

PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 6 of 2003

18 November 2003

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly. Legislation Review Committee.

Legislation Review Digest, Legislation Review Committee, parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2003, 6 p; 30cm

Chair: Barry Collier MP

18 November 2003.

ISSN 1448-6954

1. Legislation Review Committee—New South Wales

2. Legislation Review Digest No 6

I Title.

II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; no. 6

TABLE OF CONTENTS

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	iii
Part One – Bills.....	5
SECTION A: Comment on Bills.....	5
1. Catchment Management Authorities Bill 2003; Native Vegetation Bill 2003; & Natural Resources Commission Bill 2003	5
2. Children and Young Persons (Care and Protection) Amendment (Child Abuse or Neglect) Bill 2003*	17
3. City Tattersall’s Club Amendment Bill 2003	19
4. Environmental Planning and Assessment Amendment (Quality Of Construction) Bill 2003.....	21
5. Evidence (Audio and Visual Links) Amendment Bill 2003	28
6. Marketing of Primary Products Amendment (Rice Marketing) Bill 2003.....	33
7. Motor Accidents Legislation Amendment Bill 2003	35
8. Police Legislation Amendment (Civil Liability) Bill 2003.....	39
9. Superannuation Legislation Amendment (Family Law) Bill 2003.....	44
10. Transport Administration Amendment (Rail Agencies) Bill 2003.....	49
11. Workers Compensation Amendment (Insurance Reform) Bill 2003	58
Part Two – Regulations	65
SECTION A: Regulations about which the Committee is Seeking Further Information.....	65
SECTION B: Copies of Correspondence on Regulations	66
Appendix 1: Index of Bills Reported on in 2003.....	71
Appendix 2: Index of Ministerial Correspondence on Bills from September 2003.....	73
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2003.....	74

* Denotes Private Members Bill

Membership & Staff

Chairman

Barry Collier MP, Member for Miranda

Vice Chairman

Marianne Saliba MP, Member for Illawarra

Members

Shelley Hancock MP, Member for South Coast

Don Harwin MLC

Virginia Judge MP, Member for Strathfield

Peter Primrose MLC

Russell Turner MP, Member for Orange

Peter Wong MLC

Staff

Russell Keith, Committee Manager

Indira Rosenthal, Project Officer

Mel Keenan, Project Officer

Rachel Dart, Committee Officer

Vanessa Pop, Assistant Committee Officer

Panel of Legal Advisors

The Committee retains a panel of legal advisors to provide advice on Bills as required.

Professor Phillip Bates

Mr Simon Bronitt

Dr Steven Churches

Dr Anne Cossins

Professor David Farrier

Mr John Garnsey QC

Associate Professor Luke McNamara

Ms Rachel Pepper

Mr Rohan Price

Ms Diane Skapinker

Ms Jennifer Stuckey-Clarke

Professor George Williams

Contact Details

Legislation Review Committee

Legislative Assembly

Parliament House

Macquarie Street

Sydney NSW 2000

Telephone

02 9230 3418

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.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CATCHMENT MANAGEMENT AUTHORITIES BILL 2003; NATIVE VEGETATION BILL 2003; & NATURAL RESOURCES COMMISSION BILL 2003

Matters for comment raised by the Bill

Introduced: 12 November 2003
House: Legislative Assembly
Minister: The Hon C J Knowles MP
Portfolio: Natural Resources

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

Purpose and Description

1. The object of the *Natural Resources Commission Bill 2003* (NRC Bill) is to establish an independent commission to provide the Government with advice on natural resource management.
2. It is cognate with:
 - the *Native Vegetation Bill 2003*; and
 - the *Catchment Management Authorities Bill 2003*.
3. The objects of the *Natural Vegetation Bill 2003* (NV Bill) are to:
 - provide for, encourage and promote, the management of native vegetation on a regional basis in the social, economic and environmental interests of the State;
 - prevent the clearing of remnant native vegetation and protected regrowth unless it leads to better environmental outcomes;
 - protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation;
 - improve the condition of existing native vegetation, particularly where it has high conservation value; and
 - encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation, in accordance with the principles of ecologically sustainable development.

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

4. The object of the *Catchment Management Authorities Bill 2003* (CMA Bill) is to devolve to regional communities certain program delivery and other natural resource management functions.

Background

5. The Bills aim to put into practice the recommendations contained in the October 2003 *Final Report of the Native Vegetation Reform Implementation Group* (NVRIG).

The NVRIG was established by the Premier in April 2003, having been foreshadowed by him on 15 March 2003.¹

6. The deliberations of the NVRIG were based upon the model of native vegetation management developed by the Wentworth Group, a group of leading Australian environmental scientists and economists. This model was presented to the State Government in February 2003.²

7. According to the Bills' Second Reading Speech:

These bills create an independent Natural Resources Commission to make recommendations on natural resource management standards and targets, audit the performance of the catchment management authorities [CMAs], report on the achievement of targets and carry out inquiries; they create 13 locally-driven catchment management authorities to deliver natural resource management programs at the catchment level; and they introduce the changes to native vegetation management that are at the heart of the Sinclair plan to end broadscale land clearing and give greater certainty to farmers and industry in their various and numerous activities.³

The Bills

Natural Resources Management Bill 2003

8. The NRM Bill provides for the establishment of a Natural Resources Commission (the Commission), whose functions are exercisable by the Commissioner [cl 5 and cl 6].
9. In the Second Reading Speech, the Minister states that the NRC Bill aims to provide the foundations for:
 - a move away from the conflict that historically goes with the natural resource debate to a professional, outcomes-based approach to natural resource management.⁴
10. The NRC Bill provides that the Commission is not subject to Ministerial control in respect of the preparation and contents of any advice or recommendation of the

¹ See "Premier Carr announces \$120 million plan to help farmers protect native vegetation", Press Release 15 March 2003.

² Wentworth Group of Concerned Scientists, *Blueprint for a Living Continent*, 1 November 2002.

³ Hon C J Knowles MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003. The Native Vegetation Reform Implementation Group was chaired by the Rt Hon Ian Sinclair AC.

⁴ Hon C J Knowles MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003.

Commission. In other respects, however, the Commission *is* subject to the control and direction of the Minister [cl 10].

11. The NRC Bill provides that the Commission has the general function of providing the Government with independent advice on natural resource management, and such other functions as are conferred or imposed on it by or under the proposed Act [cl 11].
12. The NRC Bill specifies particular functions of the Commission. They include:
 - recommending State-wide standards and targets for natural resource management issues;
 - recommending the approval (under the proposed *Catchment Management Authorities Act 2003*) of catchment action plans that are consistent with those standards and promote those targets;
 - undertaking audits of those plans;
 - co-ordinating or undertaking significant natural resource and conservation assessments;
 - undertaking inquiries on natural resource management issues;
 - assisting in the reconciliation of particular complex natural resource management issues; and
 - arranging for information to be gathered and disseminated on natural resource management issues [cl 12].⁵
13. The Commission must provide the Minister with reports on its recommendations, audits, inquiries and advice, including annual reports on:
 - the outcomes of any audits or inquiries undertaken by the Commission; and
 - the progress in achieving compliance with State-wide standards and targets adopted by the Government, including the effectiveness of the implementation of catchment action plans in achieving compliance with those standards and targets [cl 14].

Native Vegetation Bill 2003

14. The second reading speech noted that the purpose of the NV Bill is to “fulfil the Government's commitment to end broadscale clearing by reforming native vegetation

⁵ In exercising these functions, the Commission is to have regard to:
(a) the principles of ecologically sustainable development;
(b) the social and economic implications of its recommendations and advice;
(c) an integrated approach to natural resource management issues;
(d) regional variation in the environment;
(e) indigenous knowledge of natural resource management; and
(f) State and national legislation and policies that are relevant to natural resource management: cl 13 of the *Natural Resources Commission Bill 2003*.

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

management in New South Wales".⁶ It repeals the *Native Vegetation Conservation Act 1997*.

15. Part 2 of the NV Bill defines its key concepts, eg, *native vegetation* and *protected regrowth*.⁷
16. Part 3 of the NV Bill deals with the clearing of native vegetation, namely:
 - control of clearing;
 - permitted clearing; and
 - excluded clearing.
17. Parts 4 and 5 of the Bill deal with property vegetation plans, and the enforcement of the NV Bill, respectively.

Catchment Management Authority Bill 2003

18. The CMA Bill establishes 13 catchment management authorities (the Authorities) to cover the whole of New South Wales [cl 6; Sch 1 and 2]. It repeals the *Catchment Management Act 1989* [cl 42].
19. The CMA Bill provides that the affairs of each of the Authorities is to be managed by a board, subject to the control and direction of the Minister [cl 8 and cl 9].⁸
20. Each Authority has the general function of carrying out or funding catchment activities in accordance with the ensuing Act [cl 14].
21. Each Authority has the following specific functions:

⁶ Hon C J Knowles MP, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003. "Broadscale clearing" is defined as the clearing of any remnant native vegetation or protected regrowth: cl 7 of the *Native Vegetation Bill 2003*.

⁷ Vegetation is defined to mean:

- (a) trees (including any sapling or shrub, or any scrub);
- (b) understorey plants,
- (c) groundcover (being any type of herbaceous vegetation); and
- (d) plants occurring in a wetland.

It is *indigenous* if it is of a species of vegetation, or if it comprises species of vegetation, that existed in the State before European settlement, but does not include any mangroves, seagrasses or any other type of marine vegetation to which s 205 of the *Fisheries Management Act 1994* applies: cl 8 of the *Native Vegetation Bill 2003*.

⁸ The members of the board of an Authority are to be persons who together have, in the opinion of the Minister, skills and knowledge in the following areas:

- primary production;
- environmental, social and economic analysis;
- State and local government administration;
- negotiation and consultation;
- business administration;
- community leadership; and
- biodiversity : cl 8(4) *Catchment Management Authorities Bill 2003*

- to develop catchment action plans and to give effect to any such approved plans through annual implementation programs;
 - to provide loans, grants, subsidies or other financial assistance for the purposes of the catchment activities it is authorised to fund;
 - to enter contracts or do any work for the purposes of the catchment activities it is authorised to carry out;
 - to assist landholders to further the objectives of its catchment action plan (including providing information about native vegetation);
 - to provide educational and training courses and materials in connection with natural resource management; and
 - to exercise any other function relating to natural resource management as is prescribed by the regulations [cl 15].
22. Part 4 of the CMA Bill deals with draft catchment action plans.
23. Part 5 of the CMA Bill deals with annual implementation programs, which set out the catchment action plans an Authority intends to carry out.
24. Part 6 of the CMA Bill deals with the financial responsibilities of an Authority.
25. Part 7 of the CMA Bill covers miscellaneous provisions to implement the Bill, including acquisition of, and powers of entry onto, land [cl 35 and cl 36].

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

Clause 2 Commencement

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

28. The Committee has written to the Minister seeking his advice as to the reason for commencement by proclamation and the likely commencement date of the Acts.

