal welfare regulations whereby the practice will be restricted to veterinarians and, similar to Queensland, only when it is in the interests of a dog's welfare. In the Australian Capital Territory legislation has been in place for a number of years to restrict the practice to veterinarians for therapeutic and preventive purposes...It is expected that within 12 months the procedure will be limited to use for therapeutic purposes only.

The introduction of a new animal welfare Act in Western Australia in early 2003 ensured that the practice of tail docking of dogs was restricted to veterinarians. Docking for preventive purposes as well as therapeutic purposes is allowed under this legislation. In the Northern Territory legislative amendments are proposed whereby the operation will be restricted to veterinarians but will be allowed for both therapeutic and prophylactic purposes. This will be essentially the same as the requirements currently enforced in the Australian Capital Territory and Western Australia. The South Australian animal welfare legislation was amended in late 2003 to restrict the docking of dogs' tails to veterinarians and only then for therapeutic purposes.¹⁷

Other Countries

5. According to the second reading speech:

In addition to the prohibitions on tail docking that already exist in Australia, a number of European nations have prohibited tail docking of dogs—some, such as Norway, since 1987. These countries include Denmark, Estonia, Finland, Germany, Iceland, Israel, the Netherlands, Norway, Switzerland, Sweden and some parts of Austria.

The Bill

6. The Minister's second reading speech advises:

The amendments proposed for the Prevention of Cruelty to Animals Act will restrict the tail docking of dogs to veterinarians only when it is in the welfare interests of a particular dog to do so. This will effectively limit tail docking to situations in which a curative or therapeutic effect is sought. This might occur if a dog has suffered a severe injury to the tail from, for example, being jammed in a closing door or through a vehicle accident. There may also be situations in which a dog's tail may require amputation because of the growth of a tumour or the development of severe dermatosis. Very few dogs may require docking because of repeated minor injuries

¹⁶ The Hon I M Macdonald MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 10 March 2004.

¹⁷ The Hon I M Macdonald MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 10 March 2004.

Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004

sustained through vigorous tail wagging or because of repeated injuries sustained during hunting.¹⁸

7. Currently, s 12(1) of the Act makes it an offence for a person to dock the tail of a dog. The present Act permits two defences:
 - that the dog was less than five days old at the time of docking [s 12(2)(a1)]; or
 - that the docking was performed by a veterinary surgeon in the circumstances prescribed, and in accordance with any conditions specified, in the regulations [s 12(2)(b)]¹⁹.
8. This Bill removes these two defences to tail docking of a dog.
9. The Bill inserts a new defence, namely:

if the court is satisfied that the procedure comprising the alleged offence was the docking of the tail of a dog, was performed by a veterinary surgeon and was in the interest of the dog's welfare [proposed s 12(2A)].
10. The maximum penalties for an offence under s 12 of the present Act are:
 - in the case of a corporation, 250 penalty units (currently \$27,500); and
 - in the case of an individual, 50 penalty units (currently \$5,500) or imprisonment for 6 months, or both.

The Bill does not change these penalties.

11. The present Act also provides that in any proceedings for an offence against Part 2 of the Act, or the regulations, in respect of an animal, the person accused of the offence is not guilty if the person satisfies the court that the relevant act or omission was done, authorised to be done or omitted to be done by that person in the course of, and for the purpose of, providing the animal with veterinary treatment [s 24(1)(d)].

The Bill removes this defence of docking a tail of a dog under s 12(1) [proposed s 24(3)].

Therefore, under the Bill, tail docking by a veterinary surgeon would only be a defence if it was in the interest of the dog's welfare.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

12. The ensuing Act is to commence on a day to be appointed by proclamation.

¹⁸ The Hon I M Macdonald MLC, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 10 March 2004.

¹⁹ Clause 9 of the *Prevention of Cruelty to Animals (General) Regulation 1996*, however, prescribes the circumstances in which the docking of the tail of a **cow, heifer or female calf** only may be performed. There is no prescribed circumstances for the purpose of s 12(2) of the Act in which a dog's tail may be docked.

Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004

13. 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.
14. Whilst 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.
15. The Minister's office advises that the reason for the delay in the commencement of the Act is to conduct an education campaign to ensure that the public is aware of the new offence and associated penalties.

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| <p>16. While the Committee considers that the need for an education campaign is an appropriate reason to delay the commencement of the Act, it has written to the Minister seeking advice as to the likely timeframes within which the education campaign will be conducted, and within which the Act will be proclaimed.</p> |
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The Committee makes no further comment on this Bill.

4. STOCK DISEASES AMENDMENT (FALSE INFORMATION) BILL 2004

Date Introduced: 12 March 2004
House Introduced: Legislative Assembly
Minister Responsible: The Hon Ian Macdonald MLC
Portfolio: Agriculture and Fisheries

Purpose and Description

1. This Bill amends the *Stock Diseases Act 1923* (the Act):
 - (a) to create a new offence of giving false or misleading information in relation to the agistment of stock or the use of land for grazing of stock; and
 - (b) to increase the maximum penalty for an existing offence under that Act of giving false or misleading information in relation to certain matters in connection with the sale or disposition or proposed sale or disposition of stock.

Background

2. According to the Parliamentary Secretary's second reading speech:

The Stock Diseases Act is the principal vehicle for protecting the health of farm animals in New South Wales. It is designed to help control and/or eradicate the spreading of stock diseases. The successful control of stock diseases is vital for a range of reasons, including animal welfare, environmental sustainability, regional and rural development and human health. The Stock Diseases Act is a crucial tool in protecting the future and reputation of our agricultural industries. Take, for example, the impact of ovine Johne's disease [OJD] on Australia's multibillion-dollar sheep industry.

Since being first detected on the Central Tablelands in 1980, OJD has become a major industry issue—particularly in New South Wales which has, unfortunately, been the most affected State. In January 2003 there were nearly 1,200 flocks in New South Wales with confirmed OJD.²⁰

3. The second reading speech also advised that:

The changes that are the subject of this bill are a direct result of an independent review, the Bull review, which considered the ovine Johne's disease program in 2003.

A key recommendation was for the introduction of mandatory animal health statements for all sheep traded or agisted in New South Wales. These statements will provide crucial information to sheep buyers on a flock's OJD status. They will help producers make a more informed decision about the risks of animal disease. Under the Act it is already an offence for a person to make false or misleading statements about disease, and the risk of disease in livestock, in connection with the sale or

²⁰ Mr Neville Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

Stock Diseases Amendment (False Information) Bill 2004

disposal of livestock. However, producers can also suffer stock losses due to animal disease if areas of land have been contaminated by previous flocks...

In order to help deter vendors from providing inaccurate information on animal disease status and risk, we need to have appropriate penalties in place for those who deliberately mislead others on these issues.²¹

The Bill

4. The Act provides that a person must not, in connection with a sale or disposition or proposed sale or disposition of stock, make a statement or provide information in relation to:
 - (a) the presence or absence of infection in stock, carcasses or land; or
 - (b) any matter relevant to an assessment of the likelihood of the exposure of stock to infection; or
 - (c) any other matter prescribed by the regulations,that is false or misleading in a material particular [s 20J(2)].
5. The Act currently provides that the maximum penalty for such an offence is 100 penalty units (currently \$11,000). This Bill increases the maximum penalty to 200 penalty units (currently \$22,000) [Schedule 1[1]].
6. This Bill also inserts a new offence into the Act:

A person must not, in or in connection with an arrangement or agreement or proposed arrangement or agreement for the agistment of stock or for the use of land for grazing of stock (including any lease or proposed lease of land for grazing of stock), make a statement or provide information in relation to:

