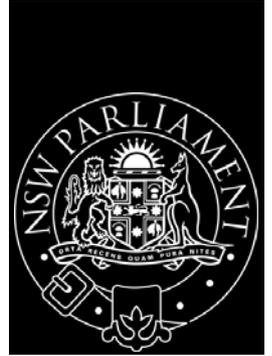


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 11 of 2010

7 September 2010

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* Denotes Private Member's Bill

MEMBERSHIP & STAFF

Chair Allan Shearan MP, Member for Londonderry

Deputy Paul Pearce MP, Member for Coogee

Members Robert Furolo MP, Member for Lakemba
Kayee Griffin MLC
Judy Hopwood MP, Member for Hornsby
The Hon Trevor Khan MLC
Russell Turner MP, Member for Orange

Staff Catherine Watson, Committee Manager
Carrie Chan, Senior Committee Officer
Jason Arditi, 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 iii).

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2010

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

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 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 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

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Adoption Amendment (Same Sex Couples) Bill (No. 2) 2010*

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

2. Crimes Amendment (Terrorism) Bill 2010

Issue: Right to Privacy

12. The Committee notes its earlier comments made in the *Legislation Review Digest No 8 of 2005* that covert search warrants are likely to trespass on affected persons' privacy and property. In particular, the Committee raised its concern with the provision of the *Terrorism (Police Powers) Act 2002* that provided for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises, thereby infringing on the rights of innocent people.
13. As this Bill seeks to extend the timeframe in which covert search warrants can be executed, the Committee reiterates its concerns about covert search warrants and their impact on individual privacy.

3. Evidence Amendment Bill 2010

Issue: Commencement by Proclamation

10. The Committee recognises that the nature of achieving uniform legislation can affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda, especially when commencement is contingent on other jurisdictions to have also passed the model legislation. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

4. Plantations and Reafforestation Amendment Bill 2010

Issue: Right to Privacy; Search and Seizure Without Warrant – Section 61A Powers of Entry and Inspection.

14. The Committee notes the requirements that an authorised officer to give notice to an owner or manager and the grounds of "reasonable suspicion" before entering the plantation or land as well as the risk of environmental harm occurring and the attempt to make prior contact when reasonable advance notice need not be given. However, the Committee is concerned about the extension of the Act to private land. While it may be implicit as a requirement of obtaining a plantation licence that authorised officers may enter the land to inspect, the power to enter unlicensed land on a "reasonable suspicion" and investigate and take samples and recordings without a warrant is a significant extension of the existing power. The Committee therefore refers the matter to Parliament.

17. The right to withhold information or refrain from answering questions that might incriminate oneself is a fundamental and longstanding principle of common law. The Committee notes that section 61B(5) provides that any information given cannot be used in criminal proceedings. However, the Committee is of the view that the right to silence should not be eroded unless there are exceptional circumstances. Further, it is concerned that the right to silence is being taken away from owners of private land who are not currently licensed under this Act. The matter is therefore referred to Parliament.

Issue: Retrospectivity – Proposed Section 64(5)&(6)

19. The Committee is concerned that proposed section 61B(5)&(6) not only significantly extends the period in which proceedings can be brought for breaches of the Act, it also has the effect of potentially allowing for proceedings to be brought in instances where the limitation period would already have expired under the current provisions if the authorised officer had not become aware of the breach during the two year period after it occurred.

Issue: Commencement on Proclamation - Clause 2 - Provide the Executive with unfettered control over the commencement of an Act

22. The Committee accepts the Minister's explanation that commencement on proclamation is necessary as the Regulations and Act need to commence at the same time in order to be consistent.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ADOPTION AMENDMENT (SAME SEX COUPLES) BILL (NO. 2) 2010*

Date Introduced:	1 September 2010
House Introduced:	Legislative Assembly
Member with Carriage:	Clover Moore MP
Portfolio:	Private Members' Bill

Purpose and Description

1. The object of this Bill is to amend the *Adoption Act 2000* to allow couples of the same sex to adopt children. At present under the Act, a couple is defined to mean a man and a woman who are married or who have a de facto relationship. The Bill amends that definition, along with the definition of spouse, so that they include persons who are de facto partners. The definition of de facto partner in the *Interpretation Act 1987* refers to persons whether they are of the same sex or a different sex. The Bill will also enable the same sex de facto partner of a person who is the adoptive parent of a child to adopt that child in his or her capacity as a stepparent.
2. The Bill also amends the *Anti – Discrimination Act 1977* to exempt faith-based adoption agencies (ie accredited adoption service providers that are established or controlled by a religious organisation) from the operation of section 49ZP of that Act to the extent that those agencies provide adoption services. Section 49ZP makes it unlawful for a person who provides services of any kind to discriminate against another person on the ground of homosexuality by refusing to provide the other person with those services or in the terms on which the other person is provided with those services.
3. The Bill also makes consequential amendments to other legislation so as to enable the provision and recording of information about the adoption of children by couples of the same sex.