Trespasses on personal rights and liberties: Clause 32 of the Native Vegetation Bill 2003

29. Clause 32 of the NV Bill provides the Director General of the Department of Infrastructure, Planning and Natural Resources (the Director General) with powers to obtain relevant information about a possible contravention of the ensuing Act:

The Director-General may, by notice in writing served on a person, require the person:

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

- (a) to give to an authorised officer, orally or in writing signed by the person (or, if the person is a corporation, by a competent officer) and within the time and in the manner specified in the notice, any relevant information of which the person has knowledge, or
 - (b) to produce to an authorised officer, in accordance with the notice, any document containing relevant information.
30. Failing to comply with a written notice from the Director General under cl 32(2), or giving false or misleading information in response to such a notice, constitutes an offence with a maximum penalty of \$11,000 [cl 32(4)].
31. Pursuant to cl 32(5) of the NV Bill, a person is not excused from giving information, answering questions or producing documents under cl 32 on the ground that the information, answers or documents may tend to incriminate the person.
32. Any information or document obtained from a natural person under cl 32 is not admissible against the person in criminal proceedings other than proceedings for an offence under this section [cl 32(5)]. There is no equivalent protection in respect of civil proceedings.
33. The Committee has previously noted the significant importance the privilege against self-incrimination has within our legal system, and in international conventions.⁹
34. The Committee notes that information obtained against the privilege cannot be used against the person in criminal proceedings.
35. However, information obtained that is inadmissible under cl 32 may nonetheless provide the basis for a search warrant, or questioning of third parties, during which further independent incriminating material of the person may be found. In this indirect way, information that was otherwise inadmissible on the ground that it violated the privilege against self-incrimination may be used to incriminate that person.

- 36. The Committee notes that the right against self-incrimination (or “right to silence”) is a fundamental right. This right should only be eroded when overwhelmingly in the public interest.**
- 37. The Committee refers to Parliament the question whether compelling a person to make self-incriminating statements that (although not themselves admissible in criminal proceedings) may inform criminal investigations or be admitted in civil proceedings, unduly trespasses on personal rights.**

⁹ Legislation Review Committee, Legislation Review Digest No.5, Report on *Transport Legislation Amendment (Safety and Reliability) Bill 2003*, at 56-58.

Trespasses on personal rights and liberties: Clause 40 of the Native Vegetation Bill 2003

38. Generally, Part 5 of the NV Bill embodies sections previously enacted in the *Native Vegetation Conservation Act 1997*, especially s 46 to s 50.
39. However, cl 40 is a new provision, which states that:
- In any criminal or civil proceedings in relation to a contravention of [the Native Vegetation Act], if it is established that native vegetation has been cleared, the onus of proof that the clearing is excluded from or permitted by this Act lies on the person who seeks to rely on the exclusion or permission.
- In any criminal proceedings in relation to a contravention of this Act, the onus of proof that the person had a reasonable excuse (as referred to in the relevant provision) lies on the person charged with the offence.
40. Clause 40 of the NV Bill also deems the landholder to be responsible for any clearing of native vegetation, unless it is established that it was cleared by another person and the landholder did not cause or permit the person to do so.
41. Clause 4(1) of the NV Bill defines landholder to mean:
- a person who owns land or who, whether by reason of ownership or otherwise, is in lawful occupation or possession, or has lawful management or control, of land.
42. Pursuant to this definition, any owner, leaseholder, licensee or property manager could be liable under cl 40 of the NV Bill, to a maximum penalty of \$11,000 [cl 38(2)].
43. Traditionally, the responsibility for proving all the elements of a criminal offence has fallen on the prosecution (consistent with the presumption of innocence). The Committee notes that the presumption of innocence and the principle that the prosecution bears the onus of proof of an offence remain vital to the maintenance of personal rights and liberties. Erosion of such principles should only be allowed when the loss of rights is clearly outweighed by the public interest.
44. Under cl 40 the burden of proof is effectively reversed. Once it has been established that prohibited native vegetation clearing has occurred, in the absence of a reasonable excuse, the landholder must prove that he/she was not responsible for the clearing to avoid liability.
45. Although it is increasingly common for legislation to reverse the burden of proof in relation to the issue of whether the accused had a culpable state of mind (*mens rea*), it is still quite unusual to require the accused to show that they did not engage in prohibited acts (*actus reus*).

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

46. The Committee has previously noted the difficulties faced by owners and occupiers of land in discharging an onus of proof in relation to acts that lead to criminal responsibility when those acts have occurred on land which they own or occupy.¹⁰

47. The Committee notes that the Bill reverses the onus of proof for owners, occupiers and managers of land in relation to native vegetation offences, once prohibited clearing of native vegetation is substantiated. The Bill effectively deems such persons guilty unless they can prove their innocence or provide evidence regarding the matters set out in the Bill.

48. The Committee refers to Parliament the question of whether this trespass on personal rights is undue, given the object of facilitating the protection of native vegetation.

Trespasses on personal rights and liberties: Clause 41 of the Native Vegetation Bill 2003

49. Clause 41 provides that if a corporation contravenes a provision of the proposed Act, whether by act or omission, each director or other person who is concerned in the management of the corporation is taken to have contravened the same provision.

50. The onus of proof is again reversed, in that a person will be liable under the clause unless the person satisfies the court that:

- the corporation contravened the provision without the knowledge of the person; or
- the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
- the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

51. Pursuant to cl 41(2), a person may be proceeded against and convicted under this clause whether or not the corporation has been proceeded against or been convicted under cl 41.

52. The Committee notes that the Bill reverses the onus of proof for certain persons concerned with the management of a corporation in relation to native vegetation offences alleged to have been committed by the corporation. The Bill deems such persons guilty unless they can prove their innocence or provide evidence regarding the matters set out in the Bill.

53. The Committee also notes that individuals may be proceeded against and convicted even if the relevant corporation has been proceeded against and convicted under the Bill.

54. The Committee refers to Parliament the question of whether this trespass on personal rights is undue given the Bill's object of facilitating the protection of native vegetation.

¹⁰ Legislation Review Committee, *Legislation Review Digest No.4*, Report on *Sydney Water Amendment (Water Restrictions) Bill 2003*, at 31-33.

Trespasses on personal rights and liberties: Clause 36 of the Catchment Management Authority Bill 2003

55. Clause 36 of the CMA Bill continues the existing entry and construction powers under the *Catchment Management Act 1989*.
56. Clause 36 contains extensive powers that permit trespass on private property and derogate from the rights of property owners:
An authority may, by its employees and other persons, enter and inspect any land (other than a dwelling) for the purpose of exercising its functions, and there construct any work in its annual implementation program that it is authorised to construct on the land.
57. "Work" is defined in cl 36 to include any building or structure. There is no definition of "other persons" in the CMA Bill.
58. Moreover, obstructing or hindering this process, without reasonable excuse, is an offence with a maximum penalty of \$1,100 [cl 36(4)].
59. The Committee notes that the power to enter private land is a trespass on the rights to property and privacy. The power to enter private land without a warrant should only be given when overwhelmingly in the public interest.
60. Although cl 36 makes provision for compensation claims in respect of the operation of the clause, such a claim for compensation:
(a) is ineffective unless made in writing not later than 6 months after the damage was suffered; and
(b) in the absence of agreement on the compensation, is to be dealt with as if it were a claim for compensation for the compulsory acquisition of land under the Native Vegetation Act.

- 61. The Committee notes that the broad power of entry contained in clause 36 of the *Catchment Management Authority Bill 2003* trespasses on individual rights.**
- 62. The Committee refers to Parliament the question as to whether this is an undue trespass on rights.**
- 63. The Committee further notes that there is no limitation on the class of persons to whom these powers can be conferred. In addition, there appears to be no formal instrument or procedure for conferring these powers on persons. Nor is there any requirement on such persons to produce identification.**
- 64. The Committee has previously noted its concerns regarding legislation which confers powers which significantly affect rights, without setting appropriate limits or guidelines as to whom those powers can be conferred – or their qualifications.**

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

65. The Committee has written to the Minister to seek his advice as to why there are no requirements regarding the qualifications or attributes of persons who may have powers of entry conferred upon them for the purposes of the proposed *Catchment Management Authority Act 2003*.

Trespasses on personal rights and liberties: Clause 38 of the Catchment Management Authority Bill 2003

66. Clause 38 of the CMA Bill provides that no legal proceeding may be brought to compel an Authority to carry out its functions or to recover any penalty or damages from an Authority in respect of a failure to carry out its functions.

67. This clause deprives individual members of the public of claims that may arise at common law for nonfeasance¹¹ against the Authority. This has recently been considered by the High Court in *Graham Barclay Oysters Pty Ltd v Ryan*.¹²

68. In that decision, McHugh J noted that:

in most cases, a public authority will not be in breach of a common law duty by failing to exercise a discretionary power that is vested in it for the benefit of the general public. But if the authority has used its powers to intervene in a field of activity and increased the risk of harm to persons, it will ordinarily come under a duty of care. So also, if it knows or ought to know that a member of the public relies on it to exercise its power to protect his or her interests, the common law may impose a duty of care on the authority. If the authority comes under a duty of care, the failure of the authority to exercise a discretionary statutory power may give rise to a breach of the common law duty of care.¹³

69. The Committee notes that by depriving members of the public of the ability to bring claims against an Authority to compel the Authority to carry out its functions, the provisions of the *Catchment Management Authority Bill 2003* trespass upon individual rights to seek redress for nonfeasance by a Catchment Management Authority.

70. The Committee refers to Parliament the question as to whether this removal of the right to seek redress is an undue trespass on personal rights.

Inappropriately delegates legislative powers: Clause 35 of the Catchment Management Authority Bill 2003

71. The CMA Bill provides an Authority with the power to acquire land for the purposes of the ensuing Act [cl 35(1)].

¹¹ The neglect or failure to do some act which ought to be done, eg, failing to keep in repair the highway.

¹² [2002] HCA 54 (5 December 2002).

¹³ *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at paragraph 81.

72. Such land (including an interest in land) may be acquired by agreement, or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (Land Acquisition Act).¹⁴
73. Section 3(a) of the Land Acquisition Act provides a guarantee that, when land affected by a proposal for acquisition by an Authority is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition.¹⁵
74. This guarantee must be provided when written notice is given by an Authority to an owner of land to the effect that the land is affected by a proposal for acquisition [s 10 of the Land Acquisition Act].
75. An Authority may not give a proposed acquisition notice under the Land Acquisition Act without the approval of the Minister [cl 35(3)].

76. The Committee notes that a Catchment Management Authority is under the control and direction of the Minister, the Minister's approval must be given for a proposed acquisition, and the terms of any acquisition must conform to the requirements of the *Land Acquisition (Just Terms Compensation) Act 1991*.

77. The Committee refers to Parliament the question of whether such compulsory acquisition trespasses on personal rights.

Makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers: Clauses 15 and 28 of the Native Vegetation Bill 2003

78. Clause 15 of the NV Bill provides that regulations may be made with respect to the following:
- clearing principles or other matters to which the Minister must or may have regard in determining an application for development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* (EPA Act);
 - the exclusion of matters required to be considered under Part 4 of the EPA Act;
 - the circumstances in which broadscale clearing is to be regarded as improving or maintaining environmental outcomes for the purposes of development consent;
 - the circumstances in which development consent for clearing is not to be granted; and

¹⁴ There is, otherwise, no obligation on a State Legislature to provide just compensation: *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

¹⁵ The Act does *not* apply to an acquisition of land if the acquisition consists of the taking of a mortgage, charge or other similar security over an interest in land: s 6(b) of the *Land Acquisition Act (Just Terms Compensation) 1991*.

