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Legislation Review Committee

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MEMBERSHIP & STAFF

Chair	Allan Shearan MP, Member for Londonderry
Deputy	Paul Pearce MP, Member for Coogee
Members	Amanda Fazio MLC Robert Furolo MP, Member for Lakemba Sylvia Hale MLC Judy Hopwood MP, Member for Hornsby Robyn Parker MLC Russell Turner MP, Member for Orange
Staff	Catherine Watson, Committee Manager Carrie Chan, Senior Committee Officer Kathryn Simon, Senior Committee Officer Leon Last, Committee Officer Millie Yeoh, Assistant Committee Officer
Panel of Legal Advisers The Committee retains a panel of legal advisers to provide advice on Bills as required.	
Contact Details	Legislation Review Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 3308
Facsimile	02 9230 3052
Email	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc/digests

FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

(i) trespasses unduly on personal rights and liberties, or

(ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

(iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

9 Functions with respect to Regulations:

(1) The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

(i) that the regulation trespasses unduly on personal rights and liberties,

(ii) that the regulation may have an adverse impact on the business community,

(iii) that the regulation may not have been within the general objects of the legislation under which it was made,

(iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

(v) that the objective of the regulation could have been achieved by alternative and more effective means,

(vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

(vii) that the form or intention of the regulation calls for elucidation, or

(viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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

GUIDE TO THE LEGISLATION REVIEW DIGEST

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 4).

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page 4).

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2009

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2009

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

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

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

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

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

SUMMARY OF CONCLUSIONS

1. Child Protection Legislation (Registrable Persons) Amendment Bill 2009

Issue: Freedom of Association – Amendment of *Child Protection (Offenders Prohibition Orders) Act 2004* - Schedule 2 [3] – insertion of Part 2A Contact prohibition orders:

23. Therefore, by taking into consideration the general limits on the making of contact prohibition orders under proposed section 16D and the provision for variation and revocation of such orders under proposed section 16E, along with the protection of the best interests of victims in the nature of such offences, the Committee is of the view that the proposed insertion of the new Part 2A, will not unduly trespass on individual rights and liberties.

Issue: Privacy – Amendment of *Child Protection (Offenders Registration) Act 2000* - Schedule 1 [9] – proposed insertion of sections 19BA (3A); (3B) and (3C) after section 19BA (3) Exemption of certain agencies from privacy protection legislation:

26. The Committee notes that under the current section 19BA of the *Child Protection (Offenders Registration) Act 2000*, certain agencies are already exempt from the privacy protection legislation and may collect and use personal information about a registrable person and may also disclose personal information about a registrable person to another scheduled agency.

27. The Committee considers that the proposed subsections 19BA (3A), (3B) and (3C) to be inserted after the current section 19BA (3), seek to clarify the current operation. This includes giving effect to a case management plan for a registrable person as referred to in the existing subsection (3), where a senior officer of a schedule agency needs to be satisfied that there are reasonable grounds to suspect that there is a risk of substantial adverse impact on the registrable person or some other person or class of persons if the use or disclosure of the personal information to a scheduled agency does not occur; or the use or disclosure of the personal information to the schedule agencies is likely to assist in developing or giving effect to a case management plan for the registrable person. Therefore, the Committee is of the view that this does not trespass unduly on individual rights such as privacy.

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

29. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

2. Constitution Amendment (Lieutenant-Governor) Bill 2009

Issue: Retrospectivity – Clause 3 – Amendment of *Constitution Act 1902* – Proposed section 9B (6) Appointment of Lieutenant-Governor and Administrator:

18. However, the Committee considers that the retrospectivity of the proposed section 9B (6), does not, in this instance, unduly trespass on individual rights and liberties, since it continues the current and long-standing practice in New South Wales that the Chief Justice is appointed as Lieutenant-Governor and clarifies that the Chief Justice would be authorised to act as Administrator even if the appointment of the Chief Justice as Lieutenant-Governor had not been validly made at the relevant time, as the Bill would deem that the Chief Justice has taken to have been acting as Administrator.

19. The Committee also notes that the retrospective application will ensure certainty of previous acts or matters done or omitted by the Chief Justice of the Supreme Court in the capacity of Administrator for individuals who have relied upon such acts and ordered their affairs accordingly.

3. Crimes Amendment (Fraud, Identity And Forgery Offences) Bill 2009

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

28. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

4. Electricity Supply Amendment (GGAS) Bill 2009

Issue: Denial of Compensation – Amendment of *Electricity Supply Act 1995* - Schedule 1 [19] – proposed section 179A Compensation not payable:

14. The Committee is of the view that the right to seek damages or compensation is an important personal right and that such a right should not be removed or restricted by legislation unless there is a compelling public interest in doing so. Therefore, the Committee refers to Parliament to consider whether the proposed section 179A in schedule 1 [19] may trespass unduly on individual rights by removing the right to seek compensation or damages in relation to changes to the legislative framework for GGAS or its termination.

5. Electricity Supply Amendment (Solar Bonus Scheme) Bill 2009

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

18. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

6. Emergency Services Legislation Amendment (Finance) Bill 2009

Issue: Strict Liability - Proposed section 64(4)(a) *Fire Brigades Act 1989*; section 117E(4)(a) *Rural Fires Act 1997*; and section 24U(4)(a) *State Emergency Service Act 1989*

17. The Committee notes that proposed section 64(4)(a) *Fire Brigades Act 1989;* section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* introduce strict liability offences. The Committee has always been concerned to identify strict liability offences that may have an adverse impact on a person. However, the Committee is of the view that it is appropriate to impose strict liability offences with monetary penalties that are of sufficient severity to act as a deterrent so long as balanced against the protection of personal rights and liberties.

18. The Committee notes that the proposed penalties in proposed section 64(4)(a) *Fire Brigades Act 1989;* section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* are monetary penalties with a maximum penalty of 50 penalty units rather than a term of imprisonment. Accordingly, the Committee is of the view that these proposed sections do not unduly trespass on personal rights and liberties.

7. Graffiti Control Amendment Bill 2009

Issue: Excessive Punishment And Reverse Onus of Proof – Amendment of *Graffiti Control Act 2008* - Schedule 1 [2] – section 4 damaging or defacing property by means of graffiti implement; and Schedule 1 [3] – section 5 possession of graffiti implement:

28. The Committee considers the reference made to the report done by the Department of Justice and Attorney General with interviewing 52 graffiti offenders along with the various recent research and statistical findings of the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Australian Institute of Criminology (AIC), involving larger matched samples and longitudinal studies, as referred to above. The Committee, therefore, notes the conclusions of BOCSAR and the AIC that increasing the penalty to a longer term of imprisonment may not necessarily act as an effective deterrent.

29. However, the Committee also notes the seriousness of graffiti offences including the defacement, vandalism and deliberate damage of private and public property in proportionality to the deterrence effect and severity of the increased penalties.

30. The Committee weighs up the general community interests in addressing and deterring graffiti offenders from the defacement and vandalism to property, including the apparent public expectation for more serious penalties to reflect the nature and extent of damage caused by graffiti offences.

31. Therefore, the Committee refers to Parliament the questions of whether increasing the maximum penalty to a longer imprisonment term under section 4 (1) (from 6 months to 12 months) and under section 5 (1) (from 3 months to 6 months), by Schedule 1 [2] and [3], would be an appropriately effective deterrent in proportionality to the offences concerned and their likely impact on the victims, without being excessive and unduly trespassing on personal liberties.

32. The Committee also refers to Parliament the question of whether increasing the maximum penalty to a longer imprisonment term (under sections 4 (1) and 5 (1)), is a measure of last resort and for the shortest appropriate period of time in accordance with the rights of a child under Article 37 (b) of the *Convention on the Rights of the Child*.

33. The Committee observes that the current section 4 (1) of the *Graffiti Control Act 2008* indicates that the defendant carries the onus of proof. Section 4 (1) states that a person must not, without reasonable excuse (proof of which lies on the person), intentionally damage or deface any premises or other property by means of any graffiti implement.

34. This reverses the onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14 (2) of the *International Covenant on Civil and Political Rights*.

35. Therefore, the Committee refers to Parliament to consider whether the maximum penalty of imprisonment up to 12 months as proposed in Schedule 1 [2], in the context of the current reversal of onus of proof under section 4 (1), may unduly trespass on individual rights and liberties, especially that of young people, when balancing the interests of the general community in deterring graffiti offences.

Issue: Strict Liability – Amendment of *Graffiti Control Act 2008* - Schedule 1 [5] – insertion of proposed sections 8B (1) and (2) Possession of spray paint cans by persons under 18:

40. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence or that the person's possession of the spray paint was for an unlawful purpose. Presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.

41. However, the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.

42. The Committee takes into consideration the adverse impact of graffiti offences on the general community. The Committee also notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, proposed section 8B (2) provides for the availability of defences but proof of which lies on the defendant under 18 years of age, to establish that it was not unlawful for him or her to possess the spray paint can.

43. The Committee, therefore, refers to Parliament to consider whether Schedule 1 [5] and its proposed sections 8B (1) and (2) may unduly trespass on the rights and liberties of young people who could be charged with the strict liability offence that attracts a possible maximum penalty of imprisonment for 6 months, when weighing up the adverse impact of such graffiti offences on the general community.

Issue: Excludes reviews – Amendment of *Graffiti Control Act 2008* – Schedule 1 [7] – proposed section 9N - No appeals against order; and proposed section 9P (2)(a) – application of *Children (Community Service Orders) Act 1987* to orders made in respect of child offenders:

49. The Committee notes that the proposed section 9P (2)(a) of this Bill will exclude those above provisions under the *Children (Community Service Orders) Act 1987* with respect to their corresponding rights of appeals. The Committee is also concerned that the proposed section 9N is very broad.

50. Accordingly, the Committee refers the proposed sections 9N and 9P (2)(a), to Parliament for consideration as to whether they may potentially subject individual rights of children and young people, to be unduly dependent on non-reviewable decisions.

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

52. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

8. Historic Houses Amendment (Throsby Park Historic Site) Bill 2009

12. The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

9. Independent Commission Against Corruption and Ombudsman Legislation Amendment Bill 2009

Issue: Schedule 1 [3] – Obtaining, possessing, publishing, and communicating recordings of private conversations - Right to Privacy

21. The Committee acknowledges that, in relation to admitting or excluding illegally obtained evidence, courts have a discretion to consider and weigh the competing requirements to protect the public interest and protection of the individual from unlawful and unfair treatment. However, the Committee considers that Clause 1 [3] of the bill adversely effects the rights to privacy of all parties who may be included on the tapes associated with Michael McGurk and refers the matter to Parliament.

Issue: Clause 1 [3] – Retrospective Operation of Clause 1 [3]

24. The Committee is concerned about the retrospective application of Clause 1 [3], particularly in cases such as this one, where there is the real potential to adversely impact upon individual privacy and refers the matter to Parliament.

10. Independent Commission Against Corruption Amendment (Political Donations) Bill 2009

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

11. Parliamentary Electorates And Elections Amendment (Automatic Enrolment) Bill 2009

Issue: Proposed Part 4, Division 6 – Collection of electoral information – Privacy

15. Certain provisions exempt the Electoral Commissioner and officers acting under the direction of the Electoral Commissioner from the requirements under the *Privacy and Personal Information Protection Act 1998*. However, proposed section 48(1) of the Bill specifically provides that it is an offence, with a maximum penalty of 50 penalty units for a person who acquires information in the exercise of functions under Part 4, Division 6 to make a record of the information or divulge the information to another person. Accordingly, the Committee considers that in the circumstances there is no undue trespass on personal rights, in particular rights to privacy.

Issue: Proposed 151EA *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009* - Strict Liability

21. The Committee understands that it may be in the public interest to impose strict liability offences in certain circumstances, for example to act as a deterrent. However, the Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. Accordingly, the Committee refers to Parliament to consider whether the proposed sections 114AA and 151EA, which provide a possible maximum penalty of imprisonment of 6 months, may unduly trespass on the personal rights and liberties.

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

23. The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

12. Personal Property Securities (Commonwealth Powers) Amendment Bill 2009

Issue: Proposed Clause 22 – Denial of Compensation

13. The Committee notes that proposed Clause 22(1) of the Bill, which provides that compensation is not payable by the State, State officers and agencies with respect to PSS transitional matters is limited by the application of Clause 22(2). However, the Committee refers to Parliament for its consideration whether proposed Clause 22(1) unduly trespasses on personal rights and liberties.

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

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

13. Public Sector Restructure (Miscellaneous Acts Amendments) Bill 2009

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

14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee asks Parliament to consider whether schedule 15 to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

14. Road Transport Legislation Amendment (Miscellaneous Provisions) Bill 2009

Issue: Proposed section sections 179(6) and (7) *Road Transport (General) Act 2005*; Proposed section 38(1E) *Fines Act 1996* – Excessive Punishment

25. The Committee notes that the significant increase in penalties through, in particular, proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* may be considered excessive punishment and an undue trespass on personal rights and liberties. Accordingly, the Committee refers proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* to Parliament for its consideration.

Issue – Schedule 1.1[5] – Amendments to the *Road Transport (Driver Licensing) Act 1998* and Schedule 1.2[15] – Amendments to the *Road Transport (General) Act 2005* – Retrospectivity

29. The Committee has always been concerned to identify provisions with a retrospective application that may detrimentally impact on personal rights and liberties. The Committee notes that the retrospective application of proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998* may impact on the rights and liberties of persons convicted for offences under these sections. Accordingly, the Committee refers Schedule 1.1[5] of the Bill regarding the application of the proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998,* to Parliament for its consideration.

31. The Committee has always been concerned to identify provisions with a retrospective application that may impact on personal rights and liberties. The Committee has concerns that proposed Schedule 1.2 [15] of the Bill provides that proposed amendments to the *Road Transport (General) Act 2005,* which will impact the scope and operation of terms such as “registered operator” will apply retrospectively on and from September 2005. The Committee has particular concerns that the proposed amendments will also retrospectively validate enforcement action that may have otherwise been considered invalid. Accordingly, the Committee refers Schedule 1.2[15] of the Bill to Parliament for its consideration.

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

36. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

15. Save The Graythwaite Estate Bill 2009*

Issue: Retrospectivity – Clause 2 – Commencement; and Clause 13 – Retrospective invalidation of transfer etc:

25. The Committee is concerned with clause 2 which provides that the proposed Act is taken to have commenced on the date on which the notice for the introduction of the Bill for the proposed Act was given, rather than commence on the date of assent after the Bill has been duly passed by both Houses of the Parliament.

26. The Committee is also concerned with clause 13 and its retrospective invalidation of any sale, transfer, lease, mortgage, charge or other alienation or encumbrance of the Graythwaite Estate, that occurred on or after 10 September 2009 but before the date of assent to the proposed Act, and which is contrary to the proposed Act. The Committee believes clause 13 could cause loss to persons who have acted on the basis of the sale, transfer, mortgage or other alienation duly made under a contract before the commencement of this proposed Act.

27. However, the Committee notes the strong community campaign with the support of various levels of government such as the Commonwealth Government, North Sydney Council, along with major community groups such as the Friends of Graythwaite, the RSL, the Construction, Forestry, Mining and Energy Union (CFMEU), as well as, interests from major hospitals such as the St Vincent's Hospital and Mater, to preserve the Graythwaite Estate within public ownership and control.

28. The Committee refers to Parliament to consider whether allowing retrospectivity is justified in this context of strong community interests or whether the retrospective effects of clauses 2 and 13 may constitute as undue trespasses on individual rights of those who have relied on the law at the time, and ordered their affairs accordingly based on the sale, transfer, mortgage or other alienation duly made under contract at the time before the commencement of the proposed Act.

16. Statute Law (Miscellaneous Provisions) Bill (No 2) 2009

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

17. Surface Coal Mining Prohibition (Lake Macquarie) Bill 2009*

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

18. Swimming Pools Amendment Bill 2009

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

19. Trade Measurement (Repeal) Bill 2009

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

13. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

20. Trustee Companies Amendment Bill 2009

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

14. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

21. Valuation of Land Amendment Bill 2009

Issue: Proposed section 18 *Valuation of Land Act 1916* – Retrospectivity

18. The Committee will always be concerned to identify any retrospective application of proposed legislation that may adversely impact on personal rights and liberties. The Committee notes that this Bill has been introduced in response to *Valuer-General v Commonwealth Custodial Services Ltd* [2009] NSWCA 143, in which the State of NSW was a party. As stated in the Second Reading Speech, the Bill intends to clarify the approach to valuing heritage land that has been developed by the Valuer General and to "maintain the status quo" regarding this approach. Accordingly, in these circumstances, the Committee does not consider that the retrospective application of the proposed amendments will unduly trespasses on personal rights and liberties.

22. Water Management Amendment Bill 2009

Issue: Proposed section 372B(2) *Water Management Act 2000* – Denial of Compensation

17. Proposed section 372B(2) *Water Management Act 2000* reads that no compensation is payable by or on behalf of the Crown to any person who suffers loss or damage because of the removal by the Ministerial Corporation of metering equipment installed by the Ministerial Corporation. The Committee notes that this provision may be considered to unduly trespass on personal rights of individuals, and refers it to Parliament for its consideration.

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

19. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

Part One – Bills

SECTION A: Comment on Bills

1. CHILD PROTECTION LEGISLATION (REGISTRABLE PERSONS) AMENDMENT BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Police

Purpose and Description

1. This Bill amends the *Child Protection (Offenders Registration) Act 2000* and the *Child Protection (Offenders Prohibition Orders) Act 2004* to make further provision with respect to registrable persons.

2. Schedule 1 contains amendments to the *Child Protection (Offenders Registration) Act 2000*. Offenders on the register (known as "registrable persons") are required under section 9 of the Act to inform police of a range of personal information, including their primary place of residence. They are also required under section 11 of the Act to inform police of any change to that information within 14 days. The exception is that under section 11 (1) (a), registrable persons must currently inform police of any unsupervised contact with a child when that contact is for three days or more in a 12-month period, within three days of that contact occurring.

3. This Bill amends section 11 (1) (a) so that registrable persons will now have 24 hours to report contact with a child. This change came from a recommendation of a national Child Protection Register working party, established through the Ministerial Council of Police and Emergency Management-Police [MCPEMP] and endorsed by that council in June 2009. All Australian jurisdictions will require their registrable persons to report to police within 24 hours any total of three days unsupervised contact with a child.

4. The Bill amends section 11 requirements so that registrable persons must notify police of a change to their primary place of residence 14 days before they move. This change will ensure that police have advance notice of any planned moves made by registrable persons so that they can assess the new location and inform any relevant agencies if necessary. Fourteen days notice may not be possible in all circumstances so the legislation makes an exception for unforeseeable emergency circumstances. A change of address must be notified to police as soon as practicable and within three days of a move.

5. Another main change to the Child Protection Register is the ability for the clock to be stopped on a registrable person's reporting period when that person is overseas for one month or more, under the proposed section 15 (3) of the Act. The length of a registrable person's reporting period is determined by section 14A of the Act and will

be eight years, 15 years or life, depending on the offence committed. For juveniles, these periods are halved, with a maximum of 7.5 years.

6. Section 15 allows for a person's reporting period to be suspended for certain reasons. If the person is in custody, their reporting obligations are suspended and the period for which they are required to be registered, is extended by that time.

7. This Bill inserts section 15 (3) into the Act so that prolonged periods of a month or more of overseas travel to countries without a corresponding register will result in a corresponding increase to the reporting period, as with terms of custody. It also amends section 16 of the Act so that a registrable person whose reporting period is extended under section 15 (3) can apply to the Administrative Decisions Tribunal to have their reporting obligations suspended for the extended period.

8. As part of the introduction of the Child Protection Watch Team, section 19BA of the Act was introduced to allow the exchange of information on registrable persons between agencies. Section 19BA currently provides that agencies may disclose personal information about a registrable person to another agency if the disclosure of that information accords with a written authorisation given by a senior officer. The officer giving the authorisation must be satisfied that there are reasonable grounds to suspect that there is a risk of substantial adverse impact on the registrable person or another person or class of persons if the information is not disclosed or if that the information will assist in developing or giving effect to a case management plan for the registrable person.

9. The Bill amends section 19BA to allow the Commissioner of Police to serve a notice on a scheduled agency directing it to provide personal information of a particular kind about a registrable person. The amendment specifies that information provided under this section does not give rise to any liability to civil, criminal or disciplinary action and is not a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct.

10. Schedule 2 contains amendments to the *Child Protection (Offenders Prohibition Orders) Act 2004*. Police can apply to a Local Court for an order to prevent registrable persons from engaging in specific behaviour where there is a reasonable cause to believe the behaviour poses a risk to the sexual safety or life of a child, or children generally. This Bill introduces a new type of order a (Contact Prohibition Order) under that Act, so police can prevent a registrable person from contacting a specified co-offender or victim.

11. The new Contact Prohibition Order aims to complement the existing options for prohibiting associations by allowing police to prohibit a registrable person who is living in the community and is not the subject of an Extended Supervision Order or a Child Protection Prohibition Order from contacting particular individuals who are their co-offenders or victims.

12. A Contact Prohibition Order will be granted by a Local Court on application from the Commissioner of Police where the commissioner has reasonable grounds to suspect that the registrable person will seek to contact the specified victim or co-offender. If a Contact Prohibition Order is breached, the registrable person will face a penalty of 50 penalty units, 12 months imprisonment or both. Section 16D of the Act provides that Contact Prohibition Orders cannot restrict contact with the close family of a

registrable person, unless the court considers that there are exceptional circumstances which make this necessary.

Background

13. Since 2001, in New South Wales, child sex offenders have been managed through the Child Protection Register, under the *Child Protection (Offenders Registration) Act 2000*, administered by the New South Wales Police Force.

14. The Second Reading speech explained that:

> Police have observed that some registrable persons appear to be going overseas for long periods of time to avoid their reporting obligations. It is also believed that many persons who are required to register in New South Wales and have not done so are, in fact, overseas and will return to New South Wales only when their reporting period has expired. An example is that of a citizen of the United Kingdom who returned to the United Kingdom for six or seven years of his eight-year reporting period and returned to Australia as soon as his reporting obligations ceased. While registered sex offenders in the United Kingdom are required to report in Australia as their legislation is recognised as corresponding to our regulations, our legislation is not recognised as corresponding by their legislation. This may need to be pursued through the Ministerial Council for Police and Emergency Management—Police [MCPEMP] and the Commonwealth to ensure that, where possible, corresponding registration with other jurisdictions is occurring…Another example is a man who travelled to Indonesia for six months, a country without a register, returned to Australia for less than 14 days—and therefore was not required to report—to renew his visa, and then returned to Indonesia.

15. In order to ensure more effective monitoring and management of high-risk registrable persons, a closer interagency approach is suggested. In 2008, to promote interagency collaboration in relation to registrable persons, the Government endorsed the progressive statewide rollout of the Child Protection Watch Team across New South Wales. This Team consists of representatives from the New South Wales Police Force, Corrective Services NSW, Community Services, NSW Health, Justice Health, Juvenile Justice, Education and Training, Ageing, Disability and Home Care, and Housing NSW. The Team takes an interagency risk management approach to high-risk registrable persons. The Child Protection Watch Team was progressively rolled out across New South Wales with a planned completion date of 2010.

16. According to the Second Reading speech:

> However, given the current public concern about child sex offenders in the community, the Government has agreed to accelerate the rollout of the remaining branches of the team to cover the whole of New South Wales. To facilitate this accelerated rollout, the allocation of seven new positions to the Child Protection Registry within the Sex Crimes Squad of the New South Wales Police Force, who chair the Child Protection Watch Team branches, has been brought forward from 2010-2011 to 1 January 2010…The intention of this legislative amendment was to clarify that there were no privacy impediments to the exchange of personal information in these circumstances. However, I am advised that certain agencies have remained reluctant to exchange information without the consent of the registrable person concerned. This makes effective management and monitoring of registrable persons difficult if the full range of information is not made available.

17. There is currently no legislative restriction on a registrable person contacting a co-offender. There is also similarly no legislative restriction on a registrable person

contacting a victim. Prohibiting association with a specified person or class of persons can at present, be issued on sentence under the *Crimes (Sentencing Procedure) Act* as a condition of an Extended Supervision Order [ESO] under the *Crimes (Serious Sex Offenders) Act*, or of a Child Protection Prohibition Order [CPPO] under the *Child Protection (Offender Prohibition Orders) Act*. The Bill aims to make changes to the Child Protection Watch Team to enhance the multi-agency approach.

The Bill

18. The objects of this Bill are:

(a) to amend the *Child Protection (Offenders Registration) Act 2000*:

(i) to require a registrable person to report a change in the children who generally reside in the same household as that in which the person generally resides or with whom the person has regular unsupervised contact within 24 hours of the change occurring (instead of within 3 days as at present), and

(ii) to require a registrable person to report an intended change in the place where he or she generally resides to the Commissioner of Police, and

(iii) to provide for the extension of a registrable person's reporting period during the period in which the registrable person is travelling outside Australia for a month or more or residing outside Australia (unless the person is a person to whom Division 5 of Part 3 or section 11B of the Act applies), and

(iv) to confer power on the Administrative Decisions Tribunal to exempt a registrable person from the reporting obligations imposed by such an extension of the reporting period, and

(v) to enable the Commissioner of Police to direct certain agencies to provide to the Commissioner certain personal information about a registrable person collected or used by the agencies for the purposes of developing or giving effect to a case management plan for a registrable person, and

(b) to amend the *Child Protection (Offenders Prohibition Orders) Act 2004* to enable the Local Court to make an order prohibiting a registrable person in relation to a particular registrable offence from contacting a victim of, or co-offender in relation to, that offence.

19. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act.

Schedule 1 Amendment of *Child Protection (Offenders Registration) Act 2000* No 42
Schedule 1 [1] and [2] amend sections 9 (1) (e) and 11 (1) (a) of the *Child Protection (Offenders Registration) Act 2000* (the ***2000 Act***) to achieve the object described in paragraph (a) (i) of the Overview above.
Schedule 1 [3] inserts proposed section 11F into the 2000 Act to achieve the object described in paragraph (a) (ii) of the Overview above.
Schedule 1 [4] amends section 15 of the 2000 Act to achieve the object described in paragraph (a) (iii) of the Overview above.
Schedule 1 [5]–[8] amend section 16 of the 2000 Act to achieve the object described in paragraph (a) (iv) of the Overview above.

Schedule 1 [9] amends section 19BA of the 2000 Act to achieve the object described in paragraph (a) (v) of the Overview above.
Schedule 1 [10] amends Schedule 2 to the 2000 Act to enable the making of savings and transitional regulations consequent on the enactment of the proposed Act.
Schedule 1 [11] inserts a savings and transitional provision into Schedule 2 to the 2000 Act.

Schedule 2 Amendment of *Child Protection (Offenders Prohibition Orders) Act 2004* No 46
Schedule 2 amends the *Child Protection (Offenders Prohibition Orders) Act 2004* (the ***2004 Act***) to achieve the object described in paragraph (b) of the Overview above.
Schedule 2 [3] inserts new Part 2A (proposed sections 16A–16H) into the 2004 Act. Section 16A defines ***contact*** and ***contact prohibition order*** for the purposes of the proposed Part.
Section 16B enables the Commissioner of Police to apply for a contact prohibition order in specified circumstances.
Section 16C enables the Local Court to make a contact prohibition order if it is satisfied that there are sufficient grounds to do so. A registrable person who is subject to a contact prohibition order will be prohibited from contacting or attempting to contact a victim or co-offender specified in the order or from procuring another
person to contact or attempt to contact the victim or co-offender.
Section 16D limits the power of the Local Court to make contact prohibition orders prohibiting contact with a member of a registrable person's close family.
Section 16E provides for the variation and revocation of contact prohibition orders.
Section 16F requires the Local Court to explain the effect of a contact prohibition order to the registrable person who is subject to the order.
Section 16G makes it an offence to contravene a contact prohibition order.
Section 16H provides for applications under the proposed Part to be dealt with in the absence of the public (with some limited exceptions).
Schedule 2 [1] and [2] make consequential amendments.
Schedule 2 [4] amends section 17 of the 2004 Act to limit the power of the Commissioner of Police to delegate the Commissioner's functions under the proposed Part where the powers concern a young registrable person.
Schedule 2 [5] amends Schedule 2 to the 2004 Act to insert a savings and transitional provision.

Issues Considered by the Committee

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

Issue: Freedom of Association – Amendment of *Child Protection (Offenders Prohibition Orders) Act 2004* - Schedule 2 [3] – insertion of Part 2A Contact prohibition orders:

20. Schedule 2 [3] inserts new Part 2A (proposed sections 16A–16H) into the *Child Protection (Offenders Prohibition Orders) Act 2004*. Proposed section 16B enables the Commissioner of Police to apply for a contact prohibition order in specified circumstances. Proposed section 16C enables the Local Court to make a contact prohibition order if it is satisfied that there are sufficient grounds to do so. A registrable person who is subject to a contact prohibition order will be prohibited from contacting or attempting to contact a victim or co-offender specified in the order or from procuring another person to contact or attempt to contact the victim or co-offender. Proposed section 16G makes it an offence to contravene a contact prohibition order. The maximum penalty is 50 penalty units or imprisonment for 12

months or both. This extends to an act contravening this section done outside Australia by a person resident or domiciled in the State.

21. The Committee will be concerned if a proposed provision will criminalise a person's associations instead of a guilty act of a specific criminal conduct as it will deny a person's right of association with others, a fundamental right established by Article 22 (1) of the *International Covenant on Civil and Political Rights*.

22. However, the Committee notes that the proposed section 16D limits the power of the Local Court to make contact prohibition orders that will prohibit contact with a member of a registrable person's close family, unless there are exceptional circumstances that a registrable person's close family may be specified in a contact prohibition order. Proposed section 16E also provides for the variation and revocation of contact prohibition orders.

23. Therefore, by taking into consideration the general limits on the making of contact prohibition orders under proposed section 16D and the provision for variation and revocation of such orders under proposed section 16E, along with the protection of the best interests of victims in the nature of such offences, the Committee is of the view that the proposed insertion of the new Part 2A, will not unduly trespass on individual rights and liberties.

Issue: Privacy – Amendment of *Child Protection (Offenders Registration) Act 2000* - Schedule 1 [9] – proposed insertion of sections 19BA (3A); (3B) and (3C) after section 19BA (3) Exemption of certain agencies from privacy protection legislation:

24. Proposed insertion of new subsections 19BA (3A) and (3B) will enable the Commissioner of Police to direct certain agencies to provide to the Commissioner personal information about a registrable person collected or used by the agencies for the purposes of developing or giving effect to a case management plan for a registrable person.

25. Proposed subsection (3C) states that the provision of information under this section in good faith: (a) does not give rise to any liability to civil, criminal or disciplinary action, and (b) is not a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct.

26. The Committee notes that under the current section 19BA of the *Child Protection (Offenders Registration) Act 2000*, certain agencies are already exempt from the privacy protection legislation and may collect and use personal information about a registrable person and may also disclose personal information about a registrable person to another scheduled agency.

27. The Committee considers that the proposed subsections 19BA (3A), (3B) and (3C) to be inserted after the current section 19BA (3), seek to clarify the current operation. This includes giving effect to a case management plan for a registrable person as referred to in the existing subsection (3), where a senior officer of a schedule agency needs to be satisfied that there are reasonable grounds to suspect that there is a risk of substantial adverse impact on the registrable person or some other person or class of persons if the use or disclosure of the personal information to a scheduled agency does not occur; or the use or disclosure of the personal information to the schedule agencies is likely to assist in developing or giving effect to a case management plan for the registrable person. Therefore, the Committee is of the view that this does not trespass unduly on individual rights such as privacy.

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

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

28. The Committee notes that the proposed Act is to commence on the date of assent except as provided by subsection (2) where schedule 1 [1] – [3] will commence on a day to be appointed by proclamation. This may delegate to the government the power to commence schedule 1 [1] – [3] on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Minister's office that: "Schedule 1 [1] to [3] are to commence by proclamation rather than on assent as they involve changes to the reporting obligations of registrable persons (persons on the Child Protection Register), and those people will need to be notified of the changes prior to their commencement. If the provisions were to commence on assent many registrable persons may unintentionally breach their reporting conditions through being unaware of the changes".

29. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

2. CONSTITUTION AMENDMENT (LIEUTENANT-GOVERNOR) BILL 2009

Date Introduced:	10 November 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Nathan Rees MP
Portfolio:	Premier

The Bill passed both Houses on 11 November 2009. The preparation of this report was done in accordance with the *Legislation Review Act 1987* with respect to commenting on Bills as originally presented to Parliament.

Purpose and Description

1. This Bill amends the *Constitution Act 1902* in relation to the appointment of the Chief Justice as the Lieutenant-Governor.

2. This Bill is introduced to remove any legal doubts that might otherwise have arisen concerning acts done by Lieutenant-Governors who were appointed in New South Wales after 1986.

3. Under the New South Wales *Constitution Act 1902*, if no Lieutenant-Governor is appointed then the Chief Justice is automatically taken to be the Administrator and is authorised to act for the Governor when the Governor is unavailable.

Background

4. The *Constitution Act 1902* provides for the appointment of a Lieutenant-Governor who may act when the Governor is not available and, if there is no Lieutenant-Governor appointed or the Lieutenant-Governor is not available, for the Chief Justice to act as Administrator.