 - (a) the presence or absence of infection in stock, carcasses or land, or
 - (b) any matter relevant to an assessment of the likelihood of the exposure of stock to infection, or
 - (c) any other matter prescribed by the regulations, that is false or misleading in a material particular.
7. The proposed maximum penalty for this offence is 200 penalty units (currently \$22,000) [Schedule 1[2]].
8. According to the second reading speech, the penalties proposed for s 20J(2) and s 20J(2A) will bring the penalties in New South Wales:

into line with those in other States. It will also bring them into line with similar penalties relating to the sale of other goods in New South Wales.²²

²¹ Mr Neville Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

²² Mr Neville Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

Issues Considered by the Committee

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

Strict Liability: proposed s 20J(2A)

9. The proposed offence of providing false or misleading information in relation to certain matters concerning the agistment of stock or the use of land for grazing stock is a *strict liability offence*.
10. Strict liability offences remove the requirement that the prosecution prove that the accused had the requisite intention to commit the crime (*mens rea*).

The only defence to an offence of strict liability is reasonable and honest mistake of fact.
11. By providing that this offence is one of strict liability, it places the onus on the defendant to prove that there was a reasonable and honest mistake of fact.

This reverses the ordinary requirement that the prosecution prove that the defendant *knowingly* provided information which was false or misleading as an element of the offence to be proved.
12. The second reading speech refers to the need “to have appropriate penalties in place for those who *deliberately* mislead others on these issues”.²³ However, the Bill also applies to those who inadvertently mislead others, unless they can prove they were honestly and reasonably mistaken.
13. Whilst strict liability may be appropriate for some offences - mainly offences of a regulatory nature - it is generally not appropriate in the case of offences for which heavy penalties apply, such as the maximum penalty provided for the current offence (200 penalty units, which is currently \$22,000).

14. **The Committee considers that, except in extraordinary circumstances, it is inappropriate for an offence with such heavy penalties to be an offence of strict liability.**
15. **The Committee has written to the Minister to seek his advice as to why the offence created by the Bill is one of strict liability.**

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

Commencement by proclamation: Clause 2

16. The proposed Act is to commence on a day to be appointed by proclamation.
17. 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 that Act at all.

²³ Mr Neville Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

Stock Diseases Amendment (False Information) Bill 2004

18. Whilst 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.
 19. The Minister's office has advised the Committee that the delay in commencement of the Act is necessary to allow the Department time to conduct an adequate education campaign about the responsibilities and offence created by the Bill, prior to the significant penalties coming into force.
20. **While the Committee considers that the need for an education campaign is an appropriate reason to delay the commencement of the Act, it has written to the Minister seeking advice as to the likely timeframes within which the education campaign will be conducted, and within which the Act will be proclaimed.**

The Committee makes no further comment on this Bill.

5. THOROUGHBRED RACING LEGISLATION AMENDMENT BILL 2004

Date Introduced: 12 March 2004
House Introduced: Legislative Assembly
Minister Responsible: The Hon Grant McBride MP
Portfolio: Gaming and Racing

Purpose and Description

1. The object of this Bill is to amend the *Thoroughbred Racing Board Act 1996* and certain other racing legislation for the following purposes:
 - (a) to change the name of the NSW Thoroughbred Racing Board to Racing New South Wales (***Racing NSW***) and to change the name of the *Thoroughbred Racing Board Act 1996* consequentially;
 - (b) to require Racing NSW to ensure that persons registered or licensed by it are fit and proper persons to be so registered or licensed;
 - (c) to make further provision with respect to the membership and functions of the Racing Industry Participants Advisory Committee;
 - (d) to make it clear that Racing NSW has a right of appeal to the Appeal Panel and the Racing Appeals Tribunal with respect to certain decisions;
 - (e) to provide that appeals heard by the Appeal Panel and the Racing Appeals Tribunal are new hearings and that fresh evidence may be heard;
 - (f) to make further provision with respect to the functions of the Appeal Panel and the Racing Appeals Tribunal on an appeal; and
 - (g) to make other amendments of a minor, consequential or transitional nature.