Catchment Management Authorities Bill 2003;
Native Vegetation Bill 2003; &
Natural Resources Commission Bill 2003

- the keeping of a public register by the Director-General relating to development consents granted by the Minister under the ensuing Act and applications for such consents.
79. Clause 15 of the NV Bill provides that regulations may be made with respect to the following:
- matters to which the Minister must or may have regard in determining whether to approve such a plan;
 - the circumstances in which clearing is to be regarded as improving or maintaining environmental outcomes for the purposes of any such plan;
 - the circumstances in which any such plan is not to be approved; and
 - the form and content of any such plans, including the evidence required to accompany a plan which identifies vegetation as regrowth.

- 80. The Committee notes that these matters to be prescribed by regulation are central to the effective and fair operation of the ensuing Act.**
- 81. The Committee has written to the Minister to seek an explanation as to why the matters referred to in clause 15 and 28 are not prescribed within the *Native Vegetation Bill 2003*.**
- 82. The Committee refers to Parliament the question as to whether allowing these significant matters to be prescribed by regulation is an appropriate delegation of legislative power.**

The Committee makes no further comment on this Bill.

2. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (CHILD ABUSE OR NEGLECT) BILL 2003*

Matters for comment raised by the Bill

Introduced: 13 November 2003
House: Legislative Council
Member: The Hon J Ryan MLC
Portfolio: Private Member's Bill

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

Purpose and Description

- The object of this Bill is to:
 - amend the *Children and Young Persons (Care and Protection) Act 1998* to increase the maximum penalty for certain offences relating to the abuse or neglect of children; and
 - amend the *Criminal Procedure Act 1986* to allow those offences to be dealt with either summarily or on indictment (at the election of the prosecutor).

The Bill

- This Bill increases the maximum penalty for the following offences under the *Children and Young Persons (Care and Protection) Act 1998*:

Section	Offence	Current maximum penalty	Proposed maximum penalty if dealt with summarily	Proposed maximum penalty if dealt with on indictment
227	Abuse of a child or young person	200 penalty units (currently \$22,000)	200 penalty units (currently \$22,000) or imprisonment for 2 years, or both	400 penalty units (currently \$44,000) or imprisonment for 5 years, or both.
228	Neglect of a child or young person	200 penalty units (currently \$22,000)	200 penalty units (currently \$22,000) or imprisonment for 2 years, or both	400 penalty units (currently \$44,000) or imprisonment for 5 years, or both.
231	Leaving a child or young person unsupervised in a motor vehicle	200 penalty units (currently \$22,000)	200 penalty units (currently \$22,000) or imprisonment for 2 years, or both	400 penalty units (currently \$44,000) or imprisonment for 5 years, or both.

Children and Young Persons (Care and Protection) Amendment (Child Abuse or Neglect) Bill 2003*

3. This Bill also provides that these offences are to be tried summarily, unless the prosecutor elects to proceed on indictment: [Schedule 2[2]].
4. This Bill is to commence on assent.

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

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

The Committee makes no further comment on this Bill.

3. CITY TATTERSALL'S CLUB AMENDMENT BILL 2003

Matters for comment raised by the Bill

Introduced: 12 November 2003
 House: Legislative Assembly
 Minister: The Hon G McBride MP
 Portfolio: Gaming and Racing

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

Purpose and Description

- The object of this Bill is to amend the *City Tattersall's Club Act of 1912*:
 - to increase the limits applying to matters, including financial matters, above which the consent of a special general meeting of the City Tattersall's Club is required;
 - and to provide for the expiry of the Act when the club adopts a different corporate structure.

Background

- Founded in 1895, the City Tattersall's Club operates under the *City Tattersall's Club Act of 1912*. The Act places a number of restrictions on the operation of the Club, including that the following not be undertaken without the consent of the majority of a special general meeting of the Club:
 - the borrowing of funds, or the disposal of any money, land or personal property, regardless of the value of the transaction;¹⁶ and
 - any expenditure or investment exceeding five hundred pounds.¹⁷

The Bill

- This Bill provides that a special general meeting of the Club need only be called:
 - where the borrowing of funds or disposal of land or property at the one time or in the one contract exceeds \$1,500,000 (annually adjusted), or that would result in the club's interest-bearing liabilities exceeding \$5,500,000 (annually adjusted): [Schedule 1[2]]; and
 - where any expenditure or investment exceeds \$1,500,000: [Schedule 1[4]].
- A special general meeting is no longer required for the realisation or disposition of personal property: [Schedule 1[3]].

¹⁶ *City Tattersall's Club Act of 1912* s 6.

¹⁷ *City Tattersall's Club Act of 1912* s 7.

5. This Bill also provides that the *City of Sydney Tattersall's Club Act of 1912* is to expire on a date appointed by proclamation, being a date no earlier than both of the following:
- (a) the day on which the club is incorporated under another Act of NSW or the Commonwealth; and
 - (b) 31 December 2005.

According to the second reading speech, by 31 December 2005, the Club will have established itself as a company under the *Corporations Act 2001*. Two years was said to be sufficient time for the Club to institute the necessary changes to become a company.¹⁸

6. These proposals were supported by a special general meeting of the Club's members on 14 October 2003.¹⁹
7. This Bill is to commence on assent.

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

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

The Committee makes no further comment on this Bill.

¹⁸ Mr T Stewart MP, Parliament Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 12 November 2003.

¹⁹ Mr T Stewart MP, Parliament Secretary, *NSW Parliamentary Debates (Hansard)*, Legislative Assembly, 12 November 2003.

4. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (QUALITY OF CONSTRUCTION) BILL 2003

Matters for comment raised by the Bill

Introduced: 14 November 2003
 House: Legislative Assembly
 Minister: The Hon Craig Knowles MP
 Portfolio: Planning, Infrastructure and Natural Resources

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

Purpose and Description

1. This Bill:

- (a) amends the *Environmental Planning and Assessment Act 1979* (the EPA Act) and the *Environmental Planning and Assessment Regulation 2000* (the EPA Regulation) with respect to the following matters (among others):
 - (i) the functions and investigation of certifying authorities;²⁰
 - (ii) improper influence with respect to the conduct of certifying authorities;
 - (iii) the appointment and functions of principal contractors;
 - (iv) construction and occupation certificates;
 - (vii) conditions of development consents;
 - (viii) offences and penalties; and
- (b) amends the *Building Legislation Amendment (Quality of Construction) Act 2002* (the “Building Amendment Act”) to remove certain un-commenced amendments from that Act and re-enact them with modifications in the Bill; and
- (c) makes a consequential amendment to the *Environmental Planning and Assessment (Savings and Transitional) Regulation 1998*.

Background

The Campbell Committee Report

2. According to the Second Reading Speech,²¹ the Bill responds to a number of recommendations made in the report of the *Joint Select Committee on the Quality of Buildings* (the *Campbell Committee*).

²⁰ A “certifying authority” means a person who:

- (a) is authorised by or under section 85A to issue complying development certificates, or
- (b) is authorised by or under section 109D to issue Part 4A certificates. (See section 4 EPA Act).

²¹ Ms Diane Beamer, Minister for Juvenile Justice, Minister for Western Sydney, and Minister Assisting the Minister for Infrastructure and Planning (Planning Administration), Legislative Assembly, *Parliamentary Debates, (Hansard)*, 14 November 2003.

3. The Committee enquired into:
 - the role that building certifiers should play in ensuring the quality of workmanship in home building across the State;
 - the checks and balances there should be to ensure that consumers are protected and that their homes are safe, properly certified and built to an appropriate standard; and
 - options for improving the system of builder licensing.
4. The Committee reported in July 2002, making 55 recommendations relating to certification, licensing, dispute resolution, consumer education, building contracts, building standards, and structural change.
5. The Second Reading Speech states that:

“the Government responded to the Committee's recommendations by introducing measures designed to improve the quality of buildings, particularly residential buildings, and the accountability of the people who build and certify them.”
6. The Bill responds to some of the recommendations made. It also repeals and remakes a number of un-commenced provisions in the Building Amendment Act that were made in response to some of the Campbell Committee’s recommendations.

Consultations with stakeholders

7. According to the Second Reading Speech, the Department of Infrastructure, Planning and Natural Resources held 14 information forums across the State during September and October 2003.

The 14 sessions were attended by a total of approximately 800 people and were held in Sydney, Parramatta, Wollongong, Newcastle, Port Macquarie, Ballina, Queanbeyan, Wagga Wagga, Dubbo and Tamworth.
8. The stakeholders invited included all Councils across NSW, the four NSW accreditation bodies, all accredited certifiers²², the Australian Institute of Building Surveyors—which did a mail-out of invitations to all its members—the Housing Industry Association of Australia, the Master Builders Association and the Upper Parramatta Catchment Management Trust. A number of developers, lawyers and academics also attended.
9. According to the Second Reading Speech, the

“feedback obtained from participants at these forums has helped the department to understand the development and building issues that Councils and private certifiers are dealing with, and informed finalisation of the provisions of the bill.”

²² Section 109T of the Act provides that an accreditation body may accredit persons (other than bodies corporate) as ***accredited certifiers*** in accordance with its authorisation as an accreditation body. Section 109 S provides that the Minister may authorise any professional association as an “***accreditation body***” with respect to any specified class of matters.

The Bill

10. The majority of the amendments introduced by the Bill are administrative and are designed to:
- more clearly delineate the responsibilities of councils and consent authorities on the one hand, and certifying authorities and head contractors, on the other;
 - clarify the distinction between interim and final occupation certificates;²³ and
 - enable the Director General of Planning to take action against accredited certifiers who fail to meet their obligations.
11. Specifically, the Bill:
- makes it an offence for a person to influence an accredited certifier, and for an accredited certifier to seek or accept any benefit;²⁴
 - gives the departmental auditors of the Department of Infrastructure, Planning and Natural Resources the authority to audit councils acting as certifying authorities, as well as accredited certifiers;
 - increases the penalty for unsatisfactory professional conduct or professional misconduct by an accredited certifier from 300 to 1,000 penalty units, or from \$33,000 to \$110,000;
 - allows proceedings for offences under the Act to be commenced up to two years after the offence was alleged to have been committed, rather than up to six months as is currently the case;
 - requires records of inspections to be kept by the principal certifying authority for at least 15 years;
 - requires certifying authorities to inspect buildings at certain critical stages of construction, such as commencement, framework, stormwater and completion, prior to the issue of an occupation certificate; and
 - requires principal certifying authorities to satisfy themselves that the relevant conditions of development consents have been complied with, that the buildings being constructed are the same buildings as those approved in the plans and that the building is suitable for occupation in accordance with its class under the Building Code of Australia.
12. The amended provisions specify that the builder may not appoint the principal certifying authority, unless the builder is also the landowner. This will reinforce the responsibility of the principal certifying authority to act in the public interest.

²³ An **occupation certificate** authorises the occupation and use of a new building or a change of building use for an existing building (Part 4A of the EPA Act). Part 4A governs other development certificates, including **compliance certificate**, (certifying that specified building work or subdivision work has been completed as specified in the certificate and complies with specified plans and specifications etc), **construction certificate** (certifying that work completed in accordance with specified plans and specifications will comply with the requirements of the legislation), and **subdivision certificate** (authorises the registration of a plan of subdivision under Division 3 of Part 23 of the *Conveyancing Act 1919*.)