5. The New South Wales *Constitution Act 1902* provides that the appointment of both the Governor and the Lieutenant-Governor is to be made by the Queen. Under Part 2A of the *Constitution Act 1902*, the appointment of the Governor and the Lieutenant-Governor is made by “Commission under Her Majesty’s Sign Manual” (namely, by the Queen in accordance with constitutional practice for the Colony and then the State of New South Wales).

6. The long-standing practice in New South Wales is that the Chief Justice is appointed as Lieutenant-Governor (which is currently the case). However, in the past few years, South Australia, Victoria and Tasmania have changed their practices so that their Lieutenant-Governors are now appointed by their Governors rather than by the Queen.

7. The appointment of the Governor and the Lieutenant-Governor (or Administrator) of a State is now governed by the Australia Acts of the Commonwealth and of the United Kingdom. In some States, the view has been taken that the Lieutenant-Governor should be appointed by the Governor instead of by the Queen (as a result of debate

about the interpretation of relevant provisions of the *Australia Act 1986* such as interpretation of section 7 of the *Australia Act 1986*).

8. Section 7 of the *Australia Act 1986* does not expressly address the appointment of the Lieutenant-Governor. On its face, s 7(2) suggests that the power to appoint the Lieutenant-Governor is made exercisable only by the Governor of the State, unless Her Majesty is present in the State and exercises her power under s 7(5).

9. South Australia, Victoria and Tasmania have formed the view that the Australia Act, which came into force in March 1986, requires the Lieutenant-Governor to be appointed by the Governor and prevents appointments by the Queen unless Her Majesty is personally present in the jurisdiction. Those States have taken this view even though the Lieutenant-Governors were still being appointed by the Queen long after the Australia Act commenced. They also take the view that the Australia Act, being a Commonwealth statute, overrides any inconsistent State Constitution Act.

10. According to the Agreement in Principle speech:

> The application of the Australia Act to the appointment of Lieutenant-Governors is not entirely clear. While the view taken in other States is arguable, the contrary view also is arguable. The only way to resolve the ambiguity would be to amend the Australia Act to clarify the required appointment process. However, the Australia Act can be amended only with the consent of all States. For some years now the New South Wales Government has been discussing with other States the possibility of approaching the Commonwealth Government with a proposal to amend the Australia Act to remove all uncertainty. Although most States have endorsed that approach also, unanimous agreement has not been achieved. Pending any possible clarifying amendments being made to the Australia Act, it is prudent to enact this bill to remove the immediate legal uncertainty.

11. The Agreement in Principle speech explained further that:

> …even if the appointment of the Chief Justice as Lieutenant-Governor were invalid, the Chief Justice would nevertheless clearly be authorised to act as Administrator. The Bill makes this explicit by providing that if for any reason the appointment of the Chief Justice as Lieutenant-Governor was not legally effective, then the Chief Justice will be taken to have been acting as Administrator. In this way there can be no possible legal doubt about the past or future acts of any New South Wales Lieutenant-Governor. Provided any acts were within the powers of a Lieutenant Governor, those acts would also have been within the power of an Administrator.

12. Tasmania has recently introduced similar validating legislation, and Victoria is also introducing such validating legislation.

The Bill

13. The object of this Bill is to amend the *Constitution Act 1902* in relation to the appointment of the Chief Justice of the Supreme Court as the Lieutenant-Governor.

14. In order to avoid any doubt about the exercise of the Governor's functions in NSW (pending any clarifying changes made to the Australia Acts), the Bill deems the Chief Justice to be acting as Administrator (which is clearly authorised by the *Constitution Act 1902*) if for any reason it is subsequently determined that the appointment as Lieutenant-Governor was not legally effective.

15. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 amends section 9B of the *Constitution Act 1902* to give effect to the object outlined above.

Issues Considered by the Committee

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

Issue: Retrospectivity – Clause 3 – Amendment of *Constitution Act 1902* – Proposed section 9B (6) Appointment of Lieutenant-Governor and Administrator:

16. The Bill proposes to insert after section 9B (5) of the New South Wales *Constitution Act 1902*:

> (6) Any act, matter or thing done or omitted by the Chief Justice of the Supreme Court (before or after the commencement of this subsection) in the capacity of Lieutenant-Governor is taken to have been done or omitted, and always to have been done or omitted, in the capacity of Administrator if for any reason the Chief Justice was not holding office as Lieutenant-Governor at the relevant time. This subsection extends to any act, matter or thing done or omitted as the Governor's deputy under section 9D.

17. The Committee will always be concerned to identify the retrospective effects of legislation that may have an adverse impact on a person.

18. However, the Committee considers that the retrospectivity of the proposed section 9B (6), does not, in this instance, unduly trespass on individual rights and liberties, since it continues the current and long-standing practice in New South Wales that the Chief Justice is appointed as Lieutenant-Governor and clarifies that the Chief Justice would be authorised to act as Administrator even if the appointment of the Chief Justice as Lieutenant-Governor had not been validly made at the relevant time, as the Bill would deem that the Chief Justice has taken to have been acting as Administrator.

19. The Committee also notes that the retrospective application will ensure certainty of previous acts or matters done or omitted by the Chief Justice of the Supreme Court in the capacity of Administrator for individuals who have relied upon such acts and ordered their affairs accordingly.

The Committee makes no further comment on this Bill.

3. CRIMES AMENDMENT (FRAUD, IDENTITY AND FORGERY OFFENCES) BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. This Bill amends the *Crimes Act 1900* with respect to fraud, identity, forgery and other related offences; and to make related amendments to the *Criminal Procedure Act 1986* and other Acts.

2. The object of this Bill is to amend the *Crimes Act 1900* (the principal Act) to reform and modernise the law relating to fraud and forgery offences and to create new offences relating to identity crime. The proposed offences were the subject of a Consultation Paper released by the Criminal Law Review Division of the Department of Justice and Attorney General in July 2009.

3. This Bill amends the *Crimes Act 1900* to introduce three new parts. The first part updates the crime of fraud and increases the maximum penalty for this crime to 10 years, doubled from five in the current law. The second part introduces new offences arising from identity crime, the maximum penalty for which will be 10 years. The third part updates the law relating to forgery, and also sets the maximum penalty at 10 years.

4. It repeals the specific and outdated offences, and substitutes them with six broad offences. For example, these offences can cover machinery made to counterfeit money, and standard office equipment such as scanners used to make false identification.

5. Schedule 1 [3] inserts a new part 4AA into the *Crimes Act* and it also contains the new fraud provisions. The principal fraud offence is contained in clause 192E, which makes it an offence for a person by any deception to dishonestly obtain another's property, obtain any financial advantage or cause any financial disadvantage. This offence carries a maximum penalty of 10 years imprisonment. This provision covers most fraud cases, and ensures that only people that have been deceptive and dishonest will be prosecuted.

6. The Model Criminal Code definition of dishonesty has been adopted, so that the mental element of dishonesty means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to those standards. This definition will apply to those offences in the *Crimes Act* that involve dishonesty, and was recommended by the Model Criminal Law Officers Committee.

7. This part also contains definitions for the purposes of fraud and forgery, and the concepts of "obtain property", "obtain financial advantage" and "cause financial

disadvantage". "Deception" is defined in this part and includes a deception exercised on a machine such as a computer or automatic teller machine.

8. Three further offences are contained in proposed part 4AA. They include an offence for a person to dishonestly destroy, which includes obliterate, or conceal any accounting record with the intention of obtaining another's property, obtaining a financial advantage or causing a financial disadvantage. This offence carries a maximum penalty of five years imprisonment. This offence will ensure that accounting records cannot be deleted or concealed on a computer in order to avoid prosecution.

9. Clause 192G is a modernised version of section 178BB of the *Crimes Act*. This makes it an offence for a person to dishonestly make or publish or concur in making or publishing any statement that is false or misleading in a material way, with the intention of obtaining another's property, or obtaining a financial advantage or causing a financial disadvantage. This offence carries a maximum penalty of five years imprisonment.

10. Clause 192H applies to officers of organisations who make false or misleading statements with the intention of deceiving the members or creditors of that organisation about its affairs. This offence carries a maximum penalty of seven years imprisonment, and the higher penalty is justified by the position of trust and responsibility that the offender is in.

11. Schedule 1[3] inserts the new identity offences in a new part 4AB. Clause 192J makes it an offence for a person to deal in identification information with the intention of committing, or facilitating the commission of, an indictable offence. This offence will carry a maximum penalty of 10 years imprisonment.

12. "Deal" is defined broadly and includes make, supply or use. A person may also commit the offence of possession of identification information with the intention of committing or facilitating the commission of an indictable offence. This offence will carry a maximum penalty of seven years imprisonment. It will also be an offence to possess equipment to make identification information punishable by imprisonment of up to three years.

13. Schedule 3 amends the *Criminal Procedure Act*, to allow a victim of identity crime to obtain a certificate from the Local Court that identifies the person as a victim of identity crime, and describes the manner in which identification information relating to the victim was used to commit the offence. The certificate aims to assist victims of identity crime in repairing the damage done to their financial affairs and personal details.

14. Schedule 1 [4] inserts the six new simplified forgery offences. Provision is made in the part for what is a false document and ensures that a reference to inducing in this part includes causing a machine to respond to a document as if it were a genuine document. The forgery part shares the language used in the fraud part, and also shares the concepts of “obtain property”, “obtain financial advantage” and “cause financial disadvantage”.

15. Clause 253 makes it an offence to make a false document with the intention that it will be used to induce another person to accept it as genuine to obtain another's property, obtain a financial advantage or cause a financial disadvantage, or influence

the exercise of a public duty. This offence carries a maximum penalty of 10 years imprisonment. The Bill makes it an offence for a person to knowingly use a false document with the intention to induce another person to accept it as genuine to obtain property, obtain a financial advantage or cause a financial disadvantage, or influence the exercise of a public duty. This offence carries a maximum penalty of 10 years imprisonment.

16. The other major forgery offence is of possession of a false document with the intention of inducing someone to accept it as genuine to obtain another's property, obtain a financial advantage or cause a financial disadvantage, or influence the exercise of a public duty. This offence carries a maximum penalty of 10 years.

17. Provisions criminalising the making or possessing of equipment have been added in order to keep up with technological advances. The old provisions have been updated in modern language, but it remains an offence to knowingly make or possess especially adapted equipment with intent to use it to commit forgery. This offence is punishable by imprisonment for up to 10 years.

18. In addition, the Bill makes it an offence to possess especially adapted equipment without reasonable excuse. It is also an offence for a person to possess ordinary, everyday equipment which has not been especially adapted, but if it is held with the intention of committing a forgery offence. Both these offences carry a penalty of three years.

Background

19. This Bill is the result of research, consultation and three reports produced by the Model Criminal Law Officers Committee of the Standing Committee of Attorneys General on Theft and Fraud, Credit Card Skimming, and Identity Crime. It also draws on the Commonwealth Criminal Code.

20. The Bill does not adopt all of the provisions of the reports as incorporated in the Model Criminal Code but it brings New South Wales closer to the national approach.

21. The Model Criminal Code definition of dishonesty has been adopted, so the mental element of dishonesty means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to those standards. According to the Second Reading speech, this definition was supported by the High Court in the case of *Peters v the Queen* and has been adopted in the Commonwealth *Crimes Act*.

22. More than 30 fraud provisions will be replaced with 4 new provisions, and 25 forgery provisions will be replaced with 6 new provisions under this Bill.

23. According to the Second Reading speech:

> Fraud, which is the dishonest deception by one person of another to obtain property or financial gain or to cause a financial disadvantage, is an area of crime that has exploited the opportunities opened up by technology, and that makes it hard to police. It covers the creation and cashing of false cheques, pyramid schemes, inducements to invest based on a misrepresented scheme, the creation and sale of counterfeit items such as artworks or designer clothing, or failing to pay for items, such as petrol.

24. The Second Reading speech also explained that:

> Identity fraud, involving the theft then misuse of personal identification information, is a growing problem, and one to which we are all potentially exposed. A major enabler of this sort of fraud is the trade in identification information. People acquire it in various ways—skimming machines or fake emails, for example—and then they sell it on-line to other people who use it to commit a crime, such as fraud, or the creation of a new identity to conceal involvement in other serious crimes, drug offences or money laundering. It will now be a very serious crime, punishable by up to 10 years imprisonment, if a person deals in identification information this will include using it, making it or selling it.

The Bill

25. The Bill draws on provisions in the following:

(a) The Final Report on Identity Crime released in March 2008 by the Model Criminal Law Officers Committee of the Standing Committee of Attorneys-General (SCAG).
(b) The Final Report on Theft, Fraud, Bribery and Related Offences released in December 1995 by the predecessor Model Criminal Code Officers Committee of SCAG, and the Final Report of that Committee on Credit Card Skimming Offences released in February 2006.
(c) The provisions of the *Criminal Code Act 1995* of the Commonwealth that were also drawn from those Reports.

The Bill also makes related amendments to the *Criminal Procedure Act 1986*.

26. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Principal amendments to *Crimes Act* 1900 No 40
Definition of "dishonest":
Schedule 1 [1] inserts, for the purposes of the fraud, forgery and related offences, a definition of ***dishonest*** into the principal Act so that the mental element of dishonesty in those offences means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people. In a prosecution for an offence, dishonesty is a matter for the trier of fact (that is, the jury or the Judge/Magistrate if the offence is tried summarily). This definition was recommended by the Model Criminal Code Officers Committee and adopted in the *Criminal Code Act 1995* of the Commonwealth. It follows the decisions of the House of Lords in *Feely* and *Ghosh* and is supported in the High Court case of *Peters v Queen*.

Fraud and related offences:
Schedule 1 [3] inserts Part 4AA into the principal Act (and replaces existing provisions of the principal Act omitted by Schedule 2). Proposed sections 192B–192D provide definitions for the purposes of the offences and proposed sections 192E–192H contain the offences.

Proposed section 192E contains the offence of fraud. It will be an offence for a person, by any deception, to dishonestly obtain property belonging to another or obtain any financial advantage or cause any financial disadvantage (maximum penalty: 10 years imprisonment).

Proposed sections 192F–192H contain the following related fraud offences:

(a) it will be an offence to dishonestly destroy or conceal any accounting record with the intention of obtaining property belonging to another or obtaining a financial advantage or causing a financial disadvantage (maximum penalty: 5 years imprisonment),

(b) it will be an offence to dishonestly make or publish, or concur in making or publishing, any statement that is false or misleading in a material particular with the intention of obtaining property belonging to another or obtaining a financial advantage or causing a financial disadvantage (maximum penalty: 5 years imprisonment),

(c) it will be an offence for an officer of an organisation, with the intention of deceiving members or creditors of the organisation about its affairs, to dishonestly make or publish, or to concur in making or publishing, a statement that to his or her knowledge is or may be false or misleading in a material particular (maximum penalty: 7 years imprisonment).

Proposed section 192B refines the definition of ***deception*** in connection with the offence of fraud so that it means any deception, by words or other conduct, as to fact or as to law, including:

(a) a deception as to the intentions of the person using the deception or any other person, or

(b) conduct by a person that causes a computer, a machine or any electronic device to make a response that the person is not authorised to cause it to make.

The deception must be intentional or reckless for a person to commit an offence by a deception.

Proposed section 192C provides that a person ***obtains property*** if:

(a) the person obtains ownership, possession or control of the property for himself or herself or for another person, or

(b) the person enables ownership, possession or control of the property to be retained by himself or herself or by another person, or

(c) the person induces a third person to do something that results in the person or another person obtaining or retaining ownership, possession or control of the property.

A person must intend to permanently deprive the other person of the property and borrowing property may amount to obtaining property if the person's intention is to treat the thing as his or her own to dispose of regardless of the other person's rights.

Proposed section 192D provides that to ***obtain*** a financial advantage includes:

(a) to obtain a financial advantage for oneself or for another person, and

(b) to induce a third person to do something that results in oneself or another person obtaining a financial advantage, and

(c) to keep a financial advantage that one has, whether the financial advantage is permanent or temporary.

The proposed section also provides that to ***cause*** a financial disadvantage means:

(a) to cause a financial disadvantage to another person, or

(b) to induce a third person to do something that results in another person suffering a financial disadvantage, whether the financial disadvantage is permanent or temporary.

Schedule 1 [2] re-enacts a current provision of the principal Act that provides that the necessary geographical nexus exists between NSW and an offence of larceny or fraud (or a related fraud offence) to enable a prosecution in NSW if the offence is committed by a public official and involves public money of the State or property held by the public official for or on behalf of the State of NSW (even if the offence is committed outside NSW).

Identity offences:
Schedule 1 [3] inserts Part 4AB into the principal Act and creates new offences relating to identity crime. Proposed section 192I contains definitions used in the Part.
Identification information means information relating to a person (whether living or dead, real or fictitious, or an individual or a body corporate) that is capable of being used to identify or purportedly identify the person.
The proposed Part contains the following offences:

(a) it will be an offence for a person to deal in (including make, supply or use) identification information with the intention of committing, or facilitating the commission of, an indictable offence (maximum penalty: 10 years imprisonment),

(b) it will be an offence for a person to possess identification information with then intention of committing, or facilitating the commission of, an indictable offence (maximum penalty: 7 years imprisonment),

(c) it will be an offence for a person to possess any equipment, material or other thing that is capable of being used to make a document or other thing containing identification information if the person intends that the document or thing will be used to commit, or facilitate the commission of, an indictable offence (maximum penalty: 3 years imprisonment).

The Part will apply to a person who intends to commit an indictable offence even if committing the offence concerned is impossible or it is to be committed at a later time.

Forgery offences:
Schedule 1 [4] repeals Divisions 1 and 2 of Part 5 of the principal Act and replaces outdated provisions with a modernised and simplified set of provisions relating to forgery offences. Proposed section 250 sets out when a document is considered to be a false document. Proposed section 251 makes it clear that a reference to inducing a person to accept a false document as genuine includes a reference to causing a machine to respond to a document as if it were a genuine document. The proposed section also provides that if it is necessary to prove an intent to induce some person to accept a false document as genuine, it is not necessary to prove the accused intended so to induce a particular person. Proposed section 252 provides that certain concepts used in relation to fraud offences (that is, “obtaining property belonging to another” and “obtaining financial advantage or causing financial disadvantage”) apply in relation to forgery in proposed Part 5.
Proposed sections 253–256 contain the following offences:

(a) it will be an offence for a person to make a false document with the intention of using it to induce some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),

(b) it will be an offence for a person to use a false document, knowing that it is false, with the intention of inducing some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),

(c) it will be an offence for a person to have in his or her possession a false document, knowing that it is false, with the intention of using it to induce some person to accept it as genuine, and because of its being accepted as genuine, to obtain another person’s property, obtain any financial advantage or cause

any financial disadvantage or influence the exercise of a public duty (maximum penalty: 10 years imprisonment),

(d) it will be an offence for a person to make, or have in his or her possession, any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted and with the intention of using it to commit the offence of forgery (maximum penalty: 10 years imprisonment),

(e) it will be an offence for a person to make or possess, without reasonable excuse, any equipment, material or other thing designed or adapted for the making of a false document, knowing that it is so designed or adapted (maximum penalty: 3 years imprisonment),

(f) it will be an offence for a person to possess any equipment, material or other thing that is capable of being used to make a false document, with the intention that the person or another person will use the equipment, material or other thing to commit the offence of forgery (maximum penalty: 3 years imprisonment).

Proposed provisions and corresponding provisions in *Model Code*, *Commonwealth Criminal Code* and *NSW Crimes Act*

The following Table sets out the provisions relating to dishonesty, fraud, identity crime and forgery in the proposed Act and the corresponding provisions of the Model Criminal Code (***Model Code***) and the *Criminal Code Act 1995* of the Commonwealth (***Cth Code***), and, where there is no Code equivalent, the existing provisions of the *Crimes Act 1900* of New South Wales (***NSW Crimes Act***):

Proposed provision	Corresponding provision
Dishonesty:	
s4B	s14.2 Model Code; s130.3 and 130.4 Cth Code
Fraud:	
s192B	s17.1 Model Code; s133.1 Cth Code
s192E	ss 17.2 and 17.3 Model Code; ss 134.1, 134.2 and 135.1 Cth Code
s192F	s158 NSW Crimes Act
s192G	s178BB NSW Crimes Act
s192H	s19.8 Model Code, s176 NSW Crimes Act
Identity crime:	
s192I	s3.3.6 (1) Model Code
s192J	s3.3.6 (2) Model Code
s192K	s3.3.6 (3) Model Code
s192L	s3.3.6 (4) Model Code
Forgery:	
s250	s19.2 Model Code, s143.2 Cth Code
s251	s19.1 Model Code, s143.4 Cth Code
s253	s19.3 Model Code, s144.1 Cth Code
s254	s19.4 Model Code, s145.1 Cth Code
s255	s19.5 Model Code, s145.2 Cth Code
s256	s19.6 Model Code, s145.3 Cth Code

Schedule 2 Consequential and other amendments to *Crimes Act 1900* No 40

Schedule 2 omits the following sections relating to certain existing fraud and forgery offences that are made redundant by the provisions of proposed Parts 4AA and 5:

(a) section 158 (Destruction, falsification of accounts etc by clerk or servant),

(b) Subdivision 7 of Division 1 of Part 4 (sections 164–178) (Frauds by factors and other agents),
(c) section 178A (Fraudulent misappropriation of moneys collected or received),
(d) section 178B (Valueless cheques),
(e) section 178BA (Obtaining money etc by deception),
(f) section 178BB (Obtaining money etc by false or misleading statements),
(g) section 178C (Obtaining credit by fraud),
(h) Subdivision 13 of Division 1 of Part 4 (sections 179–185) (False pretences),
(i) section 185A (Inducing persons to enter into certain arrangements by misleading etc statements etc),
(j) section 186 (Taking reward for helping to recover stolen property),
(k) section 527 (Fraudulently appropriating or retaining property),
(l) section 527A (Obtaining money etc by wilfully false representation),
(m) section 527B (Framing a false invoice),
(n) section 528 (Advertising reward for return of stolen property),
(o) section 545A (Bogus advertisements),
(p) section 547A (False statement respecting births, deaths or marriages).

Schedule 2 also contains consequential amendments that renumber provisions and replace headings in order to re-structure surrounding parts of the principal Act in a clearer and more logical manner.

Schedule 3 Amendment of *Criminal Procedure Act 1986* No 209
Schedule 3 [1] makes a consequential amendment.
Schedule 3 [2] enables a victim of an identity offence to obtain a certificate from the Local Court that such an offence has been committed to assist with problems the offence has caused in relation to the victim's personal or business affairs.
Schedule 3 [3]–[6] provide that fraud, identity and forgery offences (under Parts 4AA, 4AB and 5 of the *Crimes Act 1900* as inserted by Schedule 1 [3] and [4]) are triable summarily unless the prosecutor or the person charged elects otherwise, other than offences under section 192L (Possession of equipment etc to make identification documents or things) and section 256 (2) or (3) (Making or possession of equipment etc for making false documents) of that Act, which are triable summarily unless the prosecutor elects otherwise.

Schedule 4 Consequential amendment of other Acts
Schedule 4 makes consequential amendments to a number of Acts that contain references to Part 4 of the *Crimes Act 1900* that require updating as a result of the restructure of that Part by Schedule 2.

Issues Considered by the Committee

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

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

27. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation rather than on assent. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Attorney General's office that: "The significance of the changes for the legal profession is why the Department decided on Proclamation. Because they introduce new offences, and change the way that fraud and forgery have been dealt with, time needs to be given

to allow the Police and the legal profession to familiarise themselves with the new legislation".

28. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

4. ELECTRICITY SUPPLY AMENDMENT (GGAS) BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Robertson MLC
Portfolio:	Climate Change and the Environment, Energy

Purpose and Description

1. This Bill amends the *Electricity Supply Act 1995* with respect to abatement certificates and abatement certificate providers and the liability of the State in connection with the GGAS Scheme and to make provision with respect to the termination of that Scheme; and for other purposes.

2. It proposes amendments to the *Electricity Supply Act 1995* to allow for a reduction in the number of surplus GGAS certificates remaining at the end of GGAS, and it provides for half-year compliance and other technical changes to facilitate the move to CPRS.

3. It will reduce surplus certificates by stopping new applications for accreditation under GGAS from 1 January 2010, or another prescribed date. It will remove opportunities to create GGAS certificates from generation projects that were commissioned prior to the commencement of GGAS known as category A projects from 1 July 2010 or another prescribed date.

4. The Bill makes technical changes to existing provisions to clarify their operation in the transition to the CPRS. It amends section 97KB, which permits the termination of GGAS upon the commencement of a national emissions trading scheme. The Bill makes it clear that the scheme must apply in New South Wales rather than be established in New South Wales. GGAS abatement certificates will not be permitted to be created for activities occurring on or after the termination of GGAS.

5. The Bill also makes it clear that compensation is not payable by the State in relation to changes to the legislative framework for GGAS or its termination.

Background

6. According to the Second Reading speech:

> On 1 January 2003, New South Wales commenced one of the first mandatory greenhouse gas emissions trading schemes in the world. The Greenhouse Gas Reduction Scheme, or GGAS, was designed to reduce emissions from the use of electricity and to encourage activities that offset the production of emissions. The success of GGAS has been impressive. By the end of 2007 there were 40 benchmark participants who surrendered approximately 17 million GGAS abatement certificates that year. Benchmark participants are required to meet the targets under GGAS and include electricity retailers and generators and some large electricity users that have

voluntarily taken part in the scheme. The 2007 figures were a 38 per cent increase in the number of certificates surrendered from 2006.

7. Over 91 million abatement certificates have been created under GGAS. In 2008, the Commonwealth announced a national emissions trading scheme (now known as the Carbon Pollution Reduction Scheme, or CPRS). Therefore, legislative transition from GGAS to CPRS is required.

8. Currently, the *Electricity Supply Act* specifies targets for GGAS compliance based on a full calendar year. If the CPRS commences on 1 July 2011, GGAS will end on 30 June 2011. Therefore, provisions need to be made to allow the final compliance period for GGAS to be prescribed as a fraction of a full calendar year.

9. New South Wales Government and GGAS participants lobbied the Australian Government for a $130 million assistance package for those GGAS participants who will be adversely affected by the transition.

The Bill

10. The object of this Bill is to provide for the transition from the greenhouse gas abatement scheme set out in Part 8A of the *Electricity Supply Act 1995* (the Principal Act) when a similar scheme is established either nationally or in this State and at least one other State or Territory, by:

    (a) permitting a termination day to be proclaimed if the Minister for Energy is satisfied that the similar scheme will apply in New South Wales and so long as the termination day does not occur before that scheme applies, and
    (b) providing for a final compliance period that ends on the day immediately preceding the termination day, and
    (c) preventing the creation of abatement certificates in respect of activities occurring on or after the termination day, and
    (d) preventing a person from applying for accreditation as an abatement certificate provider on or after 1 January 2010 (or any later date that may be prescribed), and
    (e) providing that an abatement certificate cannot be created in relation to category A generation occurring on or after 1 July 2010 (or any later date that may be prescribed), and
    (f) providing that compensation is not payable by the State in relation to the enactment, making or operation of Part 8A of the Principal Act or any Act that amends that Part (including the proposed Act), or the termination of the scheme set out in that Part or related conduct or actions.

11. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of *Electricity Supply Act 1995* No 94
Schedule 1 [18] substitutes section 97KB of the Principal Act which provided for the termination of the operation of the greenhouse gas abatement scheme set out in Part 8A of that Act (the ***GGAS scheme***) by proclamation of the Governor. The new provision modifies how the GGAS scheme is to be terminated by the Governor. The Governor may, by proclamation, prescribe a termination day for the scheme or repeal any or all of the

provisions of Part 8A. The Governor is not to make any such proclamation unless the Minister for Energy is satisfied that a similar scheme (established nationally or with other States or Territories) will apply in New South Wales. That other scheme must be designed to reduce greenhouse gas emissions associated with the production and use of electricity and must encourage participation in activities to offset the production of greenhouse gas emissions. The termination day, or any day specified for the repeal of a provision, must not be a day that is earlier than the day on which that other scheme applies in New South Wales. Under the GGAS scheme, persons who are subject to the scheme (***benchmark participants***) have obligations that arise annually. However, as the scheme may be terminated part way through a year, a final period of less than one year is likely.

Schedule 1 [1] inserts a definition of ***compliance period*** that is to replace the use of the term "year" in Part 8A of the Principal Act. A compliance period is a year, except in the case of the final compliance period, which is the period from 1 January until the day immediately preceding the termination day. **Schedule 1 [3], [8] and [10]** replace references to "year" with references to "compliance period" throughout Part 8A. **Schedule 1 [9]** makes a consequential amendment.

Schedule 1 [1] also inserts definitions of ***category A generation***, ***Emissions Workbook***, ***final compliance period*** and ***termination day*** for the purposes of Part 8A. **Schedule 1 [13] and [14]** make consequential amendments. **Schedule 1 [5]** substitutes section 97B of the Principal Act to omit redundant provisions. **Schedule 1 [4]** makes a consequential amendment.

Schedule 1 [6] updates the principles for determining the greenhouse gas benchmark for a benchmark participant to refer to compliance periods and to provide for a pro rata reduction of that benchmark for the final compliance period. **Schedule 1 [2]** makes a consequential amendment.

Schedule 1 [7] makes it clear that an amount by which a benchmark participant fails to comply with the participant's greenhouse gas benchmark for the final compliance period (a ***greenhouse shortfall***) cannot be carried forward.

Schedule 1 [11] provides that any greenhouse penalty payable by a benchmark participant in respect of a greenhouse shortfall for the final compliance period is payable within 3 months after the termination day or on any later day determined by the Independent Pricing and Regulatory Tribunal (the ***Tribunal***).

Schedule 1 [12] requires a benchmark participant to lodge with the Tribunal the participant's greenhouse gas benchmark statement in respect of the final compliance period not later than 3 months after the termination day or such later day as may be permitted by the Tribunal.

Schedule 1 [15] provides that a person may not apply for accreditation as an abatement certificate provider under Part 8A of the Principal Act on or after 1 January 2010 (or any later date that may be prescribed).

Schedule 1 [16] provides that an abatement certificate cannot be created later than 2 months after the termination day or in respect of activities occurring on or after the termination day. That amendment also provides that an abatement certificate cannot be created in relation to category A generation that occurs on or after 1 July 2010 (or any later

day that may be prescribed) and any such abatement certificate cannot be created after 1 October 2010, or if a later day is prescribed, 3 months after that later day.

Schedule 1 [17] provides that the Tribunal's report to the Minister on the extent to which benchmark participants have complied, or failed to comply, with greenhouse gas benchmarks during the final compliance period is to be forwarded to the Minister as soon as practicable after the day occurring 3 months after the termination day (but on or before the day occurring 7 months after the termination day).

Schedule 1 [19] provides that compensation is not payable by or on behalf of the State in relation to the enactment, making or operation of Part 8A of the Principal Act, any Act that amends that Part (including the proposed Act) or any instrument under that Part, or in relation to any statement or conduct relating to any such enactment, making or operation or any statement or conduct in relation to accreditation as an abatement certificate provider or to abatement certificates.

Schedule 1 [20] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act. **Schedule 1 [21]** permits such regulations to be made consequent on the repeal of a provision of Part 8A of the Principal Act. **Schedule 1 [22]** updates a reference to an abolished Department.

Schedule 2 Amendment of instruments
Schedule 2.2 [1] omits redundant references to an abolished Department.
Schedule 2.2 [2] and [3] make amendments that are consequential on the amendments in Schedule 1.
Schedule 2.2 [4] omits a redundant definition.
Schedule 2.2 [5] provides, in respect of the final compliance period, for a pro rata reduction of the baseline for the activities of a person in respect of which an abatement certificate provider is entitled to create certificates.
Schedule 2.1 and 2.3 omit redundant definitions.

Issues Considered by the Committee

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

Issue: Denial of Compensation – Amendment of *Electricity Supply Act 1995* - Schedule 1 [19] – proposed section 179A Compensation not payable:

12. Schedule 1 [19] inserts proposed section 179A to provide that compensation is not payable by or on behalf of the State in relation to the enactment, making or operation of Part 8A of the Principal Act, any Act that amends that Part (including the proposed Act) or any instrument under that Part, or in relation to any statement or conduct relating to any such enactment, making or operation or any statement or conduct in relation to accreditation as an abatement certificate provider or to abatement certificates.

13. Proposed section 179A (2) extends this section to statements, conduct and any other matter occurring before the commencement of this section.

14. The Committee is of the view that the right to seek damages or compensation is an important personal right and that such a right should not be removed or restricted by legislation unless there is a compelling public interest in doing so. Therefore, the Committee refers to Parliament to consider whether the proposed section 179A in schedule 1 [19] may trespass unduly on individual rights by removing the right to seek compensation or damages in relation to changes to the legislative framework for GGAS or its termination.

The Committee makes no further comment on this Bill.

5. ELECTRICITY SUPPLY AMENDMENT (SOLAR BONUS SCHEME) BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Robertson MLC
Portfolio:	Climate Change and the Environment, Energy

Purpose and Description

1. This Bill amends the *Electricity Supply Act 1995* in relation to renewable energy generation by retail customers.

2. It sets reporting obligations on electricity distributors to ensure that the scheme is monitored. Two reports will be provided each year setting out the number of participants in the scheme, their location, generating capacity and the amount of electricity supplied to the network.

