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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. COMMUNITY PROTECTION (CLOSURE OF ILLEGAL BROTHELS) BILL 2003*

Date Introduced:	4 December 2003
House Introduced:	Legislative Assembly
Member Responsible:	Ms Peta Seaton MP
Portfolio:	Private Member's Bill

Purpose and Description

1. The underlying principle of this Bill is to recognise the danger to public health and safety that is caused by the operation of illegal brothels in inappropriate locations within the community.

2. The objects of this Bill are as follows:

   (a) to protect the community from the operation of illegal brothels;

   (b) to encourage the restriction and regulation of brothels under instruments and policies made or adopted by local councils; and

   (c) to facilitate the prompt closure of illegal brothels by local councils.

Background

3. A similar Bill, introduced by the Leader of the Opposition on 6 September 2001, was not passed by the Lower House.

   Since then, the government has amended the laws governing brothels, the *Disorderly House Amendment (Brothels) Bill 2002* which, according to the Member's second reading speech, "brought in tighter rules of evidence to help councils close down illegal brothels but still require the lengthy court processes".[1]

   In 2002, the Government also set up a Brothels Planning Advisory Panel to advise local government on planning in relation to brothels.[2]

4. In her second reading speech, the Member stated that:

   > The bill will restore control to councils over what goes on in their area, without costing resident ratepayers an arm and a leg in legal fees while their council is forced into

[1] Second reading speech, Ms Peta Seaton MP, Legislative Assembly, *Parliamentary Debates (Hansard)*, 4 December 2003.

[2] Since May 2002, the Panel has been called the Sex Services Premises Planning Advisory Panel. It advises local government on planning issues related to sex services premises.

> months of litigation under present laws to prove that a brothel is illegal and not an escort agency.
>
> The bill will help protect underage [homeless] girls and young men who can easily fall prey to unscrupulous illegal brothel operators who offer a young homeless person a roof over their head, at huge human cost.

The Bill

5. The Bill amends the *Environmental Planning and Assessment Act 1979.*

6. Specifically, the Bill amends the Table to section 121B providing for the giving of an order by a local council to cease using premises for the purposes of an illegal brothel if the use of the premises as a brothel is prohibited under an environmental planning instrument or where development consent is required but has not been obtained [Schedule 1, clause 3]. No advance notice of the making of the order need be given.

7. The person to whom the order is addressed (the owner of the premises or the person by whom the premises are being used as a brothel) must comply with it within 48 hours of it being given.

8. If the person fails to comply, the council may take such action as it "considers necessary or appropriate in order to prevent persons from entering the premises to which the order relates" [proposed s 121ZJA(1)].

   This action includes entering the premises to secure, change the locks on, or erect hoardings over, any door, window or gate [proposed s 121ZJA (2)] with or without police assistance [proposed s 121ZJA (3)].

   Reasonable costs incurred by the council in taking such action and in making the order are recoverable from the person required to comply with the council's order [proposed ss 121ZJA (4) & 121ZJB respectively].

9. The Bill *exempts* a council making an order to close an illegal brothel from complying with the procedural requirements set out in sections 121F-121K of the Act.[3] These requirements include:

   - consideration by a council before it makes an order, as to whether the order will or is likely to have the effect of making a resident homeless [s.121G];
   - giving notice to the person concerned that the order is to be made and that they may make representations as to why it should not be made [121H(1)];
   - allowing the person concerned the opportunity to make such representations [s.121I]; and
   - making an order only after having heard and considered any such representations made [s. 121K].

10. The Bill also inserts a new section 39A to provide that the *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1) does not apply to or in respect of development for the purposes of a brothel.

[3] See section 121D of the Act, which requires a person to comply with certain procedures *before* making an order.

According to the second reading speech:

> [t]his is a very important provision, because in the past it has been very difficult for councils to defend themselves against arguments by proponents that they should be given consent for a brothel under SEPP 1. This makes it clear that SEPP 1 cannot be used for that purpose.

11. The Bill commences on Assent.

Issues Considered by the Committee

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

Denial of procedural fairness: Clause 5, Amendment of section 121D of the Act

12. The Bill provides that the Council may make an order to close an illegal brothel without giving notice to those that are the subject of that order. This means that there is no opportunity for a person to make their case to the council before the order is made and put into effect.

13. In her second reading speech, the Member stated that the reason for this was to "give councils the essential element of surprise, which is essential in catching these fly-by-night illegal brothel operators".

14. On the other hand, not providing an opportunity for a person to put their case or make representations before the council makes its order is a denial of procedural fairness.

The Committee will always be concerned about administrative action, including decision-making, which does not afford those directly affected the right to be heard before the action is taken. This will be especially so if the action impacts adversely on individual rights and liberties.

Further, the Committee considers that there may be circumstances in which a council erroneously decides that premises are being used illegally as a brothel and takes action under this Bill to prevent access to the premises. In such a case, a person who may otherwise lawfully enter these premises would be prevented from doing so. In such circumstances, the person subject to the order may also bear the burden of rectifying any damage to the premises caused by council action taken under this Bill (eg, repairing or replacing locks removed by the council, removing hoardings the council erects).

15. The Committee understands that requiring a council to give notice before taking action to close premises it considers are being used as an illegal brothel eliminates the element of surprise.

16. The Committee will always be concerned about legislation that authorises administrative decision-making without also providing for the right of those directly affected by such decision to have their views heard.

17. The Committee refers to Parliament the question whether this Bill unduly trespasses on rights and liberties by providing that a local council is not required to give advance notice of the making an order to close premises it considers are being used as an illegal brothel.

The Committee makes no further comment on this Bill.

2. CRIMES (SENTENCING PROCEDURE) AMENDMENT (VICTIMS IMPACT STATEMENTS) BILL 2003

Date Introduced:	5 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill's object is to expand the category of offences in relation to which a Local Court may receive and consider victim impact statements [VIS].

Background

2. The *Victims Rights Act 1996* introduced the concept of VIS to the criminal justice system in New South Wales.

3. Pursuant to this change, victims of serious violent crime were able to detail for a Supreme or District Court judge the impact which the crime has had upon their lives.

4. In most cases a VIS is a description of the personal harm suffered as a direct result of a crime

5. In 1998 this process was extended to the Local Court, in cases involving a death.

6. Subsequently, the *Victims Legislation Amendment Act 2003* gave eligible victims the right to read their statements aloud in the courtroom prior to sentencing.[4] When read aloud in court, the VIS directly confronts the offender with the human consequences of his or her crime.

7. In August 2003, the Premier announced the further extension of the process to allow victims of violent crimes to have their VIS presented to the Local Court.[5]

8. At present, a VIS may be received by the Local Court only when the offence being dealt with resulted in a death, or it is an offence for which a higher maximum penalty may be imposed when death is occasioned.[6] Many serious offences dealt with in the Local Court are not currently covered by the existing provision, eg, causing grievous bodily harm [s 54 *Crimes Act 1900*].

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[4] The *Victims Legislation Amendment Act 2003* inserted a new s 30A into the *Crimes (Sentencing Procedure) Act 1999*.

[5] Mr B J Gaudry MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly 5 December 2003.

[6] See s 27 *Crimes (Sentencing Procedure) Act 1999*.

9. The proposed change enables the Local Court to receive a VIS when an indictable offence listed in Table 1 of Sch 1 to the *Criminal Procedure Act 1986* is dealt with summarily, and:

- has resulted in either actual physical bodily harm to any person; or
- involves an act of actual or threatened violence, or an act of sexual assault.

10. Once the Local Court has received a VIS, the victim is entitled to read out the statement at such time following conviction, but prior to sentencing, as the Court determines.

11. The offences listed in Table 1 of Sch 1 to the *Criminal Procedure Act 1986* are indictable offences which are to be dealt with summarily unless the prosecutor or the person charged elects otherwise. These include offences such as:

- malicious wounding;
- maliciously inflicting grievous bodily harm;
- aggravated indecent assault; and
- dangerous driving occasioning grievous bodily harm.

The Bill

12. Schedule 1 [1] inserts a new s 27(3)(c) into the Act to expand the category of offences in relation to which a Local Court may receive and consider a VIS to include:

(a) an offence that results in actual physical bodily harm to any person, or

(b) an offence that involves an act of actual or threatened violence or an act of sexual assault.

13. Schedule 1 [2]–[5] provide for consequential amendments, and the making of regulations of a savings and transitional nature as a consequence of the enactment of the proposed Act.

Issues Considered by the Committee

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

Commencement: Clause 2

14. The Bill provides that the Act is to commence on a day to be appointed by proclamation.

15. The Committee is advised by the Attorney General's office that this delay is due to the need for administrative and resourcing issues in the Local Court to be addressed, and so that practitioners may be made fully aware of the changes made by the proposed Bill, thereby ensuring its effective operation from commencement.

16. The Committee is further advised that the Attorney General's Department aims to commence the legislation at the end of June 2004, by which time budgetary considerations in implementing the changes will have been fully addressed.

17. The Committee considers that allowing time to implement the required administrative changes and to educate practitioners about the change to Victim Impact Statement practice in the Local Court are appropriate reasons to delay commencement.

The Committee makes no further comment on this Bill.

3. ELECTRICITY (CONSUMER SAFETY) BILL 2003

Date Introduced:	4 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Fair Trading

Purpose and Description

1. The Bill's objects are to:

   (a) repeal the *Electricity Safety Act 1945* [the current Act];

   (b) re-enact (with modifications) the provisions of the current Act concerning electrical articles, electrical installations and the investigation and reporting of electrical accidents to the extent that they are currently administered by the Minister for Commerce and the Minister for Fair Trading;

   (c) amend the *Electricity Supply Act 1995* [the ESA] to re-enact (with modifications) the provisions of the current Act concerning electrical structures, corrosion protection systems, stray current sources and the investigation and reporting of electrical accidents to the extent that they are currently administered by the Minister for Energy and Utilities;

   (d) amend the *Energy Administration Act 1987* [the EAA] to re-enact (with modifications) the provisions of the current Act concerning energy efficiency for electrical articles and the functions of the Energy Corporation of New South Wales in relation to electricity safety to the extent that they are currently administered by the Minister for Energy and Utilities;

   (e) make consequential amendments to various other Acts and Regulations; and

   (f) enact provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Background

2. The current Act makes provision for the safe use of electricity and certain electrical equipment and for the reporting and investigation of serious electrical accidents. It also empowers the Energy Corporation of New South Wales [the Corporation], constituted under the EAA, to promote and encourage the safety of persons and property in relation to electricity.

3. The current Act confers a number of functions on the Director of the Department of Energy, a position which no longer exists.

4. However, the combined effect of various Orders relating to public sector management legislation currently in force is that:

   (a) references in provisions of the current Act to the Director, or the Department of Energy (other than to the extent that they relate to electrical installations or

electrical articles), are to be read as references to the Director-General of the Ministry of Energy and Utilities and the Ministry of Energy and Utilities respectively; and

(b) references in provisions of the current Act to the Director or the Department of Energy are to be read as references to the Commissioner for Fair Trading and the Department of Commerce respectively, to the extent that they relate to electrical installations and electrical articles.[7]

5. The current Act is jointly administered by the Minister for Energy and Utilities, the Minister for Commerce and the Minister for Fair Trading.

6. To clarify areas of responsibility, the Bill splits the Act's administration so that:

- matters under the current Act administered by the Minister for Energy and Utilities are transferred to either the ESA, or the EAA, as appropriate;
- the sections of the current Act that provide certain powers, duties and functions to the Corporation are transferred to the EAA; and
- provision for the inspection, investigation and reporting of matters relating to network assets are included in the ESA.

7. The provisions under the proposed Act that are administered under the Fair Trading portfolio prescribe a regime for safe electrical articles, the safety of electrical installations and reporting and investigation of accidents involving articles and installations.

8. In the Bill's Second Reading speech, the Minister for Fair Trading stated that:

> The provisions of the *Electricity Safety Act* relating to electrical articles and installations have been remade in this *Electricity (Consumer Safety) Bill*, with some amendments, to improve the administration of the legislation, to enhance consumer safety, ease the burden on suppliers of electrical articles and to underscore the serious intent of this safety regime.[8]

The Bill

9. The Bill contains the following Parts:

- Part 1, consisting mainly of definitions;
- Part 2, dealing with *declared electrical articles*,[9] with reference to matters such as their specifications, approval and sale, and including offences against the proposed Act and investigation powers;
- Part 3, dealing with electrical installations;[10]

[7] Those Orders include: the *Public Sector Management (Electricity Safety) Order 1997*, the *Public Sector Management (General) Order 1999*, the *Public Sector Management (Ministry of Energy and Utilities) Order 2000 (No 2)* and the *Public Sector Employment and Management (General) Order 2003*.

[8] Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 4 December 2003.

[9] An ***electrical article*** is defined to mean any appliance, wire, fitting, cable, conduit, meter, insulator, apparatus, material or other electrical equipment intended or designed for use in, or for the purposes of, or for connection to, any electrical installation [cl 3].

- Part 4, dealing with accident reporting and investigation;
- Part 5, dealing with the proposed Act's enforcement, including provision for search warrants and proceedings for offences
- Part 6, consisting of miscellaneous provisions;
- Schedule 1, consisting of savings, transitional and other provisions;
- Schedule 2, amending the ESA; and
- Schedule 3, amending the EAA.

Issues Considered by the Committee

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

Definition of electrical installation: Clause 3

10. As noted earlier, Part 1 of the Bill defines *electrical installation*.

11. However, cl 3 provides that the regulations may make provision as to the circumstances in which electrical equipment is taken to form part of an electrical installation in a place, for the purposes of that definition. The current definition does not permit the exclusion of matters from the definition by regulation.

12. The Explanatory Note gives the example that the regulations might provide that the part of a power line of an electricity supply authority supplying electricity to an electrical installation that is located on land owned by a consumer of electricity forms part of the consumer's electrical installation.[11]

13. The effect of cl 3 of the Bill would be to allow the proposed Act to be amended by a change to the definitions in the Regulation. The example given in the Bill's Explanatory Notes raises the practical concern that part of a power line owned by an electricity supply authority may be defined by Regulation to be part of a consumer's electrical installation.

14. Accordingly, a consumer may end up bearing the responsibility for such a power line. It appears that the potential costs associated with this could range from a few hundred dollars with respect to a suburban residence, or business, to many thousands with respect to a rural property.

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[10] Subject to Regulations, an ***electrical installation*** is defined in the Bill to mean any fixed appliances, wires, fittings, apparatus or other electrical equipment used for (or for purposes incidental to) the conveyance, control and use of electricity in a particular place, but not:
(a) any electrical equipment used, or intended for use, in the generation, transmission or distribution of electricity that is:
(i) owned or used by an electricity supply authority, or
(ii) located in a place that is owned or occupied by such an authority,
(b) any electrical article connected to, and extending or situated beyond, any electrical outlet socket;
(c) any electrical equipment in or about a mine;
(d) any electrical equipment operating at not more than 50 volts alternating current or 120 volts ripple-free direct current; or
(e) any other electrical equipment, or class of electrical equipment, prescribed by the regulations.

[11] *Electricity (Consumer Safety) Bill 2003*, Explanatory Note at 3.

15. Providing for a regulation to amend an Act in this way significantly reduces parliamentary oversight of the legislative process. Such provisions have come to be referred to as *Henry VIII clauses*.

16. Because 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.

17. The Committee has previously noted the limited situations in which a *Henry VIII* clause may be appropriate.[12] These are:

- facilitating the effective application of innovative legislation;
- facilitating transitional arrangements;
- facilitating the application of national schemes of legislation; and
- circumstances warrant immediate Executive action.

18. Definitional amendments as envisaged by cl 3 do *not* appear to fall within any of these exceptions.

19. Arguably, the definition of something which is as fundamental to the operation of the proposed Act as an electrical installation, and which may have serious financial implications for consumers, should be set out clearly in the legislation itself.

20. The Committee notes that allowing the definition of electrical installation in the proposed *Electricity (Consumer Safety) Act* to be amended by regulation reduces parliamentary oversight of a matter that may determine the very ambit of the Act.

21. The Committee has written to the Minister seeking her advice as to the potential for additional costs to consumers arising from providing that the part of a power line of an electricity authority supplying electricity to an electrical installation that is located on land owned or occupied by a consumer of electricity forms part of the consumer's electrical installation.

22. The Committee has further sought the Minister's advice as to the need for the definition of electrical installation to be amended by regulation.

23. The Committee refers to Parliament the question of whether allowing such a fundamental matter to be amended by regulation is an inappropriate delegation of legislative power.

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

Powers of entry : Clause 30, Clause 35 and Schedule 2[4]

24. Clause 30 of the Bill provides that an authorised officer may enter any place at any reasonable time for the purpose of inspecting any electrical installation in the place.

25. Clause 3 of the Bill defines an authorised officer as:

[12] See *Legislation Review Digest* No.3, 14 October 2003, p.23.

- any investigator[13]; or
- any other person appointed under s 39 of the proposed Act by the Director-General[14] as an authorised officer for the purposes of the provision in which the expression is used.[15]

26. Clause 35 provides that an authorised officer may, in any place where a *serious electrical accident* has, or may reasonably be expected to have, occurred, do any one or more of the following:

(a) enter and inspect the place;

(b) examine and test any electrical article, electrical installation or other electrical equipment;

(c) take photographs;

(d) take for analysis a sample of any substance or thing that in the authorised officer's opinion may relate to the accident;

(e) require any person in the place to produce any record that may be of relevance to the occurrence of the accident;

(f) take copies of, or extracts or notes from, any such record;

(g) require any person in the place to answer questions or otherwise furnish information relating to the accident; and

(h) require the owner or occupier of the place to provide the authorised officer with such assistance and facilities as are reasonably necessary to enable the authorised officer to exercise the authorised officer's functions under this section.

27. A *serious electrical accident* is defined in cl 3(1) to mean an accident:

- in which an electrical article or electrical installation is involved; and
- as a consequence of which a person dies or suffers permanent disability, is hospitalised, receives treatment from a health care professional or is unable to attend work for any period of time.[16]

[13] An investigator means a person appointed as an investigator under s 18 of the *Fair Trading Act 1987*. Clause 41 provides that the powers conferred by the proposed Act or the regulations on persons who are authorised officers by reason of being investigators are in addition to, and not in derogation of, the powers conferred on investigators by Division 3 of Part 2 of the *Fair Trading Act 1987*.

[14] Throughout the Bill, "Director General" has the same meaning as used in the *Fair Trading Act 1987*, ie the Commissioner for Fair Trading, Department of Commerce, or - if there is no such position in the Department - the Director-General of the Department [s 4 *Fair Trading Act 1987*].

[15] Pursuant to cl 39, an authorised officer is to be provided by the Director-General of the Department of Fair Trading with a certificate of identification. This must be produced to any person apparently in charge of a place who requests its production, when the authorised officer is exercising in any place any of his or her functions under the proposed Act or the regulations.

[16] Clause 36 makes it an offence for a person to disturb or interfere with the site of a serious electrical accident before it has been inspected by an authorised officer, other than for the purpose of making it safe or with the permission of an authorised officer or as provided by the regulations. The same provisions are included with respect to a *serious electricity works accident* in new s 63U of the *Electricity Supply Act 1995*.

28. An authorised officer may not exercise his or her functions under cl 30 or cl 35 in relation to a part of any premises being used for residential purposes except:

- with the permission of the occupier of that part of the premises; or
- under the authority conferred by a search warrant issued under this Act [cl 30(4); cl 35(3)].

29. An authorised officer may apply for a search warrant for a place if the authorised officer has reasonable grounds for believing that:

- an unsafe electrical installation is in the place, or
- a serious electrical accident has occurred in the place, or
- a provision of the proposed Act or the regulations has been or is being contravened in the place [cl 42(1)].

Electricity Supply Act 1995

30. Similar entry provisions are contained in Sch 2[4] of the Bill, which inserts a new Part 5D in the *Electricity Supply Act 1995* [ESA], relating to electricity safety.[17]

31. Division 3 of the new Part 5D of the ESA re-enacts (with modifications) the provisions of s 25 and s 26 of the current Act, to the extent that they are administered by the Minister for Energy and Utilities.

32. These provisions deal with the inspection of cathodic protection systems (to be renamed *corrosion protection systems*[18]) and stray current sources, and the safety of certain electricity delivery equipment.

33. The new Division enables the Energy Director-General to authorise the inspection of electrical installations, and for inspectors to require the disconnection of installations that are unsafe [new s 63O of the ESA]. It also provides that the Director-General may cause electricity delivery equipment[19] to be examined and tested for determining whether such equipment may be used safely [new s 63P].[20]

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[17] The proposed Part re-enacts (with modifications) those provisions of Parts 5 (Electrical apparatus and appliances) and 6B (Accident reporting and investigation) of the *Electricity Supply Act 1995* that are currently administered either exclusively or jointly by the Minister for Energy and Utilities.