²⁴ Penalties for these offences are set at 10,000 penalty units (currently \$1.1 million) or two years imprisonment, or both.

According to the Second Reading Speech, this change addresses a concern of the Campbell Committee that conflicts of interest can exist between builders and certifiers.

13. The new provisions will also give accreditation bodies power to place conditions on a certifier's accreditation; and allow complaints to be made and action to be taken against, accredited certifiers who continue to do the work of an accredited certifier after their accreditation has lapsed.

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

Clause 2 – Commencement by proclamation

14. Most of the provisions in the proposed Act commence on a day or days to be appointed by proclamation.²⁵ The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

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

15. **The Committee has written to the Minister seeking his advice as to the reason for commencement by proclamation and the likely commencement date of these provisions.**

Clause 32 – Trespass on individual rights - Retrospectivity

16. A number of amendments to the EPA Act made by the Bill apply retrospectively.
17. The Committee will always be concerned with any retrospective effect of legislation that impacts on personal rights.
18. Clause 32 amends subsection 109ZF(2) by allowing complaints to be made against an accredited certifier where their accreditation has lapsed or is suspended. Under the present section, a complaint may be made against an accredited certifier where their accreditation has been withdrawn.

Under the transitional provisions in Schedule 6, this amendment extends to complaints made, but not finally dealt with, before commencement of the amendments. This has the effect of retrospectively changing the disciplinary regime in relation to certifying authorities or principal certifying authorities whose accreditation has lapsed.

19. The reasons for applying this provision retrospectively and the implications of doing so are unclear to the Committee. For this reason the Committee has resolved to write to the Minister seeking clarification.

²⁵ However, sections 3 and 5 and Schedule 1, clauses 27, 32, 39 & 42-44 commence on the date of Assent to this Act [clause 2(2)].

20. The Committee has written to the Minister to seek clarification as to the reason for the retrospective application of this provision and for a further explanation as to its full implications.

21. Clause 37 inserts a new Division 1B in Part 6 of the Act, comprising four new sections, 118O, 118P, 118Q and 118R.
22. Section 118P provides that the Director-General may appoint a member of staff of the Department as a Departmental auditor to investigate the work and activities of a council in its capacity as a certifying authority.
23. The auditor has obligations to report to the Director-General who must, in turn, send a copy of the report to the Director-General of the Department of Local Government and to the council concerned.

The council must respond to the report within 40 days of receiving it. It must specify the things done or proposed to be done to give effect to any recommendations made in the report.

24. Section 118Q provides that the Director-General may also appoint a member of staff of the Department as a Departmental auditor to investigate the work and activities of an accredited certifier in his or her capacity as a certifying authority.

The auditor must report to the Director-General. If the Director-General is satisfied that, as a result of the investigation, the accredited certifier is or may be guilty of unsatisfactory professional conduct or professional misconduct,²⁶ the Director-General may also give a copy of the report to the relevant accreditation body and may apply to the Administrative Decisions Tribunal for a disciplinary finding against an accredited certifier with respect to any matter arising from the report.

25. If the Director-General applies to the Tribunal for a disciplinary finding, he or she may suspend the accredited certifier's authority to exercise the functions of an accredited certifier pending the Tribunal's decision.

²⁶ Section 109R defines these terms as follows:

"professional misconduct", in relation to an accredited certifier, means conduct that is unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the accredited certifier's accreditation as an accredited certifier or the withdrawal of the accredited certifier's accreditation.

"Unsatisfactory professional conduct" includes conduct (whether consisting of an act or omission):

- (a) occurring in connection with the exercise of an accredited certifier's functions as a certifying authority that falls short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent accredited certifier, or
- (b) by which an accredited certifier exercises his or her functions as a certifying authority in a partial manner, or
- (c) by which an accredited certifier wilfully disregards matters to which he or she is required to have regard in exercising his or her functions as a certifying authority, or
- (d) by which an accredited certifier fails to comply with:
 - (i) any relevant code of conduct established by the accreditation body by which he or she is accredited, or
 - (ii) any other Act or law prescribed by the regulations, or
- (e) by which an accredited certifier contravenes this Act, whether or not he or she is prosecuted or convicted for the contravention.

26. The Tribunal may vary or revoke the suspension at any time before or during the proceedings before it.
27. Under clause 44, these provisions have retrospective application, with the new provisions applying to matters arising before the commencement of the Division.
- They do not apply, however, to any investigation that had commenced before the repeal and replacement of the present section (s. 109U) by this Bill.
28. Under the present section, the Director-General does not have the power to suspend the accredited certifier's authority.

29. The Committee notes that section 109U is saved in relation to any investigation that is on foot when the new Division commences. In addition, the decision of the Director-General to suspend an authority is reviewable by the Tribunal. In these circumstances, the Committee is of the view that the retrospective application of this provision does not unduly trespass on individual rights.

Right to silence and professional confidentiality

30. New section 118R provides that a Departmental auditor (appointed by the Director-General under new section 118Q) may direct "a person", *inter alia*, to:
- (a) appear personally before the Departmental auditor at a time and place specified in the direction;
 - (b) give evidence (including evidence on oath);
 - (c) produce any document that is in that person's custody or under that person's control (s.118R(1)(c)); and
 - (d) grant such authorities as may be necessary to enable the auditor to gain access to any document that is in the custody or under the control of any other person (s.118R(1)(d)).
31. A person to whom such a direction is given must not fail to comply with that direction [s.118R(2)].
32. This provision raises concerns about the privilege against self-incrimination where the person directed is the accredited certifier under investigation. It also raises concern about the confidentiality of communications between certain professionals and their clients (eg, where the person subject to a direction is a lawyer acting for the accredited certifier).
33. The common law of Australia jealously protects the privilege against self-incrimination. The principle *nemo tenetur accusare se ipsum* (no person is bound to accuse himself or herself) originated as a means of protecting suspects from torture and oppressive interrogation, but is now recognised as a basic human right protecting personal freedom and human dignity.²⁷

²⁷ The historical origins and modern rationale of the privilege are explored in *EPA v Caltex* (1993) 178 CLR 447.

34. Article 14(3)(g) of the International Covenant of Civil and Political Rights (ICCPR) states that a person has the right “[n]ot to be compelled to testify against himself or to confess guilt”. Outside the criminal context, the privilege is an attribute of the wider right to a fair trial protected by Art 14(1) of the ICCPR.
35. The privilege provides that a person is not under a duty to answer questions or otherwise cooperate with public officials engaged in the investigation or prosecution, often called the *right to silence*. This right has been described by the High Court as:
- an entitlement to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles that they played.²⁸
36. In the absence of a compelling reason in the public interest for overturning the right to remain silent, the Committee is strongly of the view that legislation curtailing or removing this fundamental right is an undue trespass on individual rights.
37. In addition, the laws governing privileged communications between lawyer and client are an important feature of our justice system. Privileged communications enable a lawyer and client to enter into a frank relationship, essential for the provision of accurate and proper legal advice.
38. It is not clear to the Committee whether this provision is intended to remove the right to silence or to compel a lawyer to breach the confidentiality of a client. The Committee is concerned that it might have such effect. The Committee has therefore resolved to write to the Minister to seek clarification of the intended scope of this provision.
- 39. The Committee is strongly of the view that restricting or removing the right to remain silent and undermining the confidentiality of communications between lawyer and client, are trespasses on individual rights. These will only ever be justifiable in the public interest in exceptional circumstances.**
- 40. The Committee has written to the Minister to seek clarification on the scope of the provision and to express its concern that it could have the effect of unduly trespassing on the right to remain silent and remove the important confidentiality privilege that communications between a lawyer and client generally enjoy.**

The Committee makes no further comment on this Bill.

²⁸ Adverse inferences cannot be drawn from the failure to answer in these circumstances. *R v Petty* (1991) 173 CLR 95 at 95.

5. EVIDENCE (AUDIO AND VISUAL LINKS) AMENDMENT BILL 2003

Introduced: 12 November 2003
 House: Legislative Assembly
 Minister: The Hon R J Debus MP
 Portfolio: Attorney General

Matters for comment raised by the Bill

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

Purpose and Description

- The Bill amends the *Evidence (Audio and Audio visual Links Act 1998* to:
 - require a court to take into account certain factors in determining whether it is in the interests of the administration of justice to direct an accused detainee other than an accused child detainee to appear in certain criminal proceedings by audio visual link;
 - enable rules of court to be made to require a court to take into account such factors in determining whether it is in the interests of the administration of justice to direct an accused child detainee to appear in certain criminal proceedings by audio visual link;
 - make it clear that Part 1B of the Principal Act applies to an accused detainee required to appear in criminal proceedings brought against the accused detainee even if the offence concerned is not the offence for which the detainee is in custody;
 - alter references to the interests of justice so as to refer to the administration of justice (consistently with usage elsewhere in the Principal Act); and
 - make it clear that any entitlement of a person under s 14 of the *Criminal Appeal Act 1912* to be present in proceedings on the hearing of an appeal is satisfied if audio visual links are used in relation to the person under the Principal Act.

Background

- The Bill amends the *Evidence (Audio and Visual Links) Act 1998* (the Principal Act) and the *Evidence Legislation Amendment (Accused Child Detainees) Act 2003* (the Accused Child Detainees Act), which makes uncommenced amendments to the Principal Act.
- The Principal Act provided arrangements between participating States with respect to the taking of evidence by audio and audiovisual links interstate. It was amended in 2001 by the *Evidence (Audio and Audio Visual Links) Amendment Act 2001*, to establish:

- a presumption in favour of using audiovisual links in preliminary criminal proceedings;²⁹ and
 - a presumption in favour of physical attendance at court for substantive criminal proceedings, referred to as “relevant criminal proceedings”.³⁰
4. The Principal Act was recently further amended by the Accused Child Detainees Act [see *Legislation Review Committee Digest No.4*].
5. It was stated in the Bill’s Second Reading Speech that:
- a number of high-profile criminal matters have raised the issue of the court’s discretion to order that an accused detainee appear by audio visual link where serious security concerns have been identified. Matters before the courts have involved threats being made to the safety of judicial officers and other court users.
- ...it is recognised that in exceptional cases that raise particularly serious security concerns, requiring an accused detainee to appear by [audiovisual link] may realistically be the only appropriate option available to our courts. The amendments proposed in the bill will put beyond doubt the capacity of the court to make such an order in the unusual and extreme circumstances where it may be necessary.³¹

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

The Bill

Evidence (Audio and Visual Links) Act 1998 (*The Principal Act*)

7. The Bill specifically provides that the use of audiovisual links satisfies any entitlement of a person under s 14 of the *Criminal Appeal Act 1912* to be present in proceedings on the hearing of an appeal³² [proposed s 3(3)].
8. The Bill replaces the phrase “concerning the offences in respect of which he or she is in custody” with “in relation to the detainee concerning an offence” in s 5B(2A), s

²⁹ Section 3 of the Act defines *preliminary criminal proceedings* to include: proceedings relating to bail (other than a proceeding defined as a “relevant criminal proceeding”), where a person has previously been remanded in custody, subsequent proceedings with respect to the remand of the person for the same offence, interlocutory proceedings held in connection with any criminal proceeding, applications for an adjournment, any arraignment on a day other than the day appointed for the trial of a person.