Background

4. Existing adoption excludes families headed by same-sex couples. Unlike heterosexual couples, same-sex couples cannot adopt a child together.
5. Despite this, it is estimated that more than 4,300 children live in same-sex couple families in Australia.
6. In a 1997 New South Wales Law Reform Commission report, it was recommended that legislation permit adoption by either a couple, whether married or de facto,

heterosexual or same-sex, or by a single person. Despite this, reforms to adoption procedures in 2000 did not extend adoption rights to same-sex couples.

7. Meanwhile, the Australian Human Rights Commission 2007 'Same-Sex: Same Entitlement' report regards the exclusion of same-sex adoptions on the basis of sexuality as a breach of article 21 of the Convention on the Rights of the Children, which requires that the best interests of a child be the paramount consideration in adoption.
8. In its July 2009 report entitled 'Adoption by same-sex couples', the Standing Committee on Law and Justice concluded that 'same-sex parenting is as likely to result in positive developmental outcomes for children as opposite-sex parenting'. However, the Committee report was not endorsed unanimously and dissenting statements by two Members were provided.
9. Provisions under this Bill reflect the recommendations made by the Legislative Council Standing Committee on Law and Justice 'Adoption by same-sex couples' report.
10. On 1 September 2010, the *Adoption Amendment (Same Sex Couples) Bill* was withdrawn and the current Bill – the *Adoption Amendment (Same Sex Couples) Bill (No 2)* – was introduced into Parliament. The sole difference between the first introduced Bill and this current Bill is that this Bill also provides an exemption for faith-based adoption agencies from the operation of the *Anti-Discrimination Act 1977*.
11. The Committee previously commented on the first introduced Bill on this matter – the *Adoption Amendment (Same Sex Couples) Bill* – in its Digest No. 10 of 2010.

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.

Schedules 1 and 2 make the amendments described in the above Overview.

Issues Considered by the Committee

- | |
|---|
| <p>13. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</p> |
|---|

The Committee makes no further comment on this Bill.

2. CRIMES AMENDMENT (TERRORISM) BILL 2010

Date Introduced:	1 September 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The object of this Bill is to amend the *Crimes Act 1900* to extend the date until which membership of a terrorist organisation is an offence under the Act from 13 September 2010 to 13 September 2013.

Background

2. The *Terrorism Legislation Amendment (Warrants) Bill* was passed in 2005, establishing the scheme for covert search warrants. A definition for 'terrorist act' was also included in the *Crimes Act 1900* to allow for a State offence of membership of a terrorist organisation,
3. A sunset clause for being a member of a terrorist organisation was included and was intended to be a temporary measure only, pending the introduction by the Commonwealth of a national covert search warrant scheme. The Commonwealth is yet to enact that scheme.
4. The authority to apply for and execute search warrants for terrorist related offence ends on 13 September 2010 (the day on which the offence of being a member of a terrorist organisation expires), prompting this Bill to delay the expiration.

The Bill

5. 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 the *Crimes Act 1900* to extend the sunset date for the offence of being a member of a terrorist organisation. This offence (which is similar to the offence provided for in section 102.3 of the Criminal Code set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth) was originally inserted into the *Crimes Act 1900* by Schedule 4 to the *Terrorism Legislation Amendment (Warrants) Act 2005* in order to provide for the issue of covert search warrants under New South Wales law relating to membership of a terrorist organisation in anticipation of the

Commonwealth Parliament enacting a national covert search warrant scheme. A national covert search warrant scheme has not yet been enacted. Accordingly, the additional 3 years before the repeal of the offence is proposed so as to ensure that covert search warrants can continue to be granted until a national scheme is adopted.