Background

2. According to the second reading speech²⁴, the bill arises from a review of the principal Act conducted in 2001. Section 53 of that Act requires the legislation to be reviewed 5 years after it commenced. The report of the review was tabled in Parliament in June 2002.
3. The Parliamentary Secretary reported that the review was confined to “whether the objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.”²⁵ Twenty-two submissions were received.

²⁴ Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

²⁵ Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

Thoroughbred Racing Legislation Amendment Bill 2004

4. According to the second reading speech, the review report concluded that the existing structure and composition of the Thoroughbred Racing Board²⁶ be retained, but that a number of amendments be made to the legislation.
5. The Board itself requested that its name be changed to “bring its formal name into alignment with its adopted usage of Racing New South Wales.”²⁷ This name change made by the Bill is accompanied by a change of name for NSW Racing P/L (the company that represents the three codes of racing in dealings with the TAB Ltd) to a name “which will avoid confusion with Racing NSW.”²⁸

As a consequence, the name of the principal Act is changed to the *Thoroughbred Racing Act 1996*.

The Bill

Registration and licensing power of Racing NSW

6. Under the principal Act the Board, to be named Racing NSW, has the power to register or licence, or refuse to register or licence, or cancel or suspend the registration or licence of, a race club, or an owner, trainer, jockey, stablehand, bookmaker, bookmaker’s clerk or another person associated with racing, or disqualify or suspend any of those person permanently or for a specified period [s. 14(2)(b)].
7. The Bill amends this power, providing that Racing NSW is to exercise it to ensure that any individuals it registers or licences are, in the opinion of Racing NSW, “fit and proper person to be so registered or licensed [schedule 1, cl 7].
8. Further, a person is not be registered or licensed if they have a conviction and Racing NSW is of the opinion that the circumstances of the offence concerned are such as to render the person unfit to be registered or licensed [proposed s 14AA(2)].

“Conviction” has the same meaning as in the *Criminal Records Act 1991* [s 14AA(4)]. Section 4 of that Act provides that “**conviction** means a conviction, whether summary or on indictment, for an offence and includes a finding or order which ... is treated as a conviction for the purposes of this Act.” It does not include a spent conviction.²⁹

²⁶ According to the second reading speech, in 1996, following the report of the “Temby Review”, the control and regulation of thoroughbred racing was transferred from the Australian Jockey Club to the newly created NSW Thoroughbred Racing Board.

²⁷ Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

²⁸ Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

²⁹ 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 [ss 7 – 10].

Appeals to the Appeal Panel

9. Currently, the Principal Act provides a person aggrieved by a decision of a racing authority (eg, the stewards of Racing NSW or of a race club) a right of appeal against the decision to the Appeal Panel [s.42].

The Bill gives Racing NSW the same right of appeal to the Appeal Panel. In addition, it gives Racing NSW the right to appeal “a decision to dismiss a charge against a person for contravention of the Rules of Racing” [proposed s 42(1A)].

10. The amendments make it clear that the Appeal Panel may vary the decision appealed against by substituting any decision that could have been made by the racing authority that made the decision that is the subject of appeal [schedule 1, cl. 16].
11. They also make clear that an appeal to the Panel:
- is to be by way of a new hearing and fresh evidence , or evidence in addition to or in substitution for the evidence on which the decision appealed against was made, may be given on the appeal [schedule 1, cl.15].

Appeals to Racing Appeals Tribunal

12. Schedule 2 amends the *Racing Appeals Tribunal Act 1983*. Among other things, these amendments mirror those made in relation to the Appeal Panel. For example, they give Racing NSW the right to appeal a decision of the Appeal Panel to the Tribunal and provide that an appeal to the Tribunal is to be by way of a new hearing and that fresh evidence may be given on the appeal³⁰ [schedule 2, clauses 5 and 6].
13. In addition, the Tribunal may vary the decision appealed against by substituting any decision that could have been made by the body that made the decision appealed against.
14. According to the second reading speech, the Racing Appeals Tribunal and the Thoroughbred Racing Board have argued for these changes to the appeals structure.³¹
15. The Bill also empowers the Tribunal to compel witnesses to attend hearings and produce documents. These powers are being transferred from the *Racing Appeals Tribunal Regulation 1999* to the Act.³²

Commencement

16. The Bill commences on proclamation.

³⁰ Currently, under clause 12 of the *Racing Appeals Tribunal Regulation 1999*, the Tribunal has limited power to hear new evidence.