³⁰ Section 3 of the Act defines *relevant criminal proceedings* to include: committal proceedings, inquiries into a person’s unfitness to be tried for an offence, trials or hearings of charges, sentencing hearings, hearings of an appeal arising out of a trial or hearing, proceedings relating to bail: before a Magistrate or justice in respect of the period between a person being charged with an offence and the person’s first appearance before a court in relation to the offence, or on a person’s first appearance before a court in relation to an offence.

³¹ Mr A P Stewart MP, Parliamentary Secretary, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003.

³² Section 14(1) of the *Criminal Appeal Act 1912* specifically provides that an appellant is entitled to be present at an appeal, notwithstanding that he or she is in custody, except where the appeal is solely on a question of law.

5BA(1) and s 5BB(1). This is to ensure the provisions apply when the proceedings do not relate to the offence for which the person is in custody.

9. Proposed s 5BB(5) provides a list of factors that must be taken into account by a court in determining whether it is in the interests of the administration of justice to direct an accused detainee (other than an accused child detainee) to appear in certain criminal proceedings by audio visual link [Sch 1 [9]].

These are as follows:

- the risk that the personal security of a particular person or persons (including the accused detainee) may be endangered if the accused detainee appears in the courtroom or other place where the court is sitting;
- the risk of the accused detainee escaping or attempting to escape, from custody when attending the courtroom or place where the court is sitting;
- the behaviour of the accused detainee when appearing before a court in the past; and
- the conduct of the accused detainee while in custody, including the accused detainee's conduct during any period in the past during which the accused detainee was being held in custody in a correctional centre or detention centre.

The Accused Child Detainees Act

10. The Bill enables rules of court to be made to require a court to take into account any factor of a kind referred to in proposed s 5BB(5)³³ in determining whether it is in the interests of the administration of justice to direct an accused child detainee to appear in certain criminal proceedings by audiovisual link [proposed s 5BBA(4A)].
11. The Bill also amends the uncommenced s 5BBA(1) to make it clear that the section applies to an accused child detainee required to appear in criminal proceedings when the proceedings do not relate to the offence for which the child is in custody.

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

Clause 2: Commencement - Retrospectivity

12. Clause 2 of the Bill provides that the ensuing Act will commence on assent, with the exception of s 4 and Sch 2.
13. These provisions commence, or are taken to have commenced, on the date of assent to the Accused Child Detainees Act.
14. The Accused Child Detainees Act is to commence on proclamation. Should the Accused Child Detainees Act be proclaimed prior to the Assent to the Bill, the amendments to the Bill will have retrospective effect.

³³ Set out in paragraph 9 above.

- 15. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, given the nature of the changes made to the *Evidence Legislation Amendment (Accused Child Detainees) Act 2003* by the *Evidence (Audio and Audio Visual Links) Amendment Bill 2003*, the Committee is of the opinion that the retrospectivity is unlikely to adversely affect the personal rights of an accused child detainee.**

Appearance by audiovisual link: Trespasses on Personal Rights

16. The right of an accused person to participate in criminal proceedings is internationally recognised.³⁴
17. The proposed s 5BB(5) arguably erodes this right by setting out matters apart from the interests of the accused to be taken into consideration in deciding whether or not to proceed by way of audiovisual link.
18. However, it does not confine the exercise of judicial discretion to those factors, but allows an individual accused detainee's particular circumstances to be taken into account.
19. The Bill also preserves the presumption in favour of physical appearance for "relevant criminal proceedings".³⁵
20. Judicial authority exists for the displacement of an accused person's right to participate in proceedings if their conduct is such that an orderly trial cannot take place.³⁶
21. The changes made to the Principal Act by the Bill seek to achieve an effective balance between the procedural rights of an accused detainee and the public expectations of the processes of criminal justice generally, in order to satisfy the interests of the administration of justice.
22. It was noted in the Second Reading Speech that this is particularly so in the instances where the safety of persons involved in the court process may be considered to be at risk:

The amendments in this bill will ensure that the court is equipped to meet community expectations that court proceedings will be conducted in a secure environment that will ensure the physical safety of all court users.³⁷

- 23. Given the presumption in favour of personal appearance in "relevant criminal proceedings", the retention of judicial discretion in the interests of the administration of justice, and the objectives of the Bill, the Committee does not consider that the Bill trespasses unduly on personal rights.**

³⁴ See, eg, Article 14 of the United Nations International Covenant on Civil and Political Rights.

³⁵ Section 5BB(1) of the Principal Act.

³⁶ *Eastman v The Queen* (1997) 158 ALR 107 at 138.

³⁷ Mr A P Stewart MP, Parliamentary Secretary, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003.

The Committee makes no further comment on this Bill.

6. MARKETING OF PRIMARY PRODUCTS AMENDMENT (RICE MARKETING) BILL 2003

Matters for comment raised by the Bill

Introduced: 12 November 2003
 House: Legislative Council
 Minister: The Hon Ian Macdonald MLC
 Portfolio: Agriculture and Fisheries

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

Purpose and Description

1. The object of this Bill is to extend, from 31 January 2004 to 31 January 2009, the authorisation under the *Marketing of Primary Products Act 1983* (MPP Act) of certain rice marketing arrangements that would otherwise contravene Part IV of the Commonwealth *Trade Practices Act 1974* and the *Competition Code of NSW*.³⁸

Part IV of the *Trade Practices Act* deals with restrictive trade practices.

2. Specifically, the amendment continues the exemptions for those marketing arrangements that authorise the Rice Marketing Board (the Board) to act as the agent and sole buyer of rice produced in NSW and vests ownership of the rice produced in the Board.

These arrangements were made by agreement between the Ricegrowers' Cooperative Ltd and the Board.

Background

3. In his Second Reading Speech³⁹, the Minister referred to the review of the Act under the National Competition Policy in 1995.

The Review recommended that ownership of all rice grown in NSW continue to be vested in the Board while discussions were held at the national level on proposals for a national single desk for rice exports.

4. According to the Second Reading Speech, negotiations that had been ongoing between the Commonwealth, the rice industry and State Governments were abandoned early in 2003 because of difficulties at the Commonwealth level.
5. The Minister said that, as a consequence, "the NSW government agreed that vesting should be renewed for a further five years during which time a further review under

³⁸ The text of the Competition Code of NSW is the Schedule version of Part IV of the Commonwealth *Trade Practices Act* and related sections of, and regulations under, that Act [s 4, *Competition Policy Reform (New South Wales) Act 1995*].

³⁹ The Hon Ian Macdonald MLC, Minister for Agriculture and Fisheries, *Parliamentary Debates (Hansard)* Legislative Council, 12 November 2003.

Competition Policy principles of the powers of the Rice Marketing Board would be undertaken, making recommendations before vesting expires on 31 January 2009.”

6. The Minister also said that “[t]he vesting arrangements do not interfere with the market price for rice, which is offered on world markets at a competitive and unsubsidised price”.
7. The Minister stated that:

Rice is the most supported agricultural commodity in the world, with 80 per cent of the value of gross farm receipts subsidised by governments. The vesting arrangements under consideration allow the co-operative to market its exports in an organised way, and they have led to a highly effective, productive, and competitive rice industry.
8. He also noted that NSW produces 99% of Australia’s rice and that the rice industry strongly supported the extension of the vesting.

The Bill

9. Clause 2 of Schedule 1 makes the amendment that extends for five years until 31 January 2009 the authorisation for actions by the Board that would otherwise contravene the *Trade Practices Act* and the *Competition Code of NSW*.
10. Clause 3 of Schedule 1 updates a reference to the agreement between the Board and Ricegrowers’ Co-operative Ltd that was replaced in 2001.
11. The Bill commences on assent.

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

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

The Committee makes no further comment on this Bill.

7. MOTOR ACCIDENTS LEGISLATION AMENDMENT BILL 2003

Matters for comment raised by the Bill

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

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

Purpose and Description

1. The object of this Bill is to provide that the claims procedures of the *Workplace Injury Management and Workers Compensation Act 1998* and the scheme under the *Workers Compensation Act 1987* apply where an employee is injured or killed as a result of a motor vehicle accident occurring in the course of employment, in circumstances where:
 - (a) the motor accident did not arise from the use or operation of a motor vehicle on a road or road related area; and
 - (b) there is no motor accident insurer on risk (including any insurer under a third-party policy) in respect of the motor accident and there is no right of action against the Nominal Defendant.

Background

2. Section 151E of the *Workers Compensation Act 1999* provides that a claim for *common law damages* arising as a result of a motor vehicle accident occurring during the course of employment are to be determined according to the motor accidents legislation.⁴⁰
3. In the recent decision of the Supreme Court in *Pender v Power Coal Pty Limited* [2002] NSWSC 925, a coal mine employee was injured in an attempt to unwind a hose from 750 kilogram drum by securing the hose to a parked purpose-built mining vehicle known as a PJB and moving the drum with a forklift.
4. The Court held that both the PJB and the forklift came within the definition of a motor vehicle. As a consequence, an action for common law damages would necessarily be brought under the *Motor Accidents Compensation Act 1999*.
5. In his judgement in *Pender*, Woods CJ advised:

close consideration on the part of the industry, and the Legislation, is required of the question whether accidents underground, which involve the use of equipment falling

⁴⁰ Either the *Motor Accidents Act 1988* or the *Motor Accidents Compensation Act 1999*. The former Act applies to all motor vehicle accidents occurring prior to the commencement of the later Act.

within the definition of motor vehicles, should be exempt from the operation of the *Motor Accidents Compensation Act 1999*. The use of vehicles with modifications required for mining purposes, and the nature of the activities in which they are displayed arguably places them in a very different category from that which would apply to the use of conventional vehicles above ground.

6. According to second reading speech, the decision in *Pender*:

defined a broad scope for the type of motorised equipment, and consequently the accidents that now came within the Motor Accidents Compensation Act, with the consequence that a motor accident can now involve unique pieces of equipment used only in particular workplaces, for example, excavating equipment on a construction site.⁴¹

The Bill

7. This Bill amends both the *Motor Accidents Act 1988* and the *Motor Accidents Compensation Act 1999* to provide that neither Act applies in respect of a death or injury caused by a motor accident if:

- (a) the motor accident did not arise from the use or operation of a motor vehicle on a road or road related area; and
- (b) there is no motor accident insurer on risk in respect of the motor accident;⁴² and
- (c) the death or injury gave rise to a work injury claim.

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

Clause 2 - Commencement

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

⁴¹ Mr Tony Stewart MP, Parliamentary Secretary, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003.

⁴² The Bill provides that there will be no motor accident insurer on risk in respect of an accident if:

- (a) at the time of the motor accident the motor vehicle was not subject to coverage under a third-party policy and was not subject to coverage under a policy of compulsory third-party personal injury insurance or a compulsory motor vehicle accident compensation scheme under the law of a place other than NSW or under a law of the Commonwealth, and
- (b) there is no right of action against the Nominal Defendant in respect of the motor accident: [Schedule 1[1] and Schedule 2[1]].