3. This Bill provides for a review of the scheme in 2012 or when scheme capacity reaches 50 megawatts, whichever occurs first. The Solar Bonus Scheme will be reviewed against its objectives.

4. The Bill provides for customers who are eligible to participate in the scheme have the right to be connected to the electricity network. Clause 15A provides that distribution network service providers are to authorise the connection of eligible generators to their network, provided the generator complies with specified technical, metering and safety requirements.

5. The Bill places an initial liability on distribution network service providers to pay for the scheme. They will recover these costs from their broader customer base. Distribution network service providers are to record a credit against network charges payable by the small retail customer for all electricity produced by a complying or eligible generator.

Background

6. The Solar Bonus Scheme has three objectives. It seeks to: support those who want to generate renewable energy as a response to climate change; develop jobs in the renewable energy sector by assisting renewable energy generation to compete with non-renewable energy generation; and increase public exposure to renewable energy technology to encourage the community to respond to climate change. These objectives are set out in this Bill.

7. The Second Reading speech stated that:

> To ensure that the introduction of the scheme is as streamlined as possible for both consumers and businesses, the design of the Solar Bonus Scheme was developed following a rigorous consultation process. That process included a dialogue with the

> community and industry, including the appointment of a taskforce that considered public submissions, investigated a range of options and their impact on consumers and prepared a detailed public report. This was also followed by a detailed eligibility review and public submission process that has led to the inclusion of small-scale wind turbines in the scheme.

8. The scheme will include micro wind turbines up to 10 kilowatts in size. It has been designed to complement the Australian Government's solar credits scheme, which multiplies the number of Renewable Energy Certificates that can be created for small-scale renewable energy generators and provides a discount on the purchase price of these systems.

9. According to the Second Reading speech:

> The Solar Bonus Scheme will operate with a gross tariff. A gross tariff pays consumers for all the electricity that they generate and feed into the electricity grid. The scheme will be concentrated over seven years, giving customers greater certainty about scheme payments. Until now the Australian Capital Territory had been the only Australian jurisdiction offering a gross scheme. Our scheme has the most generous feed-in tariff rate in Australia... It will pay a flat rate of 60¢ per kilowatt hour for all electricity that is fed back into the electricity grid from eligible solar photovoltaic systems up to 10 kilowatts in size. This is around three to four times the average price of electricity in New South Wales.

10. The Second Reading speech explained that:

> Trends overseas are quite conclusive on the benefits of a gross tariff model. It is understood that when the German scheme moved to a gross tariff design, the amount of electricity generated from renewable energy sources doubled, allowing Germany to increase its renewable energy targets. In September this year an Access Economics report, commissioned by the Victorian Electrical Trades Union, found that a national gross feed-in tariff could create more than 22,000 jobs nationally in the next 10 years. Industry participants in New South Wales have already indicated their intention to dramatically expand their operations as a result of this bill. The gross scheme will give households and businesses planning to invest in solar PV or micro wind systems the benefit of being able to better plan for and understand what return they will get on their significant investment.

11. The scheme will be concentrated over seven years. Small retail customers such as households, small businesses, community organisations and schools, that use less than 160 megawatt hours per year will be eligible to participate in the scheme.

12. Under the Bill, the tariff rate will be fixed at 60¢ per kilowatt hour for the term of the scheme.

13. Existing PV systems that meet the scheme requirements will also be eligible to participate in the scheme from its commencement on 1 January 2010. Transition arrangements will be in place for those customers who have installed net metering.

14. The obligations on distribution network service providers and retail suppliers to implement the Solar Bonus Scheme will be enforced through licence conditions.

The Bill

15. The object of this Bill is to establish the solar bonus scheme under which persons can apply to have small solar photovoltaic generators or wind turbines or small renewable energy generators of a class prescribed by the regulations connected to the electricity network and receive a payment of $0.60 per kilowatt hour in respect of electricity that is supplied to the network by the person.

16. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of *Electricity Supply Act 1995* No 94
Schedule 1 [1] inserts proposed section 15A into the *Electricity Supply Act 1995*.
The proposed section provides that if a small retail customer applies to have a complying generator connected to a distribution network, the distribution network service provider must connect the generator or permit it to be connected, but only if the generator is to be installed at premises that are in the distribution network service provider's distribution district and the small retail customer has a right to be provided with customer connection services at those premises.

A generator is a ***complying generator*** if the generator:

(a) is a solar photovoltaic generator, a wind turbine, or a renewable energy generator of a class prescribed by the regulations, that has a generating capacity of no more than 10 kilowatts, and
(b) is installed and connected to the distribution network in a manner that provides for all the electricity generated to be supplied to the distribution network and allows the relevant distribution network service provider to measure at any instant the amount of electricity supplied, and
(c) complies with, and is installed and connected in a manner that complies with any safety, technical or metering requirements that may be prescribed by the regulations or market operations rules.

A distribution network service provider must record a credit against charges payable at the amount of $0.60 per kilowatt hour for electricity that is supplied to the distribution network by a small retail customer using a complying generator.
A distribution network service provider must provide the small retail customer's retail supplier with details of the amount of credit recorded for electricity that the small retail customer's complying generator has supplied to the network.
A distribution network service provider must also provide a report to the Minister for Energy and the Director-General of the Department of Industry and Investment within 28 days after 30 June and 31 December in each year. The report must set out the total number of small retail customers in the distribution network service provider's distribution district who have installed and connected a complying generator, the postcode of each such customer, the total generating capacity of all such generators in the distribution district and the amount of electricity supplied to the distribution network.
It is a condition of a distribution network service provider's licence that the distribution network service provider must not contravene proposed section 15A.
Proposed section 15A is to be repealed on 31 December 2016.

Schedule 1 [2], [3], [5] and [10]–[13] make consequential amendments.

Schedule 1 [4] provides that it is a condition of a retail supplier's licence that the retail supplier must pay a small retail customer an amount representing the amount of any credit recorded under proposed section 15A for electricity supplied by the small retail customer or must reduce an amount payable by the small retail customer by an amount representing that amount of credit.

Schedule 1 [6] provides that regulations may be made for or with respect to the supply of electricity to the distribution network by customers using renewable energy generators. Regulations may also be made to prescribe additional criteria that may have to be satisfied before a credit can be recorded under proposed section 15A.

Schedule 1 [7] provides for a review of the solar bonus scheme to be undertaken by the Minister for Energy as soon as possible after 1 July 2012 or as soon as the Minister becomes aware that the total generating capacity of all complying generators reaches 50 megawatts, whichever occurs first.

Schedule 1 [8] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [9] provides that credit is not to be provided in respect of electricity supplied before the commencement of proposed section 15A and that a generator installed before that commencement may be a complying generator. **Schedule 1 [9]** also provides for transitional arrangements in respect of schemes currently operated by Country Energy, EnergyAustralia and Integral Energy that purchase electricity supplied by small retail customers on a net basis.

Issues Considered by the Committee

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

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

17. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Minister's office that: "The Bill establishes a Solar Bonus Scheme to pay eligible customers a 'gross' feed-in tariff for all electricity produced by eligible renewable energy generators. Tariff payments will be made from the date of the commencement of the Solar Bonus Scheme. It is important that the Solar Bonus Scheme commences on a specified date, rather than on assent, to provide certainty to consumers and to ensure that all implementation and administration issues are addressed prior to Scheme commencement. For example, if the Scheme were to commence on assent and before electricity businesses had established the necessary administrative processes to record Scheme payments it would not be possible to pay customers in accordance with the provisions of the Scheme. It is proposed to commence the Solar Bonus Scheme on 1 January 2010. The Act will be proclaimed to commence on this date, once the Bill has passed and implementation and administration issues addressed. It is necessary to commence the proposed amendments on proclamation to permit the finalisation of new Regulations to be made under the proposed amendments. For example, proposed section 63Z of the *Electricity Supply Act 1995* requires the excavation work to which it applies to be prescribed by Regulation".

18. **The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

The Committee makes no further comment on this Bill.

6. EMERGENCY SERVICES LEGISLATION AMENDMENT (FINANCE) BILL 2009

Date Introduced:	10 November 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Steve Whan MP
Portfolio:	Emergency Services

Purpose and Description

1. The object of this Bill is to amend the *Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Service Act 1989* in relation to the scheme for funding the New South Wales Fire Brigades, the New South Wales Rural Fire Service and the State Emergency Service from contributions by insurance companies, local councils and the State government.

2. Consequential amendments are also made to the *National Parks and Wildlife Act 1974* and the *Valuation of Land Act 1916* to update references to the *Fire Brigades Act 1989*.

Background

3. In 2008, the *State Revenue and Other Legislation Amendment (Budget Measures) Act 2008* amended the three emergency services Acts (*Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Service Act 1989)* to include the State Emergency Service as part of the contributory system that had previously applied only to the NSW Fire Brigades and NSW Rural Fire Service.

4. The previous amendments also standardised the provisions in the *Fire Brigades Act 1989, Rural Fires Act 1997* and *State Emergency Service Act 1989* to allow for the contributions to be collected centrally by one agency called Emergency Management NSW.

5. The Bill clarifies the funding arrangements and addresses a number of anomalies that have been detected since the introduction of the previous legislation relating to the funding of Emergency Services.

6. As stated in the Agreement in Principle Speech, the Bill makes relatively minor changes to the way by which contributions are calculated. It aims to ensure that the correct amounts are collected from contributors in the simplest manner.

7. Under the proposed amendments assessment notices will be issued each year to local councils and insurance companies that are required to make contributions. These assessments will provide the amount payable and any amounts that are already paid, are to be paid or to be credited. Further, instalment notices will be issued each quarter and will specify the amount payable for the quarter and the date by which it must be paid.

8. Under the current legislation, the contributions of insurers and local government made prior to the beginning of any financial year may be taken into account in determining the agencies surplus or deficit. The Bill amends the method by which estimates of annual expenditure are adjusted so as to include surpluses or deficits in the recurrent expenditure account only and not the capital account.

9. The Bill also makes amendments with respect to due dates of contributions and penalty provisions. As stated in the Agreement in Principle Speech, there are currently a number of inconsistencies in the relevant Emergency Services Acts in relation to when contributions are due and payable. Accordingly, the proposed amendments are intended to ensure that contributors pay their invoices on time.

10. The Bill makes it an offence for a local council or an insurance company to pay a contribution instalment after its due date, instead of the current 10 per cent late fee. As stated in the Agreement in Principle Speech, a maximum penalty of 50 penalty units was introduced through previous amendments to the *Fire Brigades Act 1989* in 2008. The Bill re-instates and replicates this maximum penalty for a number of proposed offences, including proposed section 49 *Fire Brigades Act 1989*.

11. Finally, the Bill will correct existing anomalies before the third quarter assessments are distributed and will provide certainty for funding to the emergency service agencies. As stated in the Agreement in Principle Speech, the amendments ensure that the funding for Emergency Services does not adversely impact on arrangements with contributors.

The Bill

12. **Outline of provisions**

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

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

Schedule 1 Amendment of emergency services Legislation

Under the *Fire Brigades Act 1989*, the *Rural Fires Act 1997* and the *State Emergency Service Act 1989*, local councils and insurance companies, as well as the State government, are required to contribute to the costs of running the New South Wales Fire Brigades, the New South Wales Rural Fire Service and the State Emergency Service. Local councils, insurance companies and the State government are required to pay an amount based on a proportion of the annual estimated expenditure of each service.

Schedule 1.1, 1.3 and 1.4 replace the provisions relating to the contribution schemes in each of the Principal Acts so as to simplify and clarify the provisions and ensure consistency across the 3 Acts. The principal changes are as follows:

(a) to amend the method by which estimates of annual expenditure are adjusted so as to include surpluses or deficits in the recurrent expenditure account only and not the capital account;

(b) to clarify the process by which contributions are determined and collected. Assessment notices will be issued by the Minister each year to each local

council and insurance company that is required to make contributions for the financial year, and will state the amount payable and any amounts that are already paid, are to be paid or to be credited to the local council or insurance company. Instalment notices will be issued by the Commissioner each quarter to each local council and insurance company, and will specify the amount payable for that quarter and the date by which it must be paid;

(c) to make it an offence (maximum penalty: $5,500) for a council or an insurance company to pay a contribution instalment after the due date (instead of a 10% late fee being charged, as is currently the case);

(d) to provide that the New South Wales Fire Brigades Fund and the New South Wales State Emergency Service Fund (which are established in the Special Deposits Account in the Treasury) are to each consist of a recurrent expenditure account (into which contributions are to be paid and which is to be used for meeting expenditure costs) and a capital account (into which money appropriated by Parliament and arising from the sale of the Department's assets is to be paid and which is to be used as permitted under proposed provisions or another Act and in accordance with the Treasurer's agreement).

Schedule 1.2 and 1.5 update references to the *Fire Brigades Act 1989* in the *National Parks and Wildlife Act 1974* and the *Valuation of Land Act 1916* respectively.

Issues Considered by the Committee

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

Issue: Strict Liability - Proposed section 64(4)(a) *Fire Brigades Act 1989*; section 117E(4)(a) *Rural Fires Act 1997*; and section 24U(4)(a) *State Emergency Service Act 1989*

13. The Committee notes that there are a number of provisions in the Bill that provide for strict liability offences. For example, proposed section 49(3) *Fire Brigades Act 1989* makes it an offence with a maximum penalty of 50 penalty units if a local council or an insurance company fails to pay a contribution instalment within 30 days of it being payable. The Committee notes, in particular that proposed section 64(4) *Fire Brigades Act 1989* makes it an offence with a maximum penalty of 50 penalty units for a person to:

    (a) obstruct the Auditor-General, or any other person acting on behalf of the Auditor-General, when exercising functions under this section; or

    (b) fail without lawful excuse, when requested to do so for the purposes of this section by the Auditor-General or a person so acting, to produce any account, book or record in the person's possession or under the person's control or to answer any question.

14. The Committee notes that proposed section 64(4)(a) *Fire Brigades Act 1989* provides for a strict liability offence with a maximum penalty of 50 penalty units, whereas proposed section 64(4)(b) *Fire Brigades Act 1989* specifically provides for a "lawful excuse". The Bill proposes to introduce similar offences to the offence in proposed section 64(4) *Fire Brigades Act 1989* through amending the *Rural Fires Act 1997* (proposed section 117E(4)) and *State Emergency Service Act 1989* (proposed section 24U(4)).

15. As discussed in the Committee's Discussion Paper on Strict and Absolute Liability (June 2006), strict liability offences are offences that do not require a prosecutor to provide that a person intended to commit the offence. A strict liability offence provides that it is sufficient for the prosecutor to prove that the person did the act that constituted the offence, regardless of their intention. Accordingly, strict liability offences displace the common law requirement that the prosecutor must prove mens rea or guilty mind and may trespass on the fundamental rights of the accused, for example the fundamental right to presumption of innocence (Article 14(2) of the International Covenant on Civil and Political Rights).

16. There are circumstances where it may be appropriate to impose strict liability, particularly in areas of public safety or to ensure the integrity of the regulatory scheme. Accordingly the imposition of strict liability will not always unduly trespass on personal rights and liberties. When considering whether a strict liability offence unduly trespasses on personal rights and liberties, it may be relevant to consider the impact of the offence on the community, the penalty that may be imposed and the availability of any defences or safeguards.

17. The Committee notes that proposed section 64(4)(a) *Fire Brigades Act 1989;* section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* introduce strict liability offences. The Committee has always been concerned to identify strict liability offences that may have an adverse impact on a person. However, the Committee is of the view that it is appropriate to impose strict liability offences with monetary penalties that are of sufficient severity to act as a deterrent so long as balanced against the protection of personal rights and liberties.

18. The Committee notes that the proposed penalties in proposed section 64(4)(a) *Fire Brigades Act 1989;* section 117E(4)(a) *Rural Fires Act 1997* and section 24U(4)(a) *State Emergency Service Act 1989* are monetary penalties with a maximum penalty of 50 penalty units rather than a term of imprisonment. Accordingly, the Committee is of the view that these proposed sections do not unduly trespass on personal rights and liberties.

The Committee makes no further comment on this Bill.

7. GRAFFITI CONTROL AMENDMENT BILL 2009

Date Introduced: 12 November 2009
House Introduced: Legislative Council
Minister Responsible: Hon John Hatzistergos MLC
Portfolio: Attorney General

Purpose and Description

1. This Bill amends the *Graffiti Control Act 2008* and related legislation to make further provision with respect to the minimisation and control of graffiti.

2. Schedule 1 [2] increases the maximum penalty for the existing offence of damaging or defacing property with a graffiti implement from six months to twelve months imprisonment. Schedule 1 [3] increases the maximum penalty for the existing offence of possessing a graffiti implement with the intention that it be used to damage or deface property from three months to six months imprisonment.

3. It also creates two new offences. The offences will further restrict the supply of spray paint cans to persons under the age of 18 years and the possession of spray paint cans by persons under the age of 18 years. Under proposed section 8A, a person who supplies a spray paint can to a person under the age of 18 years will be guilty of an offence with a maximum penalty of $1,100.

4. It is a defence to this offence, with the proof on the person who supplied the spray paint, if, firstly, the person believed on reasonable grounds that the spray paint was going to be used by the person for a defined lawful purpose; and, secondly, where the supply occurred in a public place, the person believed that the spray paint was going to be used by the person for another defined lawful purpose.

5. For these offences, the Bill defines the purposes or uses of graffiti as lawful: the lawful pursuit of an occupation, education or training; any artistic activity that does not constitute an offence against this Act or any other law; and any construction, renovation, restoration or maintenance activity that does not constitute an offence against this Act or any other law.

6. It is a defence if the supply occurred in a private place and the person believed that the spray paint was going to be used by the person to whom the paint was given for any purpose which is not against the law at or in the immediate vicinity of that private place.

7. Under proposed section 8B, a person under the age of 18 years who is in possession of a spray paint can in a public place is guilty of an offence, with a maximum penalty of $1,100 or six months imprisonment.

8. It will be a defence that the person had the spray paint can in his or her possession for a defined lawful purpose, being education or employment. It will also be a defence if the person had the paint in his or her possession for one of the other defined lawful purposes, such as a lawful artistic activity, but only at the place or in the immediate

vicinity of the place where it was being used or it was intended to use the spray paint. In order to ensure consistency in the principal Act, schedule 1 [6] amends the existing spray paint confiscation powers to allow a police officer to confiscate the spray paint can unless the person satisfies the officer that his or her possession of the can does not constitute an offence under the new provisions.

9. This Bill also creates a scheme of community clean-up work. Courts which impose fines for graffiti offences will be able to order that offenders pay off those fines by way of community clean-up work at the rate of $30 per hour. It will be open to offenders to volunteer to do this work instead of paying a fine. In the latter case, a community clean-up order can be made by a registrar. In relation to children, the orders can only be made after consultation with Juvenile Justice. In relation to adults, the orders can be made after consultation with Corrective Services to ensure that the person is suitable to do the work. These orders draw on the statutory machinery of community service orders. However, the community clean-up order is a distinct type of order that attaches to a fine.

10. A court can revoke the order if an offender fails or is unable to comply. It can also revoke the order if the offender requests and it is satisfied that it would be in the interests of justice to do so. Once the order is revoked, the offender must pay the remaining amount of his or her fine.

11. An offender need not be present when the order is revoked, and a registrar can sanction revocation. However, notice of the intention to revoke the order and an opportunity to put submissions must be given before an order is made.

12. There is no right of appeal against the decision to make or revoke a community clean-up order. The effect of the proposed section 9L is to allow a court which hears an appeal against the severity of the fine, or any other appeal which affects that fine, to vary or quash that order as the case may require. Appeal courts which re-sentence an offender to a fine will also be able to make the order.

13. The Bill makes a number of other amendments. Currently, only the Police and Fair Trading investigators may issue penalty notices for the sale of spray paint cans. Schedule 2.4 amends the *Graffiti Control Regulation 2009* to allow certain local council employees to also issue such penalty notices. Schedule 2.5 amends the *Rail Safety Act 2008* to give rail safety officers the power to direct a person to state the person's name and address if the officer finds a person committing an offence against the *Graffiti Control Act 2008* or reasonably suspects that the person has committed an offence against that Act. This power is similar to other powers that rail safety officers already have in relation to antisocial behaviour on trains and related premises.

Background

14. The purpose of this Bill is to give effect to the New South Wales Government's graffiti action plan which the Premier announced on 8 November 2009. It will create a scheme of community clean-up work for graffiti offenders.

15. According to the Second Reading speech:

> Portions of the bill draw on the evidence-based research done by the Department of Justice and Attorney General on graffiti offenders in the report entitled "The motivations

and modus operandi of persons who do graffiti". The report on the interviews with 52 offenders found that while most offenders do graffiti either in the pursuit of fame or recognition or for the adrenaline rush that doing graffiti gives them, graffiti offenders are a heterogeneous group; and while some offenders are opportunistic in their illegal activities, around a third of those interviewed stated that they were dedicated members of a crew or semi-organised group, which can range from 10 members and up to 40 members.

Given that the current penalties do not appear to be a deterrent to these serious graffiti offenders, there is a need to increase their severity. Moreover, compared with other jurisdictions in Australia, the penalties for marking graffiti and carrying a graffiti implement with intent in New South Wales are at the lower end of the scale. However, the Government is also focusing its energies on intervening early with graffiti offenders through a range of options, especially youth justice conferences.

16. The Department of Justice and Attorney General's report identified the current sale restrictions under the *Graffiti Control Act 2008* had limited the ability of offenders to buy spray paint and has led to graffitists recruiting adults to buy the cans on their behalf. An audit of approximately 800 stores by the Office of Fair Trading found 100 per cent compliance with obligations regarding the display and sale of spray paint cans.

17. Under the proposed community clean-up order, an offender must participate at least two hours in a graffiti prevention program (if practicable). The program will include education, personal development, or another program which is to prevent offenders from engaging in unlawful graffiti activities.

The Bill

18. The objects of this Bill are:

(a) to amend the *Graffiti Control Act 2008* (the principal Act):
(i) to create new offences relating to the supply of spray paint cans to children and the possession of spray paint cans by children, and
(ii) to increase the penalties for certain existing graffiti offences, and
(iii) to introduce a scheme of community clean up orders, under which an offender fined for a graffiti offence can be directed by a court to perform community clean up work in order to satisfy the fine, and
(iv) to make other consequential and minor amendments, and
(b) to amend the *Graffiti Control Regulation 2009* to enable certain local council employees to issue penalty notices for certain offences under the principal Act, and
(c) to amend the *Rail Safety Act 2008* to give rail safety officers the power to direct a person to state the person's name and address if the officer finds a person committing an offence against the principal Act, or reasonably suspects the person has committed an offence against the principal Act, and
(d) to amend other Acts as a consequence of the introduction of the scheme of community clean up orders.

19. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act. Most amendments commence on the date of assent. Provisions relating to community clean up orders will commence on a day or days to be appointed by proclamation.

Schedule 1 Amendment of *Graffiti Control Act 2008* No 100
New graffiti related offences
Schedule 1 [5] creates 2 new graffiti offences. The offences restrict the supply of spray paint cans to persons under the age of 18 years and the possession of spray paint cans by persons under the age of 18 years. It is already an offence under the principal Act to sell a spray paint can to a person under the age of 18 years.

Under proposed section 8A, a person who supplies a spray paint can to a person under the age of 18 years will be guilty of an offence with a maximum penalty of $1,100. It will be a defence (that the person charged must prove) that the person who supplied the spray paint can believed on reasonable grounds that the recipient intended to use the spray paint can for a defined lawful purpose, being the lawful pursuit of an occupation, education or training. It will also be a defence if the person charged proves the supply occurred in a public place and the person believed on reasonable grounds that the recipient intended to use the spray paint can at or in the immediate vicinity of the place where the supply occurred for another defined lawful purpose. It will also be a defence if the person charged proves the supply occurred in a private place and the person believed on reasonable grounds that the recipient intended to use the spray paint can at or in the immediate vicinity of the place where the supply occurred for an activity that does not constitute an offence against the principal Act or any other law.

Under proposed section 8B, a person under the age of 18 years who is in possession of a spray paint can in a public place is guilty of an offence with a maximum penalty of $1,100 or 6 months imprisonment. It will be a defence (that the person charged must prove) that the person had the spray paint can in his or her possession for a defined lawful purpose, being the lawful pursuit of an occupation, education or training. It will also be a defence if the person charged proves that the person had the spray paint can in his or her possession for another defined lawful purpose and was at or in the immediate vicinity of the place where the spray paint can was being used or intended to be used for that defined lawful purpose. A court that convicts a person under the proposed section must not sentence the person to imprisonment unless the person has previously been convicted of a graffiti offence on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.

A ***defined lawful purpose*** is defined as:

(a) the lawful pursuit of an occupation, education or training, or
(b) any artistic activity that does not constitute an offence against the principal Act or any other law, or
(c) any construction, renovation, restoration or maintenance activity that does not constitute an offence against the principal Act or any other law, or
(d) any other purpose authorised by the regulations.

A ***public place*** means a place or part of premises that is open to the public or used by the public, but does not include the premises of a school or other educational establishment. A ***private place*** means a place that is not a public place.

Schedule 1 [6] is a consequential amendment. At present, a police officer is authorised to confiscate a spray paint can in the possession of a person in a public place if the officer reasonably suspects the person is under the age of 18 years, unless the person satisfies the officer that the person has the spray paint can in his or her possession for a purpose that is not unlawful. Under the new provisions of the principal Act, persons under the age of 18

years will only be permitted to be in possession of a spray paint can in a public place in defined circumstances. The amendment allows the police officer to confiscate the spray paint can unless the person satisfies the officer that his or her possession of the can does not constitute an offence under the new provisions.

Increase in penalties for existing graffiti related offences

Schedule 1 [2] increases the maximum penalty for the existing offence of damaging or defacing property with a graffiti implement from 6 months to 12 months imprisonment.

Schedule 1 [3] increases the maximum penalty for the existing offence of possessing a graffiti implement with the intention that it be used to damage or deface property from 3 months to 6 months imprisonment.

Community clean up work

Schedule 1 [7] inserts proposed Part 3A into the principal Act, which enables a court that imposes a fine on a person for an offence under the principal Act (a ***graffiti offence***) to make an order requiring the person to perform community clean up work in order to satisfy the amount of the fine.

Community clean up work will be any community service work under (in the case of a child offender) the *Children (Community Service Orders) Act 1987* or (in the case of an adult offender) the *Crimes (Administration of Sentences) Act 1999* that is approved as community clean up work by the Minister administering the relevant Act. The community clean up work that an offender is directed to do by the officer assigned to the offender under the *Children (Community Service Orders) Act 1987* or the *Crimes (Administration of Sentences) Act 1999* (the ***assigned officer***) must, if practicable, include at least 2 hours participation in a graffiti prevention program.

A court must not make a community clean up order unless satisfied that the offender is a suitable person for community clean up work and, if the offender is a child, is sufficiently mature to perform community clean up work, and that community clean up work is available in the area where the offender lives.

Once a court makes a community clean up order, it must give written notice of the order to the offender. In the case of an adult offender, notice of the order must also be given to the Commissioner of Corrective Services. In the case of a child offender, notice of the order must also be given to the Director-General of the Department of Human Services and, if the order is made by a court other than the Children’s Court, to the registrar of the Children’s Court. The notice must include where the offender must present himself or herself so that the administration of the order can begin and the period in which the offender must present himself or herself for that purpose.

A court that makes a community clean up order must explain, in language likely to be readily understood by the offender, the requirements of the order, the consequences of not complying with those requirements and the fact that the offender may pay the fine instead of performing community clean up work.

Satisfaction of fines and community clean up orders

One hour of community clean up work performed by an offender is equivalent to $30 of the amount of fine. If an offender complies with the community clean up order by completing the required number of hours of work, the fine is taken to be satisfied. If an offender performs part of the work under the order, the fine is taken to be satisfied by the amount calculated at $30 for each hour of community clean up work actually performed. An offender may also choose to pay the fine, or the balance of the unpaid fine, instead of completing the community clean up work. The community clean up order ceases to be in force if the offender pays the fine or the balance of the fine.

Revocation of community clean up orders

A court may revoke a community clean up order, after it has received a report from the offender's assigned officer, if it is satisfied that the offender has failed to report for work under the order within 3 months after being required to do so, has failed to report for work within any period of 3 months, has failed to comply with the order, is not capable of performing the work or is not suitable to be engaged in work under the order. A court may also revoke a community clean up order if the offender so requests and the court is satisfied that it would be in the interests of justice to do so. A community clean up order is also revoked if the finding of guilt, conviction or sentence for the graffiti offence in respect of which the order was made is quashed, annulled or set aside. If a fine imposed by a court is varied, the court that varies the fine may revoke or vary a community clean up order made in respect of that fine.

Notice of the revocation or variation of a community clean up order must be given to the offender and to the offender's assigned officer. If the court that revokes an order in respect of a child offender is not the Children's Court, notice must also be given to the registrar of the Children's Court.

Other provisions

The *Children (Community Service Orders) Act 1987* applies, with some exceptions, to a community clean up order made in respect of a child offender in the same way as it applies to a children's community service order made in respect of a person under that Act. The *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* apply, with some exceptions, to a community clean up order made in respect of an adult offender in the same way as they apply to a community service order made in respect of a person under the *Crimes (Sentencing Procedure) Act 1999*.

There is no right to appeal against the making of a community clean up order, a failure to make a community clean up order or the revocation or variation of a community clean up order.

The functions of a court in relation to the making of a community clean up order may be exercised by the registrar of a court, if the offender consents to the making of the order. The functions of a court in relation to the revocation of a community clean up order may be exercised by the registrar of a court.

The regulations may make further provision for or with respect to community clean up work and community clean up orders and may increase the amount of $30 (the amount equivalent to one hour of community clean up work performed by an offender).

Schedule 1 [1] inserts standard definitions of ***exercise*** and ***function***, which are applicable to the new provisions relating to community clean up orders.

Schedule 1 [8] enables savings and transitional regulations to be made as a consequence of the proposed Act.

Schedule 1 [9] provides for the application of the amendments made by the proposed Act.

Schedule 2 Amendment of other legislation

Schedule 2.1 and 2.3 amend the *Children (Community Service Orders) Act 1987* and the *Crimes (Administration of Sentences) Act 1999* as a consequence of the scheme for community clean up orders. The amendments remove cross-references from particular provisions of those Acts that will apply to community clean up orders, so as to avoid any confusion about whether the provisions apply to community clean up orders.

Schedule 2.2 amends the *Children (Criminal Proceedings) Act 1987* to make it clear that the Children's Court has power to make a community clean up order in addition to any other powers it has under that Act.

Schedule 2.4 amends the *Graffiti Control Regulation 2009* to allow certain local council employees to issue penalty notices for offences relating to the sale or display of spray paint cans. Currently, only police officers and investigators within the meaning of the *Fair Trading Act 1987* may issue penalty notices.

Schedule 2.5 amends the *Rail Safety Act 2008* to give rail safety officers the power to direct a person to state the person's name and address if the officer finds a person committing an offence against the *Graffiti Control Act 2008*, or reasonably suspects the person has committed an offence against that Act.

Issues Considered by the Committee

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

Issue: Excessive Punishment And Reverse Onus of Proof – Amendment of *Graffiti Control Act 2008* - Schedule 1 [2] – section 4 damaging or defacing property by means of graffiti implement; and Schedule 1 [3] – section 5 possession of graffiti implement:

20. The current section 4 (1) of the *Graffiti Control Act 2008* reads: A person must not, without reasonable excuse (proof of which lies on the person), intentionally damage or deface any premises or other property by means of any graffiti implement. Under the current section 5 (1), a person must not have any graffiti implement in the person's possession with the intention that it be used to damage or deface premises or other property.

21. Schedule 1 [2] increases the maximum penalty for the existing offence of damaging or defacing property with a graffiti implement from 6 months to 12 months imprisonment. Schedule 1 [3] increases the maximum penalty for the existing offence of possessing a graffiti implement with the intention that it be used to damage or deface property from 3 months to 6 months imprisonment.

22. The Committee notes the reference made to the report done by the Department of Justice and Attorney General on interviewing 52 graffiti offenders in the Second Reading speech.