[18] Schedule 2[10] of the Bill inserts the following definition of ***corrosion protection system*** into the Dictionary of the *Electricity Supply Act 1995*:

> any appliances, wires, fittings or other apparatus designed, intended or used for the protection, by means of electrical currents, of metallic structures in contact with land, including water, from external corrosion and includes cathodic protection systems, drainage bonds, boosted drainage bonds and cross bonds.

[19] Defined in the amended Dictionary of the *Electricity Supply Act 1995* to mean any machinery, apparatus, appliances, material or other equipment used or intended to be used by any network operator or retail supplier for or in connection with the generation, transmission or distribution of electricity.

[20] New s 63Q of the *Electricity Supply Act 1995* provides that the Minister may subsequently, on the advice of the Director-General, permanently or temporarily prohibit the use of the equipment.

34. New s 63T provides inspectors with the same entry, etc., powers as contained in cl 35 of the Bill [see paragraph 21].[21]

35. Division 5 of the new Part 5D enables an inspector to apply for a search warrant for a place if the inspector has reasonable grounds for believing that:

    (a) an unsafe electrical installation is in the place; or

    (b) a serious electricity works accident has occurred in the place; or

    (c) a provision of the new Part 5D or the regulations made for the purposes of that Part has been or is being contravened in the place [new s 63W of the ESA].

Inspection of documents

36. An authorised officer may, with the written authority of the Director-General, enter any place and inspect and copy documents in the place, if the Director-General believes on reasonable grounds that there are in that place documents evidencing conduct in connection with:

    - an electrical installation in contravention of the proposed Act or the regulations [cl 30(3)]; or
    - a serious electrical accident [cl 35(2)]

    in contravention of the proposed Act or the regulations.

37. The power to enter any premises to locate documents evidencing a contravention of the proposed Act or the regulations is a new power.

Obstruction, etc, of authorised officers

38. Clause 40 of the Bill makes it an offence to refuse or fail to comply with a requirement made, or to answer a question asked by, an authorised officer, or wilfully delay, hinder, or obstruct an authorised officer or falsely to represent oneself to be an authorised officer [maximum penalty of 500 penalty units for a corporation or 150 penalty units in any other case].[22]

39. This applies to the powers of entry, etc, contained in cl 30 and cl 35.

40. However, cl 40(3) provides that it is a sufficient defence to a prosecution for an offence arising under cl 40(1)(a) by reason of the failure of a defendant to answer a question asked by an authorised officer, if the defendant satisfies the court that the defendant did not know, and could not with reasonable diligence ascertain, the answer to the question.

[21] As with cl 35 of the Bill, new s 63U of the *Electricity Supply Act 1995*, makes it an offence for a person to disturb or interfere with the site of a serious electrical accident before it has been inspected by an authorised officer other than for the purpose of making it safe or with the permission of an authorised officer or as provided by the regulations.

[22] Pursuant to cl 40(4) a person cannot be prosecuted for both an offence against proposed s 40 *and* an offence against s 23 (Obstruction etc of officers) of the *Fair Trading Act 1987* in relation to the same act or omission.

41. Schedule 2[4] includes the same provisions relating to obstruction, and defence to a prosecution for obstruction, in the proposed amendments to the ESA [new s 63N(1) and s 63N(3) respectively].

42. The Minister for Fair Trading specifically referred to the expanded scope of these search powers in the Bill's Second Reading speech:

> Continuing the Government's initiatives to improve electricity-related safety, the powers of Ministry of Energy and Utilities inspectors and Office of Fair Trading investigators have been enhanced. In the future when undertaking an investigation, an authorised person's powers to make enquiries will not be limited to the place where a serious accident occurred.
>
> The key benefit is that all causes of an accident can now be more thoroughly investigated. Under current legislation, an investigation can be hampered by the inability of an authorised person to obtain relevant information from other sites. Investigations also will be possible at all premises where commercial activity involving electrical works and articles is carried on, although a search warrant will remain necessary for entry to the parts of places used for residential purposes. Penalty notices will be introduced for clearly identified one-off breaches relating to electrical articles and installations…The Government is taking this opportunity to strengthen the enforcement aspects of the electricity consumer safety legislation.[23]

43. The Committee notes the wide scope of the powers of entry, inspection and seizure contained in the proposed *Electricity (Consumer Safety) Act* and in the amendments to the *Electricity Supply Act 1995*.

44. Given the limitations on the entry powers, the significant public interest in ensuring safety of electrical installations, and the Bill's express aim of widening the entry powers of inspectors, the Committee does not consider that the powers of entry and search without a warrant in the Bill unduly trespass on individual rights.

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

Limitation on self-incrimination: Clause 44

45. Clause 44(1) provides that:

> A person who is required under this Act or the regulations to answer a question, produce a thing or provide information is not excused from answering the question, producing that thing or providing the information on the ground that the answer to the question, the production of the thing or the provision of the information might tend to incriminate the person or make the person liable to a penalty.

46. As noted above, cl 40(1)(a) makes it an *offence* to refuse, or fail, to answer a question asked by an authorised officer, with a maximum penalty of 150 penalty units [$16,500] for an individual.

47. Clause 44(2) states that any answer given to a question, thing produced, or information provided by a natural person in compliance with the proposed Act or the regulations is not admissible in evidence against the person in criminal proceedings.

[23] Hon R P Meagher MP, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 4 December 2003.

48. Nonetheless, the evidentiary limit on the use of incriminating statements does not apply to civil proceedings, nor to proceedings for an offence against new s 27(4) [sell an electrical article in contravention of a notice in force under s 27, or remove or alter a label affixed to an electrical article or a container or package under s 27], or new s 40(1) [obstruct, etc., an authorised officer].

49. The Committee has previously noted the significant importance the privilege against self-incrimination has within our legal system, and in international conventions.[24]

50. The privilege provides that a person is not under a duty to answer questions or otherwise cooperate with public officials engaged in the investigation or prosecution, often called the *right to silence*. This right has been described by the High Court as:

> an entitlement to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles that they played.[25]

51. It is clear that an investigator exercising powers under the Bill is acting as a "person in authority", and that the exercise of these powers poses a threat to the privilege against self-incrimination.

52. The Committee notes that the right against self-incrimination (or "right to silence") is a fundamental right. This right should only be eroded when overwhelmingly in the public interest.[26] The Committee also considers that, as a rule, when a person is compelled to answer incriminating questions, that information should not be capable of being used against the person.

53. The Committee also notes that proposed s 40 makes it an offence to refuse or fail to answer an authorised officer's question.

54. The Committee also notes that proposed s 44 contains no privilege against self-incrimination in respect of civil proceedings.

55. The Committee also notes the public benefit of obtaining information regarding the safety of electrical articles and electrical installations.

56. The Committee refers to Parliament the question of whether the removal of the privilege against self-incrimination in the Bill unduly trespasses on personal rights.

The Committee makes no further comment on this Bill.

[24] Legislation Review Committee, Legislation Review Digest No.5, Report on *Transport Legislation Amendment (Safety and Reliability) Bill 2003*, at 56-58.

[25] Adverse inferences cannot be drawn from the failure to answer in these circumstances: *R v Petty* (1991) 173 CLR 95 at 95.

[26] Thus, legislative abrogation of the right to silence in the United Kingdom has been held to infringe the right to a fair trial contained in Article 6 of the European Convention on Human Rights: *Condron v United Kingdom* [2001] 31 EHRR 1.

4. LEGAL PROFESSION LEGISLATION AMENDMENT (ADVERTISING) BILL 2003

Date Introduced:	2 December 2003
House Introduced:	Legislative Council
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. This Bill amends the *Legal Profession Act 1987* (*LPA*) and the *Workplace Injury Management and Workers Compensation Act 1998* (*Workplace Injury Act*) to:

   (a) expand the power to make regulations under those Acts to regulate advertising by legal practitioners;

   (b) ensure that the regulations under the *LPA* with respect to advertising can regulate any conduct with respect to the marketing of legal services (in line with the power conferred under the *Workplace Injury Act*);

   (c) increase the penalty that advertising regulations under the *LPA* can impose from 10 to 200 penalty units (that is, from $1,100 to $22,000) (in line with the maximum penalty applicable under the *Workplace Injury Act*);

   (d) empower the Law Society Council (in the case of solicitors), the Bar Council (in the case of barristers) and the Legal Services Commissioner (in the case of solicitors or barristers) to apply to the Administrative Decisions Tribunal for a direction that a person cease advertising;

   (e) give the Minister administering the *LPA* and the Minister administering the *Workplace Injury Act* the same power to issue a direction to any person to cease advertising or other conduct without the involvement of the Administrative Decisions Tribunal; and

   (f) make consequential amendments.

Background

2. Currently, the *LPA* and the *Workplace Injury Act* prohibit lawyers from advertising in relation to personal injury work except in limited and specified ways. In addition, workers compensation agents are prohibited from advertising in relation to work injuries.

   These Acts also provide for the making of regulations for the purpose of governing advertising.

3. Clause 139 of the *Legal Profession Regulation 2002*, provides that a legal practitioner must not publish or cause to be published an advertisement that includes any reference to "personal injury".[27]

   Violation of this rule is punishable by a maximum of 10 penalty units ($1,100).

4. According to the second reading speech,[28] the amendments are being made to ensure consistency in approach under the two Acts.

   They also close a loophole used by some legal practitioners who retain businesses that are not legal firms to advertise services on their behalf. According to the second reading speech "[a]dvertising by these third-party businesses circumvents and undermines the prohibition on lawyer advertising."[29]

5. This Bill was declared urgent and passed all stages in the Legislative Council on 3 December 2003, and pursuant to a suspension of Standing Orders, the Bill passed all stages in the Legislative Assembly on 3 December 2003.

6. Under s 8A(2), the Committee is not precluded from reporting on a Bill after it has passed a House of Parliament or become an Act.

The Bill

7. The amendments in this Bill include:

   - increasing the penalty for advertising in breach of the *LPA* from 10 penalty units (currently $1,100) to 200 penalty units (currently $22,000) in line with the penalty for advertising in breach of the *Workplace Injury Act*;
   - providing that regulations under the *LPA* can regulate any conduct with respect to the marketing of legal services, to make this consistent with the power conferred under the *Workplace Injury Act*; and
   - allowing regulations to be made under both Acts to prohibit third-party advertising in a way that undermines the ban on lawyers advertising in relation to personal injury or work injury.

8. The Bill also amends both Acts to enable the Minister responsible, or the Administrative Decisions Tribunal (ADT) on application by the Legal Services Commission, the Bar Association or the Law Society, to direct a person not to engage in the prohibited conduct (ie, the advertising).

9. If such an application is made to the ADT, it must conduct an initial *ex parte* hearing to determine whether to issue an interim direction pending a final determination on the matter. This will allow for directions to be made for the immediate withdrawal of

[27] "Personal injury" is defined in clause 138 of the *Legal Profession Regulation 2002*, as including "pre-natal injury, impairment of a person's physical or mental condition, and disease".

[28] Second reading speech, The Hon John Hatzistergos, Minister for Justice, *Parliamentary Debates (Hansard)*, Legislative Council, 2 December 2003.

[29] Second reading speech, The Hon John Hatzistergos, Minister for Justice, *Parliamentary Debates (Hansard)*, Legislative Council, 2 December 2003.

an advertisement that, in the view of the ADT, is likely to be found to be in breach of the legislation.

10. Under both Acts, it is an offence for a person to continue to advertise in breach of a direction from a Minister or the ADT. The maximum penalty will be 200 penalty units (currently $22,000). Under the *LPA*, a breach of a direction by a lawyer may also constitute professional misconduct, as defined by section 127 of that Act.

11. Schedule 1, clause 3, inserts a new section 38JA into the *LPA.* A similar amendment is made in Schedule 2, clause 2, inserting additional subsections into section 142 of the *Workplace Injury Act*. These amendments give the Minister the power to direct a person in writing not to engage in prohibited advertising.

12. Proposed subsections 38JA (10) and 142(6) provide that the Minister is *not* required to notify the persons concerned before making such a direction.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

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

14. 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.

15. The Committee notes that the Bill, apart from proposed section 38JA(4)–(7), commenced on 19 December 2003.

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

Schedule 1, clause 3 [proposed subsection 38JA(10)] & Schedule 2, clause 2 [proposed subsection 142(6)]

16. The Bill does not provide for administrative review of a decision by the Minister to direct a person not to engage in specific conduct.

17. The Committee is of the view that an exercise of Ministerial discretion should ordinarily be reviewable to avoid making a person's rights, liberties or obligations unduly dependent on non-reviewable decisions.

18. However, the Committee recognises that there may be circumstances in which it is not necessary to provide for administrative review.

19. The Committee has written to the Attorney General to seek advice on the reasons why the legislation does not provide for administrative review of a direction by the Minister.

20. The Committee refers to Parliament the question whether the failure to provide for such review in this case makes a person's rights, liberties or obligations unduly dependent on non-reviewable decisions.

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

Denial of procedural fairness - Schedule 1, clause 3 [proposed subsection 38JA(10)] & Schedule 2, clause 2 [proposed subsection 142(6)]

21. Proposed subsections 38JA (10) and 142(6) provide that the Minister is *not* required to notify the persons concerned before making a direction that a person not engage in the prohibited conduct.

22. The Attorney General's Department has advised the Committee that the opportunity for a person to be heard before a direction is made is not excluded by the legislation but will be decided on a case-by-case basis.

23. The right to be heard is a key rule of procedural fairness. Generally, it requires a decision-maker to give persons who may be adversely affected by the decision the opportunity to give their side of the story, before the decision is made. This is called the "hearing rule". The way in which a person is to be heard will depend on the circumstances of the case.

24. This rule, and the other rules of procedural fairness (eg, the rule against bias) are "principles developed to ensure that fair decision-making *procedure* is followed."[30] Further, these rules "enhance the *substantive* quality of decision-making by ensuring that decision-makers are well informed. In this way, procedural fairness protects [an] individual from arbitrary government action and ensures the legitimacy and integrity of decision-making by administrators, tribunals and courts".[31]

    The Committee is of the view that the right to be heard is a very important principle that serves to protect individual rights and liberties.

25. In this case, the making of a direction may have an adverse impact on a person, including significant financial loss. In addition, a person who fails to comply with the direction may incur a substantial penalty, namely a heavy fine or being found guilty of professional misconduct (if the person is a legal practitioner) or both.

26. The Committee notes that, under this legislation, the Minister must be satisfied that the conduct is in breach of the regulations before making a direction. Further, that it is open to the Minister to give a person an opportunity to be heard before making a direction.

27. The Committee also recognises that the extent to which a person is entitled to procedural fairness, and the right to be heard, will depend on the circumstances of

[30] Hayley Katzen & Roger Douglas, *Administrative Law,* Butterworths Tutorial series, 2003, at page 171.
[31] Hayley Katzen & Roger Douglas, *Administrative Law,* Butterworths Tutorial series, 2003, at page 171.

the case.[32] Such circumstances might include the extent to which they will be adversely affected by the decision.

28. Another such circumstance may be whether the decision is subject to administrative review. In some cases, providing for administrative review of a decision can ameliorate the effect of failing to provide an opportunity to be heard. However, this legislation does not provide for such review.

29. The Committee has written to the Attorney General to seek advice as to the reasons why the legislation does not provide an opportunity for a person to whom a direction is given to be heard.

30. The Committee refers to Parliament the question of whether, in the circumstances, providing that a person does not have a right to be heard before a direction is made unduly trespasses on individual rights and liberties.

The Committee makes no further comment on this Bill.

[32] See Mason J, *Kioa v West* (1985) 62 ALR 321 at 346-7.

5. OCCUPATIONAL HEALTH AND SAFETY AMENDMENT (PROSECUTIONS) BILL 2003

Date Introduced:	2 December 2003
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Industrial Relations

Purpose and Description

1. The Bill's object is to amend the *Occupational Health and Safety Act 2000* [the Act] to enable any Minister of the Crown to consent to a prosecution for an offence under that Act or under the former *Occupational Health and Safety Act 1983* [the 1983 Act] and to extend the effect of the amendments to current proceedings.

2. The amendments will extend to proceedings relating to the 1996 deaths of miners at Gretley Colliery.

Background

3. On 14 November 1996 four miners died when working in the Gretley Colliery, from an inrush of water from the Young Wallsend coal workings. The then Minister for Mineral Resources initiated a Commission of Inquiry into the deaths.

4. The Commission of Inquiry reported in 1998. Among its recommendations, where that the relevant papers be referred to the Crown Solicitor for the purposes of determining whether offences had been committed under the 1983 Act.

5. Section 48 of the 1983 Act provided for consents to prosecutions to be given by the Minister, or for prosecutions to be commenced by an inspector appointed under that Act, or by a trade union whose members were concerned in the matter to which the proceedings related.

6. On 22 December 1999, under s 48(1)(a) of the 1983 Act, the former Attorney General and Minister for Industrial Relations, the Hon J W Shaw, signed consents to commencement of prosecutions under the 1983 Act.

7. In December 1999, in the Industrial Relations Commission in Court Session, a total of 52 charges were laid against the Newcastle Wallsend Coal Company Pty Ltd, Oakbridge Pty Ltd and eight individuals.

8. On 29 June 2000, the current Minister for Industrial Relations, the Hon John Della Bosca, again consented to the prosecutions, due to concerns about the procedural requirements associated with the original filing of charges.

9. The substantive trial commenced on 12 August 2003, on the basis of the consent given in 2000.

10. On 18 November 2003, the defence indicated that it intended to challenge the validity of the consent to the commencement of the prosecution. The defendants argued that the Minister for Mineral Resources, not the Minister for Industrial Relations, should have given the consent for the prosecution.

11. On 2 December 2003, the Bill was declared urgent and passed both Houses. It received the Royal Assent on 3 December 2003. 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

12. The Bill amends the Act to enable *any* Minister to consent to the institution of proceedings for an offence under that Act [new s 106(1)(a)].

13. This resolves any uncertainty arising out of the administration of the Principal Act, or the unavailability of the relevant Minister, and enables another Minister to act for the relevant Minister

14. The Bill also inserts a new Part 3 in Sch 3 to the Act. This extends the operation of the provisions amended by the proposed Act to proceedings for offences under the Act and the 1983 Act, or regulations under those Acts, that were or are instituted before, on, or after the commencement of the amendments, whether or not proceedings are pending on that commencement [new Sch 3[19]].

15. The Bill also provides for references to the Minister in the provisions relating to the commencement of prosecutions under the 1983 Act to be construed as references to *any* Minister of the Crown, and validates the institution of existing proceedings if they were consented to by a Minister of the Crown [new Sch 3[19](4) & (5)].

16. The Bill also provides for proceedings for offences under the Act or the 1983 Act, or regulations under those Acts, which were previously terminated merely because the proceedings were incorrectly instituted, to be able to be recommenced, if those proceedings would have been taken to have been valid under the Act, as amended by the proposed Act.

17. Such proceedings may be recommenced, relying on the original processes, even if the time for commencing proceedings has expired or the manner of commencing proceedings has changed. Things done in the terminated proceedings are taken to have been done in any recommenced proceedings [new Sch 3[20]].

Issues Considered by the Committee

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

Retrospectivity: Schedule1 [4]

18. Schedule 1 [4] amends the Act to retrospectively provide that any Minister of the Crown may validly commence prosecutions under that Act, and to validate any prosecutions that would have otherwise been instituted invalidly [new Sch 3[19(4) &(5)]].

19. The crux of the Bill is to ensure that what was essentially an administrative error does not operate to frustrate the effective operation of the Act, or the 1983 Act, in respect of the prosecutions arising from the accident at the Gretley Colliery.

20. Parliament may enact retrospective legislation by means of an express intention to do so. However, the general rule in all Australian jurisdictions is that, in the absence of such an express intention, legislation effecting a change in the law does *not* apply to past facts or events, so as to affect previously existing rights, privileges, obligations or liabilities. This is especially so with regard to legislation which creates criminal offences or increase penalties.

21. This presumption against retrospectivity is not confined to the common law, but is the basis of Article 15 of the International Covenant on Civil and Political Rights. Article 15 provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.[33]

22. In its 1995 3rd Report to the United Nations on the operation of Article 15, the Commonwealth Attorney-General's Department noted that:

> retrospective criminal legislation would be contrary to Australian political traditions. It is clear from existing case law that although the Article 15 principle of non-retrospectivity in the application of criminal law is not constitutionally guaranteed, it is regarded with great importance by both Parliament and the courts, and is derogated from only in exceptional circumstances.[34]

23. In Yrttiaho v. Public Curator (Queensland),[35] the High Court drew a distinction between retrospective legislation that purports to divest vested rights, and those statutes that are merely procedural.