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

Impact on personal rights and liberties

12. The effect of this Bill is to preclude common law damages being sought under the motor accidents legislation in the circumstances described by the Bill. The Bill clarifies that damages in these circumstances should be pursued under the Worker's Compensation regime.
13. The structure for common law damages under the workers compensation legislation and the motor accidents legislation is significantly different. By being denied rights to obtain common law damages under the motor accidents legislation, some plaintiffs may be disadvantaged compared to their position under workers compensation legislation.
14. The Committee notes, however, that rights to common law damages under the motor accidents legislation are only unavailable in circumstances where:
- (a) the motor accident did not arise from the use or operation of a motor vehicle on a road or road related area; and
 - (b) there is no motor accident insurer on risk in respect of the motor accident; and
 - (c) the death or injury gives rise to a work injury claim.

15. Given that the Bill only affects circumstances which would not normally be considered a motor accident and which give rise to a work injury claim, the Committee does not consider that being denied access to the motor accidents compensation regime unduly trespasses on personal rights.

Schedule 1[4] and Schedule 2[5] - Retrospectivity

16. The proposed Schedule 4, Part 12 of the *Motor Accidents Act 1998* provides that the proposed s 3D of that Act:
- extends to motor accidents occurring before the section commences. However, section 3D does not affect court proceedings commenced before 5 December 2002 or any decision of a court made before the section commences.
17. Likewise, the proposed Schedule 5, Part 4, Clause 17 of the *Motor Accidents Compensation Act 1999* provides that the proposed s 5A of that Act has the same retrospective operation as stated above.
18. 5 December 2002 is the date of the Minister's Statement announcing the intention to introduce this legislation.⁴³

⁴³ In this Ministerial Statement, the Hon J Della Bosca MLC announced the intention to bring forward legislation in the next session of Parliament 'to remove anomaly in workers compensation entitlements that has arisen as a result of the decision in a recent Supreme Court case' (i.e. *Pender*). The Minister further indicated that 'I

19. These provisions are therefore treat the amendments contained in the Bill as having taken effect from the date the Minister announced his intention to introduce the amendments in his Ministerial Statement.

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

carries with it the assumption that citizens should arrange their affairs in accordance with announcements made by the Executive rather than in accordance with the laws made by the Parliament. It treats the passage of the necessary retrospective legislation 'ratifying' the announcement as a pure formality. It places the Parliament in the invidious position of either agreeing to the legislation without significant amendment or bearing the odium of overturning the arrangements which many people may have made in reliance on the Ministerial announcement. Moreover, quite apart from the debilitating effect of the practice on the Parliament, it leaves the law in a state of uncertainty... The legislation when introduced may differ in significant details from the terms of the announcement. The Government may be unable to command a majority in the Senate to pass the legislation giving effect to the announcement or it may lose office before it has introduced the relevant legislation, leaving the new Government to decide whether to proceed with the proposed change to the law.⁴⁴

21. The Committee is concerned that individuals may have commenced claims for common law damages under the motor accidents legislation, on the basis of the Supreme Court's decision in *Pender*, unaware of the Ministerial Statement of 5 December 2002.

22. The Committee notes that this Bill will have the effect of rendering any actions commenced after 5 December 2002, but not yet decided prior to the Bill being proclaimed, as ineffective.

23. The Committee refers to Parliament the question of whether the retrospective effect of these provisions to the date which they were announced by the Minister unduly trespasses on personal rights and liberties.

The Committee makes no further comment on this Bill.

propose that the Legislation to...be backdated to commence from the date of the ministerial statement' (The Hon J Della Bosca MLC, *NSW Parliamentary Proceedings (Hansard)*, Legislative Council, 5 December 2003).

⁴⁴ Senate Scrutiny of Bills Committee, *Annual Report 1986-87*, pp 12-13.

8. POLICE LEGISLATION AMENDMENT (CIVIL LIABILITY) BILL 2003

Matters for comment raised by the Bill

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

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

Purpose and Description

1. The objects of this Bill are:
 - (a) to amend the *Employees Liability Act 1991* to confirm that police officers are employees of the Crown for the purposes of that Act; and
 - (b) to amend the *Law Reform (Vicarious Liability) Act 1983*⁴⁵ to require persons seeking damages for torts⁴⁶ committed by police officers in the performance or purported performance of their functions as police officers generally to sue the Crown instead of the police officers concerned; and
 - (c) to amend the *Police Act 1990* to exclude any member of NSW Police from personal liability for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under that Act or any other Act or law (whether written or unwritten).

Background

2. In his Second Reading Speech, the Minister referred to the report of November 2002 of the Australasian Centre for Policing Research, the *Issues in Civil Litigation Against Police* report. The Centre found that “the incidence and nature of civil litigation by members of the public against police are growing issues of concern”.⁴⁷
3. The Minister stated that in 2002–03, “44 of the 186 police tort claims involved claims against individual officers as well as the Crown, with a total of 82 officers being individually sued.”

⁴⁵ “*Vicarious liability*” means “[i]liability which falls on one person as a result of an action of another, e.g. the liability of an employer for the acts and omissions of his [sic] employees”. *Osborn’s Concise Law Dictionary*, 7th Ed., at page 339.

⁴⁶ A “*tort*” is “[a]n act which causes harm to a determinate person, whether intentionally or not, being the breach of a duty arising out of a personal relation or contract, and which is either contrary to law, or an omission of a specific legal duty, or a violation of an absolute right.” *Osborn’s Concise Law Dictionary*, 7th Ed., at page 325.

⁴⁷ Second Reading Speech, the Hon John Watkins MP, Minister for Police, *Parliamentary Debates (Hansard)*, 13 November 2003.

4. He also stated that “[a]lthough NSW has laws to prevent individual police and other public officers from being personally liable for damages arising from their acts or omissions, the Government believes these additional measures are needed.”

The Bill

Amendment to the Employees Liability Act 1991

5. Schedule 1 amends the *Employees Liability Act 1991*. This Act provides that an employer is *not* entitled to seek any indemnity in contract or a contribution as joint tortfeasor from an employee who has committed a tort for which the employer is also liable.
6. The Act also provides that, where the tort victim recovers damages directly from an employee, the employee is entitled to an indemnity from the employer.
7. The Act abolishes any action in tort that an employer may have to recover damages from an employee based on the loss of the services of any injured fellow employee. However, the Act does not apply to a tort committed by an employee if the conduct constituting the tort was serious and wilful misconduct or did not occur in the course of, and did not arise out of, the employment of the employee.
8. In *Police Service of New South Wales v Honeysett* (2001) 53 NSWLR 592, the New South Wales Court of Appeal held that a police officer was an employee for the purposes of the Act.
9. Schedule 1 inserts a new section 2A in the Act to confirm that police officers are employees of the Crown for the purposes of the Act.

Amendment to the Law Reform (Vicarious Liability) Act 1983

10. Schedule 2 amends the *Law Reform (Vicarious Liability) Act 1983*, inserting a new Part 4, which governs legal proceedings for damages for torts committed by police officers.
11. New section 9B makes the most significant amendment in this Bill. It provides that a person may *not* make a police tort claim against a police officer. They may, however, make a claim against the Crown. According to the Minister, the practical effect of section 9B is to prevent an individual officer from being directly sued.
12. A “*police tort claim*” is a claim for damages for a tort allegedly committed by the police officer concerned in the performance or purported performance of the officer’s functions as a police officer.
13. The exceptions to the new rule in proposed section 9B are when the Crown denies vicarious liability for the tort of a police officer [proposed 9B(3)] or if the plaintiff is

- suing the police officer for something the officer did in a personal capacity [proposed section 9F(e)].⁴⁸
14. If the Crown denies vicarious liability, the plaintiff can join the police officer concerned as a party to the proceedings [proposed section 9B(3)].
 15. Proposed section 9D requires the court, subject to the exceptions at section 9E, to strike out the claim against any individual officer where the Crown concedes it would be vicariously liable if the tort were established, or where the court makes an initial determination that the Crown would be so liable.
 16. The new Part extends to claims against a person who was a police officer at the time of a tort or alleged tort, but who has ceased to be a police officer since that time (proposed section 9A).
 17. Proposed section 9G applies the new Part 4 *retrospectively* to torts allegedly committed by police officers before the commencement of the Part (known as “*pre-commencement torts*”).
 18. Part 4 [other than proposed sections 9B(2), 9C & 9D(2)] also extends to any legal proceedings to which the Crown is a party concerning a pre-commencement tort, but only if:
 - (a) the proceedings are pending on the commencement of this Part; and
 - (b) the court has not yet begun a hearing on the merits in the proceedings.⁴⁹

This means that a claim against a police officer can be struck out or dismissed by the court if the Crown concedes vicarious liability [9D(1)], provided that the court has not yet begun a hearing on the merits.

Furthermore, a police officer will not be able to be joined to pending proceedings unless the Crown denies vicarious liability (9B(3)).

19. Proceedings against an individual police officer (whether or not as co-defendant with the Crown) in which the court has begun a hearing on the merits can continue.

Amendment of Police Act 1990

20. Schedule 3, clause 1 re-enacts section 213(1) of the *Police Act* to provide that a member of NSW Police is not liable for any injury or damage caused by any act or omission of the member in their exercise in good faith of a function conferred or imposed by or under that Act or any other Act or law (whether written or unwritten⁵⁰).

⁴⁸ The new Part does not preclude a defendant in proceedings brought by a police officer from making a police tort claim in a cross-claim against the officer [proposed section 9E].

⁴⁹ Proposed subsection 9G(2).

⁵⁰ This makes clear that the provision extends to functions conferred by common law.

21. The present section 213 only protects a member from liability if they cause injury or damage in the course of exercising a function in respect to the protection of persons from injury or death or property from damage.
22. The new section 213 does not prevent a person from suing the Crown for a tort committed by a member of NSW Police who has the benefit of the exclusion if the Crown is vicariously liable for that tort.⁵¹
23. Schedule 3, clause 3 applies the re-enacted section 213 *retrospectively* to acts or omissions done, or omitted to be done, before its commencement. However, it does not extend to proceedings initiated before commencement.

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

Trespasses on personal rights and liberties

Part 4, clause 9G - Retrospectivity

24. The Bill applies Part 4 retrospectively to pre-commencement torts allegedly committed by police officers and to some legal proceedings already on foot on the date of commencement.⁵²
25. The Committee will always be concerned with any retrospective effect of legislation that impacts on personal rights, such as the right to sue for damage or injury suffered as a result of a tortious act. Where retrospective provisions adversely affect individual rights, the Committee considers them to be a trespass on those rights.
26. However, in this case, the retrospective application of Part 4 does not appear to have any detrimental effect on the rights of plaintiffs to sue for damages for torts committed by police officers. Plaintiffs' rights to recover damages for torts committed by police officers are preserved as they may sue the Crown in place of individual police officers.

<p>27. The Committee is of the view that personal rights are not unduly trespassed by the retrospective application of this Bill as the plaintiffs' rights to recovery of loss are preserved.</p>
--

Delegates legislative powers

Clause 2 – Commencement by proclamation

28. The proposed Act is to commence on a day or days to be appointed by proclamation. The Committee notes that providing for an Act to commence on proclamation

⁵¹ See section 10 of the *Law Reform (Vicarious Liability) Act 1983*, which provides that a statutory exemption from civil liability is to be disregarded in determining whether a person is vicariously liable for the tort of a person who has the benefit of the exemption.