23. However, the Committee is aware of the recent report in September 2009 released by the Australian Institute of Criminology, 'The specific deterrent effect of custodial penalties on juvenile reoffending' conducted by Don Weatherburn, Sumitra Vignaendra and Andrew McGrath.[1] This study compared a group of 152 young offenders who served time in a detention centre with a similar group of 243 given non-custodial sentences. The report indicated that only 2 other Australian studies back in 1974 and in 1996 had tried to ascertain whether jail had a deterrent effect. At the time, both of those studies were flawed in their design by not comparing like groups of offenders. The latest longitudinal cohort study compared 2 groups with similar characteristics including those with similar prior criminal records. This study by Weatherburn, Vignaendra and McGrath found that juvenile offenders who were sent to jail were just as likely to re-offend as similar others who have received community orders, fines or other non-custodial sentences. Their study concluded that: "The finding that prison exerts no specific deterrent effect is consistent with overseas evidence on the specific deterrent effect of custodial penalties reviewed earlier in this article".[2] Further, their study referred to another 1999 research by Fagan and Freemen: "…for example, using data from a national panel study of 5,332 randomly selected youths, found that incarceration produced a significant negative

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[1] Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, *The specific deterrent effect of custodial penalties on juvenile reoffending*, Reports, AIC Technical and Background Paper 33, Australian Institute of Criminology, Australian Government, 2009

[2] Weatherburn, Vignaendra and McGrath, at p 10. See above.

effect on future employment prospects, even after adjusting for the simultaneous effects of race, human capital and intelligence”. [3]

24. The Committee notes another recent study released in September / November 2009 by the NSW Bureau of Crime Statistics and Research (BOCSAR), ‘The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment’.[4] According to that BOCSAR research: “Being sent to prison is no more effective in reducing the risk of future re-offending than being threatened with prison…In fact, if anything, being sent to prison actually increases the risk of further offending”.[5] Analyses were carried out for 1,611 matched pairs of offenders with a prior prison sentence and 2,650 matched pairs of offenders who had no prior prison sentence. In cases where the offender had no previous experience of imprisonment, BOCSAR found no significant difference in the likelihood of re-conviction between those who received a full time sentence of imprisonment and those who were given a suspended sentence of imprisonment. Where offenders had been previously sent to prison, it was found that the offenders sent to prison were significantly more likely to re-offend than matched offenders given a suspended sentence of imprisonment. The Director of BOCSAR, Don Weatherburn, stated that the findings were consistent with a growing body of evidence that the experience of imprisonment does not reduce the risk of further offending.[6]

25. The Committee also refers to statistics and research previously published by the NSW Bureau of Crime Statistics and Research (BOCSAR) with regard to figures on malicious damage to property offences in NSW and trends in recorded incidents of graffiti in NSW. It appears the most frequent place for graffiti incidents to take place in 2005 was residential premises (22%), followed by business or commercial premises (17%) and then outdoor or public place (12%).[7] Over two-thirds of the persons identified for graffiti offending were under the age of 18 years old and half of all identified persons were young males.[8] BOCSAR suggested that it is possible that a greater number of young people come into contact with NSW Police not because they offend more frequently but because they are more visible to police or are less experienced offenders.[9]

26. There was another BOCSAR publication which looked at malicious damage to property offences in NSW in 2005. It found that with regard to the use of graffiti, the damage was done to schools and commercial buildings.[10] Malicious damage was

[3] Weatherburn, Vignaendra and McGrath, at p 10. See above.
[4] Rohan Lulham, Don Weatherburn and Lorana Bartels, ‘The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment’, *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*, Number 136, September 2009, NSW Bureau of Crime Statistics and Research
[5] Don Weatherburn, The Director, NSW Bureau of Crime Statistics and Research, media statement, ‘The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment’, 11 November 2009.
[6] Don Weatherburn, The Director, NSW Bureau of Crime Statistics and Research, media statement, ‘The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment’, 11 November 2009.
[7] S. Williams and S. Poynton, Recent Trends in Recorded Incidents of Graffiti in New South Wales 1996 – 2005, *Crime and Justice Statistics Bureau Brief*, Issue paper no. 34, April 2006, NSW Bureau of Crime Statistics and Research, p. 2.
[8] Williams and Poynton, p. 3. See above.
[9] J. Fitzgerald, Graffiti in New South Wales, *Crime and Justice Statistics Bureau Brief*, March 2000, NSW Bureau of Crime Statistics and Research.
[10] M. Howard, Malicious Damage To Property Offences in New South Wales, *Crime and Justice Bulletin*, Number 10, September 2006, NSW Bureau of Crime Statistics and Research, p. 3.

also more prevalent in regional NSW than in Sydney.[11] However, only 13% of victims reported that the cost of the damage was $1,000 or more.[12] Malicious damage incidents were rarely witnessed. The majority of the ones identified by police involved males, with over one-third (35.3%) of the alleged offenders under the age of 18.[13]

27. The Committee notes the discussion or conclusion which the BOCSAR publication reached. It found that given the high prevalence of malicious damage incidents and their low probability of being detected: "it is unlikely that imposing more severe penalties would serve as a deterrent for many offenders. Instead, the literature suggests that malicious damage would be best addressed by improving prevention methods with the community. These measures could include structural designs that reduce opportunities to commit malicious damage, such as improved lighting and greater opportunities for natural surveillance…or physical barriers that prevent the defacing of walls and fences, such as protective coatings/material or vegetation".[14]

28. The Committee considers the reference made to the report done by the Department of Justice and Attorney General with interviewing 52 graffiti offenders along with the various recent research and statistical findings of the NSW Bureau of Crime Statistics and Research (BOCSAR) and the Australian Institute of Criminology (AIC), involving larger matched samples and longitudinal studies, as referred to above. The Committee, therefore, notes the conclusions of BOCSAR and the AIC that increasing the penalty to a longer term of imprisonment may not necessarily act as an effective deterrent.

29. However, the Committee also notes the seriousness of graffiti offences including the defacement, vandalism and deliberate damage of private and public property in proportionality to the deterrence effect and severity of the increased penalties.

30. The Committee weighs up the general community interests in addressing and deterring graffiti offenders from the defacement and vandalism to property, including the apparent public expectation for more serious penalties to reflect the nature and extent of damage caused by graffiti offences.

31. Therefore, the Committee refers to Parliament the questions of whether increasing the maximum penalty to a longer imprisonment term under section 4 (1) (from 6 months to 12 months) and under section 5 (1) (from 3 months to 6 months), by Schedule 1 [2] and [3], would be an appropriately effective deterrent in proportionality to the offences concerned and their likely impact on the victims, without being excessive and unduly trespassing on personal liberties.

32. The Committee also refers to Parliament the question of whether increasing the maximum penalty to a longer imprisonment term (under sections 4 (1) and 5 (1)), is a measure of last resort and for the shortest appropriate period of time in accordance with the rights of a child under Article 37 (b) of the *Convention on the Rights of the Child*.

[11] Howard, p. 3. See above.
[12] Howard, p. 5. See above.
[13] Howard, p. 5. See above.
[14] Howard, p. 10. See above.

33. The Committee observes that the current section 4 (1) of the *Graffiti Control Act 2008* indicates that the defendant carries the onus of proof. Section 4 (1) states that a person must not, without reasonable excuse (proof of which lies on the person), intentionally damage or deface any premises or other property by means of any graffiti implement.

34. This reverses the onus of proof that requires the prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence, a fundamental right established by Article 14 (2) of the *International Covenant on Civil and Political Rights*.

35. Therefore, the Committee refers to Parliament to consider whether the maximum penalty of imprisonment up to 12 months as proposed in Schedule 1 [2], in the context of the current reversal of onus of proof under section 4 (1), may unduly trespass on individual rights and liberties, especially that of young people, when balancing the interests of the general community in deterring graffiti offences.

Issue: Strict Liability – Amendment of *Graffiti Control Act 2008* - Schedule 1 [5] – insertion of proposed sections 8B (1) and (2) Possession of spray paint cans by persons under 18:

36. Schedule 1 [5] creates 2 new graffiti offences. The offences restrict the supply of spray paint cans to persons under the age of 18 years and the possession of spray paint cans by persons under the age of 18 years. It is already an offence under the principal Act to sell a spray paint can to a person under the age of 18 years.

37. Under proposed section 8B (1), a person under the age of 18 years who is in possession of a spray paint can in a public place is guilty of an offence with a maximum penalty of 10 penalty units or 6 months imprisonment.

38. Under proposed section 8B (2), it will be a defence (proof of which lies on the person in possession of the spray paint can) that the person had the spray paint can in his or her possession for a defined lawful purpose, being the lawful pursuit of an occupation, education or training. It will also be a defence if the person charged proves that the person had the spray paint can in his or her possession for another defined lawful purpose and was at or in the immediate vicinity of the place where the spray paint can was being used or intended to be used for that defined lawful purpose. A defined lawful purpose is:

(a) the lawful pursuit of an occupation, education or training, or
(b) any artistic activity that does not constitute an offence against the principal Act or any other law, or
(c) any construction, renovation, restoration or maintenance activity that does not constitute an offence against the principal Act or any other law, or
(d) any other purpose authorised by the regulations.

A *public place* means a place or part of premises that is open to the public or used by the public, but does not include the premises of a school or other educational establishment.

39. The Committee also notes that the offence under proposed section 8B (1) places the onus of proof on the defendant (under 18 years of age) under its proposed subsection (2) in relation to establishing that it was not unlawful for him or her to

possess the spray paint can. This is a key element of the offence of unlawful possession of spray paint can by persons under 18 years of age.

40. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence or that the person's possession of the spray paint was for an unlawful purpose. Presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.

41. However, the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.[15]

42. The Committee takes into consideration the adverse impact of graffiti offences on the general community. The Committee also notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, proposed section 8B (2) provides for the availability of defences but proof of which lies on the defendant under 18 years of age, to establish that it was not unlawful for him or her to possess the spray paint can.

43. The Committee, therefore, refers to Parliament to consider whether Schedule 1 [5] and its proposed sections 8B (1) and (2) may unduly trespass on the rights and liberties of young people who could be charged with the strict liability offence that attracts a possible maximum penalty of imprisonment for 6 months, when weighing up the adverse impact of such graffiti offences on the general community.

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

Issue: Excludes reviews – Amendment of *Graffiti Control Act 2008* – Schedule 1 [7] – proposed section 9N - No appeals against order; and proposed section 9P (2)(a) – application of *Children (Community Service Orders) Act 1987* to orders made in respect of child offenders:

44. Schedule 1 [7] inserts proposed Part 3A into the principal Act, which enables a court that imposes a fine on a person for a graffiti offence under the principal Act to make an order requiring the person to perform community clean up work in order to satisfy the amount of the fine. Community clean up work will be any community service work under (in the case of a child offender) the *Children (Community Service Orders) Act 1987* or (in the case of an adult offender) the *Crimes (Administration of Sentences) Act 1999* that is approved as community clean up work by the Minister administering the relevant Act. A court must not make a community clean up order unless satisfied that the offender is a suitable person for community clean up work and, if the offender is a child, is sufficiently mature to perform community clean up work, and that community clean up work is available in the area where the offender lives.

45. Proposed section 9N reads: An appeal does not lie in respect of the making of a community clean up order, a failure to make a community clean up order or the revocation or variation of a community clean up order.

[15] Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

46. Proposed section 9P (2)(a) refers to some provisions of the *Children (Community Service Orders) Act 1987* as not applying to a community clean up order, but of particular concern, Part 4 and section 28.

47. Part 4 of the *Children (Community Service Orders) Act 1987* deals with the extension and revocation of children's community service orders. In particular, under that Act, section 21A (3) on revocation of children's community service order reads: A person on whom a penalty is imposed as a consequence of the revocation of a children's community service order under this section has the same rights of appeals if the penalty had been imposed when the person was convicted of the offence to which the penalty relates.

48. Under section 28 (2) of the *Children (Community Service Orders) Act 1987*, if a person in respect of whom a children's community service order is made is subsequently dealt with by a court for the offence in respect of which the order was made, the person shall be deemed to have a right of appeal against the manner in which the person is dealt with under the relevant court proceedings.

49. The Committee notes that the proposed section 9P (2)(a) of this Bill will exclude those above provisions under the *Children (Community Service Orders) Act 1987* with respect to their corresponding rights of appeals. The Committee is also concerned that the proposed section 9N is very broad.

50. Accordingly, the Committee refers the proposed sections 9N and 9P (2)(a), to Parliament for consideration as to whether they may potentially subject individual rights of children and young people, to be unduly dependent on non-reviewable decisions.

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

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

51. The Committee notes that this proposed Act is to commence on the date of assent except as provided by subsection (2) where schedule 1 [7] and schedule 2.1 – 2.3, will commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence these provisions on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Attorney General's office that "commencement on proclamation is necessary to allow the administrative arrangements underpinning community cleanup orders to be put in place. The orders require new programmes to be put in place, as well as the development of information sharing arrangements between agencies, amongst other administrative changes".

52. The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

8. HISTORIC HOUSES AMENDMENT (THROSBY PARK HISTORIC SITE) BILL 2009

Date Introduced:	11 November 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Nathan Rees MP
Portfolio:	Arts

Purpose and Description

1. The Historic Houses Amendment (Throsby Park Historic Site) Bill 2009 (the Bill) transfers the Throsby Park Historic Site to the Historic Houses Trust (the Trust). The objects of this Bill are as follows:

   (a) to revoke the reservation of the Throsby Park Historic Site (the Site) under the *National Parks and Wildlife Act 1974* and to vest the Site (and all assets, rights and liabilities of the Crown relating to the Site) in the Historic Houses Trust of New South Wales (the Trust);
   (b) to ensure that the Trust cannot sell or exchange the whole or any part of the Site except as authorised by an Act of Parliament;
   (c) to provide that a lease or licence granted by the Trust must not have a term that exceeds 99 years (including any further term that may be granted under an option in respect of the lease or licence).

Background

2. Throsby Park is located on the outskirts of Moss Vale in the Southern Highlands, approximately 140 kilometres from Sydney. It was one of the first properties in the region, and opened up settlement of the Southern Highlands. The site contains a Georgian house built in the 1830s and a small cottage as well as a number of heritage items such as furniture, art, books, and photographs.

3. The Bill will revoke the site from reservation as a historic site under the *National Parks and Wildlife Act 1974* and will vest the land with the Trust. The Bill will amend the *Historic Houses Act 1980* to prevent the site from being sold without an Act of Parliament, ensuring that this significant heritage site will remain in public ownership in perpetuity.

4. The Trust is a statutory authority within the Department of Arts, Sport and Recreation, established in 1980 to manage, conserve and interpret historic buildings and places. It currently manages fourteen properties, including houses, public buildings, gardens, parklands and extensive heritage collections.

5. The Throsby Park Historic Site was initially reserved under the *National Parks and Wildlife Act in 1975*. The Throsby family originally donated the site to the Government so that its values could be protected. Since this time, the *Heritage Act 1977* has commenced and the Trust was established.

6. As stated in the Second Reading Speech, the Trust provides a more appropriate conservation framework for historic houses such as Throsby Park. Throsby Park is also listed on the New South Wales Heritage Register and is therefore protected under the terms of the *Heritage Act 1977*.

7. According to the Second Reading Speech, after thorough consideration of a range of possible management approaches, the Department of Environment, Climate Change and Water and the Trust have agreed that a long-term residential lease would provide the best and most cost-effective management option to conserve the site's State significant heritage values.

8. The Trust will manage the site under its Endangered Houses Fund. The Endangered Houses Fund is an initiative that is used to acquire historic buildings and then conserve and protect them before putting them on the market, either for sale or as long-term leases, which will be the case for Throsby Park.

9. According to the Second Reading Speech, to ensure that the public will continue to have the opportunity to appreciate the historic heritage values of the Throsby Park site, the Trust will put conditions in the lease to ensure that some form of regular public access is provided as part of any leasing arrangements as determined by the Trust.

The Bill

10. **Outline of provisions**

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

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

Schedule 1 Amendment of Historic Houses Act 1980 No 94

Schedule 1 [1] inserts proposed section 22 into the *Historic Houses Act 1980* (the principal Act) to revoke the reservation of the land comprising the Site and to vest that land in the Trust. The land is vested in the Trust freed and discharged from all estates, interests and encumbrances (other than certain interests under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*). On the vesting of the Site in the Trust, all assets, rights and liabilities of the Crown relating to the Site are transferred to the Trust. Proposed Schedule 1A applies to the transfer of those assets, rights and liabilities.

Schedule 1 [2] inserts proposed Schedule 1A into the principal Act which contains 6 clauses. Proposed clause 1 of Schedule 1A inserts a number of definitions used in that Schedule and proposed section 22. Proposed clause 2 of Schedule 1A makes savings and transitional arrangements consequent on the transfer of the Site to the Trust. Proposed clause 3 of Schedule 1A makes it clear that the operation of the Schedule (including the commencement of proposed section 22) is not to be regarded as a breach of contract, as giving rise to any remedy by a party to an instrument or as an event of default under any contract or other instrument.

Proposed clause 4 of Schedule 1A provides that the Trust has no power to sell or exchange the whole or any part of the Site except as authorised by an Act of Parliament, but may lease or otherwise dispose of an interest (other than the fee simple) in the Site. A lease or

licence granted by the Trust must not have a term that exceeds 99 years (including any further term that may be granted under an option in respect of the lease or licence).

Proposed clause 5 of Schedule 1A provides that duty under the *Duties Act 1997* is not chargeable in respect of the transfer of the Site to the Trust. Proposed clause 6 of Schedule 1A provides for compensation to be paid to a person (other than the State or an authority of the State) if the person is divested of an interest in the Site by operation of proposed section 22.

Schedule 1 [3] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

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

11. The Committee notes that under Clause 2, the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the following advice received from the Minister that "the Department of Environment, Climate Change and Water has advised that the Act would need to commence by proclamation, rather than on assent, to allow for it and the Historic Houses Trust to make transitional management arrangements" regarding heritage items on the site.

12. **The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

The Committee makes no further comment on this Bill.

9. INDEPENDENT COMMISSION AGAINST CORRUPTION AND OMBUDSMAN LEGISLATION AMENDMENT BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos
Portfolio:	Attorney General

Purpose and Description

1. The objects of this Bill are to amend the Independent Commission Against Corruption Act 1988 to provide that Part 2 of the *Surveillance Devices Act 2007* (which prohibits certain activities relating to surveillance devices and recordings) does not prevent the Independent Commission Against Corruption from using, until 31 December 2010, recordings of private conversations to which Mr Michael Loch McGurk was a party that were obtained in contravention of Part 2, and (ii) to make it clear that Part 2 does not prevent a person from providing, until 31 December 2010, any such recordings to the Commission if required to do so by the Commission.

2. The Bill also extends the duty of principal officers of public authorities to report alleged corrupt conduct to the Commission to the heads of separate offices within those public authorities.

3. The Community Services (Complaints, Reviews and Monitoring) Act *1993* is also amended to confer on the Ombudsman the function of auditing the implementation by public authorities of the *New South Wales Interagency Plan To Tackle Child Sexual Assault in Aboriginal Communities 2006–2011*.

Background

4. According to the Second Reading Speech the Commissioner for the ICAC asked the Government for amendments in the context of an investigation he is undertaking in relation to audio recordings involving the late Mr Michael McGurk. The Government agrees there is a strong public interest case in the ICAC not being unnecessarily restricted in the conduct of its investigations.

5. In order to provide some assurance to other jurisdictions with which New South Wales is developing cooperative relationships in regard to surveillance device legislation the additional powers given to the ICAC are limited through the inclusion of a sunset clause and by only allowing them to be used for recordings in relation to Mr McGurk.

6. The bill's application is expressly limited to recordings that appear to the ICAC to be a recording of a private conversation in which the late Mr Michael McGurk was a participant. Clearly, the amendments would not be needed if Mr McGurk could provide the ICAC with direct evidence about any alleged corrupt conduct of which he was aware.

7. There are also additional safeguards put in place by the amendments to protect individual privacy and the integrity of investigative processes. The provisions of the bill only apply where the ICAC has obtained the recordings through the use of its coercive powers during the course of a corruption investigation. It will not be possible for the ICAC to use recordings provided to it on an unsolicited basis or for any other non-investigative purposes, such as corruption education. As a further safeguard, the amendments will sunset on 31 December 2010.

8. The second reform in the bill is a new power for the Ombudsman to conduct an audit of the Government's implementation of the NSW Interagency Plan to Tackle Child Sexual Assault in Aboriginal Communities. The Ombudsman's new audit function arises out of the Government's response to the Wood Special Commission of Inquiry. In its response the Government announced that it would take steps to ensure the Ombudsman could review implementation of the Interagency Plan.

9. The third amendment to be made by the bill is to expand the category of senior public officials who are under an obligation to report corrupt conduct to the ICAC. This amendment has also been requested by the Commissioner of the ICAC. Section 11 of the ICAC Act provides that the principal officer of a public authority is under a duty to report to the Commission any matter that the person suspects, on reasonable grounds, concerns or may concern corrupt conduct. The wide-ranging reforms of the New South Wales public sector instituted by the Government this year mean that chief executive officers of the new amalgamated departments are under this obligation to report corruption to the ICAC.

The Bill

10. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Schedule 1 Amendment of Independent Commission Against Corruption Act 1988 No 35
Schedule 1 [3] inserts special provisions into Schedule 4 to the *Independent Commission Against Corruption Act 1988* (the principal Act) to enable the Commission to obtain, possess, publish or communicate, until 31 December 2010 in accordance with the principal Act, any recordings of private conversations to which Mr Michael Loch McGurk was (or apparently was) a party that have been obtained by the use of a surveillance device in contravention of Part 2 of the *Surveillance Devices Act 2007*. The provisions also make it clear that Part 2 does not prevent a person from providing any such recording to the Commission in accordance with a requirement made of the person under the principal Act. Anything done by the Commission or other persons before the commencement of the proposed Act is taken to have been validly done if authorised by the proposed special provisions. Section 11 of the principal Act imposes a duty to report corrupt conduct to the Independent Commission Against Corruption on certain persons, including the principal officer of a public authority. The regulations may prescribe the person who is the principal officer for the purposes of section 11.
Schedule 1 [1] ensures that the regulations may prescribe the principal officer of a separate office within a public authority as the principal officer of the public authority in relation to matters concerning the separate office. The amendment will enable the duty to report to be retained in relation to the former heads of government departments that have recently been amalgamated.

Schedule 1 [2] enables regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Community Services (Complaints, Reviews and Monitoring) Act 1993 No 2

Schedule 2 [1] inserts proposed Part 6A (proposed sections 43B–43E) into the *Community Services (Complaints, Reviews and Monitoring) Act 1993*.

Proposed section 43B defines ***the Interagency Plan*** as the *New South Wales Interagency Plan To Tackle Child Sexual Assault in Aboriginal Communities 2006–2011*.

Proposed section 43C provides that the Ombudsman's audit functions include a review of the implementation of the Interagency Plan by relevant State public authorities (including identifying further action required by the public authorities to implement the Interagency Plan and making recommendations for the more efficient and effective implementation of the Interagency Plan). Proposed section 43C also requires the Ombudsman to report to the Minister for Aboriginal Affairs on the audit by 31 December 2012 (the report is to be tabled in Parliament within 1 month after it is furnished to the Minister).

Proposed section 43D deals with the provision of information to the Ombudsman by the head of a relevant public authority to assist the Ombudsman in carrying out the audit.

Proposed section 43E applies relevant provisions of the *Ombudsman Act 1974* to functions exercised under proposed Part 6A.

Schedule 2 [2] enables regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Schedule 1 [3] – Obtaining, possessing, publishing, and communicating recordings of private conversations - Right to Privacy

11. Schedule 1 [3] inserts special provisions into Schedule 4 of the *Independent Commission Against Corruption Act 1998* to enable the Commission to obtain, possess, publish or communicate, until 31 December 2010, recordings of private conversations to which Mr Michael Loch McGurk was (or apparently was) a party that have been obtained by the use of a surveillance device in contravention of Part 2 of the *Surveillance Devices Act 2007.*

12. The Committee is always concerned regarding issues of individual privacy. While the High Court of Australia has [16]established that there was no general legal right to privacy, certain privacy interests do find protection within both the common law (eg the law of trespass) and in various Commonwealth and State statutes an example of which is the *Surveillance Devices Act 2007 (NSW).*

13. Australia is also a party to a number of international conventions that provide some protection for privacy. Perhaps the most significant of these is the International Covenant on Civil and Political Rights ("ICCPR"). Article 17 of the Convention provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."

14. Section 7 of the *Surveillance Devices Act 2007* sets out clear principles as to the use of listening devices and makes it clear that a warrant is required to install, use or

[16] *Victoria Park Racing and Recreation Grounds Company Ltd v Taylor* (1937) 58 CLR 479 at 496

cause to be used or maintain a listening device to overhear, record, monitor or listen to a private conversation to which a person is not a party, or to record a private conversation to which the person was a party.

15. There are a number of exceptions to this section such as where all parties to the conversation consent. However, the tapes of conversations pertaining to Mr Michael McGurk do not fall under any of these exceptions.

16. Section 138 of the *Evidence Act 1995 (NSW)* provides that evidence that was illegally or improperly obtained "is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained." This provision reflects the common law.

17. At common law in Australia, there is a discretion to exclude unlawfully or improperly obtained evidence. This is commonly referred to as the public policy discretion. The High Court has ruled that when unlawful means are employed to procure evidence, the judge has a discretion to reject it.[17]

18. Therefore, the competing requirements to protect the public interest and protection of the individual from unlawful and unfair treatment should be considered and weighed against each other.

19. The discretion to exclude evidence also hinges on the question as to whether the reception of the evidence would be unfair to an accused in the sense that its use would result in an unfair trial due to the unreliability of how the evidence was obtained.

20. The tapes related to Michael McGurk do not relate to a particular legally accused person. However, their contents may be prejudicial to any persons included on the tapes and potentially trigger an investigation against, unfairly incriminate, or attract adverse attention in relation to them. It is also noted that ICAC can obtain tapes that Michael McGurk "apparently was" a party too, further extending the Commission's ability to obtain illegally taped evidence.

21. The Committee acknowledges that, in relation to admitting or excluding illegally obtained evidence, courts have a discretion to consider and weigh the competing requirements to protect the public interest and protection of the individual from unlawful and unfair treatment. However, the Committee considers that Clause 1 [3] of the bill adversely effects the rights to privacy of all parties who may be included on the tapes associated with Michael McGurk and refers the matter to Parliament.

Issue: Clause 1 [3] – Retrospective Operation of Clause 1 [3]

22. The Bill provides that Clause 1 [3] extends to relevant recordings obtained by a person by the use of a surveillance device prior to the commencement of that part of the Bill.

[17] *R v Ireland* (1970) 126 CLR 321 at 335 (Barwick J); See also *Bunning v Cross* (1978) 141 CLR 54 at 72 (Stephen and Aickin JJ); *Cleland v The Queen* (1982) 151 CLR 1 at 19-20 (Deane J); *Ridgeway v The Queen* (1995) 184 CLR 19 at 30-36 (Mason, Deane and Dawson JJ).

23. The Committee is always concerned about issues of retrospectivity in legislation, particularly in cases such as this one, where there is the real potential to adversely impact upon individual privacy.

24. The Committee is concerned about the retrospective application of Clause 1 [3], particularly in cases such as this one, where there is the real potential to adversely impact upon individual privacy and refers the matter to Parliament.

The Committee makes no further comment on this Bill.

10. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (POLITICAL DONATIONS) BILL 2009

Date Introduced:	13 November 2009
House Introduced:	Legislative Assembly
Member Responsible:	Barry O'Farrell MP
Portfolio:	Non - government

Purpose and Description

1. The object of this Bill is to amend the Independent Commission Against Corruption Act 1988 to confer on the Commission the function of investigating and reporting on connections between political donations and decisions made by elected public officials (including decisions made by officials acting on behalf of elected public officials or in the course of their employment in agencies responsible to elected public officials).

Background

2. According to the Agreement in Principle speech, the bill seeks to address community concern about political donations being used to unduly influence decisions of government. It "seeks to confer on the Commission the function of investigating and reporting on connections between political donations and decisions made by elected officials, including officials acting on behalf of elected officials or in the course of their employment in agencies responsible to elected officials".

The Bill

3. Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Schedule 1 Amendment of Independent Commission Against Corruption Act 1988 No 35

Schedule 1 inserts section 13A into the *Independent Commission Against Corruption Act 1988*. The new section includes, as a function of the Commission, the function of conducting on-going investigations into (and reporting on) any connections between reportable political donations to elected public officials (or to the political parties to which they belong) and the decisions made by those officials.
The new section provides that there is such a connection if the official makes a decision that benefits the political donor and the decision is apparently made because of the donation (whether because it was a benefit to which the political donor was not reasonably entitled or for any other reason). The elected public officials to whom the new section applies are elected members of Parliament or of local councils and any candidates for election to Parliament or to a local council. For the purposes of the new section, decisions made by

officials acting on behalf of elected public officials, or in the course of their employment in agencies responsible to elected public officials, are to be regarded as the decisions of the elected public officials.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

11. PARLIAMENTARY ELECTORATES AND ELECTIONS AMENDMENT (AUTOMATIC ENROLMENT) BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon Nathan Rees MP
Portfolio:	Premier

Purpose and Description

1. The object of this Bill is to amend the *Parliamentary Electorates and Elections Act 1912* (the Act) so as:

   (a) to provide for a form of automatic enrolment of electors on the rolls for State parliamentary and local government elections;
   (b) to allow persons eligible to enrol in an electoral district (a district) to enrol and cast a provisional vote in an election for that district on polling day, provided the person can produce a driver licence or a New South Wales Photo Card issued by the Roads and Traffic Authority; and
   (c) to centralise the processing of postal vote applications and allow such applications to be made on-line; and
   (d) to provide that pre-poll voting places may be operated outside the State (for example, in interstate capital cities and overseas); and
   (e) to make miscellaneous amendments to improve the conduct of State parliamentary elections under the Act.

Background

2. Australia has a system of compulsory enrolment and voting. However, as stated in the Second Reading Speech, the number of people on the electoral roll is declining and nearly 10% of eligible voters are not enrolled.
   It has been suggested that a significant reason for a decline in enrolment is that procedures have not kept pace with technological developments.

3. Under a Joint Roll Arrangement, The Australian Electoral Commission (AEC) is currently responsible for maintaining electoral rolls for Commonwealth, State and Local Government elections. The AEC uses information from State agencies such as the Roads and Traffic Authority to check the accuracy of the rolls. Based on this information, the AEC can initiate a process to remove a person from the roll, for example, where they have changed their address and no longer entitled to be enrolled for a district.

4. However, the Australian Electoral Commission cannot enrol that person at their new address, even when it possesses information in relation to a person's change of details, unless the person physically fills out a paper form. According to the Second

Reading Speech, the Australian Electoral Commissioner has acknowledged that traditional strategies to encourage people to enrol or update their enrolment details are not working, and the high costs of initiatives such as mail-outs are unsustainable.

5. Consistent with the recommendations of the Joint Standing Committee on Electoral Matters in its review of the 2007 State election, the Bill will assign responsibility for the preparation of rolls for State and local Government elections to the New South Wales Electoral Commissioner. The Bill will allow the Electoral Commissioner to enrol eligible NSW voters and to update the details of voters who are already enrolled based on data held by other government agencies. As stated in the Second Reading Speech, the Government has consulted extensively with the New South Wales Electoral Commission in relation to the Bill.

6. Under the Bill, the New South Wales Electoral Commissioner will use enrolment data supplied by the Australian Electoral Commission and information obtained from State Government agencies to create a list of NSW electors from which electoral rolls will be generated for State and local government elections. Such information will be subject to enhanced privacy protections by creating a new offence for the misuse of personal information acquired under the Act, with a maximum penalty of 50 penalty units ($5,500).

7. As stated in the Second Reading Speech, the New South Wales Electoral Commissioner already has the power to collect and use personal information held by government agencies for enrolment purposes. This Bill simply enables the New South Wales Electoral Commission to use that information to directly update the roll.

8. Current electoral laws also prevent people from voting if they have not submitted an enrolment form before the close of the roll for an election, namely by 6.00 p.m. on the day the writs are issued. According to the Second Reading Speech, the Electoral Commissioner has advised that if automatic enrolment is implemented in New South Wales there is no practical reason why eligible electors cannot enrol or update their details after the writs are issued. Amendments to section 106 of the Act will enable a person to enrol and cast a vote for a district on an election day if they can produce a driver licence or NSW photo card.

9. The Bill also increases the maximum penalty payable under a penalty notice for failing to vote to 0.5 penalty units, or $55, and increases the maximum penalty payable on conviction in a court for failing to vote to one penalty unit, or $110. As stated in the Second Reading Speech, this will make NSW penalties for failing to vote comparable with other jurisdictions, including the Commonwealth and Victoria. The Bill also increases the maximum penalty for failure to enrol from 0.5 penalty units to one penalty unit.

10. Finally, as stated in the Second Reading Speech, the Bill also responds to concerns of the Commonwealth Joint Standing Committee on Electoral Matters regarding the display of electoral material on electronic billboards and digital road signs. The proposed amendment provides that it is an offence, with a maximum penalty of five penalty units ($550) or imprisonment for six months to display certain electoral advertisements on an electronic billboard, digital road sign or other similar device without the name and address of the person on whose instructions the matter was displayed.

11. Outline of provisions

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

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

Schedule 1 Amendment of Parliamentary Electorates and Elections Act 1912 No 41 relating to automatic enrolment

Schedule 1 makes amendments to various provisions of the Principal Act:

(a) to enable the Electoral Commissioner to undertake automatic enrolment of electors in certain circumstances, and
(b) to allow persons eligible to enrol in a district to enrol and cast a provisional vote in an election for that district on polling day, provided the person can produce a driver licence or a New South Wales Photo Card.

Specifically, **Schedule 1 [5] and [6]** omit Part 3 (Qualification of electors) from the Act and insert instead proposed Part 3B (Entitlement to enrol and vote) (containing proposed sections 22–25) into the Principal Act. The proposed new Part substantially re-enacts the provisions of the omitted Part.