Issues Considered by the Committee

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

Issue: Right to Privacy

6. The Bill extends the sunset date for the offence of being a member of a terrorist organisation from 13 September 2010 to 13 September 2013. In effect, this means that the powers conferred onto police and other law enforcement agents under the *Terrorism (Police Powers) Act 2002* relating to the investigation of alleged terrorist activity, remain in force for an additional three years.
7. Under section 270 of the *Terrorism (Police Powers) Act 2002*, covert search warrants authorise an eligible person to covertly enter and search premises, using such force as is necessary, to seize, substitute, detail, copy or break open such things in the course of executing the warrant, as well as the ability to covertly enter adjoining premises. A warrant can be issued by an eligible judge of the Supreme Court in instances where there are reasonable grounds to suspect that a terrorist act has been, is presently being, or is likely to be committed.
8. In his Second Reading Speech to Parliament, then Attorney General, the Hon. Bob Debus MP stated that:

‘the citizens of this State have a right to expect that their privacy will be protected from unjustified searches and interference from the State. Society recognises, however, that there are certain circumstances when an individual’s right to privacy must be weighed against the greater public interest in order to allow law enforcement agencies to uphold the law and prevent criminal activity, especially when many lives are potentially at stake... The powers set out in this Bill are not designed or intended to be used for general policing... These powers are extraordinary and have only been permitted with the strictest of safeguards.’¹
9. Article 17 of the *International Covenant on Civil and Political Rights* prohibits both unlawful and arbitrary interferences with a person’s privacy and home. In its comments on the *Terrorism Legislation Amendment (Warrants) Bill 2005*, when these powers were first conferred, the Committee noted in its *Legislation Review Digest No 8 of 2005* that covert search warrants were likely to trespass on affected persons’ privacy and property. In particular, the Committee raised its concern with the provision that provided for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises, thereby infringing on the rights of innocent people.
10. As the current Bill seeks to extend the timeframe in which covert search warrants can be executed under the parameters set out in the *Terrorism (Police Powers) Act*, the Committee reiterates the view it raised in its earlier digest that these powers may adversely affect the privacy of innocent individuals.

¹ The Hon R J Debus, Attorney General, Legislative Assembly Hansard, 9 June 2005.

11. However, the Committee notes that in March 2009 the covert search warrants scheme was significantly extended with the introduction of the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009*. In particular, covert search warrants can now be made available to investigate indictable crimes carrying a sentence of seven years imprisonment or more that involve certain offences such as destruction of property, violence causing grievous bodily harm, child pornography, organised theft, or the possession, manufacture or cultivation of drugs or prohibited plants such as cannabis.
12. **The Committee notes its earlier comments made in the *Legislation Review Digest No 8 of 2005* that covert search warrants are likely to trespass on affected persons' privacy and property. In particular, the Committee raised its concern with the provision of the *Terrorism (Police Powers) Act 2002* that provided for the covert entry of premises of occupiers not suspected of any criminal activity in order to access adjoining premises, thereby infringing on the rights of innocent people.**
13. **As this Bill seeks to extend the timeframe in which covert search warrants can be executed, the Committee reiterates its concerns about covert search warrants and their impact on individual privacy.**

The Committee makes no further comment on this Bill.

3. EVIDENCE AMENDMENT BILL 2010

Date Introduced:	1 September 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The purpose of this Bill is to amend the *Evidence Act 1995* with respect to:
 - enacting the mutual recognition of certificates concerning the privilege against self-incrimination so that a witness who objects to giving evidence and is granted a self-incrimination certificate in another State or Territory jurisdiction can exercise the immunity conferred by the certificate in New South Wales; and
 - substituting the definition of 'unavailability of witnesses' by providing that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability.

Background

2. The amendments proposed by this Bill arise out of recommendations made in the 2005 Uniform Evidence Law report, a joint report of the Australian, New South Wales and Victorian law reform commissions following a review of the New South Wales and Commonwealth Evidence Act after 10 years of operation. During the inquiry, the commissions released two community consultation documents and received 130 submissions.
3. Many of the commissions' recommendations were incorporated in the Model Uniform Evidence Bill, which was endorsed by the Standing Committee of Attorneys-General in July 2007 and subsequently incorporated in the New South Wales *Evidence Act 1995* by the *Evidence Amendment Bill 2007*.
4. At its meeting on 7 May 2010, the Standing Committee of Attorneys-General (SCAG) approved the making of an additional two amendments to the *Model Uniform Evidence Act* that had been endorsed by SCAG in July 2007.
5. The provisions set out in this Bill seek to give effect to the amendments agreed to at the SCAG meetings.