⁵² See proposed section 9G.

delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

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

29. The Minister's office has advised the Committee that the reason for commencement by proclamation of this Bill is to allow time for consultations with the Police Association after the passage of the Bill through Parliament. According to the Minister's office, the Association has requested this consultation.
30. It is not clear to the Committee why it is necessary to delay the commencement of the Bill, which Parliament will have passed, in order for these consultations to take place. The Committee has resolved to write to the Minister for further explanation of the reasons for the delay in commencement.

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

The Committee makes no further comment on this Bill.

9. SUPERANNUATION LEGISLATION AMENDMENT (FAMILY LAW) BILL 2003

Matters for comment raised by the Bill

Introduced: 12 November 2003
House: Legislative Assembly
Minister: The Hon J Della Bosca MLC
Portfolio: Special Minister of State

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

Purpose and Description

1. According to the Second Reading Speech,⁵³ this Bill:

proposes to make a number of amendments to legislation governing the New South Wales judicial, parliamentary and public sector employees' superannuation schemes. Most of the proposed amendments stem from Commonwealth reforms that provide for the division of superannuation on marriage breakdown under the *Family Law Act 1975*.⁵⁴

In general terms, the new Commonwealth laws make superannuation part of the marital property and prescribe a range of processes to facilitate superannuation splitting where that is appropriate.
2. The amendments allow certain payments (*splittable payments*) in respect of a superannuation interest to be allocated between spouses, either by agreement or by an order of the Family Court.
3. Specifically, the Bill amends a number of Acts and a Regulation regulating public sector superannuation schemes:
 - (a) to give effect to agreements or orders under the *Family Law Act 1975* of the Commonwealth relating to the division of superannuation interests between spouses by providing for the payment of entitlements and other amounts and consequential matters;
 - (b) to extend entitlements to spouse pensions to de facto partners of certain former pensioners under closed public sector superannuation schemes;
 - (c) to update provisions relating to the adjustment of pensions under certain closed public sector superannuation schemes; and
 - (d) to enable savings and transitional regulations to be made consequent on the proposed amendments.

⁵³ Mr. Tony Stewart, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

⁵⁴ See *Family Law Legislation Amendment (Superannuation) Act 2001*, Part VIII B (Commonwealth).

Background

4. Part VIII B of the *Family Law Act 1975* (Commonwealth) and the *Family Law (Superannuation) Regulations 2001* made under that Act (“family law superannuation legislation”) provide for the division of superannuation entitlements on marriage breakdown.
5. The family law superannuation legislation contains a scheme enabling agreements (*splitting agreements*) and orders (*splitting orders*) to be made specifying the division (or *split*) of superannuation interests.
6. Under the Commonwealth legislation, payments under splitting agreements or orders can be made by way of transferring or rolling over a family law superannuation entitlement to another superannuation fund or retirement savings account or by paying it to the spouse or former spouse entitled to it.⁵⁵
7. The proposed amendments (among other things) set out the procedures for making these payments under State superannuation schemes and the circumstances in which they may be made, as well as providing for the consequential reduction of superannuation entitlements.
8. The amendments made by this Bill will “enable the creation of separate interests in all the public sector defined [superannuation] benefit schemes, wherever this is appropriate.”⁵⁶

The Bill

9. The principal amendments made by the Bill can be grouped into two for convenience.

“Group 1 Amendments”

10. The object of the first group of amendments is to facilitate arrangements for payment splits under the family law superannuation legislation and to provide for family law superannuation payments to, or in respect of, non-member spouses for the purposes of satisfying Division 2.2 of Part 2 of the *Family Law (Superannuation) Regulations 2001* (Commonwealth).

An effect of this is that payments of a benefit to the member spouse will no longer be liable to be split for the purposes of the family law superannuation legislation.

11. The amendments set out the rules and procedures by which the administrator (eg, a trustee) of a superannuation scheme may pay out a family law superannuation entitlement.

⁵⁵ See Division 2.2 of Part 2 of the *Family Law (Superannuation) Regulations 2001* (Commonwealth). This Division sets out the circumstances in which payments in respect of a superannuation interest are not “splittable” payments.

⁵⁶ Second Reading Speech, Mr. Tony Stewart, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

If a spouse (or former spouse) of the member has an entitlement under the family law superannuation legislation and a pension is being paid to the member spouse or the member spouse is entitled to be paid a lump sum benefit, the Minister must, on written notice being given of the entitlement, either pay or release the whole of the entitlement (less costs) or transfer or roll it over to a nominated superannuation fund (either a fund regulated under Commonwealth law or the First State Superannuation Fund) or a retirement savings account.

If there is no nomination, or if the nomination is not accepted, the payment may be transferred to the First State Superannuation Fund.

The value of an entitlement or payment is to be determined in accordance with the regulations under the Principal Act and the family law superannuation legislation.

12. This group of amendments also enables the administrator of a scheme to reduce a future benefit payable to or in respect of a member spouse whose superannuation entitlements are affected by a splitting order or agreement, if an amount is paid or payable under the family law superannuation legislation.
13. Schedules 2, 5, 7, 10, 11 and 12 make these amendments to the *Judges' Pension Act 1953*, *Parliamentary Contributory Superannuation Act 1971*, *Police Regulation (Superannuation) Act 1906*, *State Authorities Non-contributory Superannuation Act 1987*, *State Authorities Superannuation Act 1987* and the *Superannuation Act 1916* respectively.⁵⁷

"Group 2 Amendments"

14. The second group of amendments in the Bill relate to certain closed superannuation schemes under which deceased members received a pension. These amendments extend the right to a spouse pension under the relevant superannuation scheme to the de facto spouse of a pensioner under that scheme.
15. "*De facto spouse*" is defined to include same sex partners.⁵⁸ In the Second Reading Speech, the Parliamentary Secretary stated that:

[the] proposed amendments will mean that heterosexual and same-sex de facto partners of pensioners will be eligible for a spouse pension in the same circumstances as married spouses. This will bring the definition of 'spouse' in these schemes into line with other New South Wales public sector schemes.⁵⁹
16. This amendment is made by Schedules 3, 4, 8, 9 and 13 to the *Local Government and Other Authorities (Superannuation) Act 1927*, *New South Wales Retirement Benefits Act 1972*, *Public Authorities Superannuation Act 1985*, *Public Authorities Superannuation (Transport Retirement Fund Closure) (Savings and Transitional) Regulation 1986* and the *Transport Employees retirement Benefits Act 1976* respectively.

⁵⁷ There are some minor variations in the amendments made to these Acts to take account of the differences in membership and in the structure of their respective schemes.

⁵⁸ See the definition in section 4 of the *Property (Relationships) Act 1984* (NSW).

⁵⁹ Mr. Tony Stewart, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

17. Under amendments to public sector superannuation Acts by this Bill, a person to whom payment of an entitlement under the family law superannuation legislation is made may nominate a superannuation fund or retirement savings account into which the payment is to be made. If no nomination is made, the amendments provide for transfer of the payment to the First State Superannuation Fund. Schedule 1 of the Bill amends the *First State Superannuation Act 1992* to enable that Fund to receive such payments.
18. Other amendments to the *First State Superannuation Act* include making the person on whose behalf the payment is made into the Fund an associate member of the Fund.
19. Schedule 6 amends the *Police Association Employees (Superannuation) Act 1969* by applying provisions relating to obligations and other matters under the family law superannuation legislation to officers of the Police Association who contribute to the Police Superannuation Scheme and other persons who are beneficiaries of that Scheme.

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

Clause 2(2) – Commencement by proclamation

20. Clause 2(2) provides that Schedules 1[2]-[4], 2, 5, 6, 7, 10, 11 and 12 commence on a day or days to be proclaimed.
21. The Committee notes that providing for an Act or part thereof to commence on proclamation delegates to the Government the power to commence the Act or any of its provisions on whatever day it chooses after assent or not to commence them at all.

While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.
22. In this case, the Minister's office has advised the Committee that these Schedules are being commenced on proclamation to allow time for the making of certain regulations. These regulations will prescribe the valuation mechanisms for calculating a spouse's benefit where this is a percentage of the member's benefit value.
23. The Minister's Office has also advised that it is important that the valuation mechanisms to be applied by NSW when executing splitting orders or agreements are consistent with those applied for family law purposes under federal law.
24. The NSW Government (like all State and Territory Governments) is currently waiting for the Federal Attorney-General to approve the methods to be used in the federal context.
25. The Minister's Office has advised that these Schedules will be proclaimed on the day the regulations are made.

26. Given the advice of the Minister's office, in particular the need to wait for federal valuation methods to be approved to ensure consistency between the two jurisdictions, the Committee is of the view that commencing these provisions on proclamation is not an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

10. TRANSPORT ADMINISTRATION AMENDMENT (RAIL AGENCIES) BILL 2003

Matters for comment raised by the Bill

Introduced: 12 November 2003
 House: Legislative Assembly
 Minister: The Hon M Costa MLC
 Portfolio: Transport Services

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

Purpose and Description

- The Bill's objects are to:
 - constitute Rail Corporation New South Wales (*RailCorp*), a statutory State owned corporation, and to confer on it the rail passenger functions and other transport-related functions of the State Rail Authority (the *SRA*);
 - vest State rail infrastructure facilities situated within the metropolitan rail area in RailCorp instead of Rail Infrastructure Corporation (*RIC*) (which currently owns all State rail infrastructure facilities), leaving RIC with ownership of those facilities within the country rail area;
 - to constitute Transport Infrastructure Development Corporation (*TIDC*), a statutory State owned Corporation, and to confer on it functions relating to the development of major railway and other major transport projects;
 - to provide for the continuation of the State Rail Authority to exercise functions relating to its residual assets, rights and liabilities and for the dissolution of the Authority at a later time;
 - to provide for the dissolution of RIC at a later time; and
 - to make consequential amendments and provision of a savings and transitional nature consequent on the proposed Act.

Background

- The Bill is one of a series of Acts which comprises the Government's response to the findings of the April 2001 *Report of the Special Commission of Inquiry into the Glenbrook Rail Accident* (the McNerny Report).
- According to the Bill's Second Reading Speech:

A statutory State-owned corporation [ie, RailCorp] will deliver improved management and the merger will provide single-point accountability for the metropolitan rail network. Experience with vertical separation of agencies both in New South Wales and internationally is that the splitting of functions across separate organisations reduces

communication, spreads scarce technical expertise and leads to ambiguities in accountabilities and responsibilities.⁶⁰

4. RailCorp will operate CityRail and CountryLink rail passenger services, currently the responsibility of State Rail. It will also continue to own and manage the stations and related facilities outside the metropolitan area necessary to support the operation of CityRail and CountryLink passenger services.