24. It was held that, in the absence of clear words to the contrary, the former types of statute are to be construed as prospective, but merely procedural statutes are construed as being retrospective, "provided…that no injustice is done".[36]

25. In the Bill's Second Reading speech, the Minister for Industrial Relations stated that:

> The issue identified by the defence to the prosecution is purely administrative. It is not a case where the prosecution has done anything that might adversely affect the substantive rights of the defendants. The Occupational Health and Safety Act is generally allocated to the Minister for Industrial Relations, except in relation to mines.

[33] However, Paragraph 2 of Article 15 also states that nothing in that Article "shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations."

[34] www.law.gov.au/agd/Department/Publications/publications/ICCPR3/articles/article15.pdf

[35] (1971) 125 CLR 228.

[36] Gibbs J at 240, citing Dixon CJ in *Maxwell v Murphy* (1957) 96 CLR 261 at 267, citing in turn Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at 67. His Honour observed that a procedural change could be viewed as a substantive change if the effect of the procedural change were to bar the plaintiff's claim.

> Matters concerning mines are the responsibility of the Minister for Mineral Resources. Ordinarily such a prosecution would have been instigated by an inspector employed by the Department of Mineral Resources. However, the findings of the Coroner included recommendations concerning the department, and concerns were held about whether it was appropriate for consents to prosecutions to be given by the department or the Minister for Mineral Resources.
>
> However, the Government has decided to take the unusual step of placing the issue beyond doubt to ensure that the prosecutions in this very important matter can be tested on their merits rather than fail for a technical reason.[37]

26. Thus, the aim of the Bill's retrospectivity is to correct a possible administrative error in the conduct of the prosecution. It does not change the nature of the offences or the punishment that may result. Nor does the change affect a defendant's ability to defend him or herself, apart from losing the opportunity of avoiding prosecution because of the administrative error.

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

28. However, the Committee does not consider that, in the present context, retrospectively correcting an administrative error unduly trespasses on personal rights or liberties.

The Committee makes no further comment on this Bill.

[37]The Hon J J Della Bosca, Minister for Industrial Relations, *NSW Parliamentary Papers (Hansard)*, Legislative Council, 2 December 2003.

6. ROAD TRANSPORT LEGISLATION AMENDMENT (PUBLIC TRANSPORT LANES) BILL 2003

Date Introduced:	3 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Roads

Purpose and Description

1. The Bill's objects are to:

- amend the *Road Transport (Safety and Traffic Management) Act 1999* [the Act] to allow the use of approved traffic lane camera devices as a means of detecting certain offences of driving in traffic lanes that are dedicated primarily for the use of public transport in contravention of the regulations;
- amend the *Road Transport (General) Act 1999* [RTGA] to introduce operator onus enforcement of such an offence;
- make consequential amendments to the *Criminal Procedure Act 1986* [CPA]; and
- make a consequential amendment to the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*.

Background

2. The Bill aims to improve the effective operation of road-based public transport by discouraging the illegal use of public transport lanes, particularly T-Way lanes and bus lanes, through enhanced enforcement.

3. According to the Second Reading speech:

> [s]ince the early 1990s bus lanes have been progressively introduced in Sydney's CBD and at a number of other locations throughout the metropolitan area. The primary purpose of these lanes is to provide priority for buses, particularly during commuter peaks. The implementation of bus lanes assists in maintaining acceptable and consistent travel times for users of road-based public transport.[38]

4. However, despite the introduction of designated public transport lanes:

> [s]urveys of bus lanes undertaken by the RTA in 2002 indicate 35 per cent average illegal use of bus lanes with maximum illegal use as high as 48 per cent in some locations. The selfish behaviour of a minority of motorists will, if allowed to continue, frustrate efforts to provide a quality alternative to private travel by car…illegal use

[38] Mr A P Stewart, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

> continues to have a detrimental effect on the efficiency of these lanes by impacting on bus travel times and adding to operating costs.[39]

5. The amendments made by the Bill aim to address this illegal use by adapting existing technology:

> a system incorporating digital camera-based technology and OCR software can effectively detect and record illegal use of bus lanes with a high degree of reliability. The aim of introducing traffic lane cameras and the associated operator onus provisions for public transport lanes is to improve the efficiency of road-based public transport by providing a practical alternative means of enforcement.[40]

The Bill

6. The Bill inserts a new Division 3 in Part 4 of the Act to provide for the use of photographs taken by approved traffic lane camera devices as evidence of *public transport lane offences*.

7. A public transport lane offence is defined to include:

- a bus lane offence;
- a T-Way lane offence; or
- any other offence of driving a vehicle in a public transport lane in contravention of the regulations that is prescribed by the regulations for the purposes of the proposed definition [proposed s 57B].

Road Transport (General) Act 1999

8. The Bill expands the owner onus enforcement provisions in s 43 of the RTGA so that they will also apply to a public transport lane offence that is detected by an approved traffic lane camera device.

9. Section 43(1) provides that:

> If a designated offence occurs in relation to any registrable vehicle, the person who at the time of the occurrence of the offence is the responsible person for the vehicle is taken to be guilty of an offence under the provision concerned in all respects as if the responsible person were the actual offender guilty of the designated offence unless:
>
> (a) in any case where such an offence is dealt with under Division 1—the person satisfies the authorised officer under section 15 that the vehicle was at the relevant time a stolen vehicle or a vehicle illegally taken or used, or
>
> (b) in any other case—the court hearing the proceedings for the offence is satisfied that the vehicle was at the relevant time a stolen vehicle or a vehicle illegally taken or used.

10. To avoid the penalty for an offence under s 43 of the RTGA, a person who is served with a penalty notice or a summons in respect of a camera-recorded offence, and was

[39] Mr A P Stewart, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

[40] Mr A P Stewart, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

not at that time the driver of the relevant vehicle, must supply by statutory declaration to either the authorised officer under s 15 (in the case of a notice), or the informant (in the case of a summons), the name and address of the person who *was* in charge of the vehicle at the time the offence occurred [s 43(4)].

11. Alternatively, the responsible person will not be guilty under s 43 if he or she satisfies the authorised officer or court that he or she did not know, and could not with reasonable diligence have ascertained, the name and address of the person who was in charge of the vehicle at the relevant time [s 43(7)].

12. In any prosecution under s 43 of that Act, the responsible person for the vehicle in which a designated offence occurs may rely on any defence that would be available to the actual offender [Sch 2[1]].

Criminal Procedure Act 1986

13. The Bill also amends s 283 of the CPA. Section 283 provides that:

> (3) Evidence is not required in any criminal proceedings:
>
> (a) as to the accuracy or reliability of any approved camera detection device, approved camera recording device, approved speed measuring device or breath analysing instrument to which such a certificate relates, or
>
> (b) as to the manner in which any approved camera detection device, approved camera recording device, approved speed measuring device or breath analysing instrument to which such a certificate relates was operated,
>
> unless evidence is adduced that the device or instrument was not accurate, was not reliable or was not properly operated.

14. The Bill extends the coverage of s 283 to approved traffic lane camera devices, and to certificates and photographs that are admissible in proceedings by virtue of proposed Division 3 of Part 4 of the Act.

Issues Considered by the Committee

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

Extension of owner onus enforcement provisions: Schedule 2

15. Schedule 2 of the Bill expands the application of the owner onus enforcement provisions in s 43 of the RTGA to apply to a public transport lane offence that is detected by an approved traffic lane camera device.

16. This reverses the traditional onus of proof in relation to the identity of the offender, in that an accused person must show that he or she was not responsible for the infringement of the relevant traffic legislation.

17. The Committee notes, however, that:

- the responsible person is not guilty if he or she indicates who was driving the vehicle, or satisfies the authorised person or court that he or she does not, or

could not with reasonable diligence ascertain, the identity of the driver, or that the vehicle was illegally used;

- in the majority of cases, it is relatively easy for the responsible person to control the use of a vehicle and identify the driver; and
- enforcement would be significantly more difficult without such a provision.

18. The Committee notes that extending the application of the owner onus enforcement provisions in s 43 of the *Road Transport (General) Act 1999* to public transport lane offences effectively reverses the onus of proof regarding the identity of the person responsible for the offence.

19. However, having regard to the road safety aims of the legislation and the existing safeguards within s 43(4) of the *Road Transport (General) Act 1999*, the Committee considers that the reversal of the onus in these circumstances is not an undue trespass on personal rights and liberties.

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

Photographic evidence of public transport lane offences: Clause 57B

20. Clause 57B(2) provides that in proceedings for a public transport offence[41], a photograph tendered in evidence as a photograph taken by means of the operation, on a specified day, of an approved traffic lane camera device installed at a specified location is taken to have been so taken, unless evidence to the contrary is adduced.

Any such photograph is evidence (unless evidence to the contrary is adduced) of the matters shown or recorded on the photograph.

21. This provision places an evidential burden on the defendant to disprove the accuracy of the matters recorded on the photograph. This shifts the onus of proof by relieving the prosecution of the burden of proving the reliability of evidence from the traffic lane camera device unless evidence calling into question the accuracy of the camera is adduced.

22. The Bill contains identical evidentiary safeguards as are to be found in s 47(5) of the Act. Clause 57B provides that when a photograph tendered in evidence is taken by an approved traffic lane camera device, a certificate purporting to be signed by an authorised person, and certifying certain particulars, is also to be tendered in evidence.

23. The certificate is evidence (unless evidence to the contrary is adduced) that:

(a) the person is an authorised person;

[41] A ***public transport offence*** is defined in cl 57B(1) of the Bill as an offence against clause 96B (1) of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation* 1999: an offence against rule 154 (1) of the *Australian Road Rules* within the meaning of the *Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999*; or any other offence of driving a vehicle in a public transport lane in contravention of the regulations that is prescribed by the regulations for the purposes of this definition.

(b) within 30 days (or such other period as may be prescribed by the regulations) before the time and day recorded on the photograph as the time at which and the day on which the photograph was taken, the person carried out the inspection specified in the certificate on the approved traffic lane camera device that took the photograph; and

(c) on that inspection the approved traffic lane camera device was found to be operating correctly [proposed s 57B(3)].

24. Having regard to the consequences of the use of the camera technology in a public transport lane, the issue of correct vehicle identification is important. The issue of the reliability of the public transport lane cameras was addressed in the Second Reading speech:

> Digital imaging technology incorporating optical character recognition [OCR] functionality is currently used successfully in New South Wales by the RTA for enforcement of toll avoidance and in Safe-T-Cams to monitor heavy vehicle movements...The proposed traffic lane camera devices, which would require approval of the Governor under the terms of the bill, would utilise digital imaging technology that involves the use of digital cameras capable of producing an image that can be stored on a local or remote computer-based storage system. The OCR software used to process images produced by the cameras will recognise number plates, and will produce the number plate identification as text alongside the image. This procedure provides built-in checking of the image recognition and camera system operation as part of the processing of incoming images.
>
> For security, the bill proposes that a unique identifier like that applying to digital speed cameras, consisting of a series of 48 characters that is an individual combination of letters, numbers and symbols, would be incorporated onto a photograph recorded by an approved traffic lane camera device. The image would include both a close-up view of the vehicle number plate together with a wider-angle context view to identify the environment in which the vehicle was being operated. The T-way traffic lane camera device would consist of a single checkpoint that would capture two separate images of each vehicle travelling past that point....
>
> The bus lane camera device would consist of two checkpoints positioned in excess of 200 metres apart. Each checkpoint shall capture an image of each vehicle passing through that point. The system shall only store both images if a potential violation has been detected through automated matching of the number plate at both checkpoints.[42]

25. The Roads and Traffic Authority NSW [RTA] is responsible for the installation and maintenance of fixed speed cameras throughout New South Wales. Its public road safety material includes the following information:

> How do I know that the camera system is accurate and reliable?
>
> The digital speed camera system (including the digital camera recording device and the associated speed-measuring device) chosen for NSW has undergone a comprehensive evaluation and testing procedure to ensure its accuracy and reliability. Experts, authorised by the RTA, inspect each camera system and verify its accuracy and proper operation prior to the commencement of the camera operation and thereafter at regular intervals. The camera recording device is inspected every 30 days and the speed-measuring device is inspected at

[42] Mr A P Stewart, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

least every 12 months in line with current legal requirements. An inspection is also conducted following any maintenance or repair of either of these devices.[43]

26. The Committee notes that the evidentiary provisions of cl 57B shift the traditional onus of proof by relieving the prosecution of the burden of proving the accuracy of matters recorded on photographs from traffic lane camera devices unless the defence can adduce evidence calling them into question.

27. Having regard to the Bill's aims of improving the efficiency of road-based public transport, and the system of inspection and verification to ensure the accuracy of photographs being tendered as evidence pursuant to cl 57B of the Bill, the Committee does not consider that the clause unduly trespasses on personal rights.

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

Right to Privacy

28. The right to privacy is a fundamental right recognised explicitly in the Universal Declaration of Human Rights [Art.14] and the International Covenant on Civil and Political Rights [Art. 17]. Australia is a party to both of these treaties and has implemented, at the national and state levels, laws to protect individuals' privacy rights.

29. Currently under the Act, fixed speed cameras detect the speed of vehicles by using piezo electronic detectors embedded into the road surface. These detectors deflect slightly when a vehicle is driven over the detectors, which then triggers an electronic device that accurately measures the speed of the vehicle. According to the RTA, if the speed of the vehicle exceeds the legal limit, then a digital picture is taken of the offending vehicle.[44]

30. In the Bill's Second Reading speech it was suggested that a photographic record of a vehicle will only be stored if an offence has allegedly occurred:

> The system shall store the images *only if a potential violation has been detected* through automated matching of the number plate with an electronic list of authorised transitway vehicles.[45]

31. Nonetheless, once a photograph has been taken it forms a record held by the RTA.

32. Privacy NSW has advised the Committee that on at least one previous occasion the RTA has released photographic records from a speed camera in response to an application under the *Freedom of Information Act 1989* [FOI Act]. The Committee was advised that this is because the RTA does not consider such a record to be "personal information" within the meaning of s 4 of the *Privacy and Personal Information Protection Act 1998* [Privacy Act].

[43] www.rta.nsw.gov.au/roadsafety/speedandspeedcameras/fixeddigitalspeedcameras/howdofixeddigitalspeedcameraswork.html

[44] www.rta.nsw.gov.au/roadsafety/speedandspeedcameras/fixeddigitalspeedcameras/howdofixeddigitalspeedcameraswork.html

[45] Mr A P Stewart, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003. Emphasis added.

33. The Committee notes that this Bill will enable the RTA to set up cameras over public roads with the capacity to automatically identify and record passing vehicles.

34. The Committee further notes the advice that the RTA has in the past considered information recorded in analogous circumstances not to be personal information.

35. The Committee has written to the Minister seeking clarification of the safe-keeping and availability of traffic lane camera device records.

The Committee makes no further comment on this Bill.

7. ROAD TRANSPORT (SAFETY AND TRAFFIC MANAGEMENT) AMENDMENT (ALCOHOL) BILL 2003

Date Introduced:	3 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carl Scully MP
Portfolio:	Roads

Purpose and Description

1. The Bill's principal object is to amend the *Road Transport (Safety and Traffic Management) Act 1999* [the Act] to prohibit drivers who are the holders of learner licences or provisional licences from driving with *any* alcohol present in their blood.

Background

2. In 1998 the penalties that apply to drink-driving offences in New South Wales were substantially increased. However, alcohol remains one of the major factors in the state's road toll, being involved in the deaths of 130 people on New South Wales roads in 2002. Some 12% of the drivers in fatal vehicle accidents were novice drivers in their first years of driving.[46]

3. There are currently 458,685 learner and provisional licence holders in New South Wales. In 2002 learner and provisional licence holders committed 2,312 alcohol-related offences, despite the overwhelming majority of these people having a 0.02 blood alcohol limit.

4. Drivers aged 17 to 20 years are overrepresented in drink-driving crashes in New South Wales. This group comprises only 6% of New South Wales licence holders, but represents 17% of all drink-drivers who are involved in fatal crashes. The vast majority of learner and provisional licence holders fall into this 17 to 20 year age group.[47]

5. The Bill amends the Act to impose a prescribed concentration of alcohol [PCA] requirement of zero on drivers who are the holders of a learner's licence or a provisional licence.

6. Currently under the Act, *special category drivers* are subject to the special range PCA legal limit of 0.02, which means they must have less than 0.02 grams of alcohol in 100 millilitres of their blood.

[46] Mr A P Stewart MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

[47] Mr A P Stewart MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003.

7. Special category drivers include:

- learner and first-year provisional drivers;
- heavy and public passenger vehicle drivers;
- drivers of dangerous goods vehicles;
- drivers who are not licensed; and
- drivers who are under the age of 25 years and who have not held a New South Wales licence for three years.

8. Accordingly, special category driver includes the majority of provisional P2 licence holders.[48]

9. It was stated in the Bill's Second Reading speech that the amendments to the Act are a response to issues raised at the August 2003 Alcohol Summit:

> Acknowledging the extreme risk that alcohol poses for novice drivers regardless of age, a key summit recommendation was a reduction of the legal limit from 0.02 to zero blood alcohol for all holders of learner and provisional licences.
>
> ...Medical research has shown that the effects of alcohol are more pronounced on skills that are not highly practised. This means that the skills of novice drivers are more likely to be affected by alcohol than those of more experienced drivers. Young drivers—still learning how to control their vehicle, perceive road hazards and make safe judgments—are taking a far greater risk if there is any alcohol present in their blood.
>
> There is now overwhelming evidence that a blood alcohol concentration [BAC] as low as 0.02 impairs driving skills for novice drivers...Research has shown that young novice drivers aged 16 to 20 years with any BAC below 0.02 are eight times more likely to be involved in a fatal accident than older drivers with the same BAC...
>
> Their less-developed skills make novice drivers more susceptible to alcohol-impairing effects of even lower levels of alcohol, and they are more likely than older, more experienced drivers to take risks when driving. After consuming alcohol, novice drivers are likely to take even more risks. By introducing this new zero alcohol limit the Government is protecting the most vulnerable of drivers on our roads from the impairing effects of even lower levels of alcohol and subsequent trauma associated with drink-driving crashes.[49]

The Bill

10. The Bill inserts proposed s 9(1A) into the Act, making it an offence for a person who is the holder of a learner licence or a provisional licence to drive, or attempt to drive, a motor vehicle while there is present in the person's blood a concentration of more

[48] Provisional licences have two stages. A P1 licence, signified by a red P plate, is issued for 18 months. After a total of 12 months a person can attempt the Hazard Perception Test. If successful, they may then proceed to the P2 licence. A P2 licence, signified by a green P plate, is issued for 30 months and must be held for at least 24 months.

[49] Mr A P Stewart MP, Parliamentary Secretary, *NSW Parliamentary Papers (Hansard)*, Legislative Assembly, 3 December 2003. On the impairment of young drivers, see, eg, Alcohol Advisory Council of New Zealand, *Submission to the Justice & Law Reform Select Committee on the Sale of Liquor Amendment Bill (No.2),* http://www.alcohol.org.nz/resources/publications/Submission.rtf

than zero grammes, but less than 0.02 grammes, of alcohol in 100 millilitres of blood.

11. The maximum penalty prescribed is 10 penalty units (currently $1,100) for a first offence, and 20 penalty units (currently $2,200), for any subsequent offence.

12. This new blood alcohol level is described as the *novice range prescribed concentration of alcohol*.[50]

13. Section 9(1) of the Act currently provides as follows:

> A person must not, while there is present in his or her blood the special range prescribed concentration of alcohol:
>
> (a) if the person is a special category driver in respect of a motor vehicle—drive the motor vehicle, or
>
> (b) if the person is a special category driver in respect of a motor vehicle—occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
>
> (c) if the person is a special category supervisor in respect of a motor vehicle and the holder of a driver licence—occupy the seat in a motor vehicle next to a holder of a learner licence who is driving the vehicle.

14. The Bill provides that a person who is the holder of a learner licence or a provisional licence will also be liable for an offence under the existing s 9 of the Act, if found guilty of driving, or attempting to drive, a motor vehicle while there is present in the person's blood a concentration of alcohol that exceeds the novice range prescribed concentration of alcohol [new s 9(1A)].

15. It is a defence if the defendant proves that, at the relevant time, the presence in the defendant's blood of the novice range prescribed concentration of alcohol at the time that the person is alleged to have committed the offence was not caused by any of the following:

- the consumption of an alcoholic beverage (otherwise than for the purposes of religious observance, eg, Holy Communion);
- the consumption or use of any other substance (for example, food or medicine containing alcohol) for the purpose of consuming alcohol [new s 11A].

16. The Bill makes a series of consequential amendments to the Act, extending the application of s 10, s 11, s 14 and s 32 of the Act to the novice range prescribed concentration of alcohol.[51]

17. Schedule 2 of the Bill makes a number of consequential amendments to legislation other than the Act, ie, the *Road Transport (General) Act 1999*, the *Crimes Act 1900* and the *Law Enforcement (Powers and Responsibilities) Act 2002*.