Proposed section 22 makes it clear that, in general, a person is entitled to be enrolled for a district if:

> (a) the person:
> (i) has attained 18 years of age, and
> (ii) is an Australian citizen, and
> (b) the person lives at an address in that district and the person has lived at that address for at least one month before the enrolment.

The proposed section also provides that persons who are entitled to be enrolled on the Commonwealth roll (for example, Australians living outside Australia, itinerant electors, certain British subjects enrolled before 1984 etc) are also entitled to be enrolled for a district.

Proposed section 23 provides, subject to the other provisions of the Act that an elector who is enrolled for a district is entitled to vote at any election for the Legislative Assembly for the district. (Section 22 of the *Constitution Act 1902* provides that persons entitled to vote at a general election of Members of the Legislative Assembly, and only those persons, are entitled to vote at a periodic election for the Legislative Council.)

Proposed section 24 contains restrictions on entitlement to vote corresponding to the provisions of current section 20 (3)–(7) of the Principal Act.

Proposed section 25 is the transferred and renumbered section 21 of the Principal Act (Disqualifications from voting).

Schedule 1 [6] and [7] omit Part 3B (Arrangement with the Commonwealth as to rolls) and Part 4 (Officers and enrolment) from the Act and insert proposed Part 4 (Enrolment and rolls), containing proposed sections 26–52).

The new provisions make it clear that the Electoral Commissioner is to keep and maintain a roll for each district. The current practice of a joint Commonwealth-State roll for each joint subdivision being kept by subdivision registrars will no longer be continued.

Proposed Part 4 substantially re-enacts the provisions of current Part 4. The major change in the new Part are the provisions that allow the automatic enrolment of persons in certain circumstances (contained in proposed section 29).

Under the proposed section, if the Electoral Commissioner, at any time, believes that a person who is not enrolled is entitled to be enrolled for a district, the Electoral Commissioner may enrol the person. However, the Electoral Commissioner must not do so unless the person concerned is first contacted in writing (including by email, SMS text message or other electronic means) and given a period of time (being not less than 7 days) to contact the Electoral Commissioner and inform him or her that the belief is incorrect and the reasons why that is so. Similar provisions provide for the transfer of enrolment and removal from the roll.

The proposed section makes it clear that the Electoral Commissioner may form a belief by:

(a) consulting electoral enrolment details on any roll kept by the Australian Electoral Commission, and
(b) consulting and using information collected under proposed Division 6 of the Part (for example, by the Roads and Traffic Authority and the Registry of Births, Deaths & Marriages).

Proposed Divisions 1, 2, 3, 4 and 5 of the proposed Part in other respects substantially mirror current Divisions 3, 4, 5, 6 and 3A of Part 4 of the Act. However, proposed section 27 (that contains the compulsory obligation to enrol currently in section 34 of the Act) increases the maximum penalty for a failure to enroll from 0.5 penalty unit (currently $55) to 1 penalty unit (currently $110). (See below for the corresponding amendment of Schedule 19 to the Act.)

Proposed Division 6 of the Part (containing proposed sections 46–48) contains provisions to enable the Electoral Commissioner to collect information for the purposes of automatic enrolment (and generally for the preparation, maintenance and revision of rolls).

Proposed section 46 allows the collection of information. Proposed section 47 imposes an obligation on certain persons and bodies to provide information to the Electoral Commissioner on request. Proposed section 48 provides for the non-disclosure and privacy of such information kept by the Electoral Commissioner.

Proposed Division 7 of the Part substantially mirrors current Division 8 of Part 4 of the Principal Act and also a modified version of current section 21B (Arrangement with Commonwealth as to rolls) of the Act. The provision (proposed section 49) will enable continued co-operation between the NSW Electoral Commission and the Australian Electoral Commission by providing for State-Commonwealth arrangements for a joint enrolment process or for the exchange of information necessary for the preparation, maintenance and revision of rolls or for both.

Schedule 1 [14] makes a substantial amendment to current section 106 of the Act to enable persons eligible to enrol in a district to enrol and cast a provisional vote in an election for that district on election day, provided the person can produce a driver licence or a New South Wales Photo Card. Specifically, proposed section 106 (2A) provides that an unenrolled person who has never been enrolled and wishes to enrol, or whose name has been removed from the roll and wishes to re-enrol, is to be permitted to vote at a polling place at an election if:

> (a) the person completes a claim for enrolment form, produces a driver licence or a Photo Card issued by the Roads and Traffic Authority and makes a declaration in the form approved by the Electoral Commissioner, and
> (b) an election official is satisfied that the claim for enrolment form has been properly completed and the driver licence or Photo Card provided shows that the person's residence is the same as the place named in the claim for enrolment form as the person's residence.

If a person cannot produce a driver licence or a Photo Card the person will not be permitted to vote under this proposed subsection.

Proposed section 106 (2B) provides for a similar provisional voting process for transfer of enrolment.

Proposed section 106 (1) and (2) preserve the current right of persons who claim not to have voted where their names have been marked off the roll as having voted, and persons whose names have been omitted from the roll, to provisionally vote. Such persons will continue to be able to cast a provisional vote on making a declaration in the form approved by the Electoral Commissioner. Proposed section 106 (2) (a) will require a person voting under proposed section 106 (2) to complete a claim for enrolment form and produces a driver licence or a Photo Card if the person has one on them.

Proposed section 106 (2C) provides for a similar provisional voting process for a person who is enrolled for a district, but whose name does not appear on the authorised copy of the roll at the polling place concerned. A person could be enrolled, but not on the authorised copy of a roll at a polling place, if the person enrolled after the issue of the writ for the election.

Schedule 1 [18] and [19] provide for a similar form of provisional absent voting (see proposed sections 115A and 117A).

Schedule 1 [27] omits Schedule 19 (Procedure in relation to enforcement of provisions of section 34) to the Act and re-enacts it (as Schedule 19 (Enforcement of compulsory obligation to enrol)) to take account of the amendments referred to above and to update the language used in the Schedule. The proposed new Schedule increases the maximum penalty notice amount for a failure to enrol from 0.1 penalty unit (currently $11) to $55.

Schedule 1 [1]–[4], [8]–[13], [15]–[17] and [20]–[26] make other consequential amendments.

Schedule 2 Amendment of Parliamentary Electorates and Elections Act 1912 No 41 relating to postal voting

Schedule 2 makes amendments to the Act:

(a) to provide that postal vote applications are to be processed solely by the Electoral Commissioner (not by the district returning officers) (**Schedule 2 [4], [7], [16], [20] and [26]**), and
(b) to allow postal vote applications to be made on-line (including by removing the requirement that such applications must be signed and witnessed—it is noted that postal voting certificates are still required to be signed and witnessed) (**Schedule 2 [5], [8], [23] and [24]**), and
(c) to enable a person with a disability (within the meaning of the *Anti-Discrimination Act 1977*) to apply for a postal vote (**Schedule 2 [3]**), and
(d) to enable a person who believes that attending a polling place on polling day will place the personal safety of the person or of members of the person's family at risk to apply for a postal vote (**Schedule 2 [3]**), and
(e) to allow persons in declared institutions to apply for postal votes (or to be general postal voters) if otherwise qualified (**Schedule 2 [6] and [9]**), and
(f) to replace the concept of a Register of General Postal Voters with the concept of persons who are general postal voters for the purpose of the Act (that is to remove the requirement that the Electoral Commissioner keep a "register") (**Schedule 2 [1], [13]–[15] and [22]**), and
(g) to enable a person to apply to be a general postal voter if the person is a person with a disability (within the meaning of the *Anti-Discrimination Act 1977*) (**Schedule 2 [12]**), and
(h) to replace the requirement that returning officers must make all postal vote applications available for public inspection with a requirement that the Electoral Commissioner keep secure all postal vote applications for a specified period (see also proposed section 138 regarding access to electoral information) (**Schedule 2 [18]**), and
(i) to enable ballot papers sent to postal voters to be initialled by hand or by electronic or mechanical means (**Schedule 2 [19]**), and
(j) to remove certain obsolete or redundant provisions (**Schedule 2 [21]**), and
(k) to make consequential amendments (**Schedule 2 [2], [10], [11], [17] and [25]**).

Schedule 3 Amendment of Parliamentary Electorates and Elections Act 1912 No 41 relating to pre-poll voting at electoral offices and other appointed places

Schedule 3 makes amendments to the Act:

(a) to enable interstate and overseas places to be appointed as pre-poll voting places (**Schedule 3 [4] and [11]**), and
(b) to enable a person with a disability (within the meaning of the *Anti-Discrimination Act 1977*) to make a pre-poll vote (**Schedule 3 [10]**), and
(c) to enable a person who believes that attending a polling place on polling day will place the personal safety of the person or of members of the person's family at risk to make a pre-poll vote (**Schedule 3 [10]**), and
(d) to enable an elector voting at a pre-poll voting place (such as an electoral office and other appointed place) within the State that is within the elector's district to cast an ordinary vote into a ballot box rather than make a declaration style vote and place it in an envelope (**Schedule 3 [12]**), and

(e) to enable provisional voting (similar to provisional voting under proposed sections 106 and 115A—see Schedule 1 [14] and [18]) to occur at pre-poll voting places (**Schedule 3 [15]**), and
(f) to remove an obsolete provision (**Schedule 3 [16]**), and
(g) to enable the periodic Council ballot paper of a person who voted in the incorrect district to be counted in certain circumstances (**Schedule 3 [19]**), and
(h) to omit the now redundant Division 11 (Voting by post (interstate and overseas)) of Part 5 of the Act (being the Division that enabled persons to apply in person for postal votes at certain appointed interstate and overseas places, eg certain Australian embassies and high commissions overseas) (**Schedule 3 [20]**), and
(i) to make consequential amendments (**Schedule 3 [1]–[3], [5]–[9], [13], [14], [17], [18] and [21]–[25]**).

Persons outside the State will still be able to apply for postal votes in the ordinary way.

Schedule 4 Amendment of Parliamentary Electorates and Elections Act 1912 No 41 relating to pre-poll voting at declared institutions

Schedule 4 makes amendments to the Act:

(a) to enable voting at declared institutions to be undertaken on any day during the 7 days preceding polling day, rather than only on the fifth, fourth and third days preceding polling day (**Schedule 4 [1]**), and
(b) to update the language referring to persons who are in declared institutions (**Schedule 4 [2]**), and
(c) to enable an elector voting at a declared institution that is within the elector's district to cast an ordinary vote into a ballot box rather than make a declaration style vote and place it in an envelope (**Schedule 4 [3]**), and
(d) to remove certain obsolete or redundant provisions (**Schedule 4 [6]**), and
(e) to enable the periodic Council ballot paper of a person who voted at a declared institution for the incorrect district to be counted in certain circumstances (**Schedule 4 [10]**), and
(f) to make consequential amendments (**Schedule 4 [4], [5] and [7]–[9]**).

Schedule 5 Miscellaneous amendments to Parliamentary Electorates and Elections Act 1912 No 41

Schedule 5 makes miscellaneous amendments to the Act as follows:

(a) to provide for a simplified procedure for voting for electors who are in the Australian Antarctic Territory or on ships to or from that Territory during an election (**Schedule 5 [1], [71] and [72]**),
(b) to make law revision amendments following on from the abolition of group voting tickets (**Schedule 5 [2], [68] and [69]**),
(c) to provide that residents of other States and Territories may be appointed as election officials but only if they are enrolled in another State or Territory as an elector for the House of Representatives (**Schedule 5 [3]**),
(d) to provide that the Electoral Commission and the Electoral Commissioner may delegate functions to officers or members of staff of electoral commissions or electoral offices of the Commonwealth or of a State or Territory (**Schedule 5 [4] and [5]**),

(e) to provide that the Electoral Commissioner is not required to make registered party information sheets available in public libraries or other places determined by the Electoral Commissioner (it is noted that such sheets are now published on the Internet) (**Schedule 5 [6]**),

(f) to provide in numerous provisions that the Electoral Commissioner may publicly advertise notices and information in a manner chosen by the Electoral Commissioner and remove (in most places) the current requirement that notice must always be in a newspaper (**Schedule 5 [7], [10], [11], [13], [21], [22], [28], [31], [32], [53] and [60]**),

(g) to provide that the place that nomination papers for the Legislative Assembly may be received for an election need not be in the district concerned (**Schedule 5 [8]**),

(h) to provide that nomination papers for Legislative Assembly and Legislative Council elections may be received, and nominations may be withdrawn, by facsimile and email (**Schedule 5 [9], [12], [16], [20], [25] and [30]**),

(i) to make it clear that candidates, and their nominators, for Legislative Assembly and Legislative Council elections must be enrolled as at 6 pm on the date of issue of the writ for the election concerned (**Schedule 5 [14], [15], [23] and [24]**),

(j) to provide that a candidate, in his or her nomination papers, may specify a short or alternative form of his or her given name that can be printed on the ballot papers for the election (**Schedule 5 [17], [18], [26], [27], [34] and [35]**),

(k) to provide that candidates' deposit must be lodged by 12 noon on the day of nomination (rather than at the time nomination papers are lodged) (**Schedule 5 [19] and [29]**),

(l) to provide that the returning officer is to determine the order in which the candidates' names appear on the ballot papers by randomly selecting the names of candidates in a manner specified by the Electoral Commissioner (including by electronic means), rather than the regulations prescribing a form of ballot (**Schedule 5 [33]**),

(m) to provide that the Electoral Commissioner may arrange for mobile polling booths to visit remote districts for pre-poll voting (**Schedule 5 [36]**),

(n) to provide that the authorised copies of the roll used in elections may be in printed or electronic form and are to be prepared to contain the names of electors as at the date of the issue of the writ for the election (**Schedule 5 [2], [37], [38], [40], [48], [50], [52], [57] and [58]**),

(o) to provide that if a polling place does not have or runs out of ballot papers, the returning officer, polling place manager or other election official in charge at the time may have the ballot paper reproduced (including by photocopying or by copies being obtained by use of facsimile or email) (**Schedule 5 [39] and [42]**),

(p) to provide in the Act, rather than in the regulations, that immediately on delivering a ballot paper to a voter, an election official must, in a manner specified by the Electoral Commissioner, record that delivery on the printed or electronic authorised copy of the roll (**Schedule 5 [41]**),

(q) to make it clear that the offence under section 112 of the Principal Act relates to multiple voting and not only to double voting (**Schedule 5 [43]**),

(r) to provide that the penalty notices for failing to vote need not be sent to the elector's enrolled address, but must be served personally or by post (**Schedule 5 [44] and [45]**),

(s) to increase the penalty payable under a penalty notice for failing to vote from $25 to $55, (**Schedule 5 [46]**),

(t) to increase the maximum penalty payable on conviction in a court for failing to vote from 0.5 penalty unit, currently $55, to 1 penalty unit, currently $110, (**Schedule 5 [47]**),
(u) to simplify and clarify certain provisions relating to the security of election materials after the declaration of elected candidates (**Schedule 5 [49]–[51], [56], [59] and [61]**),
(v) to provide that, after an election, certain electoral information about the distribution of first preference votes is to be available to the public and certain other information is to be available to each registered political party that so requests and each member of Parliament who is not a member of a registered political party and who makes a request in respect of the member's district (**Schedule 5 [62]**),
(w) to clarify certain overlapping offence provisions that regulate the display of posters at or near polling places—the revised provisions will provide that posters must not be posted in, on the exterior of or within 6 metres (rather than 5 metres) of polling places and also posters larger than 8,000 square centimetres must not be posted within the grounds of, or on the outer wall, fence or boundary of an enclosure in which a building used as a polling place is situated (**Schedule 5 [63]–[66] and [70]**),
(x) to provide that it is an offence (carrying a maximum penalty of 5 penalty units (currently $550) or imprisonment for six months) to display certain electoral advertisements and notices on an electronic billboard, digital road sign or other similar device, unless the matter contains, in visible, legible characters, the name and address of the person on whose instructions the matter was displayed (**Schedule 5 [67]**),
(y) to omit an archaic provision that enabled the Electoral Commissioner to recommend that where a registrar, or deputy registrar, or other officer, had been guilty of any negligent act of commission or omission, contrary to the provisions of the Act, the Electoral Commissioner could recommend that the person forfeit the whole or any portion of the officer's remuneration for the year (**Schedule 5 [73]**), (z) to insert provisions of a savings and transitional nature (**Schedule 5 [74] and [75]**).

Schedule 6 Amendment of other legislation

Schedule 6 makes consequential amendments to the following Acts and regulation:

(a) the *Geographical Names Act 1966*,
(b) the *Government Information (Public Access) Act 2009* which has not yet commenced (a consequential amendment to the Act is also included which is to commence when the amendment to the *Government Information (Public Access) Act 2009* commences),
(c) the *Local Government Act 1993*,
(d) the *Local Government (General) Regulation 2005*,
(e) the Parliamentary Electorates and Elections Amendment Act 2006.

Issues Considered by the Committee

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

Issue: Proposed Part 4, Division 6 – Collection of electoral information – Privacy

12. Proposed Part 4, Division 6 (proposed sections 46-48) enable the Electoral Commissioner to collect information for the purposes of automatic enrolment and the preparation, maintenance and revision of rolls. Proposed section 46 allows for the collection of this information and proposed section 47 imposes an obligation on certain persons and bodies to provide information to the Electoral Commissioner on request.

13. Proposed section 46(3) and 47(6) provides that the Electoral Commissioner and officers acting under the direction of the Electoral Commissioner are exempt from any requirements of the *Privacy and Personal Information Protection Act 1998* relating to the collection, use or disclosure of personal information to the extent that personal information is collected, used or disclosed for the purposes of or in connection with this section.

14. Further, proposed section 47(5) provides that the *Privacy and Personal Information Protection Act 1998* does not apply in relation to the disclosure of personal information under section 47. However, despite these proposed sections, which may be considered to impact detrimentally on personal rights to privacy, proposed section 48 specifically provides for the non-disclosure and privacy of information by the Electoral Commission through the creation of an offence with a maximum penalty of 50 penalty units.

15. Certain provisions exempt the Electoral Commissioner and officers acting under the direction of the Electoral Commissioner from the requirements under the *Privacy and Personal Information Protection Act 1998*. However, proposed section 48(1) of the Bill specifically provides that it is an offence, with a maximum penalty of 50 penalty units for a person who acquires information in the exercise of functions under Part 4, Division 6 to make a record of the information or divulge the information to another person. Accordingly, the Committee considers that in the circumstances there is no undue trespass on personal rights, in particular rights to privacy.

Issue: Proposed s 151EA *Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009* - Strict Liability

16. The Committee notes that there are a number of proposed provisions in the Bill, which provide for strict liability offences, for example proposed section 48(1) and clause 393 *Local Government (General) Regulation 2005*, which relates to the use of electoral information. However, the Committee has particular concerns regarding proposed section 114AA(8), which provides that a person must not make and must not induce another person to make any false statement in, or in connection with, an application (to be a postal voter) under proposed section 114AA(2) or in any declaration contained in or made in connection with the application. The maximum penalty is 10 penalty units or imprisonment for 6 months or both.

17. The Committee also has concerns regarding proposed section 151EA, which reads that a person must not display any matter, being an advertisement or notice, containing any electoral matter (within the meaning of section 151B), on an electronic billboard, digital road sign or other similar device, unless the matter contains, in visible, legible characters, the name and address of the person on whose instructions this matter was displayed. Proposed section 151EA provides for a maximum penalty of 5 penalty units or imprisonment for 6 months.

18. The Committee has always been concerned to identify strict liability offence, particularly those offences with maximum penalty that includes a term of imprisonment. Strict liability offences are offences that do not require a prosecutor to provide that a person intended to commit the offence. A strict liability offence provides that it is sufficient for the prosecutor to prove that the person did the act that constituted the offence, regardless of their intention.

19. Strict liability offences displace the common law requirement that the prosecutor must prove mens rea or guilty mind and may trespass on the fundamental rights of the accused, for example the fundamental right to presumption of innocence (Article 14(2) *International Covenant on Civil and Political Rights*).

20. There are circumstances where it may be appropriate to impose strict liability, particularly in areas of public safety or to ensure the integrity of the regulatory scheme. Accordingly the imposition of strict liability will not always unduly trespass on personal rights and liberties. When considering whether a strict liability offence unduly trespasses on personal rights and liberties, it may be relevant to consider the impact of the offence on the community, the penalty that may be imposed and the availability of any defences or safeguards.[18]

21. The Committee understands that it may be in the public interest to impose strict liability offences in certain circumstances, for example to act as a deterrent. However, the Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. Accordingly, the Committee refers to Parliament to consider whether the proposed sections 114AA and 151EA, which provide a possible maximum penalty of imprisonment of 6 months, may unduly trespass on the personal rights and liberties.

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

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

22. The Committee notes that under Clause 2, the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Premier that the Bill is proposed to commence on proclamation rather than assent because ”a new joint roll arrangement has been negotiated by the NSW Electoral Commission and the Australian Electoral Commission, and a new agreement entered into by the Governor and the Governor-General to implement this new arrangement”. According to the Premier, the Bill is proposed to commence on proclamation to allow so that these arrangements between the NSW Electoral Commission and Australian Electoral Commission can be finalised.

23. The Committee notes the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

[18] Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006

12. PERSONAL PROPERTY SECURITIES (COMMONWEALTH POWERS) AMENDMENT BILL 2009

Date Introduced: 12 November 2009
House Introduced: Legislative Council
Minister Responsible: Hon John Hatzistergos MLC
Portfolio: Attorney General

Purpose and Description

1. The *Personal Property Securities (Commonwealth Powers) Act 2009*, which was passed through NSW Parliament in June this year referred certain matters relating to personal property securities (PPS) to the Commonwealth Parliament to enable it to make laws about these matters.

2. The proposed *Personal Property Securities Act 2009* of the Commonwealth (the proposed PPS Act), currently before the Commonwealth Parliament will enact provisions based on the referral of matters made by the Parliament of NSW and other State Parliaments.

3. Accordingly, the *Personal Property Securities (Commonwealth Powers) Amendment Bill 2009* (the Bill) amends the *Personal Property Securities (Commonwealth Powers) Act 2009* to enact savings and transitional provisions that are consequent on the enactment of the proposed PPS Act.

4. The Bill also provides for the repeal of the *Registration of Interests in Goods Act 1986*, which established the Register of Encumbered Vehicles (REV) administered by the Department of Services, Technology and Administration. The Bill also repeals the *Security Interests in Goods Act 2005*, which established the Security Interest in Goods Register administered by the Land and Property Management Authority.

Background

5. The Bill is part of a range of reforms to improve the law of personal property securities through the establishment of a single, national legislative scheme for the regulation and registration of security interests in personal property. A personal property security is created when a financier takes an interest in personal property as security for a loan or other obligation, or enters into a transaction that involves the provision of secured finance. Personal property includes all forms of property other than real property. It includes tangible property, such as motor vehicles, machinery, office furniture, and intangible property, such as contractual rights, trademarks and patents.

6. Central to the reforms will be a clear set of rules relating to security interests in personal property ordering priorities between competing secured interests in

personal property. The reforms will also create a single national personal property securities register. As stated in the Second Reading Speech:

> The reforms will create a national PPS regime that will benefit individuals, consumers and businesses by delivering more certain, consistent, less complex, and cheaper arrangements for securing loans with personal property. The national PPS register will replace numerous registers currently operated by the Commonwealth, States and Territories.

7. According to the Second Reading Speech, this Bill has been introduced to comply with the Council of Australian Government's agreement for legislation to be passed during 2009. It is also intended to provide early certainty to business that the necessary arrangements have been made for a smooth transition from the main NSW registers to the national register.

8. After the PPS scheme commences, security interests that could have previously been registered on the REV or on the Security Interest in Goods Register will be able to be registered on the national PPS register. Further, existing security interests on the NSW registers will be migrated to the PPS register.

9. As stated in the Second Reading Speech, NSW will be one of the first jurisdictions to introduce legislation making the necessary consequential and transitional amendments to ensure a smooth transition to the new national scheme. The two relevant NSW Acts will continue until the national PPS scheme commences in 2011 and will then be repealed.

The Bill

10. **Outline of provisions**

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act, except for proposed sections 3 and 4 and Schedule 2.1–2.3 and 2.5. Proposed sections 3 and 4 and Schedule 2.1–2.3 and 2.5 will commence on a day or days to be appointed by proclamation.

Clause 3 repeals the *Registration of Interests in Goods Act 1986* and any regulation made under that Act.

Clause 4 repeals the *Security Interests in Goods Act 2005*.

Schedule 1 Amendment of Personal Property Securities (Commonwealth Powers) Act 2009 No 35

Schedule 1 inserts a Schedule in the *Personal Property Securities (Commonwealth Powers) Act 2009* that contains savings and transitional provisions consequent on the enactment of the proposed PPS Act.

In particular, the proposed Schedule includes provisions that deal with the following matters:

(a) the provision of data and other information held for the purposes of the *Registration of Interests in Goods Act 1986* and the *Security Interests in Goods*

Act 2005 to the Commonwealth and its officers for use in establishing the Personal Property Securities Register under the proposed PPS Act,
(b) savings and transitional arrangements in connection with the transfer of registration functions to the Commonwealth concerning security interests in personal property to which the *Registration of Interests in Goods Act 1986* and the *Security Interests in Goods Act 2005* currently apply,
(c) the conferral of regulation-making powers on the Governor to make regulations consequent on the enactment of the proposed PPS Act and the transfer of registration functions to the Commonwealth,
(d) the protection of the State, State officers and State agencies from compensation claims in connection with the transfer of registration functions to the Commonwealth.

Schedule 2 Amendment of other Acts

Prohibition on transfers of certain licences and certificates

A right, entitlement or authority that is granted by or under a law of the State (such as a licence or certificate) can in some circumstances be personal property for the purposes of the proposed PPS Act, but only if it is transferable under the law of the State.

Schedule 2.1 amends the *Conveyancers Licensing Act 2003* to confirm that a licence granted under that Act is not transferable.

Schedule 2.2 inserts proposed section 27A in the *Motor Vehicle Repairs Act 1980* to make it an offence for the holder of a tradesperson’s certificate under that Act to transfer, attempt to transfer, lend or allow another person to use his or her certificate. The proposed section also makes it an offence for a person to attempt to obtain such a transfer or to attempt to borrow, or borrow or use, such a certificate. The maximum penalty for any such offence will be 20 penalty units (currently, $2,200).

Schedule 2.3 amends the *Property, Stock and Business Agents Act 2002* to make it an offence for a person to transfer a licence or certificate of registration granted under that Act. The maximum penalty for any such offence will be 100 penalty units (currently, $11,000).

Schedule 2.5 amends the *Valuers Act 2003* to confirm that registration under that Act is not transferable.

Account customers under Registration of Interests in Goods Act 1986

Schedule 2.4 amends section 16A of the *Registration of Interests in Goods Act 1986* to enable the Director-General (within the meaning of that Act) to withdraw the approval of a person as an account customer if the person has not paid an amount owing under arrangements made under that section within the period of 60 days after it was required to be paid or such other period as may be prescribed by the regulations under that Act. Currently, the Act provides for a fixed period of 60 days.

Issues Considered by the Committee

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

Issue: Proposed Clause 22 – Denial of Compensation

11. Proposed Clause 22 of the Bill provides for the protection of the State, State officers and State agencies from compensation claims in connection with the transfer of registration functions to the Commonwealth. Proposed Clause 22(1) reads that compensation is not payable by or on behalf of the State (or an authority of the State); or an officer, employee or agent of the State for an act or omission that is a PPS transitional matter or that arises (directly or indirectly) from a PPS transitional matter as defined in Clause 22(3).

12. However the Committee notes that proposed Clause 22(2) provides that proposed Clause 22(1) only applies with respect to acts done or omitted to be done in good faith and does not apply to acts or omissions that cause personal injury or death. Clause 22(1) also does not limit the operation of Clause 9, which relates to compensation provisions under the *Registration of Interests in Goods Act 1986*.

13. The Committee notes that proposed Clause 22(1) of the Bill, which provides that compensation is not payable by the State, State officers and agencies with respect to PSS transitional matters is limited by the application of Clause 22(2). However, the Committee refers to Parliament for its consideration whether proposed Clause 22(1) unduly trespasses on personal rights and liberties.

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

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

14. The Committee notes that under Clause 2, proposed sections 3 and 4 and Schedule 2.1–2.3 and 2.5 of the Bill will commence on a day or days to be appointed by proclamation. The Committee also notes that proposed Clause 2(3) of the Bill provides that a day may not be appointed under proposed Clause 2(2) for the commencement of sections 3 or 4 that is earlier than the day on which the registration commencement time (within the meaning of the *Personal Property Securities Act 2009* of the Commonwealth) occurs.

15. The Committee notes that Commencement by Proclamation may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee also notes the comments in the Second Reading Speech that the:

> …national PPS scheme was due to commence in May 2010, but following submissions from business and recommendations from the Senate Legal and Constitutional Affairs Legislation Committee, the Council of Australian Governments agreed that the PPS scheme would commence in May 2011. The provisions of the New South Wales bill repealing the Registration of Interests in Goods Act 1986 and the Security Interests in Goods Act 2005 will be proclaimed to commence when the national PPS scheme commences.

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

The Committee makes no further comment on this Bill.

13. PUBLIC SECTOR RESTRUCTURE (MISCELLANEOUS ACTS AMENDMENTS) BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Robertson MLC
Portfolio:	Public Sector Reform

Purpose and Description

1. This Bill amends certain legislation as a consequence of recent administrative changes involving departmental amalgamations and to implement further reforms in relation to the public sector.

2. It makes consequential amendments to legislation following the public sector restructure. For example, under the Administrative Changes Order, the position of the Director General of the New South Wales Food Authority was abolished. This Bill amends the *Food Act* to replace references to the "director general" with references to the "chief executive officer" of the authority, which is a public service position within the new Department of Industry and Investment. Another example of the consequential amendments is the amendment to the *Crimes (Administration of Sentences) Act*. Under the Administrative Changes Order, the former Department of Corrective Services has been incorporated into the new Department of Justice and Attorney General.

3. This Bill makes a minor amendment to the definition of the Commissioner of Corrective Services to make it clear that the position of commissioner is a position within the Department of Justice and Attorney General. The amendment does not affect the functions of the Commissioner of Corrective Services.

4. The Bill rationalises responsibility for the exercise of functions under various Acts within the new department structures. For example, the statutory functions of the Aboriginal Housing Office are currently exercisable by the chief executive officer of the office. Under the Administrative Changes Order, the staff of the Aboriginal Housing Office have been transferred to the new Department of Human Services. The Bill amends the *Aboriginal Housing Act* so that the functions of the Aboriginal Housing Office will be exercisable by the Director General of the Department of Human Services, with the director general having the power to delegate those functions to appropriate members of staff.

5. The Bill dissolves the Wollongong Sportsground Trust and transfer its assets to the newly formed Illawarra Region Sporting Venues Authority. The new authority will be constituted under the *Sporting Venues Authorities Act*. The Bill also dissolves the State Sports Centre Trust and transfers its assets to the Sydney Olympic Park Authority. It amends the authority's functions to make it clear that its functions relate to the Sydney Olympic Park Sports Centre.

6. The Bill makes amendments to various Acts to appoint relevant directors general as members of boards of statutory bodies where staff of the director general's department are employed to assist the body to exercise its statutory functions. For example, it will appoint the Director General of the Department of Services, Technology and Administration to the Board of Management of the Internal Audit Bureau.

7. It also amends the *Police Act*, the *Fire Brigades Act* and the *State Emergency Service Act* to allow members of the New South Wales Police Force, New South Wales Fire Brigades and the State Emergency Service to be temporarily assigned to the new Department of Police and Emergency Services New South Wales.

Background

8. In July 2009, the Government made major structural reforms to the New South Wales public sector, including the creation of 13 super departments. The changes were done by an Administrative Changes Order under the *Public Sector Employment and Management Act*.

9. This Bill implements parts of the public sector restructure that were not addressed by the Administrative Changes Order.

10. The employment as a member of the New South Wales Police Force, New South Wales Fire Brigades or the State Emergency Service will not be affected by the temporary assignment to the department under this Bill. The officers may continue to exercise their functions as members of the New South Wales Police Force, New South Wales Fire Brigades or the State Emergency Service during the period of assignment. For example, police officers may continue to act as police officers and retain their powers during the temporary assignment to the department. This also means that if an emergency requires the resources of the Fire Brigades, these members of the Fire Brigades can be dispatched without delay.

The Bill

11. The object of this Bill is to amend various Acts as a consequence of the *Public Sector Employment and Management (Departmental Amalgamations) Order 2009* (which commenced on 1 July 2009) and to implement further administrative reforms in relation to the public sector. Most of the amendments made by this Act either update references to various Divisions of the Government Service (or to positions in the Government Service) as a consequence of the amalgamations effected by that Order (***the departmental amalgamations order***) or rationalise the way in which certain Acts are administered as a result of those amalgamations.

12. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act.
Clause 3 makes it clear the explanatory notes contained in the Schedules to the proposed Act do not form part of the Act.