³¹ In the second reading speech, the Parliamentary Secretary quoted his Honour Mr Barrie Thorley, sitting as the Racing Appeals Tribunal, to the effect that, in his view, the Tribunal should have the power to increase penalties in cases that come before it, whether or not the appeal is lodged in relation to that issue, and that the Board have the right of appeal against the inadequacy of orders made by Stewards or the Appeal Panel. Mr N J Newell MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 12 March 2004.

³² See rule 19, *Racing Appeals Tribunal Regulation 1999*.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

17. The Committee *does not agree* with the Minister's assertion in his Second Reading Speech that the proposed Bill does not raise issues within its jurisdiction under s 8 of the *Legislation Review Act*.
18. The Committee has repeatedly and consistently pointed out in its Digests of 2003 and 2004 that commencing an Act on proclamation may amount to an inappropriate delegation of legislative power. This is because it 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.

Such a provision will always attract the Committee's attention and comment under s. 8(1)(b)(v) of the *Legislation Review Act*.

19. The Committee recognises that there may be good reasons to delay the commencement of an Act. However, unless such reasons are given in the second reading speech, the Committee will continue to write to the responsible Minister seeking an explanation for the delay.

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| 20. The Committee has written to the Minister seeking an explanation for commencing this Bill on proclamation and the likely timeframe within which it will commence. |
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The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04	

Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Children (Detention Centres) Amendment Bill 2004	4
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Crimes Legislation Amendment Bill 2004	3
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Cross-Border Commission Bill 2004	3
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4
Public Lotteries Legislation Amendment Bill 2004	2
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1
Stock Diseases Amendment (False Information) Bill 2004	4
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4
Wool, Hide and Skin Dealers Bill 2004	2

Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03	07/11/03	2,5	
Powers of Attorney Bill 2003	Attorney General	12/09/03	07/10/03	2,4	
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03	26/11/03	3,7	
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03		4	
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Sydney Water Amendment (Water Restrictions) Bill 2003	Minister for Energy and Utilities	24/10/03	27/10/03	4,5	
Coroners Amendment Bill 2003	Attorney General	07/11/03	27/11/03	5,7	
Courts Legislation Amendment Bill 2003	Attorney General	07/11/03	25/11/03	5,7	
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	Premier	07/11/03	27/11/03	5,7	
Lord Howe Island Amendment Bill 2003	Minister for the Environment	07/11/03	28/11/03	5	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Transport Legislation Amendment (Safety and Reliability) Bill 2003	Minister for Transport Services	07/11/03	21/11/03	5,7	
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03	03/11/03	5	1
Catchment Management Authorities Bill 2003; Natural Resources Bill 2003 and Native Vegetation Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03		6	
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03		6	
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Transport Administration Amendment (Rail Agencies) Bill 2003	Minister for Transport Services	18/11/03		6	
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
Bail Amendment (Firearms and Property Offences) Bill 2003	Attorney General	28/11/03	12/01/04	7	1
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03		7	
Local Government Amendment Bill 2003	Minister for Local Government	28/11/03		7	
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04			1
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04			1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04			1
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04			1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04			3
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04			4
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04			4
Thoroughbred Racing Legislation Amendment Bill 2004	Gaming Racing	16/03/04			4

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N,R				C
Fair Trading Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Public Lotteries Legislation Amendment Bill 2004				N	
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N,C				
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Stock Diseases Amendment (False Information) Bill 2004	C			C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Thoroughbred Racing Legislation Amendment Bill 2004				C	
Wool, Hide and Skin Dealers Bill 2004				N	

Key

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