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[50] The dictionary in the Principal Act is amended accordingly by Schedule 1 [13] of the *Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003*.

[51] Currently in the *Road Transport (Safety and Traffic Management) Act 1999*, s 10 provides for alternative verdicts for lesser offences; s 11 provides that the presence of a higher concentration of alcohol is not a defence to a charge under s 9; s 14 deals with arrest following a failed breath test; and s 32 deals with the evidence of alcohol concentration revealed by breath or blood analysis in proceedings for offence under s 9.

Issues Considered by the Committee

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

Commencement: Clause 2

18. The Act is to commence by proclamation.

19. 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. The Committee recognises that 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.

20. The Committee notes that the Roads and Traffic Authority intends to implement a communication strategy to inform all New South Wales licence holders affected by the new law that they are now subject to a zero BAC limit and that new curriculum-based drink-driving resources for high schools are being developed to ensure that young people are fully informed about the law relating to alcohol and driving before they apply for a learners licence.

21. The Committee has written to the Minister seeking his advice as to the reasons for commencement by proclamation and the likely commencement date of the Act

The Committee makes no further comment on this Bill.

8. STRATA SCHEMES MANAGEMENT AMENDMENT BILL 2003

Date Introduced:	4 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Reba Meagher MP
Portfolio:	Fair Trading

Purpose and Description

1. The object of this Bill is to amend the *Strata Schemes Management Act 1996* to implement a number of proposals in relation to the management of strata schemes arising from an overall review of that Act and a review of that Act in connection with competition policy reform. The Bill includes amendments to the *Strata Schemes Management Act 1996* ("the Principal Act").

2. In particular, the Bill:

   (a) clarifies certain provisions relating to the exercise and delegation of functions by owners corporations and the powers of owners corporations to add to or alter, or grant licences for the use of, common property.

   (b) enables officers who are authorised to carry out certain fire safety inspections of buildings and premises subject to a strata scheme to deal with the owners corporation for the building or premises instead of individual lot owners.

   (c) requires new owners corporations to establish 10-year sinking fund plans and enables the regulations to extend those requirements to some or all existing owners corporations.

   (d) defines a strata scheme comprising at least 100 lots (or such other amount prescribed by the regulations) as a ***large strata scheme*** and imposes a number of additional requirements in relation to such schemes as well as enabling regulations to be made in respect of a range of matters relating to the administration of such schemes.

   (e) requires approval by a general meeting of an owners corporation to the seeking of legal advice or services or the taking of legal action by the owners corporation where expenditure will be involved.

   (f) provides for disclosure of certain matters to owners in strata schemes.

   (g) requires all insurance taken out by an owners corporation to be taken out with an approved insurer.

   (h) gives a greater discretion to the Registrar of the Consumer, Trader and Tenancy Tribunal to refer matters to Adjudicators or the Tribunal without the need for mediation and lists specific matters that will not require mediation.

(i) expands the powers of Adjudicators and the Tribunal to appoint a strata managing agent for a strata scheme that has been the subject of an application for an order under the Act.

(j) makes a number of refinements in relation to the procedure for meetings of owners corporations of strata schemes and executive committees of owners corporations.

(k) makes other miscellaneous amendments and amendments by way of statute law revision.

3. The Bill also amends the *Retirement Villages Act 1999*, the *Retirement Villages Regulation 2000* and the *Conveyancing (Sale of Land) Regulation 2000* in relation to disclosure of certain matters to prospective purchasers of lots in strata schemes and prospective residents of retirement villages that are subject to a strata scheme.

Background

4. According to the Minister's second reading speech, the amendments arise from:

- a national competition policy review of the Principal Act carried out in 2001;
- consultations on the Government's *Living in Strata Developments in 2003* issues paper; and
- the Government's awareness of current aspects of the law needing to be overhauled.[52]

5. In particular, the Minister outlined the need to update the Principal Act in light of the sophistication and variety of modern developments now under strata schemes, including some individual schemes that have more people living in them than entire villages and towns.

> There are nearly 70,000 strata schemes in New South Wales, ranging from simple two-lot suburban developments to massive 700-lot high-rise complexes. [53]

6. An initial round of amendments to the Principal Act arising from the competition policy review were passed in November 2002.

The Bill

7. A number of the changes proposed by the Bill are set out below.

8. The Bill:

Functions of owners corporations and executive committees

- makes it clear that a decision of the owners corporation prevails over any decision of the executive committee;

[52] The Hon Reba Meaher MP, Minister for Fair Trading, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 December 2003.

[53] The Hon Reba Meaher MP, Minister for Fair Trading, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 December 2003.

- enables the owners corporation to authorise a chartered accountant to exercise certain functions relating to its finances and accounts (the Act currently only provides for certified practicing accountants);
- prevents a strata managing agent transferring functions to another person without the approval of the owners corporation;
- prevents certain functions of the owners corporation or its office holders being delegated to persons other than the executive committee or the strata managing agent or persons specified in the Act;
- makes it clear that strata scheme by-laws are of no force or effect to the extent that they are inconsistent with any Act or law;
- enables an owners corporation, by special resolution, to alter, add to or erect a new structure on common property, or allow an owner of a lot to do so;

Fire safety inspections

- enables a person authorised to carry out a fire safety inspection under the *Environment Planning and Assessment Act 1979* to require an owners corporation to organise access to the common property and individual lots. It is an offence for the owners corporation not to comply. It is a defence for the corporation failing to provide access to an individual lot if the owner or occupier denied access or could not be contacted;
- enables an owners corporation to apply for an order of an Adjudicator requiring the occupier of a lot to provide access for a fire safety inspection;

Sinking fund plans

- requires an owners corporation established after the commencement of the relevant section to prepare 10-year sinking fund plans;
- allows regulations to be made extending this requirement to some or all existing owners corporations;

Provisions relating to large strata schemes

- defines ***large strata scheme*** (LSS) as a strata scheme comprising 100 or more lots (or more than such other number of lots as may be prescribed by regulations);
- requires an owners corporation of an LSS to specify amounts for proposed expenditure on individual items or matters likely to arise before the next AGM when preparing estimates of the amounts of contributions to be levied for the administrative and sinking funds;
- requires an owners corporations of an LSS to obtain two quotations before spending an amount above that prescribed by regulations;
- requires an owners corporations of an LSS to have its accounts audited;
- enables regulations to be made in respect of certain matters regarding the administration of large strata schemes;

- requires a proxy for meetings of an owners corporation of an LSS to be given to the secretary of the corporation at least 24 hours before the meeting;

Legal action by owners corporations

- prevents an owners corporation from seeking legal advice or services, or taking legal action (other than those services or actions exempted by regulations) that will require payment unless approved by resolution of the owners corporation;

Insurance

- requires that all insurance taken out by an owners corporation, whether mandatory or not, must be taken out with an insurer approved by the Minister;

Provisions relating to disclosure and procedure for meetings

- amends the *Retirement Villages Act 1999* to require information about living in a strata scheme to be given to a prospective resident of a retirement village that is subject to a strata scheme and amends the Principal Act to require an owners corporation to give a statement of the current contributions relating to a lot in a strata scheme if requested to do so by the operator of a retirement village that is subject to that strata scheme;
- requires original owners or lessors to produce certain additional documents and plans relating to a strata scheme at the first AGM of an owners corporation and increases the penalty for failing to produce such documents;
- requires notice of meetings dealing with certain matters to be given to first mortgagees and covenant chargees;

Dispute resolution and powers of Adjudicators and Tribunal

- enables the regulations to exclude classes of strata schemes from the dispute resolution provisions;
- gives a greater discretion to the Registrar of the Consumer, Trader and Tenancy Tribunal to accept an application for an order of an Adjudicator or the Tribunal even though mediation has not been attempted;
- clarifies that the powers of an Adjudicator to make orders to give effect to agreements or arrangements arising out of a mediation session include giving effect to the terms of a written agreement entered into by parties to the mediation; and
- expands the circumstances in which an Adjudicator may make an order, on application, appointing a strata managing agent for a strata scheme and empowers the Tribunal, on its own motion, to make such an order in cases where the management structure of a strata scheme that is the subject of an application for an order under the Act or an appeal to the Tribunal is not functioning.

Issues Considered by the Committee

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

Commencement: Clause 2

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

10. 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.

11. The Committee understands from the Minister's office that commencement by proclamation is to allow time to prepare the regulations required by the Bill and complete the associated consultation. It is anticipated that the Bill will commence in a few months of it being enacted.

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

12. The Bill provides that regulations may be made regarding a number of matters. These include:

    - additional functions of an owners corporation, executive committee, chairperson, secretary or treasurer that may not be delegated [proposed s 29A(h)];
    - extending the requirement in proposed s 75A that owners corporations established after that section commences must prepare 10-year sinking fund plans to apply to any or all owners corporations, and the making of necessary modifications to the application of that section to those owner corporations [proposed s 75A(7)];
    - exempting any type of legal service or legal action from the prohibition on owners corporations or their executive committees from seeking legal services or initiating legal action without the approval of a general meeting of the owners corporation [proposed s 80D(2)];
    - excluding particular classes of strata schemes from any or all the provisions relating to the power of Adjudicator and the Tribunal to make orders and settle disputes about certain matters relating to the operation and management of a strata scheme[proposed s 123(2)];
    - in relation to large strata scheme owners corporations and notwithstanding any provisions of Schedules 2 or 3 of the Act [proposed Sch 2, Pt 3, cl 38 and Sch 3, Pt 3, cl 18]:
        - the procedure for meetings;
        - the delegation of functions;

- the decisions or classes of decisions that may or may not be made by the executive committee;
- the functions of office holders;
- the management of the administrative fund or sinking fund [proposed s 246(g) – (k)];

- requiring information and other matters to be brought to the attention of owners and executive committee members in respect of the provision of legal services to an owners corporation [proposed s 246(l)];
- the minimum number of lots comprising a large strata scheme [proposed Dictionary, pt 2, cl 5].

13. The Minister also noted that:

> The Government concedes that quite extensive regulation-making powers are included in this bill, which might draw some interest from the Legislation Review Committee. However, it is considered that none will lead to unreasonable restrictions on personal rights. They are largely supported by the community and none will be finalised without adequate consultation with relevant interest groups.[54]

14. The Committee considers the following regulation making powers to be worthy of particular note:

- allowing the requirement for 10 year sinking fund plans to be extended to all strata schemes;
- providing a large part of the rules for the governance of large strata schemes; and
- excluding classes of strata scheme from the alternative dispute resolution scheme in the Act.

Ten year sinking fund plans

15. Regarding the requirements for new strata schemes to prepare 10 year sinking fund plans, the Minister stated that:

> While the bill provides that these new sinking fund provisions will apply only to schemes that come into existence after the revised legislation commences, a regulation-making power has been provided to extend them to existing schemes where appropriate. Where insufficient funds are put aside and inadequate maintenance is provided, major building expense may arise. This requires a large one-off levy on all unit owners, placing a heavy burden on people with limited sources of income. The level of public support for the sinking fund reforms indicates that the extension of the provisions to existing schemes would be appropriate. However, this will not occur until adequate consultation has been carried out.

[54] The Committee notes that its function under s 8A(b)(iv) of the *Legislation Review Act 1987* is to report to the House whether a Bill inappropriately delegates legislative power. While the degree to which a delegation of legislative power affects personal rights is a significant consideration in determining the appropriateness of such a delegation, the crux of whether a delegation of legislative power is appropriate is whether it is proper for the Parliament, as the elected representative body of the people, to allow another body, such as the Government, to exercise its legislative power in the given circumstances. The Committee has a further role under s 9(1)(b)(i) of reporting whether any regulation made trespasses unduly on personal rights and liberties.

16. The Committee notes that the effect of this provision is to allow the Government to defer extending the requirement for the preparation of 10-year sinking fund plans to existing strata schemes until it has completed further consultation.

17. The Committee considers that, in the context, this is an appropriate delegation of legislative power.

Exclusion of alternative dispute resolution

18. Proposed s 123(2) allows regulations to exclude particular classes of strata schemes from any or all the provisions relating to the power of an Adjudicator and the Tribunal to make orders and settle disputes relating to the operation and management of a strata scheme.

19. The Minister stated that:

> This provision is merely to provide sufficient flexibility should it be found appropriate to move certain schemes from the dispute resolution processes available under the Act to other more conventional mechanisms. It could be argued that large commercial strata schemes should not be utilising a dispute resolution process fundamentally designed for issues arising in residential buildings.
>
> It could be held that it is a misuse of resources to have a relatively inexpensive, quick and informal process designed for residential matters to be accessed by wealthy commercial interests. While there are no specific plans for any schemes to be excluded at this stage, the new provision will provide the necessary flexibility to deal with any valid concerns that arise in this area.

20. The Committee notes that allowing regulations to exclude classes of strata schemes from the alternative dispute resolution provisions is a significant delegation of legislative power.

21. The Committee also notes that either House of the Parliament could disallow any regulations so excluding a class of strata scheme.

22. The Committee further notes that the Minister has indicated that none of the regulations will be finalised without adequate consultation.

23. The Committee also notes that, while the Minister's explanation of the possible need for such a provision mainly relates to large strata schemes, the provision allows the exclusion of any strata schemes from the dispute resolution mechanisms.

24. The Committee has written to the Minister to seek clarification as to why the power to make regulations excluding classes of strata schemes from the alternative dispute resolution provisions extends to all strata schemes rather than only large strata schemes.

Governance of large strata schemes

25. Proposed s 246(g) – (k) allow regulation to be made regarding the operation of owners corporations of large strata schemes, such as procedures for meetings and the exercise and delegation of functions. The Bill further provides that these regulations will prevail over Schedules 2 and 3 of the Act, which provide for meetings and

procedures of owners corporations and the constitution and meetings of the executive committee.

26. The Committee will normally draw attention to provisions in a Bill that, in effect, make provisions in an Act subject to regulations. Such provisions (often referred to as "Henry VIII clauses") run the risk of constituting an inappropriate delegation of legislative power by reversing the normal legislative hierarchy, whereby regulations made by the executive must conform to Acts passed by Parliament.

27. In her second reading speech, the Minister stated:

> The new provision will provide the necessary flexibility to adjust the administrative requirements for these large schemes, to ensure both a smoother and more workable management process and to recognise the level of accountability that needs to be included. Also, allowances need to be made for the sheer volume of tasks that have to be carried out on a day-to-day basis in such a large enterprise. The regulations will be able to prescribe differing processes and requirements for such matters as the conduct of meetings, the functions of office-bearers, the management of finances, and the operational powers of the executive committee. The development of the regulations, in which the variations will be included, will be subject to consultation with relevant groups. Indeed, representatives from some of the largest schemes have already made their views known to the Government on these issues and there will be ample material to use in commencing the consultation process.
>
> With the passage of time it may become necessary to come back to Parliament with further adjustments to the legislation on some of the matters affecting the operation of large schemes. The aim is to remove administrative burdens wherever possible while retaining the essential objectives and benefits of the strata management legislation. In some instances, new obligations will be placed on owners corporations of large schemes in the interests of individual unit owners and in recognition of the corporate nature of such large enterprises.

28. Given the nature of the matters to be dealt with by the regulations, the consultations being undertaken by the Government, and the each House's power to disallow any portion of a regulation made, the Committee does not consider that these provisions comprise an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

9. SUPERANNUATION ADMINISTRATION AMENDMENT BILL 2003

Date Introduced:	4 December 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Egan MLC
Portfolio:	Treasurer

Purpose and Description

1. The object of this Bill is to amend the *Superannuation Administration Act 1996* (the ***Principal Act***) and certain regulations under that Act with respect to:

   (a) the provision of information relating to the general administration of FSS Trustee Corporation (***FTC***) and SAS Trustee Corporation (***STC***) superannuation schemes and funds to the Minister administering the Acts relating to those schemes and funds (currently the Special Minister of State), and

   (b) monitoring the activities of FTC and STC, and

   (c) clarifying the role of various superannuation trustees in resolving disputes concerning entitlements and obligations of members and former members of certain superannuation funds, and

   (d) quorums and voting procedures of the boards of FTC and STC.

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

> The Bill will strengthen the prudential requirements and corporate governance of the New South Wales public sector superannuation schemes. It simply brings our public sector schemes further into line with other parts of industry, and as regulated by the Commonwealth's Superannuation Industry (Supervision) Act.[55]

Background

3. According to the Parliamentary Secretary, the Bill arises from a five yearly review of the Act conducted in 2001-02.

The Bill

4. The Bill makes three key changes to the Act. It:

   - facilitates prudential reviews of the FTC and STC.
   - enables the Minister or an authorised person to require a superannuation authority to provide information relating to the exercise of its functions.
   - clarifies the voting requirements of the boards of the trustee corporations.

[55] Miss Cherie Burton MP, Parliamentary Secretary, *Legislative Assembly Parliamentary Debates (Hansard)*, 4 December 2003.

5. The Bill also amends certain regulations to make it clear that former members in dispute with STC or FTC before they were transferred to local government or electricity industry schemes will now have their issues resolved by the trustees of these latter funds.

Issues Considered by the Committee

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

Commencement: Clause 2

6. This Act is to commence on a day or days to be appointed by proclamation.

7. 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.

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

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

Access to premises: Schedule 1, proposed s 99

9. Proposed s 99 allows an authorised person to enter any premises, other than any part of premises used for residential purposes, at which the person has reason to believe books relating to the affairs of the superannuation authority are kept, in order inspect those books.

10. Such powers of entry may only be used while business is being carried on, or during the hours that business is usually carried on, at the premises.

11. Given the limited purposes of the power of entry in proposed s 99, the restrictions regarding entering residential premises and the hours at which premises may be entered, the Committee does not consider that this provision trespasses unduly on personal rights.

The Committee makes no further comment on this Bill.

SECTION B: RESPONSES TO PREVIOUS DIGESTS

10. MINISTERIAL CORRESPONDENCE — BAIL AMENDMENT (FIREARMS AND PROPERTY OFFENCES) BILL 2003

Date Introduced:	19 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Background

1. The Committee reported on the *Bail Amendment (Firearms and Property Offences) Bill 2003* in Legislation Review Digest No 7 of 1 December 2003.

2. The Committee noted that the Act was to commence by proclamation and therefore wrote to the Attorney seeking advice as to the reasons why commencement by proclamation was necessary and the likely commencement date of the Act.

Minister's Reply

3. In a reply dated 12 January 2004 (below), the Attorney responded to the Committee, advising that the amendments contained in the Act require a number of administrative tasks to be carried out before the Act can be commenced. These tasks include the reprogramming of the NSW Police Computerised Operational Policing System (COPS) and the education of police Prosecutors, authorised justices and Magistrates in relation to the new provisions.

Committee's Response

4. The Committee thanks the Attorney for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 November 2003

Our Ref:LRC3777/519

Hon R J Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

BAIL AMENDMENT (FIREARMS AND PROPERTY OFFENCES) BILL 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill

The Committee notes that the Bill provides that the ensuing Act is to commence on a day or days to be proclaimed.

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.

The Committee seeks your advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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NEW SOUTH WALES

ATTORNEY GENERAL

2003/CLRD 0815

Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

RECEIVED
14 JAN 2004
LEGISLATION REVIEW COMMITTEE

12 JAN 2004

Dear Mr Collier

Bail Amendment (Firearms and Property Offences) Act 2003

I refer to your letter of 28 November 2003 regarding the *Bail Amendment (Firearms and Property Offences) Act 2003*.

The amendments contained in the Act require a number of administrative tasks to be carried out before the Act can be commenced. These tasks include the reprogramming of the NSW Police Computerised Operational Policing System (COPS) and the education of Police Prosecutors, authorised justices and Magistrates in relation to the new provisions.

As the timeframe for the completion of these preparations is not precise it was not possible to insert an exact commencement date into the Bill that went before Parliament. Providing that the Act will commence upon proclamation allows us to ensure that all necessary preparations are in place before the Act commences.

Yours sincerely

BOB DEBUS

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Facsimile: (02) 9228 3166

11. MINISTERIAL CORRESPONDENCE — CIVIL LIABILITY AMENDMENT BILL 2003

Date Introduced:	13 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Health

Background

1. The Committee reported on the *Civil Liability Amendment Bill 2003* in Legislation Review Digest No 7 of 1 December 2003.

2. The Committee noted that the Act was to commence by proclamation and wrote to the Minister seeking advice as to the reasons why commencement by proclamation was necessary and the likely commencement date of the Act.

3. The Committee also sought the Minister's advice on the breadth of the definition of "special statutory power" in s 43A. In particular, the Committee was concerned to clarify whether the term could include the provision of medical treatment or management of a person's financial affairs without the person's consent.