Schedules 1–40 make amendments to the following Acts and instrument:

Aboriginal Housing Act 1998 No 47

Children and Young Persons (Care and Protection) Act 1998 No 157
Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13
Community Relations Commission and Principles of Multiculturalism Act 2000 No 77
Crimes (Administration of Sentences) Act 1999 No 93
Dairy Industry Act 2000 No 54
Fire Brigades Act 1989 No 192
Food Act 2003 No 43
Housing Act 2001 No 52
Institute of Sport Act 1995 No 52
Internal Audit Bureau Act 1992 No 20
Mental Health (Forensic Provisions) Act 1990 No 10
Motor Accidents Compensation Act 1999 No 41
Motor Accidents (Lifetime Care and Support) Act 2006 No 16
Ombudsman Act 1974 No 68
Parliamentary Precincts Act 1997 No 66
Police Act 1990 No 47
Public Finance and Audit Act 1983 No 152
Public Sector Employment and Management Act 2002 No 43
Public Sector Employment and Management (Departmental Amalgamations) Order 2009
Rural Fires Act 1997 No 65
Rural Fires Amendment Act 2009 No 74
Sporting Venues Authorities Act 2008 No 65
State Emergency Service Act 1989 No 164
State Property Authority Act 2006 No 40
Sydney Olympic Park Authority Act 2001 No 57
Teacher Housing Authority Act 1975 No 27
Western Sydney Parklands Act 2006 No 92
Workers Compensation Act 1987 No 70
Workplace Injury Management and Workers Compensation Act 1998 No 86
Young Offenders Act 1997 No 54
Youth Advisory Council Act 1989 No 39

The amendments are explained in the explanatory note appearing at the end of the relevant Schedule relating to the Act or instrument concerned.

Issues Considered by the Committee

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

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

13. The Committee notes that the proposed Act is to commence on the date of assent except as provided by subsection (2) where schedule 15 (amendment of *Ombudsman Act 1974*) will commence on a day to be appointed by proclamation. This may delegate to the government the power to commence schedule 15 on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee asks Parliament to consider whether schedule 15 to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

14. ROAD TRANSPORT LEGISLATION AMENDMENT (MISCELLANEOUS PROVISIONS) BILL 2009

Date Introduced: 12 November 2009
House Introduced: Legislative Council
Minister Responsible: Hon David Campbell MP
Portfolio: Transport

Purpose and Description

1. The Bill amends the *Road Transport (Driver Licensing) Act 1998*:
    - to clarify who is an unlicensed driver for the purposes of section 25 of that Act; and
    - to confirm the disqualification period applicable to drivers convicted of an offence of driving while disqualified or when the driver's licence is suspended or cancelled if the offence is a second or subsequent offence.
2. The Bill amends the *Road Transport (General) Act 2005*:
    - to provide for a simplified process for a corporation served with a penalty notice for a camera recorded traffic offence or parking offence (a designated offence) to nominate the person in charge of the vehicle at the time of the offence;
    - to increase the penalties for making a false nomination of a person for a designated offence or failing to make such a nomination; and
    - to increase the period within which a person may be prosecuted for making a false nomination from 6 months to 12 months after the offence; and
    - to confirm that the quashing of a declaration that a person is a habitual traffic offender only operates prospectively; and
    - to confirm that the expression registered operator of a vehicle includes a person who is recorded in an Australian registrable vehicles register as the registered operator of the vehicle and that the expression registration includes the registration of a vehicle in such a register.
3. The Bill amends the *Road Transport (Safety and Traffic Management) Act 1999* to clarify the operation of section 9 of that Act in its application to novice drivers.
4. The Bill also makes amendments to the *Fines Act 1996* that are consistent with the amendments to the *Road Transport (General) Act 2005* concerning the nomination by corporations of persons for designated offences.

Background

Amendments to the *Road Transport (General) Act 2005*

5. Under current legislation, the registered operator of a vehicle is the person responsible for its management and use. This includes the requirement to nominate the person in charge of the vehicle in camera-recorded offences under what are called "operator onus" provisions. The person responsible for the vehicle is deemed liable for certain offences, mainly camera-recorded offences, unless he or she can nominate the person who was in charge of the vehicle at the time.

6. If the person served with the penalty notice by the State Debt Recovery Office for the offence is not the driver of the vehicle, he or she must nominate by statutory declaration the person who was responsible. The State Debt Recovery Office, through the *Fines Act 1996*, then issues a fresh penalty notice to the person nominated.

7. The proposed amendments to the *Road Transport (General) Act 2005* include an increase in the penalty for making a false or misleading nomination for a camera-recorded or parking offence from 5 penalty units for an individual to 50 penalty units and 100 penalty units for a corporation. As stated in the Second Reading Speech, this amendment will bring the penalty closer to those in other jurisdictions. According to the Second Reading Speech, the new penalties are intended to deter those who seek deliberately to mislead or evade responsibility for traffic offences.

8. Further, the Bill proposes to extend the time limit in which proceedings can commence for false or misleading nomination offences from 6 months to 12 months. As stated in the Second Reading Speech, the extension of the time limit to 12 months will provide further time to investigate whether a nomination is false.

9. The Bill also proposes to amend the *Road Transport (General) Act 2005* and the *Fines Act 1996* to make it easier for corporations to nominate a driver by means other than a statutory declaration. According to the Second Reading Speech, this is intended to benefit car rental companies and fleet operators who must currently submit a separate statutory declaration nominating the responsible person for each traffic offence.

10. Further, when the *Road Transport (General) Act* was re-enacted in 2005 to include nationally agreed compliance and enforcement provisions for heavy vehicles, new definitions were introduced. Definitions such as "registered operator" were added to existing definitions relating to the responsible person for a vehicle to extend liability to parties in the chain of responsibility in the transport industry. The Bill aims to clarify the scope and operation of these definitions and confirm that the amended definitions have effect from the time of the assent to the *Road Transport (General) Act 2005*.

11. As stated in the Second Reading Speech, if a person has been convicted of three major traffic offences within five years he or she can be declared an "habitual traffic offender" and, in addition, be disqualified from driving for an additional five years. A court has the power at a later time to quash the declaration. However, according to the Second Reading Speech, some magistrates have taken the view that, in quashing a declaration, the disqualification period is void from the start (deemed never to have existed).

12. According to the Second Reading Speech, the Bill intends to address a situation where the declaration is quashed after the period of disqualification has commenced. Where a declaration is quashed, an interpretation that deems the disqualification period never to have existed means that the entire period of disqualification is removed, and a charge of driving while disqualified cannot proceed. The Bill seeks to address this situation by clarifying that where a court quashes a habitual traffic offender declaration, if the period of disqualification has started, it ends on the date the court orders the quashing. This makes it clear that any period of disqualification that has been served is to remain and is therefore valid.

Amendments to the Road Transport (Driver Licensing) Act 1998

13. The *Road Transport (Driver Licensing) Act 1998* was previously amended to insert section 25A, which provided, among other things, a second or subsequent penalty regime for offences such as driving while disqualified, suspended, cancelled or refused. Earlier this year, a Court of Criminal Appeal in *Director of Public Prosecutions v Partridge* [2009] NSWCCA 75 found that second or subsequent penalty provisions of section 25A do not increase disqualification periods if the first offence was a major offence.

14. As stated in the Second Reading Speech, the effect of the Court's decision has been that, while fines and periods of imprisonment are increased, disqualification periods will be increased under section 25A only if the earlier convictions are for driving while disqualified, suspended, cancelled or refused, and not for major offences. According to the Second Reading Speech, this was never the policy intent of the provision.

15. Accordingly, the Bill proposes to amend section 25A of the *Road Transport (Driver Licensing) Act 1998* to ensure that a person is subject to the second offence disqualification period of two years, if convicted of driving during a period of disqualification, cancellation, refusal or suspension, or any other major offence. As stated in the Second Reading Speech the amendments confirm that the section had effect from the time it was originally enacted. However, these amendments will not include the offence of driving during a period of suspension imposed for non-payment of fines.

16. Further, in 2008 a new section 25A(3A) was created to make a distinction between driving during a period of suspension imposed for road safety reasons, such as excessive speeding or demerit points, and driving during a suspension period imposed because a person failed to pay an outstanding fine amount to the State Debt Recovery Office.

17. Severe penalties apply under the *Road Transport (Driver Licensing) Act 1998* to persons driving without ever having been licensed. A first offence attracts a fine of 20 penalty units, or $2,200, while a second or subsequent offence attracts 30 penalty units, or $3,300, or imprisonment for 18 months or both. Never having been licensed is defined as not holding a driver licence in Australia for at least five years before being convicted of the offence.

18. However, according to the Second Reading Speech, police report that, when charged with a second offence, some accused are taking out a learner licence before the matter goes to court. In doing so, they avoid the higher penalty. Accordingly, the proposed amendment will change the reliance on the five-year period before the person is convicted of the offence to the five-year period before the offence was committed.

Road Transport (Safety and Traffic Management) Act 1999

19. In 2004, a zero blood alcohol content limit was introduced for learner and provisional drivers. Previously these drivers were special category drivers, and were subject to a legal blood alcohol content of 0.02. Currently, special category drivers include drivers of public passenger vehicles, coach or heavy vehicle drivers, drivers of vehicles transporting radioactive or other dangerous goods, or drivers who have had their

licence cancelled, refused or suspended, or who have been disqualified from driving or who never have obtained a licence.

20. However, as stated in the Second Reading Speech, doubt has been raised as to whether the zero alcohol blood alcohol content would continue to apply if the learner or provisional licence was suspended or cancelled, and the person was deemed to no longer be the holder of such a licence. In those circumstances, the person would default to a legal blood alcohol content of 0.02. This appears to have been an unintended consequence of the drafting of the zero blood alcohol content laws in 2004.

21. Accordingly, the Bill proposes to amend the *Road Transport (Safety and Traffic Management) Act 1999* to ensure that the legal blood alcohol content limit of zero, which applies to the holder of a learner or provisional licence, continues to apply if that licence is subsequently cancelled or suspended, or when the licence expires or the holder is disqualified from driving. The Bill would also extend the zero blood alcohol content limit to a person who has never obtained a licence, who currently fall into the special range category with a blood alcohol content limit of 0.02.

The Bill

22. **Outline of provisions**

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

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act, except for certain provisions, which will commence on a day or days to be appointed by proclamation.

Schedule 1 Amendment of road transport legislation

Schedule 1.1 Road Transport (Driver Licensing) Act 1998 No 99

Schedule 1.1 [1] amends section 25 of the *Road Transport (Driver Licensing) Act 1998* to make it clear that a person commits the offence of driving a motor vehicle on a road or road related area while never having been licensed if the person has not held a driver licence (or equivalent) of any kind in Australia for the period of at least 5 years immediately before the commission of the offence. The section currently provides for the 5-year period to run from the time before a conviction for the offence. Schedule 1.1 [1] also makes an amendment to section 25 of the *Road Transport (Driver Licensing) Act 1998* in the nature of statute law revision.

Schedule 1.1 [2] and [3] amend section 25A of the *Road Transport (Driver Licensing) Act 1998*:

(a) to confirm that the meaning of second or subsequent offence in section 25A of that Act extends to the determination of disqualification periods for offences under that section as well as to the determination of the maximum penalty for such offences, and
(b) to provide that an offence under section 25A (3A) of that Act (which deals with a person whose driver licence is suspended or cancelled for failure to pay a fine) is a second or subsequent offence only if the same offence was committed by the person concerned within 5 years of the current offence.

The amendment referred to in paragraph (a) above overcomes the decision of the Court of Criminal Appeal in *Director of Public Prosecutions v Partridge* [2009] NSWCCA 75, which decided that a provision in section 25A defining a second or subsequent offence did not apply to the determination of disqualification periods even though the provision expressly provides for its application "for the purposes of this section".

Schedule 1.1 [4] amends clause 1 of Schedule 3 to the *Road Transport (Driver Licensing) Act 1998* to enable the Governor to make regulations of a savings or transitional nature consequent on the amendment of that Act by the proposed Act.

Schedule 1.1 [5] amends Schedule 3 to the *Road Transport (Driver Licensing) Act 1998* to insert provisions of a savings or transitional nature consequent on the amendment of that Act by the proposed Act.

Schedule 1.2 Road Transport (General) Act 2005 No 11

Schedule 1.2 [2] and [3] amend the definitions of registered operator and registration in section 3 of the *Road Transport (General) Act 2005* to confirm that those terms include, respectively, persons who are recorded as registered operators of, and vehicles that are registered in, an Australian registrable vehicles register.

Schedule 1.2 [1] inserts a definition of Australian registrable vehicles register in section 3 of the *Road Transport (General) Act 2005*. The term is defined to mean:
(a) the Register within the meaning of the *Road Transport (Vehicle Registration) Act 1997*, or
(b) a register maintained under the law of another jurisdiction that corresponds, or substantially corresponds, to the Register within the meaning of the *Road Transport (Vehicle Registration) Act 1997*.

Schedule 1.2 [4] and [7]–[11] amend section 179 of the *Road Transport (General) Act 2005* to enable a corporation that is served with a penalty notice for a designated offence involving a vehicle to nominate the person who was in charge of the vehicle at the time of the offence by means of a nomination document approved by the Roads and Traffic Authority instead of a statutory declaration. The amendments enable an authorised officer to require a corporation that has made a nomination using an approved nomination document to supply subsequently a statutory declaration for use in court proceedings.

A failure to provide such a statutory declaration will be an offence attracting a maximum penalty of 100 penalty units (currently, $11,000). The amendments will not affect the current requirement to supply a statutory declaration if the corporation is served with a court attendance notice instead of a penalty notice or prevent a corporation supplying a statutory declaration if it wishes to do so.

Schedule 1.2 [5] and [6] amend section 179 of the *Road Transport (General) Act 2005* to increase the penalties for making a false nomination of a person for a designated offence or failing to make such a nomination. The new penalties will be 50 penalty units (currently, $5,500) for a natural person and 100 penalty units (currently, $11,000) in any other case.

Schedule 1.2 [12] amends section 181 of the *Road Transport (General) Act 2005* to increase the period within which a person may be prosecuted for making a false nomination

under section 179 of that Act from 6 months (which is currently provided for in section 179 of the *Criminal Procedure Act 1986*) to 12 months after the offence.

Schedule 1.2 [13] amends section 202 of the *Road Transport (General) Act 2005* to confirm that the quashing of a declaration that a person is a habitual traffic offender by a court under that section only operates prospectively.

Schedule 1.2 [14] amends clause 1 of Schedule 1 to the *Road Transport (General) Act 2005* to enable the Governor to make regulations of a savings or transitional nature consequent on the amendment of that Act by the proposed Act.

Schedule 1.2 [15] amends Schedule 1 to the *Road Transport (General) Act 2005* to insert provisions of a savings or transitional nature consequent on the amendment of that Act by the proposed Act. In particular, these provisions confirm that the definitions of registered operator and registration (as amended by the proposed Act) applied from 30 September 2005 (being the date when most of the provisions of the *Road Transport (General) Act 2005* commenced). The provisions also validate certain enforcement action taken by reference to these concepts since that time to the extent of any invalidity.

Schedule 1.3 Road Transport (Safety and Traffic Management) Act 1999 No 20

Schedule 1.3 amends the *Road Transport (Safety and Traffic Management) Act 1999*:

(a) to provide that learner drivers for the purposes of section 9 of that Act include any holder of a driver licence who is learning to drive a motor vehicle of a different class than that for which the holder is licensed where he or she is permitted to do so under the regulations, and

(b) to clarify the circumstances in which the driver of a motor vehicle will be treated as being a novice driver for the purposes of the offence of driving a motor vehicle with the novice range prescribed concentration of alcohol in breath or blood.

Schedule 2 Amendment of Fines Act 1996 No 99

Schedule 2 [1]–[3] make amendments to section 38 of the *Fines Act 1996* that are consistent with the amendments to section 179 of the *Road Transport (General) Act 2005* by Schedule 1.2 concerning the nomination by corporations of persons for designated offences. Section 38 of the *Fines Act 1996* provides for the circumstances in which a person issued with a penalty reminder notice for a vehicle or vessel offence is not liable to pay a penalty.

Schedule 2 [4] amends clause 1 of Schedule 3 to the *Fines Act 1996* to enable the Governor to make regulations of a savings or transitional nature consequent on the amendment of that Act by the proposed Act.

Issues Considered by the Committee

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

Issue: Proposed section sections 179(6) and (7) *Road Transport (General) Act 2005*; Proposed section 38(1E) *Fines Act 1996* – Excessive Punishment

23. The Committee notes that there are a number of amendments to the *Road Transport (General) Act 2005* through proposed Schedules 1.2[5] -[7] of the Bill that will significantly increase the maximum penalty for offences under the Act. For example,

proposed section 179(7) will increase the penalty for making a false or misleading nomination for a camera-recorded or parking offence from 5 penalty units ($550) for an individual to 50 penalty units ($5,500); and from 10 penalty units ($110) to 100 penalty units ($11,000) for a corporation.

24. Further, the Bill proposes to increase the maximum penalty under section 179(6) from 20 penalty units to 100 penalty units for failure to nominate a person in charge of vehicle detected in breach of a designated offence. It also amends section 38(1E) *Fines Act 1996* by providing for a strict liability offence, with a maximum penalty of 100 penalty units for corporations that, when served with a verification notice do not supply the required statutory declaration within the period specified in the notice.

25. The Committee notes that the significant increase in penalties through, in particular, proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* may be considered excessive punishment and an undue trespass on personal rights and liberties. Accordingly, the Committee refers proposed sections 179(6) and 179(7) *Road Transport (General) Act 2005* to Parliament for its consideration.

Issue – Schedule 1.1[5] – Amendments to the *Road Transport (Driver Licensing) Act 1998* and Schedule 1.2[15] – Amendments to the *Road Transport (General) Act 2005* – Retrospectivity

26. The Committee notes that there are a number of proposed amendments in the Bill with retrospective application. For example, proposed Schedule 1.1[5] of the Bill provides that the proposed amendments to section 25 of the *Road Transport (Driver Licensing) Act 1998* extend to any proceedings for an offence against section 25(2) *Road Transport (Drive Licensing) Act 1998* that were not finally determined when the amendments commenced.

27. Further, proposed Schedule 1.1[5] of the Bill provides that the amendments to section 25A *Road Transport (Drive Licensing) Act 1998* by the Bill extend (and are taken always to have extended) to offences under that section for which persons were convicted before the commencement of the amendments. Subclause (3) of Schedule 1.1[5] further clarifies the retrospective application of the proposed amendments to section 25A *Road Transport (Driver Licensing) Act 1998*.

28. Proposed Schedule 1.1[5] also clarifies that nothing in subclause (2) and (3) affects any judgment or order of a court that was given or made before the introduction day (the day on which the Bill was first introduced into Parliament) in its application to the parties to the proceedings in which the judgment or order was given or made (including the judgment of the Court of Appeal in *Director Public Prosecutions v Partridge [2009] NSWCCA 75*).

29. The Committee has always been concerned to identify provisions with a retrospective application that may detrimentally impact on personal rights and liberties. The Committee notes that the retrospective application of proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998* may impact on the rights and liberties of persons convicted for offences under these sections. Accordingly, the Committee refers Schedule 1.1[5] of the Bill regarding the application of the proposed amendments to sections 25 and 25A *Road Transport (Driver Licensing) Act 1998,* to Parliament for its consideration.

30. The Committee also notes that proposed Schedule 1.2[15] of the Bill, which relates to amendments to the meaning of “registered operator” and “registration” in the *Road Transport (General) Act 2005*, will apply on and from 30 September 2005. The proposed amendments in Schedule 1.2[15] of the Bill also provide that any enforcement action taken under the Bill or any related legislation on and from this date that would have been validly taken had the amendments been in force is taken to be valid. It also provides that proposed section 202(4) *Road Transport (General) Act 2005* extends to any declaration of a habitual traffic offender that is in force under Division 3 of Part 5.4 *Road Transport (General) Act 2005* immediately before the commencement of that subsection.

31. The Committee has always been concerned to identify provisions with a retrospective application that may impact on personal rights and liberties. The Committee has concerns that proposed Schedule 1.2 [15] of the Bill provides that proposed amendments to the *Road Transport (General) Act 2005,* which will impact the scope and operation of terms such as “registered operator” will apply retrospectively on and from September 2005. The Committee has particular concerns that the proposed amendments will also retrospectively validate enforcement action that may have otherwise been considered invalid. Accordingly, the Committee refers Schedule 1.2[15] of the Bill to Parliament for its consideration.

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

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

32. The Committee notes that under Clause 2(2) of the Bill, Schedules 1.2[4] -[11], 1.3 and Schedule 2 of proposed Act will to commence on a day or days to be appointed by proclamation rather than assent. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all.

33. However, the Committee notes advice from the Minister that the provisions in Schedule 1.2[4] -[11], which are proposed to amend the *Road Transport (General) Act 2005* will commence on proclamation to allow for changes to administrative arrangements by agencies such as the State Debt Recovery Office to support the enforcement of the proposed amendments; and to allow time for the drafting and commencement of supporting regulations.

34. The Minister has advised that proposed Schedule 1.3, which proposes to amend the *Road Transport (Safety and Traffic Management) Act 1999* will commence by

proclamation to allow for the incorporation of the changes into administrative systems of agencies such as NSW police, for example through the preparation and distribution of training materials to roadside police regarding the introduction of zero blood alcohol concentration for certain drivers.

35. Finally, the Minister has advised that proposed Schedule 2, which provides for amendments to the *Fines Act 1996* that are consistent with amendments to the *Road Transport (General) Act 2005* will commence by proclamation to allow for administrative arrangements to be developed by agencies such as the State Debt Recovery Office to enable corporations to nominate persons in charge of vehicles that are detected of committing road transport law offences.

36. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

15. SAVE THE GRAYTHWAITE ESTATE BILL 2009*

Date Introduced:	11 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Ms Lee Rhiannon MLC
Portfolio:	The Greens

Purpose and Description

1. This Bill preserves the Graythwaite Estate in public ownership, and for other purposes.

2. The purpose of the Bill is to provide the legal protection to preserve the Graythwaite Estate in public hands.

3. Clause 4 sets out the objects of the Bill: to retain Graythwaite Estate in public ownership and subject to public control; to preserve areas of open space at the Graythwaite Estate and to allow public access to such areas; to preserve the heritage significance of the Graythwaite Estate; and to impose appropriate controls on the future development of the Graythwaite Estate.

4. Clause 5 prohibits the sale or other alienation of the Graythwaite Estate. This clause allows Graythwaite Estate to be transferred to a statutory body representing the Crown that is subject to the direction and control of a Minister.

5. Clause 6 provides that any lease or licence over the use of Graythwaite Estate to a person other than a public or local authority must include terms that require the grounds of the Graythwaite Estate to always remain open to the public.

6. The Bill restricts the types of development that may be carried out at the Graythwaite Estate. Clause 7 sets out that development for the purposes of health, educational or community facilities is permitted with the consent of North Sydney Council. Community and educational facilities are defined as facilities that provide services to the community on a not-for-profit basis. "Health facility" means a building or place used for the medical or surgical treatment of persons, whether public or private.

7. Clause 8 provides that the regulations may set up a community consultation committee for the Graythwaite Estate.

8. The Bill is retrospective to ensure that the purpose of the Bill is not overridden by the announcement of Minister for Health to sell Graythwaite Estate. Clause 2 states that the proposed Act is taken to have commenced on 10 September 2009, the date that the notice of the Bill was given in the Legislative Council. Clause 13 states that any sale, transfer or other disposal of the Graythwaite Estate that occurred on or after 10 September 2009 but before the date of assent to the proposed Act and that is contrary to the provisions of the proposed Act is null and void. A contract voided by the clause may be held by a court to be frustrated at common law.

Background

9. The Graythwaite Estate is located at 50 Union Street, North Sydney. It is the only remaining large area of parkland close to North Sydney's central business district.

10. Sir Thomas Dibbs entrusted the Graythwaite Estate to the State of New South Wales back in June 1915, in the aftermath of the Australian troops at Gallipoli. He entrusted the Graythwaite Estate to the Government as a convalescent home for wounded soldiers and sailors and, if not needed for that purpose, as a convalescent home in perpetuity for distressed subjects.

11. The Graythwaite Estate is currently listed on the State Heritage Register, the Register of the National Estate and with the National Trust of Australia. Following Sir Thomas Dibbs' instructions that the site was to be used as a convalescent home for sick and wounded soldiers and sailors, during 1916 to 1980, the Red Cross used the estate as a convalescent home. In 1980, the Graythwaite Estate was taken over by the Department of Health to be run as a nursing home.

12. In 1994, the Department of Health tried to sell the Graythwaite Estate for development. In 2001, the Department of Health again started to sell the Graythwaite Estate.

13. The community group, the ‘Friends of Graythwaite’ was formed in 2005, and has led the campaign to keep the Graythwaite Estate in public hands.

14. In March 2006, the North Sydney Central Coast Area Health Service commenced action in the Supreme Court to enable it to sell the estate for development. In August 2008, the Supreme Court found that the current use of Graythwaite as a nursing home for patients with no prospect of recovery was not consistent with the use for which Sir Thomas Dibbs gave the Graythwaite Estate—for convalescence. The court found that the Graythwaite Estate had failed in its responsibilities.

15. A second court proceeding began to determine the best use for Graythwaite Estate. Two schemes were proposed to the court. First, the Department of Health proposed that Graythwaite Estate be sold and the proceeds be used for a rehabilitation facility at Ryde Hospital. Second, it was proposed that Graythwaite Trust be filled by a Commonwealth grant of $15 million to the Returned Services League (RSL) for the provision of care services to veterans and the grounds be leased for a peppercorn rent to North Sydney Council for use as a regional park for North Sydney's CBD. This proposal also included that the Commonwealth provide $5 million for restoration of the Graythwaite mansion, and that St Vincent's Hospital and Mater hospital build a new rehabilitation facility adjacent to the Graythwaite mansion. This second proposal was supported by the Commonwealth Government, the RSL, North Sydney Council, St Vincent's Hospital and Mater hospital, and the Friends of Graythwaite.

16. In November 2008, the court [19] found in favour of the first scheme proposed by the Department of Health on the basis that it would help more distressed citizens.

17. Therefore, the Department of Health announced a tender process for the Graythwaite Estate in 2009. On 19 October 2009, the Minister for Health announced that the

[19] *Northern Sydney and Central Coast Area Health & anor v Attorney-General for New South Wales & 7 ors* [2008] NSWSC 1223.

Graythwaite Estate would be sold to the Sydney Church of England Grammar School (Shore), for $35.2 million.

18. The Federal Government offered a similar amount. Proceeds from the sale will go to the Graythwaite Trust to build a new rehabilitation centre at Ryde Hospital. The surviving family of Sir Thomas Dibbs maintained that selling the school to Shore would go against the wishes of Sir Thomas Dibbs.

The Bill

19. The objects of this Bill are:

(a) to require the Graythwaite Estate to be retained in public ownership and subject to public control, and
(b) to preserve areas of open space at the Graythwaite Estate and to allow public access to such areas, and
(c) to preserve the heritage significance of the Graythwaite Estate, and
(d) to impose appropriate controls on the future development of the Graythwaite Estate.

20. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides that the proposed Act is taken to have commenced on 10 September 2009 (being the date that notice for the introduction of the Bill for the proposed Act was given in the Legislative Council).
Clause 3 defines the term ***Graythwaite Estate*** by reference to a lot in a Deposited Plan registered by the Registrar-General and also defines the terms ***development*** and ***environmental planning instrument***.
Clause 4 sets out the objects of the proposed Act in terms similar to those set out in the Overview above.
Clause 5 prohibits the sale or other alienation, or the encumbering, of the Graythwaite Estate or any part of it, but allows it to be transferred to a statutory body representing the Crown that is subject to the direction and control of a Minister.
Clause 6 provides that any lease of, or a licence allowing the use of, the Graythwaite Estate to a person other than a public or local authority must include terms that require the grounds of the Graythwaite Estate to always remain open to the public.
Clause 7 restricts the development that may be carried out at the Graythwaite Estate. Development for the purposes of health, educational or community facilities is permitted with the consent of North Sydney Council.
Clause 8 provides that the regulations under the proposed Act may set up a community consultation committee for the Graythwaite Estate.
Clause 9 authorises the Governor to make regulations for the purposes of the proposed Act.
Clause 10 prevents the proposed Act from affecting rights conferred by any easement, lease or licence that was in force immediately before the proposed Act commences.
Clause 11 makes it clear that the proposed Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.
Clause 12 makes it clear that the proposed Act has effect despite certain decisions of the Supreme Court relating to the Graythwaite Estate.
Clause 13 makes it clear that the provisions of the proposed Act apply on and from 10 September 2009 (being the date that the proposed Act is taken to have commenced). The clause provides that any sale, transfer or other specified disposal of the Graythwaite Estate that occurred on or after 10 September 2009 but before the date of assent to the proposed

Act, and that is contrary to the provisions of the proposed Act, is null and void. A contract voided by the clause may be held by a court to be frustrated at common law.

Issues Considered by the Committee

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

Issue: Retrospectivity – Clause 2 – Commencement; and Clause 13 – Retrospective invalidation of transfer etc:

21. Clause 2 reads that: This Act is taken to have commenced on 10 September 2009 (being the date that notice for the introduction of the Bill for this Act was given in the Legislative Council).

22. Clause 13 on retrospective invalidation of transfer etc reads:

    Any sale, transfer, lease, mortgage, charge or other alienation or encumbrance of the Graythwaite Estate:

    (a) that occurred on or after 10 September 2009 (being the date that this Act is taken to have commenced), but before the date of assent to this Act, and

    (b) that is contrary to this Act,

    is null and void.

23. The Committee notes that on 19 October 2009, the New South Wales Government announced that it has sold Graythwaite Estate. The Estate has been sold to the neighbouring Sydney Church of England Grammar School, with the sales proceeds going towards a 60-bed rehabilitation facility at Ryde Hospital. [20]

24. The Committee will always be concerned to identify the retrospective effects of legislation which may have an adverse impact on a person.

25. The Committee is concerned with clause 2 which provides that the proposed Act is taken to have commenced on the date on which the notice for the introduction of the Bill for the proposed Act was given, rather than commence on the date of assent after the Bill has been duly passed by both Houses of the Parliament.

26. The Committee is also concerned with clause 13 and its retrospective invalidation of any sale, transfer, lease, mortgage, charge or other alienation or encumbrance of the Graythwaite Estate, that occurred on or after 10 September 2009 but before the date of assent to the proposed Act, and which is contrary to the proposed Act. The Committee believes clause 13 could cause loss to persons who have acted on the basis of the sale, transfer, mortgage or other alienation duly made under a contract before the commencement of this proposed Act.

[20] Josephine Tovey and Paul Bibby, 'No Beds From Graythwaite Sale', *Sydney Morning Herald*, 21 October 2009. http://www.smh.com.au/national/no-beds-from-graythwaite-sale-20091020-h6yo.html

27. However, the Committee notes the strong community campaign with the support of various levels of government such as the Commonwealth Government, North Sydney Council, along with major community groups such as the Friends of Graythwaite, the RSL, the Construction, Forestry, Mining and Energy Union (CFMEU), as well as, interests from major hospitals such as the St Vincent's Hospital and Mater, to preserve the Graythwaite Estate within public ownership and control.

28. The Committee refers to Parliament to consider whether allowing retrospectivity is justified in this context of strong community interests or whether the retrospective effects of clauses 2 and 13 may constitute as undue trespasses on individual rights of those who have relied on the law at the time, and ordered their affairs accordingly based on the sale, transfer, mortgage or other alienation duly made under contract at the time before the commencement of the proposed Act.

The Committee makes no further comment on this Bill.

16. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2009

Date Introduced:	11 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. This Bill repeals certain Acts and to amend certain other Acts and instruments in various respects and for the purpose of effecting statute law revision; and to make certain savings.

2. Schedule 1 amends the definition of child-related employment in the *Commission for Children and Young People Act 1998*. The current definition includes employment in juvenile detention centres. Schedule 1 extends the definition to include employment in juvenile correctional centres (where children may also be detained). The proposed amendment will extend the prohibition against certain persons from engaging in child-related employment and background checks to employment in juvenile correctional centres.

3. It makes other amendments to the *Environmental Planning and Assessment Act 1979* that are consequential on recent changes to plan-making procedures. These include: extending the current statutory exemption from liability for planning authorities, which are acting in good faith in relation to contaminated land, to the amended procedures for preparing or making planning instruments, and processing and determining applications to carry out major infrastructure and similar projects in relation to contaminated land. Schedule 1 makes a similar amendment to the *Local Government Act 1993* to extend the current statutory exemption from liability of local councils in relation to flooding or coastal hazards to the amended procedures for preparing or making planning proposals in relation to those matters.

4. Schedule 1 amends the *Dangerous Goods (Road and Rail Transport) Act 2008* to include police officers as authorised officers for the purposes of that Act and to enable them to exercise the same general powers under that Act as authorised officers appointed by the Department of Environment, Climate Change and Water. The amendments to that Act will also allow the appointment of a class of persons as authorised officers for the purposes of that Act rather than only an individual person.

5. It also amends the *Public Finance and Audit Act 1983* to ensure that the former managers of statutory bodies that have ceased to exist, in addition to preparing and submitting the last financial report for the body, may prepare and submit a required statement about the accuracy of the report to the Auditor-General. These amendments will allow the Auditor-General to recoup his or her costs of audit from Parliament or a Minister, if Parliament or the Minister requests a particular audit or audit-related service.