The Bill

6. 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 *Evidence Act 1995* No 25

Mutual recognition of certificates relating to the privilege against self-incrimination

Section 128 of the *Evidence Act 1995* provides a procedure for giving a witness who objects to giving evidence a certificate (a **self-incrimination certificate**) which grants that witness use and derivative use immunity for the evidence if the witness can claim the privilege against self-incrimination. Section 128A of the Act provides a procedure for dealing with objections on the ground of self-incrimination to complying with certain orders requiring a person to disclose information as part of, or in connection with, a search order, freezing order or other order under Part 25 of the *Uniform Civil Procedure Rules 2005* in civil proceedings. If a court is satisfied that information disclosed if a person complies with such an order may incriminate the person, it may give the person a certificate (a **self-incrimination disclosure certificate**) conferring use and derivative use immunity on the person in respect of the information.

Schedule 1 [1]–[4] amend section 128 and **Schedule 1 [5]** amends section 128A to provide for the recognition in NSW courts of certificates to the same effect as self-incrimination certificates and self-incrimination disclosure certificates given under sections 128 and 128A, respectively, if given under a provision of a law of a State or Territory declared by the regulations to be a prescribed State or Territory provision.

Unavailability of witnesses

Schedule 1 [7] substitutes clause 4 of Part 2 of the Dictionary to the *Evidence Act 1995* to implement recommendation 8-2 made by the Australian, New South Wales and Victorian Law Reform Commissions in their collaborative report on the operation of the provisions of the Uniform Evidence Acts in force in the Commonwealth, New South Wales, the Australian Capital Territory and Tasmania (*Uniform Evidence Law (2005)*) by providing that a person is taken not to be available to give evidence about a fact if the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability.

Savings and transitional provisions

Schedule 1 [6] enables the making of savings and transitional regulations.

Issues Considered by the Committee

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

Issue: Commencement by Proclamation

7. The Committee notes that this Bill 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.
8. However, the Committee notes that the proposed amendments form part of model legislation agreed to by SCAG and, given the nature of model legislation, it is

intended that these amendments be enacted concurrently across the participating jurisdictions.

9. The Committee recognises that the nature of achieving uniform legislation can affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda, especially when commencement is contingent on other jurisdictions to have also passed the model legislation. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

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|--|
| <ol style="list-style-type: none">10. The Committee recognises that the nature of achieving uniform legislation can affect the ability of the NSW Parliament to set commencement dates for its own legislative agenda, especially when commencement is contingent on other jurisdictions to have also passed the model legislation. As the Committee has not identified any other concerns with this Bill that may trespass on the rights and liberties of individuals, the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power in this instance. |
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The Committee makes no further comment on this Bill.

4. PLANTATIONS AND REAFFORESTATION AMENDMENT BILL 2010

Date Introduced:	1 September 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Steve Whan MP
Portfolio:	Mineral and Forest Resources

Purpose and Description

1. The object of this Bill is to amend the *Plantations and Reafforestation Act 1999* in a number of ways.
2. Firstly, the Bill aims clarify the authorisation and ownership provisions with respect to plantations.
3. Secondly, the Bill aims to expand the powers of entry and inspection and the power to obtain information with respect to plantations.
4. Thirdly, the Bill makes a number of minor amendments to the existing *Plantations and Reafforestation Act 1999*.

Background

5. Plantations are areas of land which have been planted with trees or shrubs for timber production. There are more than two million hectares of plantations across Australia. New South Wales represents 19 per cent of the total, with a plantation estate of more than 450,000 hectares.
6. According to the Minister's Agreement in Principle speech, the amendments arise out of a statutory review of the *Plantations and Reafforestation Act 1999* and the *Plantations and Reafforestation (Code) Regulation 2001* which commenced in 2005. The review recommended various changes to the Act and Code to improve the operation of the legislation and a lengthy consultation process with industry, local councils and the community was undertaken including the establishment of inter-agency working groups. An exposure draft of the Bill and regulation were then released for public comment.
7. The Bill attempts to establish a more streamlined and integrated authorisation process for plantation operations while the Code contains the detailed requirements for the establishment, management and harvesting of plantations as well providing for the conservation and management of native vegetation and the protection of Aboriginal places and objects. Environmental standards are also codified.

The Bill

8. 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 *Plantations and Reafforestation Act 1999 No 97*

Authorisation of plantations

A plantation or proposed plantation is required to be authorised under the Act, except if plantation operations carried out on the plantation are exempt farm forestry, are plantation operations on an existing plantation or are ancillary plantation operations.