Minister's Reply

4. In a reply dated 22 December 2003 (below), the Minister advised the Committee that the provisions of the Bill relating to proportionate liability are part of a nationally consistent scheme and their commencement will need to be timed to coincide with the commencement of legislation in other jurisdictions.

5. The remaining provisions commenced on 19 December 2004.

6. In regard to the meaning of "special statutory power", the Minister advised that:

> while the decision to treat a person without first obtaining that person's consent will be judged according to the revised standard prescribed by the Bill, in providing the treatment, the practitioner will be subject to the same duty and standard of care as applies to medical practitioners treating patients who have consented to treatment.
>
> The same principles would apply to the management of the financial affairs of incapable people by the Public Trustee.

Committee's Response

7. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 November 2003

Our Ref:LRC510/CP3763

The Hon M. Iemma MP
Minister for Health
Level 30, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

CIVIL LIABILITY AMENDMENT BILL 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest* No 7 of 2003.

The Committee notes that this Act is to commence by proclamation. I would appreciate it if you would advise the Committee why it is necessary for this Bill to commence on proclamation and indicate a time frame within which the Act will commence after assent.

The Committee is also concerned with the breadth of the definition of "special statutory power" in proposed section 43A.

The Committee therefore seeks your clarification of the extent to which proposed 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.

The Committee would also be grateful if you clarify for it, the types of decisions (apart from a decision to detain a person) that a "special statutory power" is intended to encompass.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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NEW SOUTH WALES

MINISTER FOR HEALTH

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

22 DEC 2003

Dear Mr Collier

I refer to your letter of 28 November 2003 and the Report of the Legislation Review Committee Number 7 of 2003 concerning the *Civil Liability Amendment Bill 2003*.

The Committee has requested advice as to the reasons why the proposed Act will commence on proclamation and for an indication as to the likely timeframe within which the Act will commence after assent.

The commencement provision recognises that different parts of the *Civil Liability Amendment Bill 2003* will need to commence at different times.

The amendments relating to proportionate liability are part of a nationally consistent scheme and their commencement will need to be timed to coincide with the commencement of legislation in other jurisdictions, particularly the Commonwealth, which is yet to pass its corresponding legislation. The Government intends to commence the proportionate liability provisions of the *Civil Liability Act 2002*, as amended by the *Civil Liability Amendment Bill 2003* as soon as practical after the Commonwealth amendments commence.

By contrast, the provisions designed to address the issues raised by the Presland case need to be commenced promptly, and the Government will be moving to ensure that this occurs.

The committee has also asked for advice in relation to the breadth of the definition of "special statutory power" in proposed section 43A.

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As defined in the Bill, a "special statutory power" is a power that is conferred by or under statute and that is of a kind that persons generally are not authorised to exercise without specific statutory authority. This definition was carefully drafted with the intention of covering only those powers and discretions that decision-makers could not lawfully exercise unless a statute grants them the authority to do so.

The term will apply to decisions such as whether to prohibit or regulate particular activities or to issue approvals; powers which persons generally are not authorised to exercise in the absence of statutory authority.

With respect to the provision of medical treatment to people deemed incapable of making decisions for themselves, the proposed section 43A does not affect the duty of care owed to those people in the provision of treatment.

Clearly, the power to detain or treat a mentally ill person without their consent is a special statutory power, as to do so without the authority granted by the Mental Health Act would be an assault. The provision of medical treatment itself however does not amount to an exercise of a special statutory power. Thus, while the decision to treat a person without first obtaining that person's consent will be judged according to the revised standard prescribed by the Bill, in providing the treatment, the practitioner will be subject to the same duty and standard of care as applies to medical practitioners treating patients who have consented to treatment.

The same principles would apply to the management of the financial affairs of incapable people by the Public Trustee.

I hope that this information is of assistance.

Yours sincerely

Morris Iemma MP
Minister for Health

12. MINISTERIAL CORRESPONDENCE — CRIMES LEGISLATION FURTHER AMENDMENT ACT 2003

Date Introduced:	20 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Background

1. The Committee reported on the *Crimes Legislation Further Amendment Bill 2003* in Legislation Review Digest No 7 of 1 December 2003.

2. The Committee noted that the Act was to commence by proclamation and therefore wrote to the Attorney seeking advice as to the reasons why commencement by proclamation was necessary and the likely commencement date of the Act.

3. The Committee also sought the Attorney's advice on the amendment of s 73 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to allow for the extension of a telephone crime scene warrant. The Committee was concerned that there was no requirement that an application for such an extension be verified before an authorised officer on oath, or affirmation, or by affidavit.

Minister's Reply

4. In a reply dated 16 December 2003 (below), the Attorney responded to the Committee, advising that the Act's commencement is delayed to provide time to educate the judiciary and the legal profession about the amendments, as well as to allow for the necessary changes to be made to court forms and databases.

5. With respect to the Committee's concerns in relation to extended telephone crime scene warrants, the Attorney advised that the form of an application will be identical to that made under the *Search Warrants Act 1985*. As such, it will be in the form of an affidavit.

Committee's Response

6. The Committee thanks the Attorney for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 November 2003

Our Ref:LRC3778/529

Hon R J Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

CRIMES LEGISLATION FURTHER AMENDMENT BILL 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill

The Committee notes that the Bill provides that the ensuing Act is to commence on a day or days to be proclaimed.

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.

The Committee seeks your advice as to the reason for commencement by proclamation and the likely commencement date of the Act.

The Committee also notes that the Bill amends s 73 of the *Law Enforcement (Powers and Responsibilities) Act 2002* to allow for the extension of a telephone crime scene warrant.

The Committee notes that crime scene warrants convey substantial powers that may trespass significantly on rights to property and privacy. 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.

In the Bill's Second Reading speech in the Legislative Council, it was stated that the current restriction "presents an unreasonable obstacle for police officers in relation to crime scenes". However, why this is considered to be the case was not explained in that speech.

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The Committee seeks your reasons as to why the Bill does not require applications for extension of a telephone warrant to be verified on oath or affirmation or by affidavit.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

ATTORNEY GENERAL

Mr Barry Collier MP
Chairperson
Legislative Review Committee
PO Box 1026
MIRANDA NSW 1490

16 DEC 2003

Dear Mr Collier

Crimes Legislation Further Amendment Act 2003.

Thank you for your letter dated 28 November 2003 in which the Committee raises two concerns about the *Crimes Legislation Further Amendment Act 2003*.

Your first concern is that the commencement of the Bill is delayed and is to commence on proclamation. As with most criminal law matters, the provisions are delayed in order to provide an adequate length of time to educate the judiciary and the legal profession about the recent amendments, as well as to allow a sufficient period of time for courts administration to make the necessary changes to forms and databases.

With the exception of the amendments in Schedule 6, (which will commence when the *Law Enforcement (Powers and Responsibilities) Act 2002* commences some time late next year), the Act is expected to commence in February 2004.

You also raise concerns about the proposed amendments to section 73 of the *Law Enforcement (Powers and Responsibilities) Act 2003*. The *Law Enforcement (Powers and Responsibilities) Act 2002* introduced new police powers in relation to securing and investigating crime scenes.

Currently there are two ways in which a crime scene warrant may be obtained: either by telephone for a maximum period of 24 hours (the 'telephone crime scene warrant'), or in person before an authorised officer for up to 72 hours (the 'in person' warrant'). A telephone warrant cannot be extended at all. An in person warrant, however, can be extended for up to a further 72 hours.

It is likely that police will be required to obtain crime scene warrants by telephone more often than any other type of warrant (such as, search warrants). This is because crimes may occur at any time of the day. A search warrant, on the other hand, will normally be executed during the day.

In the overwhelming number of cases, it is likely that police will not need more than 24 hours to complete the necessary investigation. However, it is possible that in complex or more serious cases, police may reasonably need an extended period of time to conclude crime scene

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investigation. For example, some cases may require forensic testing and the travel of experts to remote areas in the state.

The object of the amendment is to

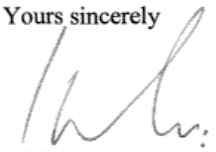
- allow police to apply to an authorised officer seeking to extend a telephone crime scene warrant for up to 60 hours,
- allow police to apply for a further 60 hours extension, and
- ensure that the total maximum period during which crime scene power may be exercised is 144 hours (the same as for other warrants).

The provision in relation to the manner in which the application must be made are set out under section 73(6), and item [4] of Schedule 6 to the Bill specifically amends this clause to ensure that the application is made in person before an authorised officer.

The form of the application (which will be identical to that made under the *Search Warrants Act 1985*) will be in the form of an affidavit. Further, a telephone warrant includes an application that is made by facsimile (see Section 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002*). In practice, this is the way in which most telephone warrant applications are made.

I hope I have addressed your concerns that in fact, an extension for a crime scene warrant must be made in person before an authorised officer.

Yours sincerely



BOB DEBUS

13. MINISTERIAL CORRESPONDENCE — LORD HOWE ISLAND AMENDMENT BILL 2003

Introduced: 29 October 2003
House: Legislative Assembly
Minister: The Hon Bob Debus MP
Portfolio: Environment

Background

1. The Committee reported on the Lord Howe Island Amendment Bill 2003in Legislation Review Digest No 5 of 10 November 2003.

2. The Committee noted that the Act was to commence by proclamation and therefore wrote to the Minister seeking advice as to the reasons why commencement by proclamation was necessary and the likely commencement date of the Act.

Minister's Reply

3. In a reply dated 26 November 2003 (below), the Minister responded to the Committee, advising that, given the degree of uncertainty about the final form of the legislation after debate in both Houses, the provision to commence the legislation by proclamation is to enable the government to ensure that any necessary preliminary requirements can be accommodated.

4. The Minister indicated that the Bill would commence as soon as practicable after the Act is passed by the Parliament.

5. The Minister also invited the Committee's advice regarding whether it considered a change necessary.

Committee's Response

6. The Committee thanks the Minister for his reply and has written to the Minister suggesting alternative provisions to commencing Acts on a day or day to be proclaimed which would achieve a better balance between flexibility in commencement dates and Parliament maintaining a sufficient level of accountability and control over the commencement of legislation it has enacted.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

7 November 2003

Our Ref: LRC475/CP3732

The Hon R J Debus MP
Minister for the Environment
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Lord Howe Island Amendment Bill 2003

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987* and notes that this Bill is to commence by proclamation.

The Committee is of the view 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 may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

I would appreciate it if you would advise the Committee why it is necessary for this Bill to commence on proclamation and indicate a time frame within which the Act will commence after assent.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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NEW SOUTH WALES

MINISTER FOR THE ENVIRONMENT

In reply please quote: 03/03809

RECEIVED
28 NOV 2003
LEGISLATION REVIEW COMMITTEE

26 NOV 2003

Mr Barry Collier MP
Chairperson
Legislation Review Committee
NSW Parliament
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

Lord Howe Island Amendment Bill

Thank you for your letter of 7 November 2003 regarding the proposed commencement of the above Bill by proclamation.

The Department of Environment and Conservation has advised me that amendment legislation is frequently commenced by proclamation. Informal advice obtained from the office of the Parliamentary Counsel suggests that it has been the practice for many years to commence legislation by proclamation on a day of the Government's choosing.

It is expected that the Bill will not be debated until the 2004 Budget session of Parliament, and, if passed, the Act would commence as soon as is practicable.

However, given a degree of uncertainty about the final form of the legislation after debate in both Houses, the provision to commence the legislation by proclamation would enable the Government to ensure that any necessary preliminary requirements can be accommodated. At this stage, however, I understand that there are no requirements for any regulation to be made prior to commencement.

If the Legislation Review Committee considers a change necessary, I would appreciate your earliest advice so that the necessary amendment can be made.

Yours sincerely

BOB DEBUS

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PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref: LRC475/CP3739a

The Hon R J Debus MP
Minister for the Environment
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Lord Howe Island Amendment Bill 2003

Thank you for your letter of 26 November regarding the commencement of the above Bill.

The Committee notes your intention for the Bill to commence as soon as practicable after being passed.

As to whether the Committee considers a change to the Bill to be necessary, the Committee again notes that providing an unfettered power to commence a Bill on a day to be proclaimed effectively gives the Government a power of veto over a Bill.

The Committee appreciates, however, the need for flexibility in commencing legislation in certain circumstances, most commonly to allow time for the preparation of regulations.

The Committee's concerns regarding commencement powers would be addressed by adopting a legislative practice that allows the Government sufficient flexibility in commencement while maintaining a sufficient level of accountability to, and control by, the Parliament.

As an example, the Committee notes section 15DA of the Queensland *Acts Interpretation Act 1954*. Under that provision, Acts that have not commenced a year after assent automatically commence unless a regulation is made postponing commencement for up to another year. This approach appears to strike a balance between flexibility and Parliamentary control. It does this in the following ways:

- it allows an initial period of 12 months in which to commence an Act;
- if this is insufficient, the Government can extend the period for another 12 months, with Parliament having the opportunity to disallow such an extension;

- if, due to unforseen circumstances, commencement needs to be postponed beyond 24 months from assent, the Government must submit the postponement to the Parliament in the form of amending legislation; and
- if a greater degree of flexibility is required for a particular Bill, that Bill can specifically provide for alternative commencement arrangements.

Another, less flexible, model is the practice at the Federal level. The Commonwelath Parliamentary Counsel's *Drafting Direction 2002, No 2* provides that, if a specific date for commencement is not provided, a Bill should normally either be automatically commenced or repealed within 6 months of assent.

These models contrast with the current practice in New South Wales, whereby legislation is routinely commenced on a day or days to be proclaimed, with Ministers tabling in Parliament lists of all legislation not commenced within 90 days of assent. It does not appear to the Committee that this achieves the best balance between Parliament's control of the legislative process and the need for flexibility in commencement.

In the absence of any control on the commencement of Acts, the Committee considers it both desirable and appropriate that an explanation be given to Parliament as to the need for a provision to be commenced on proclamation and the intended timeframe for its commencement.

The Committee welcomes your views.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

14. MINISTERIAL CORRESPONDENCE — MOTOR ACCIDENTS COMPENSATION AMENDMENT BILL 2003

Date Introduced:	12 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Commerce

Background

1. The Committee reported on the *Motor Accidents Compensation Amendment Bill 2003* in Legislation Review Digest No 6 of 2003.

2. The Committee noted the Bill was to commence on a day or days to be appointed by proclamation and resolved to write to the Minister for Commerce to seek his advice as to why the Bill commences on proclamation and a likely commencement date of the Act.

Minister's Reply

3. In a letter dated 5 January 2004 (attached), the Minister advised that the Government did not proceed with the legislation in the Legislative Council.

Committee's Response

4. The Committee thanks the Minster for his reply

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

File ref: LRC501

The Hon J Della Bosca MLC
Minister for Industrial Relations
Level 30
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Motor Accidents Compensation Amendment Bill 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 6 of 2003*.

The Committee noted that the Bill is to commence on a day or days to be proclaimed.

The Committee seeks your advice as to why the Bill commences on proclamation and an indication of a time frame within which the Act will commence.

Yours sincerely,

BARRY COLLIER MP
CHAIRMAN

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H:\RCCORRESPONDENCE - 53RD PARLIAMENT\MINISTERS\COMMERCE\031118 MOTOR ACCIDENTS BILL.DOC

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Assistant Treasurer
Minister for the Central Coast

05 JAN 2003

Ref.: A19294

Mr Barry Collier MP
Chairman
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY 2000

Dear Mr Collier

I write in reply to the your letter on behalf of the Legislation Review Committee dated 18 November 2003, regarding the Motor Accidents Compensation Legislation Amendment Bill 2003.

As you may be aware the Government did not proceed with the legislation in the Legislative Council.

The Committee may be assured that the Government will include consideration of the issues raised by the Committee in its Legislation Review Digest No.6 of 2003, in any further legislation prepared to address the decision of the Court in *Pender v Powercoal*.

Yours sincerely

Joan Della Bosca MLC
Minister for Commerce

Level 30 Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000, Australia
Tel: (02) 9228-4777 Fax: (02) 9228-4392 E-Mail: office@smos.nsw.gov.au

15. MINISTERIAL CORRESPONDENCE — NATIONAL PARKS AND WILDLIFE AMENDMENT (KOSCIUSZKO NATIONAL PARK ROADS) BILL 2003

Date Introduced:	29 October 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Environment

Background

1. The Committee wrote to the Minister on 8 December 2003 seeking the Minister's advice on the need to exclude all actions in nuisance under the Bill and the potential for private rights to be effected.

2. The Committee also sought the Minister's advice as to the reasons for commencement of the Bill by proclamation.

3. Clause 184A(5) of the Bill has the effect of precluding a person from bringing an action in nuisance where that nuisance is caused by the RTA placing any ancillary infrastructure devices on land that adjoins the land vested in the RTA under the Bill.

Minister's Response

4. The Minister advised that the Act is to commence on proclamation to give the Department of Environment and Conservation and the RTA sufficient time to prepare for the transfer of land and, in particular, sufficient time for the RTA to prepare for taking over the management of the land.

5. In relation to the exclusion of action in nuisance, the Minister advised that the safe functioning of the Alpine Way and Kosciuszko Road might require roadworks or structures to be installed on either the road reserve or on land adjacent to it in the future. To enable this to occur as required for public safety, actions in nuisance have been excluded.

6. The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

7 November 2003

Our Ref: LRC473/CP3732

The Hon R J Debus MP
Minister for the Environment
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003.

The Committee has considered this Bill under s 8A of the *Legislation Review Act 1987* and notes that effect of the proposed s 184A(5) is to preclude a person from bringing an action in nuisance, public or private, where that nuisance is caused by the RTA placing any ancillary infrastructure devices on land that is adjoining or adjacent to the land that is vested in the Roads and Traffic Authority under this Bill.

The Committee recognises that the tort of nuisance is not necessarily confined to the land upon which, or adjoining land from which, it originates. The obvious examples of this include escaping water, smoke or smells. The proposed provision would therefore appear to exclude the possibility of any action in nuisance by persons with rights in land outside that contemplated by the Bill.

The Committee therefore seeks your advice as to the need to exclude all actions in nuisance under the proposed s 184A(5) and the potential for private rights to be effected.

The Committee also notes that this Bill is to commence by proclamation.

The Committee is of the view 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 may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

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I would appreciate it if you would advise the Committee why it is necessary for this Bill to commence on proclamation and indicate a time frame within which the Act will commence after assent.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

MINISTER FOR THE ENVIRONMENT

In reply please quote: 03/03790

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000

-9 DEC 2003

Dear Mr Collier

National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003

I refer to your letter of 7 November 2003 regarding the above Bill.

With regard to the need to exclude actions in nuisance under proposed sub-section 184A(6), and the potential for private rights to be affected, I am advised that there is a possibility that roadworks and structures necessary for the safe functioning of the road may need to be installed in the future. This could occur either in the road reserve or on land adjacent to it.

The exclusion of action in nuisance is therefore necessary to ensure the road can be managed to maximise public safety. The Government maintains that this provision in the Bill has clear and compelling public interest.

With regard to the reasons why the proposed Act will not commence on assent, it is evident that management and maintenance of the Alpine Way and Kosciuszko Road is complex and ongoing. It is therefore important that both the Department of Environment and Conservation and Road and Traffic Authority have sufficient certainty and lead time with respect to the date the transfer is effected. This will allow the complex transitional management arrangements to be coordinated effectively.

Yours sincerely

BOB DEBUS

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16. MINISTERIAL CORRESPONDENCE — POLICE LEGISLATION AMENDMENT (CIVIL LIABILITY) ACT 2003

Date Introduced:	13 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Watkins MP
Portfolio:	Police

Background

1. The Committee wrote to the Minister to ask for an explanation as to why the commencement of the Bill needed to be delayed until consultations could be conducted.

2. This Act requires persons seeking damages for torts committed by police officer in the performance of their duties to sue the Crown instead of the individual officers concerned.

Minister's Response

3. In his reply, the Minister advised that there are a number of practical implementation issues that needed to be finalised before commencement.

4. For instance, educational material for police officers needs to be prepared and legal practitioners made aware of the new arrangements.

   Also, NSW Police and the Crown Solicitor's Office need to develop new procedures for handling police tort claims and to consider whether new court procedures are also required. The Minister's Department is currently discussing this with the Attorney's administration.

5. The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

Our Ref: LRC509/CP3759

The Hon John Watkins MP
Minister for Police
Level 34
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Police Legislation Amendment (Civil Liability) Bill 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 6 of 2003*.

The Committee has noted this Bill is to commence by proclamation.

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 may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

Your office has advised the Committee that the reason for commencement by proclamation of this Bill is to allow time for consultations with the Police Association after the passage of the Bill through Parliament. However, it is not clear to the Committee why it is necessary to delay the commencement of the Bill in order for these consultations to take place.