6. The *Road Transport (Safety and Traffic Management) Act* will be amended by schedule 1 to provide that the duty under that Act to arrange for certain blood samples to be submitted to a laboratory for analysis is owed by the healthcare worker who took the sample rather than a police officer. This brings the duty into line with similar duties imposed under that Act. However, the duties imposed on healthcare workers under that Act to arrange for blood samples to be submitted to a prescribed laboratory will be discharged if a police officer makes those arrangements instead. The *Road Transport (Safety and Traffic Management) Act* will also be amended to confirm the current police practice of conducting roadside oral fluid tests by a driver who has been arrested for failing or refusing to undergo an initial oral fluid test. The purpose of conducting the further more accurate test is to determine whether to issue a direction prohibiting the driver from driving a motor vehicle for a period of 24 hours.

7. Amendments by schedule 1 to the *Interpretation Act 1987* extend a provision of that Act to require references to repeal Acts or instruments that have been re-enacted or remade in another jurisdiction to be read as references to Acts or instruments so re-enacted or remade. This aims to ensure that the provisions will apply when the State refers powers to the Commonwealth and a State law is replaced by a Commonwealth law. The amendments to that Act also include authorising the Parliamentary Counsel to determine the requirements for lodging instruments required to be notified on the New South Wales legislation website, and the standard technical requirements with respect to the drafting of those instruments for the purpose of facilitating public access.

8. Schedule 1 amends the *Strata Schemes Management Act 1996* regarding orders made by the Consumer, Trader and Tenancy Tribunal to reallocate unit entitlements for a strata scheme. The amendment will require the owners corporation for the strata scheme to ensure that a copy of the order is lodged with the Registrar General no more than two years after the order is made to enable the appropriate amendments to the folio of the register to be carried out. There is currently no requirement that such an order be lodged with the Registrar General once it is made by the tribunal.

9. Schedule 2 deals with matters of statute law revision consisting of minor technical changes to legislation that the Parliamentary Counsel considers are appropriate for inclusion. These amendments are those arising out of the enactment or repeal of other legislation; correcting duplicated numbering; and those updating terminology.

10. Schedule 3 includes amendments that generally relate to the official notification of the making of certain statutory instruments that amend Acts on the New South Wales legislation website.

11. Schedule 4 provides statute law revision amendments that are consequential on the enactment of the *Local Court Act 2007*. Most of these involve replacing references to Local Courts with references to the single Local Court.

12. Schedule 5 contains statute law revision amendments updating references to liquor, registered clubs and casino legislation consequential on the enactment of the *Liquor Act 2007* and the *Casino, Liquor and Gaming Control Authority Act 2007*.

13. Schedule 6 repeals a number of Acts and provisions of Acts that are redundant. The repeals also extend to provisions of Acts that contain only amendments that have commenced.

Background

14. The Second Reading speech explained that the form of this Bill is similar to that of previous Bills in the statute law revision program.

15. The Second Reading speech stated that:

> Schedule 1 contains policy changes of a minor and non-controversial nature that the Minister responsible for the legislation, which will be amended, considers to be too inconsequential to warrant the introduction of a separate amending bill. That schedule contains amendments to 20 Acts.

16. Schedule 7 contains general savings, transitional and other provisions. These include provisions dealing with the effect of amendments on amending provisions and savings clauses for the repealed Acts. It also contains a power for the Governor to revoke or repeal by proclamation any Act or instrument repealed by the Bill.

The Bill

17. The objects of this Bill are:

 (a) to make minor amendments to various Acts (Schedule 1), and
 (b) to amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedules 2–5), and
 (c) to repeal certain Acts and provisions of Acts (Schedule 6), and
 (d) to make other provisions of a consequential or ancillary nature (Schedule 7).

18. **Outline of provisions**

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act.
Clause 3 provides for the repeal of the amendments made by the proposed Act after the amendments have commenced. Once the amendments have commenced, those provisions will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending provision does not affect the amendments made by that provision.
Clause 4 makes it clear that the explanatory notes contained in the Schedules do not form part of the proposed Act.

Schedule 1 Minor amendments
Schedule 1 makes amendments to the following Acts:

Associations Incorporation Act 2009 No 7
Building Professionals Act 2005 No 115
Building Professionals Amendment Act 2008 No 37
Commission for Children and Young People Act 1998 No 146
Dangerous Goods (Road and Rail Transport) Act 2008 No 95
Environmental Planning and Assessment Act 1979 No 203
Environmental Planning and Assessment Amendment Act 2008 No 36
Fisheries Management Act 1994 No 38
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Act 2009 No 32
Interpretation Act 1987 No 15
Local Government Act 1993 No 30
Marine Safety Act 1998 No 121
Protection of the Environment Operations Act 1997 No 156

Public Finance and Audit Act 1983 No 152
Rail Safety Act 2008 No 97
Retirement Villages Amendment Act 2008 No 121
Road Transport (Safety and Traffic Management) Act 1999 No 20
Strata Schemes Management Act 1996 No 138
Travel Agents Act 1986 No 5
Water Management Act 2000 No 92

Schedule 2 Amendments by way of statute law revision
Schedule 2 amends certain Acts and instruments for the purpose of effecting statute law revision. The amendments to each Act and instrument are explained in detail in the explanatory note relating to the Act or instrument concerned set out in Schedule 2.

Schedule 3 On-line publication of making of statutory instruments
Schedule 3 amends certain Acts in relation to the official publication of the making of certain statutory instruments on the NSW legislation website that is maintained by the Parliamentary Counsel. Some of the amendments also remove redundant provisions concerning the making of regulations. The nature of the amendments contained in Schedule 3 is explained in detail in the explanatory note at the beginning of the Schedule.

Schedule 4 Amendments consequential on enactment of *Local Court Act 2007*
Schedule 4 amends certain Acts and instruments for the purpose of effecting statute law revision consequent on the enactment of the *Local Court Act 2007*. The nature of the amendments contained in Schedule 4 is explained in detail in the explanatory note at the beginning of the Schedule.

Schedule 5 Amendments updating references to liquor, registered clubs and casino legislation
Schedule 5 amends certain Acts and instruments for the purpose of updating references to liquor, registered clubs and casino legislation consequent on the enactment of the *Liquor Act 2007* and the *Casino, Liquor and Gaming Control Authority Act 2007*. The nature of the amendments contained in Schedule 5 is explained in detail in the explanatory note at the beginning of the Schedule.

Schedule 6 Repeals
Schedule 6 repeals a number of Acts and provisions of Acts.
Clause 1 of the Schedule repeals Acts that are redundant.
Clause 2 of the Schedule repeals an Act that contains only commenced amendments to another Act.
Clause 3 of the Schedule repeals an Act that contains only commenced amendments to other Acts and a transitional provision, and transfers the transitional provision to another Act.
Clause 4 of the Schedule repeals Acts that contain only commenced amendments to other Acts or instruments, or amendments that cannot be incorporated because they are to Acts that have been amended or repealed.
Clause 5 of the Schedule repeals provisions of Acts that contain only commenced amendments to other Acts or instruments, or amendments that cannot be incorporated because they are to Acts that have been amended or repealed.
Section 30 (2) of the *Interpretation Act 1987* ensures that the repeal of an Act or statutory rule does not affect the operation of any savings, transitional or validation provision contained in the Act or statutory rule, and that the repeal of an amending Act does not affect

any amendment made by the Act. Section 5 (6) of the *Interpretation Act 1987* provides that the provisions of section 30 that apply to a
statutory rule also apply to an environmental planning instrument.
The Acts or instruments that were amended by the Acts being repealed are available electronically on the NSW legislation website at www.legislation.nsw.gov.au.

Schedule 7 General savings, transitional and other provisions
Schedule 7 contains savings, transitional and other provisions of general effect. The Schedule includes a provision allowing the Governor, by proclamation, to revoke the repeal of any Act or instrument or the provision of any Act or instrument repealed by the proposed Act or any other of the statute law revision Acts listed. The purpose of each provision is explained in detail in the explanatory note relating to the provision concerned set out in the Schedule.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

17. SURFACE COAL MINING PROHIBITION (LAKE MACQUARIE) BILL 2009*

Date Introduced:	13 November 2009
House Introduced:	Legislative Assembly
Member Responsible:	Greg Piper MP
Portfolio:	Non- government

Purpose and Description

1. The object of this Bill is to prohibit surface mining of coal in the local government area of Lake Macquarie City.

Background

2. According to the Agreement in Principle speech the Bill will "unequivocally implement the Government's intention to ban open cut mining in Lake Macquarie. It will remove the possibility of future projects that skirt the clear intention of the Government to ban such mining practices in Lake Macquarie."

3. In early 2007 the previous Planning Minister banned open cut mining within Lake Macquarie by way of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

4. However, community members have since been concerned about the proposed Olstan auger mine at Blackalls Park and whether this should be considered underground or open cut mining.

5. The Bill seeks to eliminate any uncertainty and avoid future debate on particular mining processes.

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 defines certain words and expressions used in the proposed Act.
Clause 4 provides that the proposed Act prohibits all surface mining of coal in the local government area of Lake Macquarie City (except for the area of the existing Westside open cut mine) and applies despite any other Act or law (including any environmental planning instrument) to the contrary.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

18. SWIMMING POOLS AMENDMENT BILL 2009

Date Introduced:	11 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon Barbara Perry MP
Portfolio:	Local Government

Purpose and Description

1. This Bill amends the *Swimming Pools Act 1992* to make further provision with respect to ensuring access to private swimming pools is effectively restricted; and for other purposes.

2. The object of the Bill is to provide the legislative framework for a consistent and high standard four-sided pool barrier fencing to surround all newly constructed backyard pools in New South Wales. It also aims to ensure that local councils regulate and promote awareness of the requirements, including through use of appropriate compliance mechanisms.

3. It amends the *Swimming Pools Act 1992* to remove automatic exemptions that currently allow some pools to be accessed from the house through "child-resistant" doors. The Bill proposes to remove the automatic exemptions in the Act for new pools to be built on: (a) very small properties (which are less than 230 square metres); (b) large properties (which are two hectares and over); and (c) waterfront properties. This aims to ensure that all newly constructed pools are surrounded by a four-sided barrier, a self-closing, self-latching gate, and that the pool is separated from the house and adjoining properties and public spaces at all times.

4. For pools on small properties, owners will still be able to use boundary fences and house walls as part of the swimming pool barrier, providing they meet the legislative requirements and the Australian standard. There are specific circumstances, such as the need for disability access, that justify a special exemption granted by the local council under section 22 of the existing Act. In these cases, pool owners will have the option of applying to their local council for a special exemption if they believe the barrier requirements are impracticable or unreasonable. These provisions will not change.

5. The Bill allows for a delayed commencement period for these provisions of 1 July 2010—or six months after commencement of the legislation—to allow for automatic exemptions to still apply to pools on these properties where a development application has been submitted or construction has commenced.

6. The Bill introduces a warning system so that pool owners are issued with at least 14 days notice prior to being formally ordered to fix a deficient barrier. This focuses on compliance rather than punishment to serve the Bill's aim of keeping swimming pools safe.

7. It also proposes that local councils be required to investigate complaints that they receive about possible non-compliance with barrier and other requirements under the

Act. It requires that all councils must do the investigation within a reasonable time frame. It proposes that councils must commence investigation of a complaint received in writing within 72 hours, where practicable.

8. Another proposal is to provide councils with optional powers to enter property and undertake remedial work to rectify deficient pool barriers where non-action poses a significant risk to public safety, and where the owner refuses, or is unable, to do the work. The council must provide notice of intention to do the work.

9. The Bill abolishes the Pool Fencing Advisory Committee, where the functions are now undertaken by the New South Wales Water Safety Advisory Council.

10. The proposed amendments to strengthen pool barrier requirements deal with pools to be built in the future, not existing pools and those pools built prior to 1 August 1990, as well as pools built after this date on small, large and waterfront properties, including built up until 1 July 2010.

Background

11. Reports indicate that eight children under five years drowned in private swimming pools in New South Wales in 2007-08. Recent research into barrier types around private pools has found that the risk of toddler drownings is significantly less in pools with stronger barrier requirements.

12. According to the Second Reading speech:

> One way to manage non-compliance is an increase to the maximum court-imposed penalty amounts for most offences under the Act from $1,100 to $5,500, as well as a consequent increase to penalty notice amounts prescribed by regulation from $220 to $550. Current penalty amounts have been in place for over 19 years and are lower than many offences under other New South Wales legislation of a similar nature. Penalties under the Act include failure to provide and maintain a swimming pool barrier to standard and failure to keep gates securely closed when not in use. These have been increased to bring them into line with the magnitude of the offences and the significant risks they pose to young children.

13. There is ongoing consultation with a view to making further amendments to the Swimming Pools Act to deal with exemptions for existing pools.

14. The Second Reading speech also explained that:

> …these reforms have been developed in close consultation with water safety advocate groups, such as the Royal Life Saving Society of New South Wales, the local government sector, State government agencies and other interested industry organisations and individuals, including pool owners. The Bill will be supported by the Swimming Pools Amendment Regulation, together with other information as required. This may include guidelines to assist councils with the implementation of the proposed amendments.

The Bill

The object of this Bill is to amend the *Swimming Pools Act 1992* as follows:

(a) to increase the maximum penalty for offences under that Act,

(b) to remove automatic exemptions under that Act in respect of child-resistant barriers for swimming pools constructed or installed after 1 July 2010 on very small, large or waterfront properties,
(c) to permit the regulations to prescribe the circumstances in which an opening in a wall (that is part of a child-resistant barrier) is taken to enable access to be gained to a swimming pool at any time,
(d) to require a local authority to give notice before giving a direction under that Act and to enable a local authority to carry out the requirements of such a direction if there is a failure to comply or a significant risk to public safety,
(e) to require local authorities to investigate certain complaints,
(f) to abolish the Pool Fencing Advisory Committee,
(g) to make a number of minor and statute law revision amendments.

Schedule 1 Amendment of *Swimming Pools Act 1992* No 49

Schedule 1 [2] moves definitions that were in a Dictionary at the back of the *Swimming Pools Act 1992* (the ***Principal Act***) to the front of that Act and, as a consequence of other amendments proposed in the Bill, definitions of ***allotment***, ***existing swimming pool***, ***inspector*** and ***new swimming pool*** have been omitted and a definition of ***authorised officer*** has been included. A standard definition of ***exercise*** is to replace a definition of ***exercise a function*** and the definition of ***residential building*** has been amended to provide that a shed is not a residential building if it is ancillary to a swimming pool and its primary purpose is the storage of equipment that is used in connection with the swimming pool. That definition has also been amended to enable regulations to prescribe other buildings and structures as not being residential buildings.

Schedule 1 [4] increases the maximum penalty for a number of offences under the Principal Act from 10 penalty units ($1,100) to 50 penalty units ($5,500).

Schedule 1 [7] and [8] remove exemptions from the requirements for a child-resistant barrier in relation to swimming pools on very small properties (having an area of less than 230 square metres), large properties (having an area no less than 2 hectares) and waterfront properties. Any swimming pool that is constructed or installed on any such property after 1 July 2010 will no longer be able to rely on these exemptions. However, the exemption will continue to apply in respect of a swimming pool on any such property if the construction or installation of the pool was commenced before that date.

Schedule 1 [10] clarifies that the obligation to maintain a barrier to a swimming pool means that the barrier should be maintained so that it is an effective and safe child-resistant barrier.

Schedule 1 [11] increases the maximum penalty for failure to maintain a warning notice in the immediate vicinity of a swimming pool from 1 penalty unit ($110) to 5 penalty units ($550).

Schedule 1 [12] provides that a wall of a residential building or a hotel or motel may not be used as part of a child-resistant barrier to a swimming pool if the wall contains an opening through which access may be gained to the swimming pool at any time.

Schedule 1 [13] provides that the regulations may prescribe circumstances in which such an opening in a wall is or is not to be regarded as an opening through which access may at any time be gained to a swimming pool.

Schedule 1 [14] provides that a local authority may not serve a direction on an owner of premises under section 23 of the Principal Act unless the local authority has, at least 14 days before, served on the owner a notice of intention to serve the direction. However, a local authority may serve a direction without serving a notice if it considers that the safety of a person would be at risk if the requirements of the direction were not carried out as soon as possible.

Schedule 1 [15] permits an authorised officer, or a person acting under the direction of a local authority, to enter premises and carry out some or all of the requirements of a direction given by the local authority if the person to whom the direction is given

fails to comply with the direction within the time specified in the direction or if the local authority considers that the requirements of the direction need to be carried out urgently as there is a significant risk to public safety. Before any requirement of a direction is carried out, a local authority or authorised officer must serve on the occupier of the premises a notice of intention to carry out the requirement. Also, before entering premises, a local authority or authorised officer must seek the consent of the occupier of the premises to the entry. The local authority may recover, from the person to whom the direction was given, the reasonable costs of carrying out the requirements of the direction.

Schedule 1 [19] and [20] rename inspectors as authorised officers in line with the title of such persons under other legislation. **Schedule 1 [36]** inserts a savings and transitional provision that provides for persons who are currently appointed as inspectors in respect of a local authority to be taken to be authorised officers appointed in respect of the local authority. **Schedule 1 [21]** omits a requirement that the certificate of identification issued to authorised officers by a local authority be in a prescribed form. This would enable a single identification document to be issued in respect of a person who is an authorised officer of a local authority under other legislation.

Schedule 1 [22] requires an authorised officer to produce his or her certificate of identification on demand when carrying out functions under the Principal Act on premises.

Schedule 1 [24] replaces the search warrant provision of the Principal Act with a standard provision and also inserts proposed section 29A. Proposed section 29A requires a local authority to investigate any written complaint it receives that alleges a contravention of the Principal Act unless the complaint is vexatious, misconceived, frivolous or lacking in substance. Investigation of the complaint is to be commenced, as far as is practicable, within 72 hours (or such other period as may be prescribed by the regulations). An authorised officer is permitted to enter premises to make an examination in relation to the complaint. However, before doing so, the local authority is to notify the owner or occupier of the premises about the complaint and arrange to carry out the examination at a time that is convenient to the owner or occupier.

Schedule 1 [26] and [36] abolish the Pool Fencing Advisory Committee.

Schedule 1 [28] permits notices under the Principal Act to be served by facsimile or email.

Schedule 1 [29] increases the maximum penalty that may be prescribed in respect of an offence that is dealt with by way of a penalty notice from 2 penalty units ($220) to 5 penalty units ($550).

Schedule 1 [34] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

19. TRADE MEASUREMENT (REPEAL) BILL 2009

Date Introduced:	11 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon Virginia Judge MP
Portfolio:	Fair Trading

Purpose and Description

1. The purpose of this Bill is to provide for the repeal of the *Trade Measurement Act 1989* and the *Trade Measurement Administration Act 1989* on 1 July 2010, and for the necessary transitional arrangements for the regulation of trade measurement to transfer from NSW to the Commonwealth.

2. The objects of the Bill are:

   (a) to repeal the *Trade Measurement Act 1989* and the *Trade Measurement Administration Act 1989* as a consequence of the agreement by the Council of Australian Governments in April 2007 in relation to national trade measurement reform and the transfer of trade measurement responsibilities from the States and Territories to the Commonwealth;
   (b) to make provision for transitional and consequential matters related to the transfer of trade measurement responsibilities,
   (c) to amend the *Fair Trading Act 1987* in relation to information sharing arrangements between the Director-General of the Department of Services, Technology and Administration (the Director-General) and certain other agencies of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction (which may be used in relation to the transfer of trade measurement information to the Commonwealth).

Background

3. The Bill is the result of an agreement made by the Council of Australian Governments (COAG) in April 2007 for the Commonwealth to assume full responsibility for national trade measurement from 1 July 2010. Accordingly, trade measurement will be regulated in every jurisdiction by the Commonwealth through the National Measurement Institute under the *National Measurement Act 1960* from 1 July 2010 onwards.

4. The current NSW legislation makes arrangements for the approval and use of measuring instruments for trade; labelling and measurement requirements for pre-packaged products; requirements for the sale of goods by measurement; licensing public weighbridges and the businesses which certify, service and repair measuring instruments used for trade; offences, penalties and government inspectors who check that the trade measurement requirements are complied with; the maintenance and verification of the reference standards of measurement; and the use of those reference standards to check the measurement standards used by inspectors, certifiers and industry.

5. As stated in the Second Reading Speech, the Bill provides for the repeal of the NSW legislation because it will be replaced by the Commonwealth trade measurement legislation during 2010. It also deals with “continuing matters” and offences, which are matters that have arisen under the NSW legislation before the commencement of the Commonwealth legislation and are required to be dealt with under the NSW legislation.

6. The Bill specifically includes a definition of "continuing matters”. “Continuing matters” include penalty notices; disciplinary action against licensees; a person's right of appeal to the Administrative Decisions Tribunal for the review of a decision made by the licensing authority; anything seized under the legislation and fees or charges or issuing of a search warrant in relation to an investigation of an alleged offence under the relevant legislation.

7. The Bill also makes arrangements for the disclosure or provision of information to the Commonwealth in relation to a "continuing matter", or a matter in connection with the administration of the NSW legislation. It also provides for consequential amendments to other legislation arising from the repeal of the New South Wales legislation.

8. The Bill proposes some minor amendments to section 9A of the *Fair Trading Act 1987*, which deals with arrangements for information sharing between agencies. These amendments aim to ensure the section 9A arrangements can be used to facilitate information sharing between agencies under the Council of Australian Governments national reforms.

9. As stated in the Second Reading Speech, the Commonwealth has requested that States and Territories provide certain information by March 2010 in order for systems to be put in place for the commencement and operation of the Commonwealth legislation on 1 July 2010. Accordingly, the amendments to the *Fair Trading Act 1987* would allow necessary information to be provided to the Commonwealth to ensure the continuity of the trade measurement regulation in NSW.

10. Further, as stated in the Second Reading Speech, any information provided to the Commonwealth would be subject to confidentiality and the Commonwealth privacy laws. Whilst the Bill will commence when the Commonwealth legislation starts on 1 July 2010, certain provisions, for example those relating to information disclosure and supply arrangements as well as the amendments to section 9A *Fair Trading Act 1987* will commence on the date of assent.

The Bill

11. **Outline of provisions**

Part 1 Preliminary

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

Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation (except sections 1, 2, 13 and 15 and Schedule 1.1 which commence on the date of assent to the proposed Act). It is proposed to appoint a date of commencement of 1 July 2010 by proclamation since this is the anticipated date that the Commonwealth will assume full responsibility for the national trade measurement system.

Clause 3 defines certain words and expressions used in the proposed Act.

Part 2 Repeals

Clause 4 provides for the repeal of the *Trade Measurement Act 1989* and the *Trade Measurement Administration Act 1989*.

Part 3 Transitional provisions

Clause 5 enables the issue and service of a penalty notice under the repealed *Trade Measurement Administration Act 1989* in respect of a penalty notice offence committed before the date of that Act's repeal.

Clause 6 provides for the taking of disciplinary action under the repealed *Trade Measurement Act 1989* if notice of such action was given in accordance with that Act before its repeal.

Clause 7 allows a person to apply to the Administrative Decisions Tribunal for the review of a decision of a licensing authority under the *Trade Measurement Act 1989* following its repeal if the person was entitled to make such an application immediately before the date of repeal. Clause 7 also provides for the continuation of existing reviews after the date of repeal.

Clause 8 allows an inspector to deal with a seized measuring instrument, record or other thing in accordance with the *Trade Measurement Act 1989* after its repeal if the inspector seized the thing prior to the date of repeal. Clause 8 also provides that the National Measurement Institute may inspect a seized thing for the purposes of the administration or enforcement of the Commonwealth trade measurement law.

Clause 9 provides that a fee or charge that is payable under Part 3 of the *Trade Measurement Administration Act 1989* (or the regulations under that Part) immediately before the repeal of that Act continues to be recoverable as a debt due to the Crown. Clause 9 also allows for the recovery of a charge under section 11 of the *Trade Measurement Administration Act 1989* that would have become payable after the commencement date but that relates to a period ending on or before the commencement date.

Clause 10 enables a search warrant to be issued after the commencement date in relation to the suspected contravention of a provision of the *Trade Measurement Administration Act 1989* or the *Trade Measurement Act 1989* (or of the regulations under either of those Acts) in or on a part of any premises before the commencement date.

Clause 11 makes it clear, for the purposes of the continuing matters referred to in clauses 5–10, that the *Trade Measurement Act 1989* and the *Trade Measurement Administration Act 1989* continue to apply as if they had not been repealed and the Acts and instruments specified in Schedule 1 (except Schedule 1.1) continue to apply as if they had not been amended.

Clause 12 provides that a reference in any other Act or instrument to the *Trade Measurement Act 1989* or the *Trade Measurement Administration Act 1989* extends to a reference to the Commonwealth trade measurement law (except in so far as the context or subject-matter otherwise indicates or requires).

Part 4 Miscellaneous

Clause 13 enables the Director-General (or an authorised member of staff of the Department of Services, Technology and Administration) to provide certain registers and other information to the National Measurement Institute for the purpose of the administration or enforcement of the Commonwealth trade measurement law.

Clause 14 provides that section 30 of the *Interpretation Act 1987* is not affected by the proposed Act unless otherwise indicated in the proposed Act. Section 30 enables proceedings to be commenced under the repealed *Trade Measurement Act 1989* or the *Trade Measurement Administration Act 1989* in respect of offences, which are alleged to have been committed before the date of repeal.

Clause 15 enables regulations to be made for or with respect to any matter required or permitted to be prescribed by the proposed Act or that is necessary or convenient to be prescribed for carrying out or giving effect to the proposed Act.

Clause 16 provides for the repeal of the proposed Act on 1 July 2013.

Schedule 1 Amendment of Acts and instruments

Schedule 1.1 amends the *Fair Trading Act 1987* to ensure that the information sharing arrangements provided for under section 9A of that Act are sufficiently flexible (by providing that such arrangements may be approved of by the Director-General in addition to being entered into by the Director-General).

Schedule 1.1 also amends section 9A so that such arrangements may relate to information of a type prescribed by the regulations (in addition to the types of information already specified in that section).

Schedule 1.2–1.9 make amendments to various Acts and instruments as a consequence of the repeal of the *Trade Measurement Act 1989* and the *Trade* Measurement Administration Act 1989.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

12. The Committee notes that under Clause 2, the proposed Act will commence on a day or days to be appointed by proclamation (with the exception of sections 1, 2, 13 and 15 and Schedule 1.1, which will commence on the date of assent to the proposed Act). This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes the comments in the Explanatory Note that the intention of the Government is to propose a date of commencement of 1 July 2010 (by proclamation) as this is the anticipated date that the Commonwealth will assume full responsibility for the national trade measurement system.

13. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

20. TRUSTEE COMPANIES AMENDMENT BILL 2009

Date Introduced:	11 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The object of the Bill is to amend *The Trustee Companies Act 1964* consequentially on the enactment and commencement of the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009* of the Commonwealth (the Commonwealth Act), which provides for Commonwealth regulation of trustee companies.

2. Under the Commonwealth legislation there will be a single licensing and reporting regime for trustee companies administered by a single regulator, namely the Australian Securities and Investments Commission). Accordingly, the Bill:

   (a) removes the State approval mechanism for trustee companies and defines trustee companies as licensed trustee companies under the Corporations Act; and
   (b) omits provisions that will be unnecessary when the proposed amendments to the Corporations Act take effect or that are inconsistent with that Act, and
   (c) facilitates the transfer of a trustee company's business to another licensed trustee company when its licence is cancelled under the Corporations Act, and
   (d) provides for the making of transitional regulations and makes savings and transitional provisions to facilitate the transition to the new regime, and
   (e) makes consequential amendments to the *Trustee Companies Regulation 2005* and various Acts.

3. The Bill also amends the *Trustee Companies Regulation 2005* to prescribe certain matters under sections 15A and 15AA of the *Trust Companies Act 1964* as inserted by the *NSW Trustee and Guardian Act 2009* on 1 July 2009 relating to small estates.

Background

4. In July 2008, the Council of Australian Governments (COAG) agreed that the Commonwealth would assume responsibility for the regulation of trustee companies. Accordingly, Schedule 2 to the Commonwealth Act amends the *Corporations Act 2001* of the Commonwealth (the Corporations Act) to give effect to the Commonwealth regulation of trustee companies.

5. Under the new regime, the Commonwealth will have exclusive responsibility for "entity" level regulation of trustee companies' traditional services, including licensing of the companies and regulating the fees they can charge for those traditional

services. *The Trustee Companies Act 1964*, and the rules of common law and equity, will continue to govern the functions and powers of trustee companies in New South Wales.

6. As stated in the Second Reading Speech, the Bill will ensure a smooth transition to Commonwealth regulation of trustee companies and ensure that New South Wales meets its obligations under the COAG agreement. It will amend the *Trustees Companies Act 1964* to facilitate the regulation of trustee companies by the Commonwealth.

7. The Bill will facilitate the transition to a single licensing and reporting regime administered by a single national regulator. Trustee companies will be required to have a trustee company Australian financial services licence. Further, as stated in the Second Reading Speech, a single national regulatory scheme will eliminate the unnecessary regulatory burden on trustee companies from duplicate licensing and reporting requirements in each State.

8. It will also apply the consumer protection regime for financial services from the Corporations Act to trustee companies, which will have to comply with the conduct, disclosure, advice, dispute resolution and compensation requirements of that Act. According to the Second Reading Speech, this will provide better consumer protection and access to a more cost-effective and a timely alternative dispute resolution mechanism.

9. The Bill will amend the *Trustee Companies Act 1964* so that companies will no longer be authorised to be trustee companies by being listed in a Schedule to that Act. Instead the Act will recognise licensed trustee companies under chapter 5D of the *Commonwealth's Corporations Act 2001*.

10. It also repeals sections of the *Trustee Companies Act 1964* that will be unnecessary or inconsistent when Commonwealth regulation takes effect. It also repeals provisions relating to: the fees that may be charged by trustee companies; the provision of accounts by trustee companies; the duties of officers and employees of trustee companies; restrictions on the ownership or control of trustee companies; the provision of company financial statements to the Government; and minimum capital requirements, indemnity insurance and common funds.

11. Finally, the Bill will facilitate the transfer of a trustee company's business to another licensed trustee company if its licence is cancelled. It amends the *Trustee Companies Regulation 2005* to prescribe certain matters in relation to the filing of elections to administer small deceased estates.

The Bill

12. Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation (with stated exceptions).

Schedule 1 Amendment of Trustee Companies Act 1964 No 6

Schedule 1 [1] removes spent savings and transitional provisions from the Principal Act.

Schedule 1 [2] omits definitions that will be unnecessary as a result of the repeal of various sections of the Principal Act.

Schedule 1 [3] redefines Trustee company as a licensed trustee company within the meaning of Chapter 5D of the Corporations Act as amended.

Schedule 1 [4] amends section 3 (2) of the Principal Act as a consequence of trustee companies being regulated under the Corporations Act as amended.

Schedule 1 [5]–[10] and [12] omit provisions that will be unnecessary as a consequence of trustee companies being regulated under the Corporations Act as amended. The provisions to be repealed relate to the following:

(a) fees that may be charged by trustee companies for the provision of traditional
trustee company services (as defined in section 601RAC of the Corporations Act as amended) and the disclosure of fees,
(b) provision of accounts by trustee companies in relation to traditional trustee company services provided by the companies,
(c) duties of officers and employees of trustee companies that provide traditional
trustee company services, in their capacity as officers or employees of those companies,
(d) regulation of the voting power that may be held in trustee companies that provide traditional trustee company services or that otherwise impose restrictions on the ownership or control of companies that provide such services,
(e) the provision of financial statements,
(f) minimum capital requirements, indemnity insurance and common funds.

Schedule 1 [11] inserts proposed sections 34A and 34B into the Principal Act. Section 601WBA of the Corporations Act as amended enables the Australian Securities and Investments Commission (ASIC) to make a compulsory determination that there is to be a transfer of estate assets and liabilities from a trustee company whose licence ASIC has cancelled (the transferring company) to another licensed trustee company (the receiving company). To make this determination, ASIC must be satisfied (amongst other things) that legislation to facilitate the transfer that satisfies the requirements of section 601WBC of the Corporations Act as amended has been enacted in the State or Territory in which the transferring company and receiving company is situated. Proposed section 34A of the Principal Act will satisfy the requirements of section 601WBC for New South Wales legislation when an ASIC certificate of transfer comes into force. Proposed section 34B exempts the transfer of the estate assets and liabilities of the transferring company to a receiving company from State taxes.

Schedule 1 [13] is an amendment by way of statute law revision to omit a provision that is superfluous because of section 42 of the *Interpretation Act 1987*.

Schedule 1 [14] omits the existing savings and transitional regulation-making power from the Principal Act. A replacement savings and transitional regulation-making power is inserted by Schedule 1 [15].

Schedule 1 [15] omits provisions that will be unnecessary as a consequence of trustee companies being regulated under the Corporations Act as amended and inserts savings and transitional provisions, including a savings and transitional regulation-making power.