Schedule 1 [3] amends section 6 of the Act which currently provides that plantation operations carried out on a farm will be classified as exempt farm forestry if, among other things, the total area of the farm does not exceed 30 hectares at any one time. The amendment makes it clear that the actual plantation operations on the farm must not total more than 30 hectares for the operations to be exempt farm forestry. The amendment also updates references to the repealed *Native Vegetation Conservation Act 1997*.

Schedule 1 [4], [6] and [7] amend section 9 of the Act to remove references to existing plantations. Provisions dealing with existing plantations will be included in Schedule 3 to the Act by Schedule 1 [35] as they are of a savings and transitional nature.

Schedule 1 [5] amends section 9 of the Act by way of statute law revision to ensure that ancillary plantation operations cover operations that are ancillary to the carrying out of an approved project under Part 3A of the *Environmental Planning and Assessment Act 1979*.

Schedule 1 [8] amends section 12 of the Act to provide that written notice of the Minister's decision to grant an application for the authorisation of plantation operations on an unformed road is to be given to the Minister for Lands.

Schedule 1 [9]–[11] amend section 14 of the Act to recast the present requirement that the Minister is to invite submissions on an application for authorisation of a non-complying plantation, that is, a plantation that does not comply with the complying development standards of the *Plantations and Reafforestation Code (the Code)* so that such submissions can only be made on the aspects of the application that indicate non-compliance with those standards.

Schedule 1 [16] amends section 20 of the Act to provide that the authorisation of a plantation (other than for a complying plantation) may be granted subject to any conditions. Such conditions are to be no longer restricted to just conditions relating to establishment operations.

Schedule 1 [18] and [19] amend section 22 of the Act to remove an unnecessary provision in respect of the cancellation of timber plantation authorisations.

Schedule 1 [20] amends section 23 of the Act to provide that the public register relating to plantation authorisations maintained by the Minister is no longer required to include applications for authorisations.

Schedule 1 [21] amends section 23 of the Act to provide that the register is to be made available for inspection on the internet site of the Department of Industry and Investment.

Schedule 1 [34] amends Schedule 3 to the Act to make it clear that timber plantations accredited under the repealed *Timber Plantations (Harvest Guarantee) Act 1995* are taken to be authorised plantations under the Act and therefore are not existing plantations.

Schedule 1 [35] amends Schedule 3 to the Act to insert provisions dealing with existing plantations. An existing plantation is defined as a plantation established before the commencement of section 9 of the Act (that is, before 14 December 2001) in accordance with the requirements of the *Environmental Planning and Assessment Act 1979*, any law dealing with native vegetation conservation and any other relevant law. The amendment

continues the exemption for existing plantations from the requirement to be authorised, but only if there is no replanting of an area on the plantation exceeding 30 hectares.

Schedule 1 [12] and [22] make consequential amendments.

Ownership and management of plantations

Currently, section 21 of the Act provides that any change in the ownership or management of an authorised plantation does not affect the authorisation of the plantation. **Schedule 1 [15]** inserts proposed sections 17A–17C into the Act to make it clear in which circumstances a change in ownership or management affecting a plantation will also affect the authorisation of the plantation.

Proposed section 17A requires the owner of an authorised plantation to notify the Minister of any such change in ownership or management of the plantation or part of the plantation.

Proposed section 17B provides that the authorisation of an authorised plantation will not be affected by:

- (a) any change in ownership or management of the whole of the plantation, or
- (b) any change in the ownership of a part of the plantation so long as the whole of the plantation remains under the same management, or
- (c) any change in the management of a part of the plantation so long as the whole of the plantation remains under the same ownership.

Proposed section 17C provides that, if there is a change in both the ownership and management of part of the land comprising an authorised plantation, application must be made for the authorisation as a plantation of each part of the land comprising the original plantation on which it is intended to continue plantation operations. However, the proposed section does not require authorisation of a plantation that would not otherwise be required to be authorised because the plantation operations are exempt farm forestry or ancillary plantation operations, that is, plantation operations that are ancillary to the carrying out of development, an activity or a Part 3A project under the *Environmental Planning and Assessment Act 1979*. The Minister may waive or modify any of the requirements of the Act in relation to such an application but only if all of the land to which the application relates comprises part of the original plantation. The Minister must grant such an authorisation, but may impose any conditions on the authorisation.

Schedule 1 [14] and [17] make consequential amendments.