The Committee has resolved to seek further explanation of the reasons for the delay in commencement.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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NEW SOUTH WALES

Minister for Police

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY 2000

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Dear Mr Collier

I refer to your letter concerning the reasons why the *Police Legislation Amendment (Civil Liability) Act 2003* is to start upon proclamation, rather than assent.

There are a number of practical implementation issues that needed to be finalised before commencement, including developing education material with the Police Association to inform police officers of the new arrangements.

NSW Police and the Crown Solicitor's Office need to develop new standard operating procedures for managing police tort claims, including claims that are made against individual officers in breach of the Act. It may also be necessary to establish new Court procedures, which my administration is currently discussing with the Attorney's administration.

Finally, legal practitioners needed to be made aware of the new arrangements, so they can comply with the Act. The Ministry for Police has been in consultation with the Australian Plaintiff Lawyers Association, the Bar Society and the Law Society about the Act and any changes to procedure that will need to be introduced.

The legislation is scheduled to commence on 1 January 2004.

Yours sincerely

John Watkins

John Watkins, MP
Minister for Police

1 8 DEC 2003

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17. MINISTERIAL CORRESPONDENCE — STATE REVENUE LEGISLATION (FURTHER AMENDMENT) BILL 2003

Date Introduced:	14 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Egan MLC
Portfolio:	Treasurer

Background

1. The Committee wrote to the Treasurer seeking advice on the provisions relating to collateral mortgages under the *Duties Act* and the disclosure of personal information under the *Taxation Administration Act.* These provisions have retrospective application.

2. Schedule 1[26] provides that section 218B of the *Duties Act* applies to existing mortgages if an advance or a further advance is made after 1 January 2003.

3. Schedule 6[12] allows the disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training, with effect from 1 July 2003. This has the effect of retrospectively authorising what would otherwise be an unlawful disclosure.

Treasurer's Response

4. The Treasurer advised that, although these provisions are retrospective, they do not impact adversely on personal rights.

5. In relation to the amendment to the *Duties Act*, the Treasurer advised that this provision applies to situations in which property is secured by a mortgage located in more than one state or territory. This amendment is backdated to 1 January 2003, the date on which amendments to the *Duties Act* relating to apportioning of duty between states and territories in the case of collateral mortgages, commenced.

   According to the Treasurer, the amendment was required because a decision of the Administrative Decisions Tribunal suggested that the earlier provision did not achieve the policy intentions of the Government. The amendment ensures consistency of treatment between taxpayers in different jurisdictions.

6. The Treasurer advised that the amendment to the *Taxation Administration Act* corrects an error. This error occurred when the power of the Chief Commissioner of State Revenue to release information to the Commissioner of Police and the Commissioner for Vocational Training was transferred from the *Revenue Laws (Reciprocal Powers) Act 1987* to the *Taxation Administration Act.* In that transfer, which took place in 2002, the names of the Police and Vocational Training Commissioners were inadvertently left out. This amendment corrects this error.

7. The Committee thanks the Treasurer for his response.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

28 November 2003

Our Ref:513
Your Ref:

The Hon Michael Egan MLC
Treasurer
Level 33 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Treasurer

STATE REVENUE LEGISLATION FURTHER AMENDMENT BILL 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 7 of 2003*.

The Committee notes that a number of provisions in this Bill apply retrospectively. The Committee will always be concerned with any retrospective effect of legislation that impacts adversely on personal rights.

Of particular concern, are the amendments made in Schedule 1, clause 26 relating to collateral mortgages under the *Duties Act* and Schedule 6, clause 12 relating to the disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training under the *Taxation Administration Act*.

The Committee seeks your advice as to the reasons for the retrospective application of these provisions.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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Treasurer of New South Wales
Australia

Mr B Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
Sydney, NSW 2000

Russell Agnew
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18 DEC 2003
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Dear Mr Collier

Thank you for your letter of 28 November 2003 regarding the Legislation Review Committee's consideration of the *State Revenue Legislation (Further Amendment) Bill 2003*.

I note the Committee expressed concern that some provisions of the Bill, namely Schedule 1, Clause 26, relating to collateral mortgages and Schedule 6, Clause 12, relating to the disclosure of information to the Commissioner of Police and the Commissioner for Vocational Training under the *Taxation Administration Act 1996* may impact adversely on personal rights.

I am advised the amendments, while retrospective in application, do not impact adversely on personal rights. For example, the amendments relating to collateral mortgages refer to situations where the property secured by a mortgage is located in more than one State or Territory. Generally this arises only in mortgages taken out by companies rather than individuals.

Under the *Duties Act* duty in New South Wales is charged only on the proportion of the mortgage that relates to property located in New South Wales. In 2002, as a result of changes to mortgage duty in other jurisdictions, some amendments were made to the *Duties Act*. These amendments were designed to maintain the policy of apportioning liability for mortgage duty in line with the distribution of the assets used as security. The amendments took effect from 1 January 2003.

In August 2003 a decision of the Administrative Decisions Tribunal suggested the provisions did not achieve the policy intention of the Government. Accordingly, the *State Revenue Legislation (Further Amendment) Bill 2003* amended the law to clarify the Government's policy intention. To ensure consistency of treatment between taxpayers the amendments required were made retrospective to 1 January 2003.

Treasurer, Minister for State Development, Leader of the Government in the Legislative Council and Vice-President of the Executive Council.
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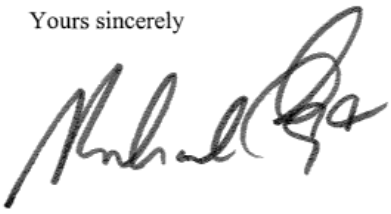
In relation to the amendments to the *Taxation Administration Act 1996* authorising disclosure of information to the Commissioner of Police, the Commissioner for Vocational Training and the Vocational Training Tribunal of New South Wales, this provision is retrospective to overcome an earlier error. Under the *Revenue Laws (Reciprocal powers) Act 1987* the Chief Commissioner of State Revenue had the power to release information to the Commissioner of Police and the Commissioner for Vocational Training. In 2002 the provisions of the *Revenue Laws (Reciprocal powers) Act 1987* were transferred to the *Taxation Administration Act 1996* with effect, as proclaimed, from 1 July 2003. However, the names of the Commissioner of Police and the Commissioner for Vocational Training were inadvertently omitted. The provisions of the *State Revenue Legislation (Further Amendment) Bill 2003* correct this error retrospectively to 1 July 2003.

I trust this information addresses the Committee's concerns. Thank you for bringing the matter to the attention of the Government.

Yours sincerely



Michael Egan
Treasurer

18. MINISTERIAL CORRESPONDENCE — VETERINARY PRACTICE BILL 2003

Date Introduced:	29 October 2003
House Introduced:	Legislative Council
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Agriculture and Fisheries

Background

1. The Committee considered this Bill at its meeting on 7 November and resolved to write to the Minister to:

   (a) raise its concern that the Bill was to commence on proclamation; and

   (b) seek the Minister's advice on the intended scope of clause 34, which the Committee considered might trespass unduly on rights and liberties, specifically the right to free speech.

2. Clause 34 defines "*unsatisfactory professional conduct*". The clause provides that such conduct may include conduct undertaken in a professional capacity which, if repeated or continued, is likely to "damage the international reputation of Australia in relation to animal exports, animal welfare, animal produce or sporting events".

3. In its letter to the Minister, the Committee noted that there are no objective criteria prescribed in the Bill for determining whether Australia's international reputation has been "damaged" by the conduct. In the Committee's view, this makes it difficult to determine the intended scope of the definition and thus could infringe the right to free speech.

The Minister's Response

4. The Committee received the Minister's response on 3 December 2003.

5. The Minister advised the Committee that the Bill was to commence on proclamation to allow time for the necessary regulations to be made. The Minister further advised that:

> In particular, the regulation will need to include the acts of veterinary science that are to be restricted to being performed by registered veterinary practitioners only. The regulation will also need to include a Code of Professional Conduct.
>
> The list of restricted acts of veterinary science can only be finalised after I have considered the recommendations of an advisory committee on the matter. This will take time and, together with the public consultation requirements of the *subordinate Legislation Act 1989,* I expect that commencement of the *Veterinary Practice Bill 2003* and the regulation will take six to twelve months.

6. In relation to the Committee's concern with clause 34, the Minister advised that the clause "is not intended to interfere with the rights of free speech" but is "directed at the performance of acts of veterinary science".

The Committee's Response

7. The Committee thanks the Minister for his letter.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

7 November 2003

Our Ref:LRC3741/CP481

The Hon Ian Macdonald MLC
Minister for Agriculture and Fisheries
Level 30 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Veterinary Practice Bill 2003

Pursuant to its function under s 8A of the Legislation Review Act 1987, the Committee has considered the above Bill introduced into the Legislative Council by you on 29 October 2003.

The Committee notes that cl 2 of the Bill provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

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 may be required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee seeks your advice as to the reasons why the proposed Act will not commence on assent and seeks an indication of the likely date for commencement of this Bill.

The Committee has also considered the definition of "*unsatisfactory professional conduct*" in cl 34. The Committee is concerned that this definition may be overly broad, and may unintentionally trespass on a person's right to free speech.

Of particular concern is that part of the definition that states that unsatisfactory professional conduct may include conduct undertaken in a professional capacity that, if repeated or continued, is likely to "damage the

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international reputation of Australia in relation to animal exports, animal welfare, animal produce or sporting events".

The Committee notes that there are no objective criteria prescribed for determining whether Australia's international reputation has been "damaged" by the conduct. This makes it difficult to determine the intended scope of the definition. For example, it is possible to read this clause as including conduct such as a veterinary practitioner's professional written publications or other public statements that express concern about, or criticise, an aspect of Australia's animal exports, animal welfare, animal produce, or participation in sporting events.

The Committee therefore seeks your advice on the intended scope of the provision and the potential for it to affect the free speech of a veterinarian.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

MINISTER FOR AGRICULTURE AND FISHERIES

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Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

Thank you for your letter dated 7 November 2003 in which you raise the issues of the commencement of the *Veterinary Practice Bill 2003* and the definition of "unprofessional conduct" in clause 34 of the Bill.

I addressed these matters in my speech in reply to the Legislative Council on 12 November 2003.

Regarding the reason why the *Veterinary Practice Bill 2003* will not commence on Assent, I note that it will be necessary that a regulation be made to complete the scheme of the legislation.

In particular, the regulation will need to include the acts of veterinary science that are to be restricted to being performed by registered veterinary practitioners only. The regulation will also need to include a Code of Professional Conduct.

The list of restricted acts of veterinary science can only be finalised after I have considered the recommendations of an advisory committee on the matter. This will take time and, together with the public consultation requirements of the *Subordinate Legislation Act 1989*, I expect that commencement of the *Veterinary Practice Bill 2003* and the regulation will take six to twelve months.

In relation to paragraph (c)(iv) of the definition of "unsatisfactory professional conduct" in clause 34 of the Bill, I note that your Committee has raised concerns that this paragraph may be overly broad and may unintentionally trespass on a person's right to free speech.

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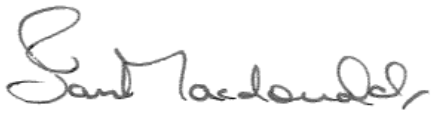
This part of the definition of "unsatisfactory professional conduct" relevantly states:
"*engaging in conduct in the veterinary practitioner's professional capacity that, if repeated or continued, is likely to do any of the following:...*
(iv) damage the international reputation of Australia in relation to animal exports, animal welfare, animal produce or sporting events,"

This clause is not intended to interfere with the rights of free speech of registered veterinary practitioners. It is directed at the performance of acts of veterinary science.

A veterinary practitioner, through a single unprofessional act, could damage international relations or cause the loss of valuable export markets. This could be done by signing a false certificate as to the disease status of animals, semen or ova destined for export, or by prescribing or administering a restricted veterinary chemical to an animal involved in sport or export. Damage could also occur through erroneous advice being given to an animal owner that leads to export animals being slaughtered before the relevant withholding periods for veterinary chemicals had been observed.

I take this opportunity to thank you and your Committee for your examination of the Bill.

Yours sincerely



IAN MACDONALD MLC
NSW MINISTER FOR AGRICULTURE & FISHERIES

19. MINISTERIAL CORRESPONDENCE — WORKERS COMPENSATION AMENDMENT (INSURANCE REFORM) BILL 2003

Date Introduced:	12 November 2003
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Commerce

Background

1. The Committee wrote to the Minister on 18 November 2003 raising a number of concerns with this Bill.

2. In particular, the Committee sought clarification on the reasons for commencing the Bill on proclamation, providing for obligations of scheme agents in relation to confidentiality and disclosure of information in regulations rather than in the Bill itself, and removing the right of managed fund insurers to seek compensation in certain circumstances.

The Minister's Response

Commencement by proclamation

3. The Minister explained that the Bill implements recommendations made in the report *Partnerships for Recovery: Caring for injured workers and restoring financial viability to workers compensation in NSW.* The Minister said that the report recommends extensive changes to the provision of workers compensation. For this reason:

> ...it will be necessary to implement the recommendations over a two-year period to ensure the change management process proceeds smoothly and that disruption to employers and workers is minimised. It will also allow existing insurers and potential new Scheme agents time to consider how they want to participate in the new Scheme and prepare themselves accordingly.

Protection of personal information held by Scheme agents

4. The Minister clarified that subsection 2A(2) of the 1987 Act has the effect of applying the restrictions concerning the disclosure of information to scheme agents under the Bill.

5. Further, the protections relating to confidentiality and the disclosure of information, including personal information,

> have not been included in the Bill because detailed arrangements to ensure the privacy protection of workers compensation claimants and their employers will need to be developed in the course of the implementation of the new scheme. At this stage

> the details are unknown, and will need to be developed in conjunction with stakeholders.

Removal of the right to compensation

6. In response to the Committee's concern that the Bill removes the right to compensation for existing insurers under the Scheme, the Minister advised that:

> … current insurers will be entitled to participate in an open, public tender process for the selection of Scheme agents. The Scheme is based on the principles of competition and contestability and it is critical to the establishment of the new arrangements that there be an ability to terminate or not renew participation without obligation.

Committee's response

7. The Committee thanks the Minister for his reply.

8. The Committee notes that the protection of personal information and confidentiality is a very important obligation on all Scheme agents. Given this, it appears to the Committee to be more appropriate for such obligations to be set out in the primary legislation. The regulations could then prescribe the details of how those obligations are to be met.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

Our Ref: LRC486/3760

The Hon J J Della Bosca MLC
Special Minister of State, Minister for Commerce, Minister for Industrial Relations, Assistant Treasurer, and Minister for the Central Coast
Room 810
Parliament Hous
Macquarie Street
SYDNEY NSW 2000

Dear Minister,

Workers Compensation Amendment (Insurance Reform) Bill 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest no 6 of 2003*.

Commencement

The Committee noted that the Bill is to commence on a day or days to be proclaimed.

I would appreciate it if you would advise the Committee why it is necessary for this Bill to commence on proclamation and indicate a time frame within which the Act will commence after assent.

Proposed section 154N: Regulations

The Committee noted that the obligations of scheme agents with respect to confidentiality and disclosure of information are to be prescribed by regulations.

Could you please clarify for the Committee what controls on the disclosure of personal information by scheme agents under the Bill would exist apart from any regulations which might be made under proposed s 154N.

The Committee would also be grateful if you could explain the reasons why the provisions it is intended to prescribe under s 154N were not set out in the Bill.

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Schedule 2 [72], Proposed Schedule 6, Part 19A, clause 6: Cancellation of licence of managed fund insurer

The Committee noted that schedule 2 [72] included provisions that would exclude the right of managed fund insurers to seek compensation in certain circumstances.

The Committee would be grateful if you could explain the reasons for the need to remove the right to compensation and the scope of rights likely to be affected by the provision.

Thank you for your attention to these matters.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

Special Minister of State
Minister for Commerce
Minister for Industrial Relations
Assistant Treasurer and
Minister for the Central Coast

Ref: WC 1780/03

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY 2000

0 5 JAN 2004

Dear Mr Collier

I refer to your comments concerning the Workers Compensation Amendment (Insurance Reform) Bill 2003.

I will briefly address the issues you have raised in turn.

Firstly, you have sought my advice as to the reasons that the proposed Act will not commence on assent and sought my advice as to the likely date for its commencement.

As indicated in the Second Reading Speech, the Bill gives effect to the recommendations in the independent report: *Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers compensation in NSW*, which was released on 8 September 2003. The report recommends extensive changes to the manner in which workers compensation insurance is provided and as the report indicates, it will be necessary to implement the recommendations over a 2 year period to ensure the change management process proceeds smoothly and that disruption to employers and workers is minimised. It will also allow existing insurers and potential new Scheme agents time to consider how they want to participate in the new Scheme and prepare themselves accordingly.

I now turn to the Committee's concerns about the protection of personal information held by Scheme agents. The Committee refers to the restrictions on the disclosure of information contained in section 243 of the Workers Compensation and Workplace Injury Management Act 1998 (the 1998 Act) and indicates that it is unclear whether these restrictions would apply to Scheme agents who collect personal information under the Workers Compensation Act 1987 (the 1987 Act). The effect of subsection 2A(2) of the

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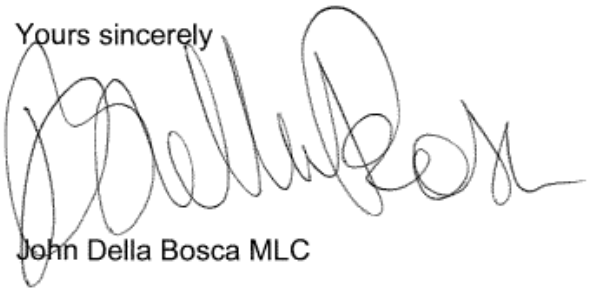
1987 Act is that the restrictions concerning the disclosure of information will apply to scheme agents under the Bill.

As the Committee has noted, proposed subsection 154N(1)(b) of the 1987 Act, contained in Schedule 1 of the Bill, provides for regulations to be made governing the obligations of Scheme agents with respect to confidentiality and the disclosure of information, including personal information. These protections have not been included in the Bill because the detailed arrangements to ensure the privacy protection of workers compensation claimants and their employers will need to be developed in the course of the implementation of the new scheme. At this stage these details are unknown, and will need to be developed in conjunction with stakeholders.

The Committee has commented on the removal of any right to compensation in the Bill, to the existing insurers under the Scheme. Current insurers will be entitled to participate in an open, public tender process for the selection of Scheme agents. The Scheme is based on the principles of competition and contestability and it is critical to the establishment of the new arrangements that there be an ability to terminate or not renew participation without obligation.

Thank you for commenting on the Bill.

Yours sincerely



John Della Bosca MLC

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
	Date	Page		
Aboriginal Land Rights Amendment (Rate Exemptions) Regulation 2003	04/07/03	6805	20/08/03	30/10/03
Child and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 and Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	11/07/03	7021 7054	20/08/03 from Privacy Commissioner	08/01/04
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 16/09/03	
Landlord and Tenant (Rental Bonds) Regulation 2003	29/08/03	8434	24/10/03 23/12/03	05/11/03 10/02/04
Pawnbrokers and Second Hand Dealers Regulation 2003	29/08/03	8698	24/10/03 23/12/03	05/11/03 10/02/04
Radiation Control Regulation 2003	29/08/03	8534	24/10/03	29/01/04
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	29/08/03	8434	24/10/03 from Privacy Commissioner	28/11/03
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	12/09/03	9227	07/11/03	03/12/03
Protected Estates Regulation 2003	26/09/03	9575	07/11/03	24/11/03

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 and Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003 • Letter to the Minister for Community Services dated 13 February 2004	04/07/2003 page 6805
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003 • Letter to the Attorney General dated 7 November 2003 • Letter from the Attorney General dated 3 December 2003	12/09/2003 page 9227
Landlord and Tenant (Rental Bonds) Regulation 2003 • Letter to the Minister for Fair Trading dated 24 October 2003 • Letter from the Minister for Fair Trading dated 5 November 2003 • Letter to the Minister for Fair Trading dated 18 November 2003 • Letter to the Minister for Fair Trading dated 23 December 2003 • Letter from the Minister for Fair Trading dated 10 February 2004	1/09/2003 page 8434
Pawnbrokers and Second-hand Dealers Regulation 2003 • Letter to the Minister for Fair Trading dated 24 October 2003 • Letter from the Minister for Fair Trading dated 5 November 2003 • Letter to the Minister for Fair Trading dated 18 November 2003 • Letter to the Minister for Fair Trading dated 23 December 2003 • Letter from the Minister for Fair Trading dated 10 February 2004	29/08/2003 page 8698
Radiation Control Regulation 2003 • Letter to the Minister for the Environment dated 24 October 2003 • Letter from the Minister for the Environment dated 23 January 2004	29/08/2003 page 8534
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003 • Letter to the Privacy Commissioner dated 24 October 2003 • Letter from the Acting Privacy Commissioner dated 27 November 2003	29/08/2003 page 8434

1. Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 & Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref: 308
Your Ref:

The Hon Carmel Tebbutt MLC
Minister for Community Services
Level 25, 9 Castlereagh Street
SYDNEY NSW 2000

Dear Minister

Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003)

I refer to the Committee's correspondence with you in relation to these Regulations and, in particular, the Committee's concern with the privacy implications of clause 27 of the *Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003.*

The Committee sought the advice as to the privacy implications, if any, of this clause from the Privacy Commissioner. That advice was received on 8 January 2004. I am now forwarding that advice to you for your information.