Schedule 2 Amendment of other Acts and Instrument

Schedule 2.4 amends the *Trustee Companies Regulation 2005* to omit provisions that will be unnecessary as a consequence of trustee companies being regulated by the Corporations Act as amended and inserts provisions relating to elections to administer small estates. In particular, the gross value of an estate which may be administered as a small estate is prescribed as being less than $100,000.

Schedule 2.1–2.3 make consequential amendments to various Acts.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation - Provide the executive with unfettered control over the commencement of an Act

13. The Committee notes that under Clause 2(1), the proposed Act (with the exception of Sections 1 and 2 and Schedule 2.4 [2], as provided by Clause 2(2)) will commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes the comments in the Second Reading Speech that the intention of the Government is that the Bill will commence when the relevant provisions of the Commonwealth Act commence in January 2010.

14. The Committee notes the above information and has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill

21. VALUATION OF LAND AMENDMENT BILL 2009

Date Introduced:	12 November 2009
House Introduced:	Legislative Council
Minister Responsible:	Hon Tony Kelly MLC
Portfolio:	Lands

Purpose and Description

1. The object of this Bill is to amend legislation relating to the valuation of land that is heritage restricted (including land listed on the State Heritage Register) to restore the practice of the Valuer-General in relation to that land before the decision of the Court of Appeal in *Valuer-General v Commonwealth Custodial Services Ltd* [2009] NSWCA 143.

2. Land value is ordinarily determined on the assumption that there are no improvements on the land and that the land can be used for any purpose for which it is being used or could legally be used. Valuations of heritage restricted land are reduced by provisions that require the Valuer-General to assume that the land can only be used for the purpose for which it is being used and that the only improvements that can be made and continued are those that are on the land at the relevant date of valuation.

3. As stated in the Second Reading Speech, the Valuer-General's practice, which the Court in *Valuer-General v Commonwealth Custodial Services Ltd* found was not supported by the current provisions of the relevant legislation, has been to treat any improvements on the land as new improvements without making any deductions because of the current condition of the improvements. The Bill reverses the decision and confirms the previous practice of the Valuer-General in relation to the valuation of heritage-restricted land.

Background

4. The Valuer General is the State Government's principal adviser on all land valuation matters and has a statutory responsibility to provide fair and accurate land valuations for rating and taxing purposes. As stated in the Second Reading Speech, the decision of the Court in *Valuer-General v Commonwealth Custodial Services Ltd* casts doubt on the validity of heritage valuations undertaken by the Valuer General. Accordingly, the Bill intends to clarify the approach to valuing heritage land that has been developed by the Valuer General.

5. The *Valuation of Land Act 1916* (the Act) provides for the valuation of land for rating and taxing purposes. Valuations made under the Act reflect land value only and value is assessed as if the land was vacant on the basis of its highest and best use. In NSW there are two categories of heritage land, namely heritage-restricted land and heritage-listed land. Land subject to a heritage restriction is listed in the heritage schedule to the Local Council's local environmental plan.

6. Heritage-listed land refers to property identified on the State Heritage Register kept under the *Heritage Act 1977*. This is a register of places and items of particular importance to the people of NSW. If a property is heritage restricted, a landowner can request the Valuer General to provide a heritage-restricted valuation for land tax and local rate purposes.

7. A heritage valuation allows a discount to be made based on the existing development of the land rather than on any presumption of future development. As a result, the valuation is usually lower than other comparable land not subject to a heritage restriction. The landowner of the heritage land would usually receive lower council rates and land tax compared to land that is not heritage listed.

8. Section 14G of the Act sets out the manner in which heritage-restricted land is to be valued. In order to determine the highest and best practical use of the land, section 14G requires three assumptions to be made. These assumptions are that the land may be used only for the purpose for which it was being used at the date of valuation; that all improvements on the land when the value was determined may be continued and maintained in order that the existing use of that land may continue; and that no improvements, other than those on the land, may be made to or on that land.

9. As stated in the Second Reading Speech, a building of heritage significance will never be in a new condition. However, the assumptions provided by section 14G were intended to assist a valuer to properly determine the highest practical use of heritage restricted land as required by the Act. The actual building itself is not assessed for value and is considered only for the purpose of determining the nature of use and the extent of development allowed on the land.

10. The Court of Appeal in *Valuer General v Commonwealth Custodial Services Pty Ltd* held that the current wording of section 14G requires that the current condition of the building must be taken into account in the valuation assessment. The court stated that the cost of maintenance of a heritage building impacts upon its marketability and available return, and the potential cost of refurbishment should therefore be factored into the valuation.

11. However, as stated in the Second Reading Speech the Valuer General has never valued heritage-restricted land in this way. Further, according to the Second Reading Speech most land in New South Wales is valued using a mass valuation process, which enables like properties to be considered together and valued in groups called “components”.

12. As stated in the Second Reading Speech, the properties in each component are similar, or are likely to change in value in a similar way. Within each component, at least one representative property is valued individually each year to measure how much the value has changed in the previous year. The change in value is then applied to all properties within the component to determine their new value.

13. As stated in the Second Reading Speech, if section 14G required that the actual condition of the heritage building be taken into account, separate inspections would need to be made for every heritage property.
To change the valuation procedure in this way would have a substantial impact on the practicality of administering the Act because a significant amount of time and expense would be required to assess each and every property.

14. Accordingly, the purpose of the Bill is to maintain the status quo and the current practice of the Valuer General. It proposes to introduce a further assumption that clarifies that when valuing property under section 14G all improvements on the land are, and will, continue to be maintained without the need to make any allowance for the building's actual condition. The amendments will ensure that a valuer need not take into account the actual condition of the building when the valuation is made. The Bill will also validate the practice of assuming that the building or structure may be continued and maintained to determine the best and highest use of the land.

15. The Bill also proposes to amend the *Heritage Act 1977* (the Heritage Act). If land is listed on the State Heritage Register, the Valuer General is compelled to value the land in accordance with the heritage valuation principles set out in section 123 of the Heritage Act. A heritage valuation made under the Heritage Act is made upon the same assumptions as section 14G of the Valuation of Land Act. Accordingly, a corresponding amendment would be made to section 123 of the Heritage Act.

The Bill

16. **Outline of provisions**

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

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

Schedule 1 Amendment of Valuation of Land Act 1916 No 2

Schedule 1 [1] amends section 14G (in relation to heritage restricted land other than land listed on the State Heritage Register) to give effect to the objects of the Bill.

Schedule 1 [2] enables regulations of a savings or transitional nature to be made as a consequence of the proposed Act.

Schedule 1 [3] validates the past valuations of the Valuer-General (but without affecting the decision of the Court of Appeal in relation to the particular valuation of land concerned).

Schedule 2 Amendment of Heritage Act 1977 No 136

Schedule 2 amends section 123 (in relation to land listed on the State Heritage Register) to give effect to the objects of the bill.

Issues Considered by the Committee

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

Issue: Proposed section 18 *Valuation of Land Act 1916* – Retrospectivity

17. The Committee notes that proposed section 18(1) provides that the proposed amendments to section 14G of the *Valuation of Land Act 1916* and section 123 of the *Heritage Act 1977* are taken to have applied, and always to have applied, to any land valuation made before the commencement of the clause. Proposed section 18(2)

clarifies that proposed section 18(1) does not affect any decision made by a Court before the commencement of this clause.

18. The Committee will always be concerned to identify any retrospective application of proposed legislation that may adversely impact on personal rights and liberties. The Committee notes that this Bill has been introduced in response to *Valuer-General v Commonwealth Custodial Services Ltd* [2009] NSWCA 143, in which the State of NSW was a party. As stated in the Second Reading Speech, the Bill intends to clarify the approach to valuing heritage land that has been developed by the Valuer General and to "maintain the status quo" regarding this approach. Accordingly, in these circumstances, the Committee does not consider that the retrospective application of the proposed amendments will unduly trespasses on personal rights and liberties.

The Committee makes no further comment on this Bill.

22. WATER MANAGEMENT AMENDMENT BILL 2009

Date Introduced: 12 November 2009
House Introduced: Legislative Council
Minister Responsible: Hon Phillip Costa MP
Portfolio: Water

Purpose and Description

1. The Bill amends the *Water Management Act 2000* and the *State Water Corporation Act 2004*:

   (a) to confer power on the Water Administration Ministerial Corporation (the Ministerial Corporation) and the State Water Corporation to install, maintain and replace metering equipment;
   (b) to clarify the powers to give directions as to metering equipment;
   (c) to provide for certain instruments to be notified on the NSW legislation website rather than being published in the Government Gazette;
   (d) to make other consequential and minor amendments.

Background

Metering Equipment

2. According to the Second Reading Speech, the Office of Water is currently administering a $28.6 million Commonwealth Government funded program of water meter installation in the Hawkesbury-Nepean catchment. This involves the purchase and installation of up to 2,000 metering systems as well as a data management system for the Hawkesbury-Nepean catchment. In-principle approval has also been provided for a Commonwealth Government funded program in the Murray-Darling Basin of approximately $221 million.

3. Measuring the amount of water extracted from rivers helps to ensure that this scarce resource is shared fairly amongst users. The installation of metering equipment helps to develop a more transparent, accurate and accountable system for monitoring the extraction of water.

4. Currently the installation of meters is the responsibility of water users where it is required as a condition of their access licence or approval. According to the Second Reading Speech, while meter coverage on regulated rivers and in some groundwater areas is relatively good, it is less widespread in unregulated rivers.

5. In order for the metering projects to progress, the Bill confers the power to install, maintain and replace metering equipment on the Ministerial Corporation and clarifies the powers of the State Water Corporation in this regard. The Bill also clarifies the Minister's power under section 326 of the *Water Management Act 2000* to issue directions to install, replace or maintain metering equipment.

6. The Bill provides for the Ministerial Corporation and State Water Corporation to take over the exclusive operation and maintenance of prescribed classes of meters in areas or water sources prescribed by regulation. Existing obligations, such as licence conditions or directions under section 326 of the *Water Management Act 2000*, requiring landholders to maintain meters will be overridden in certain areas while such a regulation is in force.

7. The Bill also allows for regulations to be made under the *State Water Corporation Act 2004* to limit the application of State Water's powers in relation to metering equipment or for such functions to be conferred, or not conferred, exclusively on State Water. This will enable alterations to be made, operation and maintenance to occur on existing meters that are almost in line with the National Water Metering Standards, and do not need to be replaced altogether.

8. Under the Bill, alterations may, for example, include the installation of telemetry equipment, which will allow a meter to provide real time data back to the Ministerial Corporation or State Water Corporation. According to the Second Reading Speech:

> …concerns have been raised in relation to increased business costs, particularly as a consequence of the requirement to install water metering equipment that is telemetry enabled. However, telemetry equipment, while having initially higher costs, provides for significantly improved efficiency in gathering the information required and will, in the medium term, result in lower metering costs to Government and hence to irrigators.

Notification of Certain Statutory Instruments

9. As stated in the Second Reading Speech, the Bill makes amendments to provide for certain statutory instruments made under the *Water Management Act 2000* to be notified on the NSW legislation website rather than published in the Government Gazette. These amendments are intended to implement the requirements of Premier's Memorandum 2009-02 in relation to the online notification of new statutory instruments.

10. According to the Second Reading Speech, the amendments only apply to instruments under the *Water Management Act 2000* that have a relatively permanent nature, for example water management plans, harvestable rights orders, access licence dealing principles orders and mandatory guidelines for the taking and use of water for domestic consumption and stock watering. As stated in the Second Reading Speech, the amendments are intended to promote transparency and for members of the public to have easier access to the statutory instruments.

Other amendments

11. The Bill also makes some other consequential and minor amendments to the *Water Management Act 2000* in response to the Commonwealth Government's water market rules. On 3 July 2008, the Intergovernmental Agreement on the Murray-Darling Basin reforms was signed by the "basin" jurisdictions. Fifty-seven percent of the basin is within New South Wales.

12. Last year the *Water (Commonwealth Powers) Act 2008* established the arrangements needed to implement the agreement and referring the power of NSW in this area to the Commonwealth. In June this year, the Commonwealth Minister for Climate Change and Water also made water market rules for the Murray-Darling Basin. The aim of the water market rules is to allow people who hold water rights as

a member of an irrigation infrastructure operator to convert the right to an individually held entitlement.

13. To mitigate the impacts on regional economies of any rapid movement of water out of an area, the national initiative enables the States to impose an interim trade threshold limit on permanent trade in water entitlements out of all water irrigation areas. The agreed limit, or "cap" on trade, is currently set at 4 % per year of the total water entitlement. NSW implemented the requirement to enable 4% trade out of irrigation areas through section 71ZA *Water Management Act 2000*, which was introduced in 2005.

14. As stated in the Second Reading Speech, as the Commonwealth is responsible for this area, the Bill seeks to remove section 71ZA of the *Water Management Act 2000*. The intention is to maintain the current cap through a trade order to ensure that regional economies continue to be protected. The NSW Office of Water has commenced consultation on the terms of a trade order under section 71 Z of the *Water Management Act 2000* to maintain the 4 % cap.

15. As stated in the Second Reading Speech, an order made under section 71Z will allow the Government to keep the issue under review and modify the order if trading restrictions in other States are lifted more quickly than planned, or if it is no longer needed to support irrigation industries and communities. As also stated in the Second Reading Speech, the Government will consider stakeholder views and keep the issue under review.

The Bill

16. **Outline of provisions**

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Schedule 1 Amendment of Water Management Act 2000 No 92

Metering equipment

Schedule 1 [11] inserts proposed sections 372A and 372B. Proposed section 372A confers the function of installing and removing metering equipment on the Ministerial Corporation and enables further functions of maintaining, repairing, improving, replacing and operating metering equipment to be conferred by regulations. Such regulations may be limited in their application and may provide for the functions to be conferred, or not conferred, exclusively on the Ministerial Corporation. Proposed section 372B provides that metering equipment installed by the Ministerial Corporation does not become the property of the Ministerial Corporation and also provides that compensation is not payable for loss or damage suffered as a result of the removal by the Ministerial Corporation of metering equipment it installed.

Schedule 1 [3] extends the offence of taking water when metering equipment is not working to equipment installed by or with the written authority of the Ministerial Corporation or the State Water Corporation.

Schedule 1 [4] excludes things done to metering equipment by or with the written authority of the Ministerial Corporation or the State Water Corporation from the offence of tampering with metering equipment. The amendment also limits the exclusion from the offence currently given to duly qualified persons, and the new exclusion for specified persons, to work done on equipment that is not equipment that may only be worked on by those Corporations.

Schedule 1 [5] inserts proposed section 91N. The proposed section makes it clear that the Ministerial Corporation and the State Water Corporation are not required to obtain approvals to construct or use metering equipment.

Schedule 1 [13] makes it clear that metering equipment is included within the meaning of drainage work for the purposes of the *Water Management Act 2000*.

Schedule 1 [14] makes it clear that metering equipment is included within the meaning of flood work for the purposes of the *Water Management Act 2000*.

Schedule 1 [15] includes telemetry equipment within the meaning of metering equipment for the purposes of the *Water Management Act 2000*.

Schedule 1 [16] makes it clear that metering equipment is included within the meaning of water supply work for the purposes of the *Water Management Act 2000*.

Directions by Minister

Section 326 of the *Water Management Act 2000* currently enables the Minister to direct landholders or persons who control water supply works to take specified measures to install metering equipment in connection with such works. Such a direction is taken to include a direction to properly maintain and seal the equipment using a duly qualified person.

Schedule 1 [6] enables a direction to be given requiring metering equipment to be replaced or metering equipment to be properly maintained. **Schedule 1 [8]** makes a consequential amendment.

Schedule 1 [7] enables a direction for the installation of a meter to require either the proper maintenance of the equipment or the sealing of the equipment, or both.

Schedule 1 [9] enables a direction to be made to require that only a specified person or persons may install, maintain or seal metering equipment. **Schedule 1 [10]** makes a consequential amendment.

Notification on the NSW legislation website

Schedule 1 [1] replaces the existing requirements to publish the following instruments in the Government Gazette with a requirement to notify them on the NSW legislation website:

(a) water management plans,
(b) orders amending or repealing water management plans,
(c) Minister's water management plan,
(d) harvestable rights orders,
(e) orders establishing access licence dealing principles,
(f) orders establishing mandatory guidelines for the taking and use of water for

domestic consumption and stock watering by landholders.

Other amendments

Schedule 1 [2] repeals section 71ZA as a consequence of the operation of rules relating to the water market between States made under the *Water Act 2007* of the Commonwealth.

Schedule 1 [12] enables regulations containing provisions of a savings or transitional nature to be made as a consequence of the proposed Act.

Schedule 2 Amendment of State Water Corporation Act 2004 No 40

Metering equipment

Schedule 2 [1] inserts a definition of metering equipment.

Schedule 2 [2] makes it clear that the State Water Corporation is to be the owner of metering equipment installed by the Corporation and confers on the Corporation the same powers in respect of metering equipment that it has with respect to works, including installing, operating, repairing and replacing the equipment.

Schedule 2 [3] inserts proposed section 22A. Proposed section 22A extends the State Water Corporation's powers with respect to metering equipment to include equipment that the Corporation does not own, if the operating licence for the Corporation so provides. It also confers power to test metering equipment and enables regulations to be made limiting the application of the State Water Corporation's powers relating to metering equipment. Such regulations may also provide for the functions to be conferred, or not conferred, exclusively on the State Water Corporation.

Savings and transitional provisions

Schedule 2 [4] enables regulations containing provisions of a savings or transitional nature to be made as a consequence of the proposed Act.

Issues Considered by the Committee

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

Issue: Proposed section 372B(2) *Water Management Act 2000* – Denial of Compensation

17. Proposed section 372B(2) *Water Management Act 2000* reads that no compensation is payable by or on behalf of the Crown to any person who suffers loss or damage because of the removal by the Ministerial Corporation of metering equipment installed by the Ministerial Corporation. The Committee notes that this provision may be considered to unduly trespass on personal rights of individuals, and refers it to Parliament for its consideration.

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

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

18. Under proposed Clause 2, the Bill will commence on a day or days to be appointed by proclamation. The Committee notes that this may delegate to the Government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes advice received from the Minister that the proposed Bill will commence on a day or days to be appointed by proclamation rather than on assent because regulations need to be made before the amendments can take effect. Further the Committee notes advice from the Minister that further analysis has to be carried out by the NSW Office of Water and the State Water Corporation to ensure that all necessary operating and administrative procedures are in place before the amendments can take effect.

19. The Committee accepts the above advice and has not identified any issues identified under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9 (1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation; and

2) to write to the Minister to seek clarification with regard to the Committee's concerns as to whether amending the Act by this regulation is an appropriate delegation of legislative power, and whether the permanent prohibitions under the Regulation may be inconsistent with the duration of closures provided under the Act.

Grounds for comment

Personal rights/liberties	
Business impact	
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	By aiming to convert fishing closures that currently have effect under section 8 of the Act for a period of 5 years to permanent prohibitions, this Regulation may be inconsistent with, or contrary to the Act's duration of closures provided under section 10 (2).
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	It could appear to be a significant delegation of legislative powers by allowing the amendment of a key feature of the Act (duration of fishing closures not to exceed 5 years) by a regulation which will convert some of the fishing closures to permanent prohibitions.

Explanatory Note

The object of this Regulation is to convert a number of fishing closures that currently have effect under section 8 of the *Fisheries Management Act 1994* for a period of up to 5 years to permanent prohibitions under that Act. The Regulation also makes a number of miscellaneous amendments to various fisheries management regulations. This Regulation is

made under the *Fisheries Management Act 1994*, including sections 20, 40, 60 and 289 (the general regulation-making power).

Comment

Inconsistency with the Act – Delegation of legislative powers – Henry VIII clause – which allows amendment of an Act by a regulation:

1. The Committee notes that the object of this Regulation is to convert a number of fishing closures that currently have effect under section 8 of the *Fisheries Management Act 1994* for a period of up to 5 years to permanent prohibitions.

2. Section 8 of the *Fisheries Management Act 1994*, provides for closure of waters to fishing: (1) The Minister may from time to time, by notification, prohibit, absolutely or conditionally, the taking of fish, or of a specified class of fish, from any waters or from specified waters. (2) Any such prohibition is called a ***fishing closure***.

3. However, under section 10 (2) of the Act, with regard to the duration of closures: a fishing closure remains in force, subject to this Act, for the period (not exceeding 5 years) specified in the notification.

4. The Committee is concerned that this Regulation, by aiming to convert fishing closures that currently have effect under section 8 of the Act for a period of 5 years to permanent prohibitions, may be inconsistent with, or contrary to the Act's duration of closures provided under section 10 (2). The Committee is also concerned that this could appear to be a significant delegation of legislative powers by allowing the amendment of a key feature of the Act (duration of fishing closures not to exceed 5 years) by a regulation which will convert some of the fishing closures to permanent prohibitions.

5. The Committee resolved to write to the Minister to seek clarification with regard to the Committee's concerns as to whether amending the Act by this regulation is an appropriate delegation of legislative power, and whether the permanent prohibitions under the Regulation may be inconsistent with the duration of closures provided under the Act.

SECTION B: POSTPONEMENT OF REPEAL OF REGULATIONS

Notification of Postponement

S. 11 Subordinate Legislation Act 1989

Paper No: 5265

NOTIFICATION OF THE PROPOSED POSTPONEMENTS OF THE REPEAL OF THE PUBLIC HEALTH (DISPOSAL OF BODIES) REGULATION 2002 (5); PUBLIC HEALTH (GENERAL) REGULATION 2002 (5); PUBLIC HEALTH (MICROBIAL CONTROL) REGULATION 2000; PUBLIC HEALTH (SKIN PENETRATION) REGULATION 2000; PUBLIC HEALTH (SWIMMING POOLS AND SPA POOLS) REGULATION 2000

...

File Ref: LRC 3022

Deputy Premier and Minister for Health

Issues

1. By correspondence received 14 October 2009, the Deputy Premier and Minister for Health advised the Committee that she is requesting to postpone the repeals of the above regulations due for staged repeal on 1 September 2010.

Recommendation

2. That the Committee approves the publication of this report to advise the Deputy Premier and Minister for Health that it does not have any concerns with the proposed postponements of the repeal of the above regulations.

Comment

3. The five regulations are made under the *Public Health Act 1991* which will be shortly replaced by a new Act.

4. The Deputy Premier and Minister for Health advised that:

> My Department has recently completed preparation of a draft Public Health Bill 2009 and I propose to seek Cabinet approval to release that Bill as an exposure draft for a period of public consultation. I then anticipate bringing a revised Bill before Parliament in Budget Session 2010. With this timetable in mind I anticipate that the new Public Health Act and any necessary regulations would commence in the first half of 2011. It is therefore considered unnecessarily resource intensive and duplicatory to consult upon, and remake the existing regulations when the process will need to be repeated in a short space of time as regulations are developed under the new Act…
>
> Considerable resources would be required to prepare regulatory impact statements on these five regulations and on passage of a new Act this process will need to be repeated. This is considered to be an inefficient use of resources and I therefore propose that the staged repeal of each of these regulations be postponed.

Public Health (Disposal of Bodies) Regulation 2002

5. This deals with the handling of bodies for cremation and burial, the exhumation of bodies and the keeping of the register of mortuaries and crematoria.

6. The Deputy Premier has proposed the postponement of the repeal of the above regulation for the fifth time, until 1 September 2011.

Public Health (General) Regulation 2002

7. This deals with a range of matters such as the provision of information to patients in relation to sexually transmissible medical conditions; the keeping of records about scheduled medical conditions and the notification of test results; and the control of vaccine preventable diseases.

8. The Deputy Premier has proposed the postponement of the repeal of the above regulation for the fifth time, until 1 September 2011.

Public Health (Microbial Control) Regulation 2000

9. This regulates the installation and maintenance of air handling systems, and water heating and cooling systems to prevent the spread of disease causing microbes.

10. This has already been postponed the maximum five times. The Premier's agreement for amendment of the *Subordinate Legislation Act 1989* by way of Statute Law Revision to postpone the repeal of this regulation until 1 September 2001 has been sought by the Deputy Premier and Minister for Health.

Public Health (Skin Penetration) Regulation 2000

11. This defines terms and regulates the hygiene standards and equipment of premises used for activities that involve penetrating the skin.

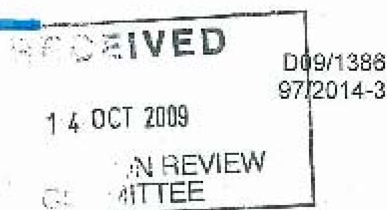
12. This has already been postponed the maximum five times. The Premier's agreement for amendment of the *Subordinate Legislation Act 1989* by way of Statute Law Revision to postpone the repeal of this regulation until 1 September 2001 has been sought by the Deputy Premier and Minister for Health.

Public Health (Swimming Pools and Spa Pools) Regulation 2000

13. This regulates the disinfection, cleanliness and inspection procedures for swimming pools and spas to which sections of the public have access.

14. This has already been postponed the maximum five times. The Premier's agreement for amendment of the *Subordinate Legislation Act 1989* by way of Statute Law Revision to postpone the repeal of this regulation until 1 September 2001 has been sought by the Deputy Premier and Minister for Health.

Carmel Tebbutt MP
Deputy Premier
Minister for Health



D09/1386
97/2014-3

- 8 OCT 2009

Mr Allan Shearan MP
Chairperson
Legislation Review Committee
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Shearan

I write in relation to the requirement under section 11(4) of the Subordinate Legislation Act 1989 that your Committee be given notice of the proposed postponement of the staged repeal of a statutory rule for the third, fourth or fifth time. I advise that I am seeking a postponement of the following regulations due for staged repeal on 1 September 2010:

Public Health (Disposal of Bodies) Regulation 2002
Public Health (General) Regulation 2002
Public Health (Microbial Control) Regulation 2000
Public Health (Skin Penetration) Regulation 2000
Public Health (Swimming Pools and Spa Pools) Regulation 2000

These five regulations are made under the Public Health Act 1991 which will shortly be replaced by a new Act. My Department has recently completed preparation of a draft Public Health Bill 2009 and I propose to seek Cabinet approval to release that Bill as an exposure draft for a period of public consultation. I then anticipate bringing a revised Bill before Parliament in Budget Session 2010. With this timetable in mind I anticipate that the new Public Health Act and any necessary regulations would commence in the first half of 2011. It is therefore considered unnecessarily resource intensive and duplicatory to consult upon, and remake the existing regulations when the process will need to be repeated in a short space of time as regulations are developed under the new Act.

The *Public Health (Disposal of Bodies) Regulation 2002* deals with the handling of bodies for cremation and burial, the exhumation of bodies and the keeping of the register of mortuaries and crematoria. The *Public Health (General) Regulation 2002* deals with a range of matters including the provision of information to patients in relation to sexually transmissible medical conditions; the keeping of records about scheduled medical conditions and the notification of test results; and the control of vaccine preventable diseases. The *Public Health (Microbial Control) Regulation 2000* regulates the installation and maintenance of air handling systems, and water heating and cooling systems to prevent the spread of disease causing microbes. The *Public Health (Skin Penetration) Regulation 2000* defines terms and regulates the hygiene standards and equipment of premises used for activities that involve penetrating the skin. The *Public Health (Swimming Pools and Spa Pools) Regulation 2000* regulates the disinfection, cleanliness and inspection procedures for swimming pools and spas to which sections of the public have access.

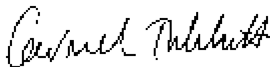
Considerable resources would be required to prepare regulatory impact statements on these five regulations and on passage of a new Act this process will need to be repeated. This is considered to be an inefficient use of resources and I therefore propose that the staged repeal of each of these regulations be postponed.

I am aware that the staged repeal of each of the Public Health (Microbial Control) Regulation 2000, the Public Health (Skin Penetration) Regulation 2000, and the Public Health (Swimming Pools and Spa Pools) Regulation 2000 has already been postponed the maximum five times. I have therefore sought the Premier's agreement for amendment of the Subordinate Legislation Act 1989 by way of Statute Law Revision to postpone the repeal of these Regulations until 1 September 2011. Your agreement to this course of action is also sought.

I am also aware that the proposed postponement of staged repeal for both Public Health (Disposal of Bodies) Regulation 2002 and the Public Health (General) Regulation 2002 will be for the fifth time. Your approval of the postponement of the staged repeal of these Regulations is also sought.

If further information is required, the officer with carriage of the matter in the Department of Health is Iain Martin, Manager Legislation in the Legal and Legislative Services Branch. Mr Martin can be contacted by telephone on 9391 9851. Mr Martin can also be contacted via Email at imartin@doh.health.nsw.gov.au.

Yours faithfully



Carmel Tebbutt MP
Deputy Premier
Minister for Health

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Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Aboriginal Land Rights Amendment Bill 2009	N, R		N, R	N	
Animal Welfare Legislation Amendment Bill 2009		N			
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Births, Deaths and Marriages Registration Amendment (Change of Name) Bill 2009	R, N				
Child Protection (Nicole's Law) Bill 2009*	R, N				
Child Protection Legislation (Registrable Persons) Amendment Bill 2009	N			N	
Children (Criminal Proceedings) Amendment (Naming of Children) Bill 2009	N			N	
Commission for Children and Young People Amendment Bill 2009	R			R, N	R
Constitution Amendment (Lieutenant-Governor) Bill 2009	N				
Courts and Crimes Legislation Amendment Bill 2009	R, N			N	
Courts and Other Legislation Amendment Bill 2009	R, N			N	
Crimes Amendment (Fraud, Identity And Forgery Offences) Bill 2009				N	
Crimes (Administration of Sentences) Amendment Bill 2009	R, N, C	N, R	N, R		
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2009	R, N				
Crimes (Criminal Organisations Control) Bill 2009	R, N		R		
Crimes (Forensic Procedures) Amendment Bill 2009	N				
Crimes (Forensic Procedures) Amendment (Untested Registrable Persons) Bill 2009	R, N				
Crimes Legislation Amendment (Possession of Knives in Public) Bill 2009*		R, N			
Criminal Legislation Amendment Bill 2009		N			

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Criminal Organisations Legislation	R, N			N	
Criminal Procedure Amendment (Case Management) Bill 2009	N			N	
Crown Lands Amendment (Special Purpose Leases) Bill 2009		N, R			
Education Amendment (School Attendance) Bill 2009	R, N			N	
Electricity Supply Amendment (GGAS) Bill 2009	N, R				
Electricity Supply Amendment (GGAS Abatement Certificates) Bill 2009	R, N				
Electricity Supply Amendment (Solar Bonus Scheme) Bill 2009				N	
Emergency Services Legislation Amendment (Finance) Bill 2009	N				
Fisheries Management Amendment Bill 2009	R, N			N	
Food Amendment (Food Safety Supervisors) Bill 2009				N	
Game and Feral Animal Control Amendment Bill 2009	R, N				
Gas Supply Amendment (Ombudsman Scheme) Bill 2009				N	
Graffiti Control Amendment Bill 2009	N, R		N, R	N	
GreyHound Racing Bill 2009				N	
Harness Racing Bill 2009				N	
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Heritage Amendment Bill 2009	N			N, R	
Historic Houses Amendment (Throsby Park Historic Site) Bill 2009				N	
Home Building Amendment (Insurance) Bill 2009	N				
Housing Amendment (Registrable Persons) Bill 2009	N, R		R		
Independent Commission Against Corruption and Ombudsman Legislation Amendment Bill 2009	N, R				
Industrial Relations Further Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Land Acquisition (Just Terms Compensation) Amendment Bill 2009	N				
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Liquor Amendment (Temporary Licence Freeze) Bill 2009	R, N		R. N	R, N	
Major Events Bill 2009	R, N	R, N		R. N	R, N
Motor Accidents Compensation Amendment Bill 2009				N	
Motor Sports (World Rally Championship) Bill 2009	N				
NSW Lotteries (Authorised Transaction) Bill 2009	R, N				
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N		N	N	
Occupational Health and Safety Amendment (Authorised Representatives) Bill 2009	N				
Occupational Licensing Legislation Amendment (Regulatory Reform) Bill 2009	R, N				
Parking Space Levy Bill 2009				N	N, C
Parliamentary Electorates and Elections Amendment (Automatic Enrolment) Bill 2009	N, R			N	
Passenger Transport Amendment (Taxi Licensing) Bill 2009	N				
Personal Property Securities (Commonwealth Powers) Amendment Bill 2009	N, R			N	
Public Sector Restructure (Miscellaneous Acts Amendments) Bill 2009				N, R	
Racing Legislation Amendment Bill 2009				N	
Real Property Amendment (Land Transactions) Bill 2009	N			N	
Road Transport (General) Amendment (Consecutive Disqualification Periods) Bill 2009*	N			N	
Road Transport Legislation Amendment (Miscellaneous Provisions) Bill 2009	N, R			N	
Road Transport (Vehicle Registration) Amendment (Heavy Vehicle Registration Charges) Bill 2009				N	
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Rural Fires Amendment Bill 2009	N	N		N	
Save the Graythwaite Estate Bill 2009*	N, R				
Succession Amendment (Intestacy) Bill 2009	N			N	
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Trade Measurement (Repeal) Bill 2009				N	
Trustee Companies Amendment Bill 2009				N	
Valuation of Land Amendment Bill 2009	N				
Water Management Amendment Bill 2009	N, R			N	
Western Lands Amendment Bill 2008				R	

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

Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09			16
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	