Enforcement

Schedule 1 [24]–[27] amend sections 58–60 of the Act to apply certain current enforcement provisions of the Act, including stop work orders and directions for remedial work, to any plantations (rather than just authorised ones) where there have been breaches of the Act or Code. However, these enforcement provisions will still not apply to existing plantations as such plantations are not subject to the Act or Code.

Schedule 1 [28] substitutes section 61 of the Act (which deals with the appointment of authorised officers to conduct investigations on whether the Act and the Code prescribed under the Act are being complied with) and inserts proposed sections 61A, 61B, 61C and 61D in respect of the appointment of authorised officers and the investigation of compliance with the Act.

Proposed section 61 provides for the appointment of authorised officers to exercise certain functions under the Act. **Schedule 1 [29] and [30]** make consequential amendments.

Proposed section 61A permits an authorised officer to enter an authorised plantation or land that the officer reasonably suspects is required to be authorised as a plantation, for the

purpose of determining whether the Act and the Code are being complied with, and enables the officer to exercise certain investigatory powers.

Proposed section 61B provides a power for the Director-General to require the owner or manager of a plantation to give relevant information or produce relevant documents.

Proposed section 61C provides for offences for obstructing authorised officers, failing to comply with requirements and providing false or misleading information.

Proposed section 61D provides for the exclusion of personal liability of authorised officers executing the Act.

Schedule 1 [31] amends section 64 of the Act to provide that proceedings for an offence under the Act or the regulations may be commenced within 2 years after the date on which evidence of the alleged offence first came to the attention of an authorised officer (at present, the proceedings may only be commenced within 2 years after the date on which the offence is alleged to have been committed).

Miscellaneous amendments

Schedule 1 [1] amends section 3 of the Act to expand one of the current objects of the Act (to codify environmental standards, and provide a streamlined and integrated scheme, for the establishment, management and harvesting of timber and other forest plantations) so that it refers to "best practice" environmental standards.

Schedule 1 [2] amends section 4 of the Act to insert definitions of *authorised officer*, *Department* and *Director-General*.

Schedule 1 [13] omits section 16 of the Act which contains outdated provisions dealing with native vegetation. **Schedule 1 [23]** contains a consequential amendment.

Schedule 1 [32] substitutes section 67 of the Act to provide for the delegation of functions by the Director-General (currently only the Minister has a power to delegate his or her functions).

Schedule 1 [33] amends Schedule 3 to the Act to enable the making of regulations of a savings and transitional nature 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: Right to Privacy; Search and Seizure Without Warrant – Section 61A Powers of Entry and Inspection.

9. Section 61A extends the power of authorised officers, on giving reasonable notice to the owner or manager, to not only enter an authorised plantation but also land that the authorised officer "reasonably suspects is required to be authorised as a plantation".
10. This section therefore significantly extends the ability of officers to enter private land without permission. While, it may be implicit as a requirement of obtaining a plantation licence that authorised officers may enter the land to inspect, entering unlicensed land on a "reasonable suspicion" is a significant extension of the existing power.
11. The Committee also notes that an authorised officer may enter such a plantation or land without giving reasonable notice if the officer believes that there is a risk of significant harm to the environment occurring in respect to the plantation or land and

the officer has attempted to contact the owner or manager before entering the plantation or the land.

12. Further, section 61(3)(a) allows the officer to conduct such investigations, inquiries, examinations and inspections, and take such samples and recordings as the officer considers necessary.
13. The Committee notes the requirements that an authorised officer give notice to an owner or manager and the grounds of "reasonable suspicion" before entering the plantation or land as well as the risk of environmental harm occurring and the attempt to make prior contact when reasonable advance notice need not be given. However, the Committee is concerned about the extension of the Act to private land. While it may be implicit as a requirement of obtaining a plantation licence that authorised officers may enter authorised plantations and land to inspect, the power to enter unlicensed plantations and land on a "reasonable suspicion" and investigate and take samples and recordings without a warrant is a significant extension of the existing power.

14. The Committee notes the requirements that an authorised officer to give notice to an owner or manager and the grounds of "reasonable suspicion" before entering the plantation or land as well as the risk of environmental harm occurring and the attempt to make prior contact when reasonable advance notice need not be given. However, the Committee is concerned about the extension of the Act to private land. While it may be implicit as a requirement of obtaining a plantation licence that authorised officers may enter the land to inspect, the power to enter unlicensed land on a "reasonable suspicion" and investigate and take samples and recordings without a warrant is a significant extension of the existing power. The Committee therefore refers the matter to Parliament.