The Acting Privacy Commissioner advised the Committee that all designated agencies that are public sector agencies must comply with the *Privacy and Personal Information Protection act 1998* when requesting medical information under clause 27. Further, from July 2004, private sector agencies (and public sector agencies) will have similar obligations under the *Health Records and Information Privacy Act 2002.*

The Acting Commissioner also advised that in some circumstances a NSW public sector organisation (eg, a designated agency) might be bound to take responsibility for the collection, use or disclosure of personal information by private sector agencies.

The Acting Commissioner advised that it might be appropriate for your Department to consider developing guidelines to assist designated agencies to

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identify when clause 27 may be used, for example if the existence of a communicable disease is indicated within the household.

He also pointed out that such guidelines could also ensure that designated agencies comply with their obligations under privacy legislation while discharging their statutory obligations under child protection legislation.

The Committee supports this advice and commends it to you.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON
Enc.

NB: The Privacy Commissioner's letter is available at www.parliament.nsw.gov.au/lrc/digests.

2. Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

7 November 2003

Our Ref:LRC3721/436

Hon R J Debus MP
Attorney General
Level 36 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney

CRIME (FORENSIC PROCEDURES) AMENDMENT (DNA DATABASE SYSTEM) REGULATION 2003

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Regulation.

The Committee notes that the Regulation's object is to prescribe the CrimTrac Agency of the Commonwealth as an appropriate authority to which information from the State's DNA database system may be transmitted under Part 12 of the *Crimes (Forensic Procedures) Act 2000* (the Act).

The Committee also notes that the practical aim of the Regulation is to facilitate the dissemination of that information to other "participating jurisdictions" within Australia. Accordingly, the safeguards contained in Part 10 and Part 11 of the Act relating to the maintenance and destruction of DNA forensic material are only as effective in protecting privacy rights as their interstate equivalents.

The Criminal Law Review Division of your Department has advised the Committee that one issue stressed by your Department in negotiations on the national DNA database is that New South Wales will only use other jurisdictions' material if that material were able to be collected under the Act. Similarly, New South Wales DNA material will only be provided to other jurisdictions on the understanding (contained within the draft Ministerial Arrangements) that it may be used in a manner that is consistent with the provisions of the Act.

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Having regard to this, the Committee seeks your advice as to the extent to which the protections contained in the Act are reflected in the legislation of participating jurisdictions, and as to the progress of Ministerial negotiations to ensure that the Act's safeguards are enshrined in any inter-jurisidictional agreements for the exchange of DNA material.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

ATTORNEY GENERAL

2003/CLRD0772

Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

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LEGISLATION REVIEW COMMITTEE

Dear Mr Collier,

Re: *Crimes (Forensic Procedures) Amendment (DNA Database System) Regulation 2003*

I refer to your letter on the above issue dated 7 November 2003. In your letter, you seek my advice as to the extent to which the protections contained in the *Crimes (Forensic Procedures) Act 2000* (the Act) are reflected in the legislation of participating jurisdictions, and as to the progress of Ministerial negotiations to ensure that the Act's safeguards are enshrined in any inter-jurisdictional arrangements for the exchange of DNA material.

In relation to the first issue, the following table demonstrates how similar the other jurisdictions' legislation is to the Act.

Jurisdiction	Legislation	Comparison to the Act
Commonwealth	*Part 1D of the Crimes Act 1914*	Very similar – principal difference is in relation to the testing of serious indictable offenders (Part 7). Amended by the *Crimes Amendment (Forensic Procedures) Act 2001* and the *Crimes Legislation Enhancement Act 2003*
Victoria	*Crimes Act 1958*	Similar in key respects. Division 30A was recently updated by the *Crimes (DNA Database) Act 2002* (Vic) to incorporate important components of 2000 Model Bill, but those amendments have not yet commenced.
South Australia	*Criminal Law (Forensic Procedures) Act 1998*	Similar in key respects. The *Criminal Law (Forensic Procedure) (Miscellaneous) Amendment Act 2002*, which came into operation on 4 April 2003, updated the legislation in line with the 2000 Model Bill (on which the Act is also based).
Queensland	*Police Powers and Responsibilities Act 2000*	Significant departures, eg: • wider range of offenders covered; • Magistrate's approval not required for compulsory mouth swabs; • legislation does not underpin procedures with criminal sanctions; • many safeguards from 2000 Model Bill not included; and • matching of DNA profiles on national DNA database is essentially unregulated.

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		Amendments in the *Police Powers and Responsibilities (Forensic Procedures) Amendment Act 2003,* assented to on 27 August 2003, have not yet been proclaimed into force, will bring the legislation more into line with the Model Bill and the Act.
Tasmania	*Forensic Procedures Act 2000*	Very similar – key differences are that a wider range offenders covered and Magistrate's approval not required for compulsory taking of mouth swabs. Amended by the *Forensic Procedures Amendment Act 2003*, which commenced on 4 June 2003.
Western Australia	*Criminal Investigation (Identifying People) Act 2002*	Similar in key respects but does not follow the structure of the Model Bill.
Australian Capital Territory	*Crimes (Forensic Procedures) Act 2000*	Very similar, but covers a wider range of offences; and Magistrate's approval not required for compulsory taking of mouth swabs.
Northern Territory	*Police Administration Act* *Juvenile Justice Act* *Prisons (Correctional Services) Act*	Substantially different, eg: • wider range of offenders covered; • Magistrate's approval not required for compulsory taking of mouth swabs; • legislation does not underpin the procedures with criminal sanctions; • many of Model Bill safeguards are not included; and • matching of DNA profiles on national DNA database is essentially unregulated.

On the second issue, namely, the progress of negotiations to ensure the Act's safeguards are enshrined in inter-jurisdictional agreements for the exchange of DNA material, I am pleased to advise that the proposed Ministerial Arrangements are being drafted by a Working Group comprised of representatives of the Criminal Law Review Division of my Department and the Crown Solicitor's Office, NSW Police and the Crown Advocate.

Adherence to the safeguards and protections in the Act is of critical concern to the Working Group. This is achieved by ensuring that the Ministerial Arrangements do not enable other jurisdictions to use DNA material obtained from NSW in a way which would not be permitted under the Act. In other words, the matching rules of the 'owner jurisdiction' prevail. This is in contrast to some of the Arrangements that other jurisdictions have entered into, where the matching rules of the receiving jurisdiction prevail. I have recently executed Arrangements under section 97 with the ACT and the Commonwealth, and anticipate that my counterparts will also execute these Arrangements in due course. I also anticipate that Ministerial Arrangements will be entered into with the other Australian jurisdictions in early 2004, as well as a Memorandum of Understanding (MOU) between the Commissioner of Police and the CEO of CrimTrac. The proposed MOU will be referred to the Crown Advocate for consideration and advice to ensure that appropriate safeguards are maintained.

Yours sincerely

BOB DEBUS

3. Landlord and Tenant (Rental Bonds) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC372/CP3698

The Hon R Meagher MP
Minister for Fair Trading
Level 37
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Landlord and Tenant (Rental Bonds) Regulation 2003

The Committee has recently considered this regulation under s 9 of the *Legislation Review Act 1987* and has resolved to write to you to seek your advice with respect to a number of concerns that it has with this regulation.

Interest rate level

The Committee notes that the prescribed rate of interest for bonds held by the Rental Bond Board is currently 0.01%.

The Committee is of the view that such a rate of interest provides no real benefit to tenants.

Further, by effectively providing for no mitigation of the erosion of the value of the bond due to inflation, this rate is contrary to the spirit of the Act, and the intention of Parliament in passing the *Landlord and Tenant (Rental Bonds) Amendment Act 1989*.

The Committee also understands that the interest earned on bonds held by the Board is currently in excess of that necessary to pay for services for the benefit of tenants under s 20 of the *Landlord and Tenant (Rental Bonds) Act 1977* (the Act). The Committee is of the view that allowing the interest to accrue to the Board in excess of that required to pay for services for tenants unduly trespasses on the right of tenants to the benefit from the interest earned on their money, which is effectively held in trust.

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Bond limits for furnished premises

The Committee notes that cl 6 of the Regulation provides for an exemption for furnished premises rented for more than $250 per week from the requirement in s 9 of the Act that the bond may not exceed an amount equivalent to six weeks' rent. The Committee notes further that this is the same level as was set when the provision was introduced in 1977. The Regulatory Impact Statement (RIS) prepared on the Regulation states that the equivalent value in current terms would be properties rented at $750 to $1,000 per week.

The exemption was introduced to provide for properties that, at the time the Act came into effect, constituted the top end of the rental market. However, it would now appear that the majority of newly rented furnished premises would fall within the exemption.

The Committee notes that the justification given in the RIS for this exemption was that it would result in a withdrawal of furnished premises from the market. No evidence was provided for this assertion, and it does not seem intuitively correct that an owner would forgo rental income from a property merely because a bond in excess of the value of six weeks' rent could not be secured. The Committee also notes that the RIS stated that similar fears were expressed when the Act was first introduced, but experience has found these to be unfounded.

The Committee therefore considers that such a low threshold for the exemption is against the spirit of the Act, which in normal circumstances sets a specific amount in which a bond may be charged.

Requirements of the *Subordinate Legislation Act 1989*

The Committee also notes that the RIS and accompanying submissions were not forwarded to the Committee within 14 days of the gazettal of the Regulation, as required by the *Subordinate Legislation Act 1989*.

The Committee wishes to bring to your attention that it is important to observe the provisions of the *Subordinate Legislation Act 1989,* to allow the Committee to consider the material while the regulation is still subject to disallowance, as required by the *Legislation Review Act 1987.*

The Committee requests your reply in this matter by 5 November 2003.

Yours sincerely

Barry Collier MP
Chairperson

Minister for Fair Trading
Minister Assisting the Minister for Commerce

FAXED

Mr B J Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2001

RML M03/5051

Min No. 03/1648
File No. 03/38198

Dear Mr Collier

I refer to your correspondence of 24 October 2003 (your ref: LRC372/CP3698) regarding the Landlord and Tenant (Rental Bonds) Regulation 2003.

I have noted the Committee's comments on the prescribed rate of interest payable on a rental bond lodged with the Rental Bond Board and the exemption for furnished premises rented for $250 or more per week from the requirement that the bond for furnished premises may not exceed an amount equivalent to six weeks rent.

Rental bonds and income earned from bonds are invested in accordance with the requirements of the *Landlord and Tenant (Rental Bonds) Act 1977* and the *Public Authorities (Financial Arrangements) Act 1987*. Regular actuarial reviews require the Board to maintain a surplus of between $15 and $20 million, in addition to the bonds held in trust, to ensure adequate income is generated to meet forward commitments for operational costs and funded programs.

The income earned from investments funds a range of programs designed to support tenants in particular and the residential tenancy market in general. Programs funded, or part funded, include the operating cost of the rental bond custodial and information service and the Office of Fair Trading's tenancy information service.

In the year to 30 June 2003, the Rental Bond Board provided $6.8 million toward the costs of the Consumer, Trader and Tenancy Tribunal. As part of Fair Trading's commitment to improving social justice outcomes for vulnerable, geographically remote and disadvantaged groups, $3.2 million funding was provided through the Tenants' Advice and Advocacy Program for community based services in metropolitan, rural and regional NSW.

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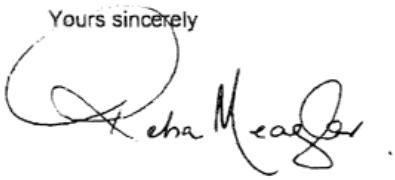
As stated in the Regulatory Impact Statement, the preferred option was to remake the Landlord and Tenant (Rental Bonds) Regulation with minor amendments, generally retaining the status quo.

To address the concerns the Committee raises would require substantial amendments to the Regulation as well as other tenancy legislation – a process that would require a more extensive review and further consultation.

With regard to the requirement to forward the Regulatory Impact Statement and accompanying submissions to the Committee, I have instructed the Office of Fair Trading to ensure future Regulatory Impact Statements are provided to the Committee within 14 days of gazettal, as advised in my letter to you of 16 October 2003.

Yours sincerely



Reba Meagher MP
Minister

05 NOV 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

Our Ref: LRC390

The Hon Reba Meagher MP
Minister for Fair Trading
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

LANDLORD AND TENANT (RENTAL BONDS) REGULATION 2003 AND PAWNBROKERS AND SECOND HAND DEALERS REGULATION 2003

Thank you for your letters of 5 November 2003 regarding the Landlord and Tenant (Rental Bonds) Regulation 2003 and the Pawnbrokers and Second Hand Dealers Regulation 2003.

The Legislation Review Committee did not find that the letters fully addressed the concerns it had raised so has resolved to seek further details from you regarding these Regulations. I will write to you in the near future to set out the further information that the Committee is seeking. Depending on the information it receives from you, the Committee may wish to hold hearings on the Regulations to obtain further evidence.

The consideration of these regulation would be conducted under the Committees function in s 9(1) of the *Legislation Review Act 1989*. The Committee is conscious, however, that that function relates to regulations *while they are subject to disallowance.*

Advice received from the Crown Solicitor last year leads to doubts about the scope of the Committee's authority to continue to consider regulations after the disallowance period has passed. Consequently, to put the Committee's authority to continue to consider these regulations beyond doubt, and to preserve the House's capacity to take action on them should the Committee so recommend, the Committee has resolved that a protective notices of motion to disallow the regulations should be given. As the disallowance period has already expired in the Legislative Assembly, such notices will only be given in the Legislative Council.

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The protective notices of motion are required to prevent the disallowance period on the regulations from expiring. I note that the giving of the notice in no way reflects a view of the member giving the notice or the Committee as a whole that the regulations should be disallowed.

While the practice of giving protective notices of motion is relatively new to New South Wales, this device has long and often been used by the Senate Regulations and Ordinances Committee. As noted in *Odgers Australian Senate Practice*:

> When [an instrument which may offend against the committee's principles] is identified, the usual practice is for the chair to give notice of a motion to disallow the instrument. ... Many notices to disallow instruments are protective notices in that they are given pending the receipt of a satisfactory explanation or undertaking from the relevant minister. (p 377)

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 December 2003

Our Ref: LRC372/CP3698

The Hon R Meagher MP
Minister for Fair Trading
Level 37
Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Landlord and Tenant (Rental Bonds) Regulation 2003

I refer to the Committee's letter to you dated 18 November 2003 in which the Committee indicated that it would write to you again seeking further details in relation to this Regulation.

COMMITTEE CONCERNS

The concerns the Committee raised with you in our letter dated 24 October remain.

Specifically, the Committee refers to the stated intention of Parliament that interest payments on rental bonds held in trust provide some mitigation of erosion by inflation and that the 0.01% interest rate payable under the Regulation is contrary to this intention and thus the spirit of the Act.

Furthermore, the Committee notes that while the Act provides for a range of payments for the benefit of tenants generally, it also provides for interest to be paid to those who have deposited bonds. The Act *does not* suggest that interest should only be paid when the costs of all other prescribed services have been covered.

The Committee is also concerned that the low threshold for the exemption for furnished premises in clause 6 is against the spirit of the Act in that, without sufficient justification, it removes the bond limit specifically provided in section 9 of the Act from what is most likely the majority of furnished premises.

The Committee notes that the $250 threshold has not been amended since 1977 when the provision was first made. Further, the Committee notes that

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the regulatory impact statement (RIS) states that the equivalent today would be $750-$1,000 per week.

This low threshold also appears to create a loophole to enable avoidance of the bond limit by unscrupulous landlords on the basis of minimal furnishings.

Finally, the Committee notes your response that, in remaking this Regulation, the preferred option in the RIS was to generally retain the status quo, while making some minor amendments.

As you will be aware, the purpose of repealing regulations every five years under the Subordinate Legislation Act is to ensure that the status quo is not maintained unless it can be demonstrated to be the best option.

FURTHER INFORMATION REQUESTED

The Committee doubts that maintaining the status quo in relation to these particular matters was the best option and seeks further information from you in relation to these matters. In particular, the Committee seeks your advice on the following questions:

1. On what basis is the maintenance of the interest rate of 0.01% paid to the depositors of bonds justified?
2. How has the interest earned on rental bonds been allocated over each of the last five years, including:
   (a) to what extent did that allocation cover the cost of the service;
   (b) to what extent did the depositors of rental bonds benefit from those services;
   (c) what proportion of the benefit of those services was enjoyed by the depositors of rental bonds and what proportion was enjoyed by other persons?
3. What would be the implications of adopting the following rates recommended in submissions on the regulations:
   (a) Commonwealth Bank of Australia Streamline Account balance of $100,000 or more (currently 0.2%) (recommended by Uniting Care);
   (b) half the UBS Bank Bill Index (recommended by Legal Aid NSW);
   (c) average rate for a six-month term deposit of $1,000 (recommended by NSW Department of Housing)
4. What is the justification for maintaining the threshold for the exemption for furnished premises in clause 6 at $250?
5. On what evidence is it claimed that increasing the threshold will reduce the supply of furnished premises in the market?
6. How does the claim that the market would be affected by increasing the threshold compare to similar claims previously made about the establishment of the rental bond scheme?

7. Does this low threshold, together with the lack of a definition of unfurnished premises, provide a loophole allowing unscrupulous landlords to avoid the bond limit on the basis of minimal furnishing?

8. What protection is provided for tenants against a landlord seeking to rely on this low threshold to charge unreasonably large bonds?

9. Can you please explain what "substantial amendment to the Regulation" would be required to address the Committee's concerns? In particular, why are substantial amendments to the Regulation (and related legislation) required to change:

   (a) the rate of interest payable; and

   (b) the $250 exemption threshold in relation to bonds for furnished premises?

10. What consequential amendments would need to be made to address the Committee's concerns?

The Committee welcomes your early advice in these matters.

Yours sincerely

Barry Collier MP
Chairperson

3

Minister for Fair Trading
Minister Assisting the Minister for Commerce

RML M03/6046
Min No. 03/2415
File No. 03/38198

Mr B J Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

I refer to your correspondence regarding the Landlord and Tenant (Rental Bonds) Regulation 2003. I refer also to my previous correspondence to you dated 5 November 2003.

In relation to your concern regarding the payment to tenants of interest on rental bonds, I draw your attention to the stated intention of Parliament to pay such interest payments at a rate comparable to the average rate provided by the private sector for similar no-fixed term investments. The regulations implementing this intention have since conformed to this intention. For example, prior to 2001 the prescribed rate was referable to the rate payable by the State Bank. After that bank's product ceased to exist, the regulation referred to the rate payable by the Commonwealth Bank. The current regulation simply continues this prescription. I note that the context of the 1989 amendment to the Act requiring interest to be paid to tenants was that inflation was in the order of 10%. This figure has now dropped to approximately 2%. This may assist in explaining the proportional drop that has occurred in market interest rates.

Raising the interest rate paid to tenants to a rate higher than the market rate would of course affect the allocation of expenditure on tenant services as permitted by sections 20 and 21 of the *Landlord and Tenant (Rental Bonds) Act 1977*. I have previously indicated the types of services being provided, which include the Renting Services functions of the Office of Fair Trading, and a variety of grants for tenancy-related services, the tenants' advice and advocacy program, residential matters before the Consumer Trader and Tenancy Tribunal, and the tenancy guarantee pilot project.

Further information on the expenditure of the Rental Bond Board is reported in the annual Budget Papers (for Budget 2002-03, see No 3 Vol 2 at pages 11-8 and 11-42). I note that each year there may be a surplus or a deficit in expenditure, because the interest revenue fluctuates as a result of changes in the value of the total bonds (ie, according to the amount of bonds paid out). The expenses also fluctuate according to changing requirements (ie, ongoing payments for services and grants, etc). I am

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advised that an activity based costing system is applied to monitor the expenditure of the Rental Bond Board and that actuarial reviews ensure that the Board is able to meet forward commitments for operational programs.

With respect to your concern about bond limits for furnished premises, I am advised firstly that during the RIS process stakeholders did not express a consensus on raising the current threshold for exemption for furnished premises. If the threshold were raised, an extensive information campaign would be needed to convey the new requirements. Secondly, this issue falls within the overall, and more significant, issue of bond limits for all premises. It is intended that this overall issue will be considered when residential tenancies legislation is next reviewed. This avenue would be a more appropriate avenue for reform than the RIS process for the Landlord and Tenant (Rental Bonds) Regulation, because it will be able to consider all relevant primary legislation as well as regulations.

I trust that the above information allays the concerns you have expressed, and that you may see fit to arrange the withdrawal of the disallowance motion in respect of this regulation. I note that, were the regulation to be disallowed, a legislative vacuum would be created which would cause uncertainty for industry and consumers. I consider that this result is not intended by the Legislation Review Committee, even as it seeks to fulfil its important regulation review role. Please do not hesitate to contact my Chief of Staff, Mr Sam Maresh, on telephone 9228 3555 to further discuss this matter.

Yours sincerely

Reba Meagher.

Reba Meagher MP
Minister

10 FEB 2004

4. Pawnbrokers and Second-hand Dealers Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC390

The Hon Reba Meagher MP
Minister for Fair Trading
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

PAWNBROKERS AND SECOND-HAND DEALERS REGULATION 2003

The Committee has considered this Regulation under section 9 of the *Legislation Review Act 1987* and resolved to write to you to express the Committee's support for the aim of the Regulation, namely regulating the industry to protect consumers and minimising the traffic of stolen goods through pawnbrokers and second-hand dealers.

The Committee also resolved to raise with you the following concerns and to seek your comment in response.

The Committee is concerned that the new requirement that people show documentary proof of their date of birth under clause 18 will have an undue adverse effect on the pawnbroking and second-hand dealers industry and could be unreasonably harsh on consumers. It is not clear to the Committee that requiring documentary proof of date of birth will produce sufficient benefits to the policing of the industry to warrant these adverse effects.

Another concern raised by the Committee relates to the new Form 3, *Notice to Person Pawning Goods*, inserted by Schedule 4, clause 23. The Committee understands that this new notice is aimed at informing consumers of their rights and obligations under the legislation. The Committee is of the view that such a notice should use simple, clear and plain English so that it is comprehensible to the widest number of consumers.

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Finally, the Committee wishes to draw to your attention that fact that the RIS and submissions on the Regulation were not forwarded to the Committee within the time required by the *Subordinate Legislation Act 1989*. It is important that the provisions of the Act be observed to allow the Committee to consider the material while the Regulation is still subject to disallowance as required by the *Legislation Review Act 1987*.

The Committee requests your reply in this matter by 5 November 2003.

Yours sincerely

Barry Collier MP
Chairperson

Minister for Fair Trading
Minister Assisting the Minister for Commerce

FAXED

Mr B J Collier, MP
Chairperson
Legislative Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RML M03/5028
Min No. 03/1647
File No. 03/025854-4

Dear Mr Collier

I refer to your correspondence regarding the *Pawnbrokers and Second-hand Dealers Regulation 2003*.

The Committee's support for the aim of the Regulation, which aims to protect consumers and minimise the traffic of stolen goods, is appreciated.

In regard to the Committee's comments on the requirement to provide documentary evidence of a person's date of birth and the language used in Form 3, Notice to Person Pawning Goods, I would like to provide the following information.

The legislation requires pawners and sellers of prescribed second-hand goods to provide their date of birth and prescribed documentary evidence of identity. This requirement is contained within Schedule 4 of the Regulation.

The requirement was introduced as a means of balancing the need for more stringent identification requirements to minimise the traffic of stolen goods against causing significant inconvenience to the pawner.

Frontline compliance officers have advised that documents that do not include a date of birth are more easily used by others as false identification.

The Regulatory Impact Statement also considered the introduction of mandatory photo identification. However, it was determined at this stage the most effective way to achieve the aims of the legislation was to require that evidence of a person's date of birth be given in government issued documentation.

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This was considered to be a reasonable requirement, given that anyone who could obtain the current prescribed forms of identification should have documentary evidence of their date of birth.

Although it was acknowledged that consumers would be unlikely to carry such documentation with them on a daily basis, it was concluded that if they were to sell or pawn goods, some forethought is required and therefore when they collected their goods to take to a licensee, they could also take their date of birth identification.

In regard to the Form 3, Notice to a person pawning goods, it should be noted that it is a prescribed form and was consequently drafted by Parliamentary Counsel.

Due to the many consumer protection provisions contained in the legislation the form is required to contain a significant amount of information. I would note that the issue of the language in the Notice form was not raised during consultation with consumer stakeholders during the Regulatory Impact Statement.

In addition, the Office of Fair Trading will produce fact sheets which will complement the Notice form.

In the previous letter that I forwarded with the Regulatory Impact Statement and submissions on the proposed Regulation, I advised that I had instructed the Office of Fair Trading to ensure that future Regulatory Impact Statements are provided to the Committee within 14 days of gazettal.

Should you require any additional information please contact Mr Michael Galderisi in my Office on 9228 3555.

Yours sincerely

Reba Meagher MP
Minister

05 NOV 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

18 November 2003

Our Ref: LRC390

The Hon Reba Meagher MP
Minister for Fair Trading
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

LANDLORD AND TENANT (RENTAL BONDS) REGULATION 2003 AND PAWNBROKERS AND SECOND HAND DEALERS REGULATION 2003

Thank you for your letters of 5 November 2003 regarding the Landlord and Tenant (Rental Bonds) Regulation 2003 and the Pawnbrokers and Second Hand Dealers Regulation 2003.

The Legislation Review Committee did not find that the letters fully addressed the concerns it had raised so has resolved to seek further details from you regarding these Regulations. I will write to you in the near future to set out the further information that the Committee is seeking. Depending on the information it receives from you, the Committee may wish to hold hearings on the Regulations to obtain further evidence.

The consideration of these regulation would be conducted under the Committees function in s 9(1) of the *Legislation Review Act 1989*. The Committee is conscious, however, that that function relates to regulations *while they are subject to disallowance.*

Advice received from the Crown Solicitor last year leads to doubts about the scope of the Committee's authority to continue to consider regulations after the disallowance period has passed. Consequently, to put the Committee's authority to continue to consider these regulations beyond doubt, and to preserve the House's capacity to take action on them should the Committee so recommend, the Committee has resolved that a protective notices of motion to disallow the regulations should be given. As the disallowance period has already expired in the Legislative Assembly, such notices will only be given in the Legislative Council.

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The protective notices of motion are required to prevent the disallowance period on the regulations from expiring. I note that the giving of the notice in no way reflects a view of the member giving the notice or the Committee as a whole that the regulations should be disallowed.

While the practice of giving protective notices of motion is relatively new to New South Wales, this device has long and often been used by the Senate Regulations and Ordinances Committee. As noted in *Odgers Australian Senate Practice*:

> When [an instrument which may offend against the committee's principles] is identified, the usual practice is for the chair to give notice of a motion to disallow the instrument. ... Many notices to disallow instruments are protective notices in that they are given pending the receipt of a satisfactory explanation or undertaking from the relevant minister. (p 377)

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 December 2003

Our Ref:LRC390/CP3693
Your Ref:RML MO3/5028

The Hon Reba Meagher MP
Minister for Fair Trading
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

PAWNBROKERS AND SECOND-HAND DEALERS REGULATION 2003

I refer to the Committee's letter to you dated 18 November 2003 in which the Committee indicated that it would write to you again seeking further detail in relation to this Regulation.

COMMITTEE CONCERNS

The Committee's principal concern with this regulation is the introduction of the requirement to show documentary proof of date of birth in order to transact with a pawnbroker or second-hand dealer.

Whilst the Committee acknowledges the public policy consideration behind the introduction of this requirement, namely the reduction in the trafficking of stolen goods through the industry, it is nevertheless concerned about the adverse impact that this requirement will have on the industry and on consumers.

In particular, the Committee is concerned that the persons most likely to use these businesses are the more marginalised sectors of the community who do not have access to other forms of credit (e.g. banks). In many instances, these people would access this industry to seek urgent access to small sums of money.

The Committee notes that the three primary forms of identification bearing a person's date of birth are a drivers license, birth certificate or passport. There is a cost associated with the acquisition of each of these forms of identification, and for some this cost would be prohibitive and could exceed the amount sought through transactions with pawnbrokers and second-hand dealers. In addition, with a birth certificate, for example, there is a five day

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waiting period before this documentation can be supplied, which disadvantages people needing urgent access to money.

FURTHER INFORMATION

The Committee therefore seeks further information from you in relation to the supposed benefits of the new requirement. In particular, the Committee seeks your advice in relation to the following questions:

1. (a) On what basis have the frontline compliance officers advised you that requiring documentary proof of date of birth will reduce the traffic in stolen goods?
   (b) In particular, do they have any data or specific experience that supports their advice?
2. Similarly, on what bases have the frontline compliance officers advised you that documents bearing a date of birth are less easily used in a fraudulent manner?
3. What specific benefits are to be obtained by recording a date of birth?
4. (a) What consideration was given to the privacy implications for the consumer?
   (b) What do you consider those implications to be?
5. (a) What consideration was given to the social impact of this requirement?
   (b) What do you consider that impact to be?
6. The Committee notes that homeless people often do not have the ability or resources to obtain a birth certificate. Furthermore, homeless people are frequent victims of theft, making it inadvisable that they keep their birth certificates on their persons and more likely that they will not have it when they need it to transact with a pawnbroker or second hand dealer.
   (a) What consideration was given to the effect that this requirement will have on the homeless?
   (b) What effect do you expect it to have?
7. (a) What consideration was given to the effect that this requirement will have on the industry by reducing their ability to trade?
   (b) What effect do you expect it to have?
   (c) The Committee notes that a number of submissions on the regulation and regulatory impact statement raised this concern. What degree of consideration was given to these submissions?
8. The Committee notes that this industry is already stringently regulated.
   (a) To what degree are the mechanisms in place to prevent the trafficking of stolen goods not working?
   (b) What evidence do you have to suggest that requiring identification bearing a date of birth will address such problems?

9. (a) What consideration was given to the requirement for date of birth on ID resulting in traffic in stolen goods being driven into the unregulated market?

   (b) To what extent would such an effect result in greater difficulty in recovering stolen goods and the prosecution of those responsible for theft or dealing in stolen goods?

10. In what way does the benefits of the requirement of showing identification outweigh the burden imposed on both the consumer and the industry by the requirement?

The Committee welcomes your early advice in these matters.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

3

Minister for Fair Trading
Minister Assisting the Minister for Commerce

RML M03/6047
Min No. 03/2416

Mr B J Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier Barry .

I refer to your correspondence concerning the Pawnbrokers and Second-Hand Dealers Regulation 2003.

I draw your attention to the recent press about the success of a recent NSW Police sting operation in Port Kembla, "Operation Casimiroa", involving the setting up of a pawnshop and reportedly dozens of arrests of suspected burglars and drug dealers who used that shop. This case illustrates the significance of the issue of policing of the industry.

I am advised that the requirement in the regulation for documentary proof of date of birth will strengthen the policing of the industry both by preventing the sale of stolen goods (the licensee can check if the date of birth appears to match the person offering the goods) and by assisting in the identification of persons who may have sold stolen goods. The requirement for date of birth documentation, in conjunction with the requirement for record keeping by licensees, would assist in ascertaining whether a person has sold more than a reasonable quantity of household goods within a given period. The current requirement only to provide a date of birth orally does not eliminate the possibility of a person entering multiple transactions fraudulently using different addresses and dates of birth.

In respect of your concern about the impact of the requirement for documentary proof of date of birth on consumers, I note that the primary legislation already requires documentary proof of the identity of a person pawning goods. In many cases this evidence would include documentary evidence of the person's date of birth (eg, a driver's licence). Other types of evidence of identity include government-issued documents such as pension cards, for which the holder must provide documentary date of birth evidence to the relevant government authority. The holder should therefore be able to also provide that evidence to the pawnbroker, without additional cost or delay. On this basis also, any additional impact on the privacy of consumers would be marginal.

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I am advised that in a random sample of 100 pawnbroker and second-hand dealer transactions carried out during January 2004 by NSW Police, persons had provided documentation for their proof of identity which either contained documentary proof of date of birth (74 persons had drivers' licences), or would have required documentary proof of date of birth to be provided to the relevant government authority (eg, health cards, proof of age cards, passports, Medicare cards, pension cards, and an OFT licence).

I appreciate your concern about marginalised sectors of the community. In this regard I note that the Office of Fair Trading is a member of the Partnership Against Homelessness, a network of NSW Government agencies which aims to improve services for homeless men and women. However, it is a requirement of the *Pawnbrokers and Second Hand Dealers Act 1996* that documentary proof of identity be provided by those offering goods for sale or pawn. The purpose of the amended Regulation is only to ensure that the date of birth evidence also required, is documentary rather than oral. I reiterate that the vast majority of consumers who are currently able to comply with the existing requirements should also be able to comply with the amendments to the Regulation.

I trust that the above discussion will serve to allay your concerns about the Regulation. I therefore ask that you consider arranging for the withdrawal of the disallowance motion for the Regulation. Please do not hesitate to contact my Chief of Staff, Mr Sam Maresh, on telephone 9228 3555 to further discuss this matter.

Yours sincerely

Reba Meagher.

Reba Meagher
Minister

10 FEB 2004

5. Radiation Control Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref: LRC379

The Hon Bob Debus MP
Minister for the Environment
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

RADIATION CONTROL REGULATION 2003

The Committee has considered this Regulation under section 9 of the *Legislation Review Act 1987* and resolved to write to you to express the Committee's full support for the objects of and need for regulatory control in this area.

The Committee also resolved to raise with you its concern about the increase in fees made in this Regulation and to ask you for further explanation as to the need for these increases.

The Committee notes the comment made by the University of Sydney in its submission on the RIS that "[f]urther attention to simplifying and reducing the cost of accrediting radiation premises is warranted." The Committee is concerned that the regulation of this area may not be as efficient as possible and seeks your comment.

Yours sincerely

Barry Collier MP
Chairperson

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NEW SOUTH WALES

MINISTER FOR THE ENVIRONMENT

In reply please quote: MOF9513

Mr B J Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

RECEIVED
29 JAN 2004
LEGISLATION REVIEW COMMITTEE

23 JAN 2004

Dear Mr Collier

I refer to your letter of 24 October 2003 seeking further explanation on two aspects of the *Radiation Control Regulation 2003* (the Regulation):

- the increase in fees for regulatory instruments; and
- the cost effectiveness of the registration of premises, in particular the concerns expressed by the University of Sydney.

The Environment Protection Authority (EPA) is part of the Department of Environment and Conservation (DEC) which formed in September 2003. The DEC has provided the attached advice.

You will see from the information provided that:

- there is a high level of acceptance of fee increases and that they are soundly based;
- the issues raised by Sydney University have been carefully considered; and
- current security concerns about the potential for misuse of unsealed radioactive sources make the new laboratory registration requirements timely and necessary.

Yours sincerely

Bob Debus

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Facsimile: (02) 9228 3166

NB: The attachments to this letter are available at www.parliament.nsw.gov.au/lrc/digests.

6. Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 & Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

24 October 2003

Our Ref:
Your Ref:

The Privacy Commissioner
Privacy NSW
Level 17, 201 Elizabeth Street
SYDNEY NSW 2000

Dear Commissioner

ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT (INTERLOCK DEVICES) REGULATION 2003

The Committee has considered this Regulation and resolved to write to you to seek your advice as to the privacy implications raised, if any, by clause 25B of the Regulation.

Amongst other things, the Regulation sets out the procedure for obtaining or varying interlock driver licenses and the conditions under which they are held.

Clause 25B provides that the RTA:

> *"may disclose to any person data or information recorded in the driver license register for the purpose of enabling the Authority to perform functions conferred or imposed on the Authority by or under the Act in relation to the alcohol interlock program."*

The Committee is concerned that this provision may be too broad and looks forward to receiving your advice on the matter.

Yours sincerely

Barry Collier MP
Chairperson

encl.

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PRIVACY
NEW SOUTH WALES
Enquiries: Siobhan Jenner
Tel: (02) 9268 5583
Our ref: A03/453
Your ref:

Mr Barry Collier MP
Chairperson
Legislation Review Committee
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Collier

Re: Request for advice on the Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003

I am pleased to be able to provide advice on the above matter.

In your letter 24 October 2003 you asked that I provide advice on clause 25B of the above Regulation which enables the Roads & Traffic Authority (RTA) to disclose the personal information recorded in the driver license register (DRIVES database) to "any person" for the purposes of enabling the RTA to perform its functions in "relation to the alcohol interlock program". I note that the Committee expressed concerns that this provision might be "too broad".

I share the Committee's concerns about this provision and I am please to be offered the opportunity to comment on it.

In January 2002 Privacy NSW was consulted by the RTA on the proposed licence for participants in the Alcohol Interlock Program (the program). The RTA agreed to reduce the size of lettering on the licence card and to refrain from including other marking which might stigmatise participants in situations where they might be required to provide their driver's licence as a means of identification.

In July 2003 Privacy NSW was asked to comment on the RTA's proposed contractual arrangement with service providers who will license the companies which will install and service the Interlock devices. The RTA advised that 'service' would include the downloading of information (the alcohol readings and other information for the given period) from the device onto computers operated by the service providers. The RTA suggested that the information might also include participants' names and addresses and their identification numbers.

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Privacy NSW suggested that the chosen tenderer for service provision should only be able to collect the identification number. It also noted in the event that the RTA decided identifying information was to be collected, the service provider might be bound by the Commonwealth National Privacy Principles under the Privacy Act 1988. Further, the RTA might be bound to take responsibility for the collection of the information under section 4(4) of the PPIP Act.

That provision makes public sector agencies, such as the RTA, responsible under the Privacy & Personal Information Protection Act 1998 (PPIP Act) for the information collected by "a person employed or engaged by the agency in the course of such employment or such engagement".

Based on the information provided by the RTA in July this year, Privacy NSW formed the view that because participation in the program would not involve the provision of personal information to any third party, there would be no PPIP Act compliance issues for the RTA. However Privacy NSW advised the RTA that the Commonwealth Privacy Act 1988 may apply to the service providers and the companies. In any case, the RTA should require them to comply with the Information Principles in the PPIP Act as they are more stringent that the National Privacy Principles.

The RTA did not indicate that program participant information would be made available by the RTA to other third parties. However it is reasonable to assume that the NSW Police would have access to the information for the purpose of verifying the information provided by participants. Police access to driver information held on the RTA DRIVES database is permitted by the Direction on Information Transfers Between Public Sector Agencies which is made under section 41 of the PPIP Act.

That direction permits agencies to transfer personal information in cases where there was an agreement to do so prior to the commencement of the PPIP Act. Access to DRIVES by the Information Processing Bureau (IPB) is permitted by the recent Direction made specifically for that purpose.

Privacy NSW therefore had no reason to suggest that regulatory amendment was required in order for the RTA to proceed with the program. This Office was not aware of the Regulation until our attention was drawn to it by your request for advice.

Clause 25B of the Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003 allows the RTA to disclose participant information to any person without regard to the privacy of individuals, and as such would allow a significant incursion into the privacy rights of the participants.

It could also adversely affect participation rates. Notwithstanding the fact that the clause might confer on the RTA the right to disclose participant information "to any person", the RTA would still be obliged to comply with section 10 of the PPIP Act.

This requires that agencies advise individuals who will be provided with their information and what will happen to their information once it is collected.

Thus if participants are made aware (as they should be) that their personal information, including sensitive medical and traffic infringement information may be disclosed "to any person" they will be less likely to agree to participate. Even if participants do agree, their consent to participation may be forced by virtue of their need to retain their licence to continue driving in order to sustain their livelihood. In such cases participants cannot be said to have freely provided their consent to the disclosure of their information.

In order to protect the privacy of participants in the program, while also ensuring the program meets its objectives, I would prefer to see limitations as to the recipients of the information and the circumstances in which the information may be disclosed. For instance if the RTA is of the view that NSW Police, the IPB or the courts should have access to participant information, these bodies should be explicitly referred to in the regulation. Additionally, the limited circumstances in which these bodies are entitled to the information should be described (for example, roadside checks by Police, imposition of fines by the IPB if relevant, or for court appearances).

I trust this information is of assistance to you. If you have any queries regarding this matter please contact Siobhan Jenner of this Office on (02) 9268 5583.

Yours sincerely

John Dickie
ACTING PRIVACY COMMISSIONER

27 NOV 2003

cc: The Hon Bob Debus, Attorney General of NSW
Mr Paul Forward, Chief Executive Officer, RTA

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Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Electricity (Consumer Safety) Bill 2003	1
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1
Strata Schemes Management Amendment Bill 2003	1
Superannuation Administration Amendment Bill 2003	1

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		4	
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		7	
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			1
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	Minster for Roads	13/02/04			1
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04			1

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
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Electricity (Consumer Safety) Bill 2003	N,R				C
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N,C				
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	

Key

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