Issue: Right to Silence – Section 61B Power to obtain information

15. Section 61B requires the owner or manager of land which has been entered by an authorised officer to provide "such relevant information as the officer requires". Section 61B(4) provides that "a person is not excused from giving relevant information under this section on the ground that the information may tend to incriminate the person".
16. The right to withhold information or refrain from answering questions that might incriminate oneself is a fundamental and longstanding principle of common law. The Committee notes that section 61B(5) provides that any information provided cannot be used in criminal proceedings. However, the Committee is of the view that the right to silence should not be eroded unless there are exceptional circumstances. Further, it is concerned that the right to silence is being taken away from owners of private land who are not currently licensed under this Act. The matter is therefore referred to Parliament.

17. The right to withhold information or refrain from answering questions that might incriminate oneself is a fundamental and longstanding principle of common law. The Committee notes that section 61B(5) provides that any information given cannot be used in criminal proceedings. However, the Committee is of the view that the right to silence should not be eroded unless there are exceptional circumstances. Further, it is concerned that the right to silence is being taken away from owners of private land who are not currently licensed under this Act. The matter is therefore referred to Parliament.

Issue: Retrospectivity – Proposed Section 64(5)&(6)

18. The two year limitation period for bringing proceedings for an offence under the Act will be changed from the date when the offence was committed to the date when the authorised officer first became aware of the offence. While the Committee notes that, in the Minister's Agreement in Principle Speech he argues that this merely brings the Act "into line with other land management legislation", this change not only significantly extends the period in which proceedings can be brought, it also has the effect of potentially allowing for proceedings to be brought in instances where the limitation period would already have expired under the current provisions if the authorised officer had not become aware of the breach during the two year period after it occurred.

19. The Committee is concerned that proposed section 61B(5)&(6) not only significantly extends the period in which proceedings can be brought for breaches of the Act, it also has the effect of potentially allowing for proceedings to be brought in instances where the limitation period would already have expired under the current provisions if the authorised officer had not become aware of the breach during the two year period after it occurred.

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

Issue: Commencement on Proclamation - Clause 2 - Provide the Executive with unfettered control over the commencement of an Act

20. The Committee notes that the Bill 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 whichever day it chooses or not at all.

21. However, the Committee notes that, in his Agreement in Principle Speech, the Minister has explained that commencement on proclamation is necessary as the Regulations and Act need to commence at the same time in order to be consistent and the Regulations are yet to be updated.

22. The Committee accepts the Minister's explanation that commencement on proclamation is necessary as the Regulations and Act need to commence at the same time in order to be consistent.

The Committee makes no further comment on this Bill.

Appendix 1: Index of Bills Reported on in 2010

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Appropriation Bill 2010	9
Appropriation (Parliament) Bill 2010	9
Appropriation (Special Offices) Bill 2010	9
Banana Industry Repeal Bill 2010	8
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Carers Recognition Bill 2010*	3
Carers Recognition Bill 2010*	5
Carers (Recognition) Bill 2010	5
Casino Control Amendment Bill 2010	2
Charter of Budget Honesty Amendment (Independent Election Costings) Bill 2010*	5
Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010	10
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	4
Coal Mine Health and Safety Amendment Bill 2010	4
Coastal Protection and Other Legislation Amendment Bill 2010	9
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2010	8
Companion Animals Amendment (Dogs in Outside Eating Areas) Bill 2010*	4
Companion Animals Amendment (Outdoor Dining Areas) Bill 2010	5
Court Information Bill 2010	4
Courts Legislation Amendment Bill 2010	9
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	9
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	3
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	4
Crimes Amendment (Police Pursuits) Bill 2010	2
Crimes Amendment (Terrorism) Bill 2010	11
Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010	10
Duties Amendment (NSW Home Builders Bonus) Bill 2010	10

	Digest Number
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010	8
Electronic Transactions Amendment Bill 2010	10
Environmental Planning and Assessment Amendment (Development Consents) Bill 2010	5
Evidence Amendment Bill 2010	11
Fair Trading Amendment (Unfair Contract Terms) Bill 2010	9
Firearms Legislation Amendment Bill 2010*	8
Game and Feral Animal Control Repeal Bill 2010*	10
Gas Supply Amendment Bill 2009	1
Health Legislation Amendment Bill 2010	8
Home Building Amendment (Warranties and Insurance) Bill 2010	10
Housing Amendment (Community Housing Providers) Bill 2009	1
Industrial Relations Amendment (Public Sector Appeals) Bill 2010	9
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
Jury Amendment Bill 2010	8
Law Enforcement and National Security (Assumed Identities) Bill 2010	10
Macedonian Orthodox Church Property Trust Bill 2010*	9
Marine Parks Amendment (Moratorium) Bill 2010*	8
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	5
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Park Estate (Riverina Red Gum Reservations) Bill 2010	5
National Parks and Wildlife Amendment Bill 2010	2
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010	8
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	5
Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010*	10
Paediatric Patient Oversight (Vanessa's Law) Bill 2010*	5
Parliamentary Contributory Superannuation Amendment Bill 2010	10
Parliamentary Electorates and Elections Amendment Bill 2010	4
Personal Property Securities Legislation Amendment Bill 2010	10
Plant Diseases Amendment Bill 2010	10
Plantations and Reafforestation Amendment Bill 2010	11
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Privacy and Government Information Legislation Amendment Bill 2010	10
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Residential Tenancies Bill 2010	8
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010	4
State Emergency Service Amendment (Volunteer Consultative Council) Bill 2010	5
State Revenue Legislation Amendment Bill 2010	9
State Senate Bill 2010	2
Statute Law (Miscellaneous Provisions) Bill 2010	9
Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010	10
Superannuation Legislation Amendment Bill 2010	9
Sydney Olympic Park Authority Amendment Bill 2009	1
Terrorism (Police Powers) Amendment Bill 2010	10
Trees (Dispute Between Neighbours) Amendment Bill 2010	5
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)	4
Weapons and Firearms Legislation Amendment Bill 2010	4
Workers Compensation Amendment (Commission Members) Bill 2010	2
Workers Compensation Legislation Amendment Bill 2010	10

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10	18/03/10				2, 5
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12		
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		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	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		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			

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
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 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Children and Young Persons (Care and Protection) Amendment (Children's Services) Bill 2010	N			N	
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	N				
Coal Mine Health and Safety Amendment Bill 2010	N, R			N, R	
Coastal Protection and Other Legislation Amendment Bill 2010	N, R	N, R		N	
Court Information Bill 2010	N, R			N	
Courts Legislation Amendment Bill 2010	N, R				
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Bill 2010	N, R		N, R	N	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	N, R				
Crimes Amendment (Police Pursuits) Bill 2010	N, R				
Crimes Amendment (Terrorism) Bill 2010	N				
Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010	N, R				
Electricity and Gas Supply Legislation Amendment (Retail Price Disclosures and Comparisons) Bill 2010				N	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Electronic Transactions Amendment Bill 2010				N	
Environment Planning and Assessment Amendment (Development Consents) Bill 2010			N, R		
Evidence Amendment Bill 2010				N	
Fair Trading Amendment (Unfair Contract Terms) Bill 2010				N	
Game and Feral Animal Control Repeal Bill 2010	N, R				
Gas Supply Amendment Bill 2009				N	
Health Legislation Amendment Bill 2010	N, R			N, R	
Home Building Amendment (Warranties and Insurance) Bill 2010	N				
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
Jury Amendment Bill 2010	N, R			N	
Macedonian Orthodox Church Property Trust Bill 2010*				N	
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	N, R				
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
National Parks and Wildlife Amendment (Visitors and Tourists) Bill 2010				N	
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	N, R			N	
Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010*	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Parliamentary Contributory Superannuation Amendment Bill 2010	N				
Personal Property Securities Legislation Amendment Bill 2010				N	
Plantation and Reafforestation Amendment Bill 2010	N, R			N	
Police Legislation Amendment (Recognised Law Enforcement Officers) Bill 2010				N	
Privacy and Government Information Legislation Amendment Bill 2010				N	
Relationships Register Bill 2010	N			N	
Residential Tenancies Bill 2010	N, R			N, R	
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010				N, R	
Statute Law (Miscellaneous Provisions) Bill 2010	N				
Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010	N, R				
Superannuation Legislation Amendment Bill 2010				N	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	
Terrorism (Police Powers) Amendment Bill 2010				N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)				N	
Weapons and Firearms Legislation Amendment Bill 2010	N, R			N	
Workers Compensation Legislation Amendment Bill 2010				N	

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	Digest 2010
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12		
Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010	Attorney General	23/02/10	28/04/10			1, 5
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09	11/01/10		16	1
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2	
Retirement Villages Regulation 2009	Minister for Fair Trading	22/02/10				1, 8
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		