The Bill

5. The Bill amends the *Transport Administration Act 1988* (TAA) by omitting Part 2 and inserting new Parts 2 and 2A [Sch 1[8]]. These set out:
 - the constitution of RailCorp and TIDC as statutory State owned corporations;⁶¹
 - the objectives and functions of RailCorp and TIDC; and
 - the management structures of RailCorp and TIDC.
6. Pursuant to new s 5(1) of the TAA, the principal objectives of RailCorp are:
 - to deliver safe and reliable railway passenger services in New South Wales in an efficient, effective and financially responsible manner; and
 - to ensure that the part of the NSW rail network vested in, or owned by, RailCorp enables safe and reliable railway passenger and freight services to be provided in an efficient, effective and financially responsible manner.
7. The new s 5(2) of the TAA sets out RailCorp's other objectives such – as exhibiting a sense of social responsibility by having regard to the interests of the community in which it operates [s 5(2)(e)].
8. However, s 5(3) provides that these additional objectives are *not* as important as those contained in s 5(1).
9. Pursuant to new s 18B(1) of the TAA, the principal objectives of TIDC are to:
 - develop major railway systems; and
 - develop other major transport projects,in an efficient, effective and financially responsible manner.⁶²

⁶⁰ Mr J G Tripodi MP, Parliamentary Secretary, *NSW Parliamentary Proceedings (Hansard)*, Legislative Assembly, 12 November 2003.

⁶¹ However, neither corporation is subject to the dividend provisions of s 20S of the *State Owned Corporation Act 1989*.

⁶² Pursuant to proposed s 18D of the *Transport Administration Act 1988*, TIDC's other functions include holding, managing, maintaining and establishing assets associated with systems it develops or proposes to develop and providing goods and services to the rail industry.

10. The new Divisions 1A and 1B of the TAA consist of miscellaneous provisions relating to rail authorities and to rail infrastructure, rail access and network control, respectively [Sch 1 [50]].
11. The Bill also makes extensive amendments to Sch 6 of the TAA, which deals with staff issues, eg, transfer of SRA staff and RIC staff to RailCorp [new cl 11A]; and Sch 6A, which relates to ownership of rail infrastructure facilities.
12. The Bill inserts a new Sch 8 into the TAA, providing for the continuation of the SRA [Sch 1 [185]].
13. Schedules 2 and 3 of the Bill consist of a series of amendments to the TAA relating to the dissolution of RIC, and amendments of other Acts and instruments consequential to enactment of the Bill.

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

Proposed s 11(6) and s 18F(6): Exemption from application of Part 3 of the Public Works Act 1912.

Insufficient parliamentary scrutiny

14. The Bill amends the TAA to provide both RailCorp [s 11] and TIDC [s 18F] with the power to acquire land for any purpose [Schedule 1 [8]].⁶³
15. Such land (including an interest in land) may be acquired by agreement, or by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* (Land Acquisition Act) [s 11(1) and s 18F(1)].⁶⁴
16. Section 3(a) of the Land Acquisition Act provides a guarantee that, when land affected by a proposal for acquisition by RailCorp or TIDC is eventually acquired, the amount of compensation will be not less than the market value of the land (unaffected by the proposal) at the date of acquisition.⁶⁵ This guarantee must be provided when written notice is given to an owner of land to the effect that the land is affected by a proposal for acquisition [s 10 of the Land Acquisition Act].
17. Neither RailCorp nor TIDC may give a proposed acquisition notice under the Land Acquisition Act without the approval of the Minister for Transport Services [s 11 and s 18F(4)].

⁶³ Pursuant to new s 11(2) and s 18F(2) the purposes for which RailCorp and TIDC respectively may acquire land include for the purposes of a future sale, lease or disposal, ie, to enable RailCorp and TIDC to exercise their functions in relation to land under the *Transport Administration Act 1988*.

⁶⁴ There is, otherwise, no obligation on a State Legislature to provide just compensation: *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

⁶⁵ The Act does *not* apply to an acquisition of land if the acquisition consists of the taking of a mortgage, charge or other similar security over an interest in land: s 6(b) of the *Land Acquisition Act (Just Compensation) 1991*.

18. For the purposes of the *Public Works Act 1912* (PWA), any such acquisition of land is taken to be for an authorised work, and RailCorp or TIDC is, in relation to that authorised work, taken to be the Constructing Authority [s 11(3) and s 18F(3)].
19. However, works constructed by RailCorp and TIDC pursuant to this power to purchase are not subject to compliance with Part 3 of the PWA. Section 34(1) of the PWA provides that:
- No public work of any kind, the estimated cost of completing which exceeds \$1,000,000, and whether such work is a continuation, completion, repair, reconstruction, extension, or a new work, shall be commenced, unless sanctioned as [provided by Part 3].⁶⁶
20. Part 3 of the PWA provides that every such proposed work must be submitted to the Legislative Assembly by the appropriate Minister. The Minister's explanation of the proposed work must comprise an estimate of the cost of such work when completed, together with such plans and specifications or other descriptions as the Minister deems proper, and an estimate of the probable revenue which the proposed work will generate [s 34(1)(a)].
21. The proposed work is then referred to the Public Works Committee, which must report back to the Legislative Assembly [s 34(1)(b)-(d)]. The Legislative Assembly then approves or rejects the proposed work [s 34(1)(e)]. If approved, the Minister must then introduce a Bill to sanction the carrying out of the work [s 37].
22. It is not unlikely that both RailCorp and TIDC may undertake land purchases that exceed \$1,000,000.⁶⁷ Under proposed s 11(6) and s 18F(6) these purchases would not be subject to the Parliamentary scrutiny otherwise provided for by the PWA.

23. The Committee notes that the proposed subsections 11(6) and 18F(6) enable RailCorp and TIDC to undertake works in excess of \$1,000,000 without reference to the Legislative Assembly or the Public Works Committee and without the passing of a Bill to sanction the work as required by Part 3 of the *Public Works Act 1912*.

24. The Committee refers to the Parliament the question of whether these provisions inappropriately delegate legislative powers or insufficiently subjects their exercise to parliamentary scrutiny.

⁶⁶ Exceptions include where the proposed work is:

- a work of water supply, sewerage or drainage [s 34(4) *Public Works Act 1912*];
- a public school, a teachers' college, a technical college or a detention centre within the meaning of the *Children's (Detention Centres) Act 1987*;
- a hospital, or a mental hospital, or an institution for the treatment of the physically or mentally ill; or
- public offices or a public building [s 34(6) *Public Works Act 1912*].

⁶⁷ Given that, eg, the 1998-99 NSW Treasury estimates put the cost of the proposed 3 km extension of the Eastern Suburbs Railway line to Bondi Beach at approximately \$100 million. NSW Treasury, *Budget Papers 1998-1999*, <http://www.treasury.nsw.gov.au/bp98-99/bp2/docs/10-1.pdf>.

Proposed s14 and s 18I: Power to remove the chief executive officers of RailCorp and TIDC.**Makes rights, liberties or obligations dependent upon non-reviewable decisions.**

25. The Bill amends the TAA by inserting new s 14(3) and s 18I(3). These provide in respect of RailCorp and TIDC respectively, that:

The board may remove a person from office as chief executive officer, at any time, for any or no reason and without notice, but only after consultation with the voting shareholders and the portfolio Minister.⁶⁸

26. These sections purport to exclude the requirement to afford natural justice or procedural fairness to persons sought to be removed. That is, they purport to exclude the opportunity for such persons to be heard in relation to that decision.⁶⁹
27. Parliament may exclude procedural fairness if it makes its intention sufficiently clear.⁷⁰

A statutory provision expressly stating that the requirements of natural justice do not apply is conclusive.⁷¹

28. However, the Bill does not expressly exclude natural justice. Accordingly, whether it has done so by way of implication requires evidence of a manifest clear intention to do so by way of plain words or necessary intendment.⁷² The issue, therefore, is whether the enactment of the words “for any or no reason and without notice” provide such a manifest intention.
29. RailCorp and TIDC are emanations of the Crown in right of New South Wales.⁷³ Therefore, the common law right, where the Crown is the employer, and the office is not an ancient office with special incidents, that the employment is at pleasure only, applies. Accordingly, the chief executive officers referred to in proposed s 14 and s 18I may be dismissed at any time without notice.⁷⁴
30. The “*dismissal at pleasure*” principle was recently unanimously upheld in the Court of Appeal decision of *Commissioner of Police for New South Wales v Jarratt*.⁷⁵ In that case, the Court of Appeal held that the common law dismissal at pleasure principle is not qualified by a common law implication of procedural fairness.⁷⁶

⁶⁸ Proposed s 15(2) and s 18J(2) of the *Transport Administration Act 1988* provide similar powers with respect to acting chief executives of RailCorp and TIDC respectively.

⁶⁹ *Kioa v West* (1985) 159 CLR 550.

⁷⁰ See, eg, s 141(4) of the *Casino Control Act 1992*, which provides that in the exercise of its functions, the New South Wales Casino Control Authority is not required to observe the rules of natural justice (except to the extent that it is specifically required to do so by that Act).

⁷¹ *Abebe v Commonwealth* (1999) 197 CLR 510.

⁷² *Kioa v West* (1985) 159 CLR 550 at 584 and *Annetts v McCann* (1990) 170 CLR 597 at 598.

⁷³ Pursuant to proposed s 4 and s 18A of the *Transport Administration Act 1988* respectively.

⁷⁴ *Browne v Commissioner for Railways* (1935) 36 SR(NSW) 21 at 24 per Jordan CJ.

⁷⁵ [2003] NSWCA 326.

⁷⁶ *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraphs 66, 79 and 102.

31. The dismissal at pleasure principle can likewise only be legislatively abrogated by clear and unambiguous statutory language.⁷⁷ The wording of new s 14(3) and s 18I(3) demonstrates an express intention by the legislature that the principle is in fact to apply. The expression “for any or no reason and without notice” emphatically includes the dismissal at pleasure principle in the amended TAA.⁷⁸
32. Moreover, there is nothing in either the Bill’s Explanatory Memorandum or Second Reading Speech that supports a contrary interpretation of s 14(3) and s 18I(3).
33. In summary, RailCorp and TIDC are, as State owned statutory corporations, emanations of the Crown. The dismissal at pleasure principle therefore applies to the persons against whom the power of removal may be exercised, displacing any common law right of procedural fairness that would otherwise be likely to apply.

34. **The Committee considers that the power to remove the Chief Executive Officers of RailCorp and TIDC contained within proposed s 14(3) and s 18I(3) respectively makes the rights of those chief executive officers dependent upon non-reviewable decisions.**
35. **The Committee refers to Parliament the question of whether those rights are unduly dependent upon non-reviewable decisions.**

Proposed s 92: Limiting amount of compensation recoverable.

Trespasses on individual rights.

36. Proposed s 92 of the TAA limits the sum that may be recovered from a rail authority in an action for damages or compensation in respect of loss of or damage or injury to property caused by fire to \$50,000, or such other amount as may be prescribed by the regulations.

Proposed s 89 defines “rail authority” to mean RailCorp, RIC, TIDC, or any other person or body prescribed by the regulations.

37. Although proposed s 92 replicates s 96 of the current TAA, neither the explanatory note nor the second reading speech of the Bill make any reference to the inclusion of this limitation to compensation payable as a result of the negligence of a rail authority.

No evidence is provided to suggest any basis for the adoption of a limit to compensation, nor any explanation as to how the figure of \$50,000 was decided upon.

38. The common law imposes liability for damages caused by dangerous things – such as fire - escaping from property.

⁷⁷ *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508 at 576; *Barton v The Commonwealth* (1974) 131 CLR 477 at 488 and 501; *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraph 87.

⁷⁸ *Coutts v Commonwealth* (1985) 157 CLR 91 at 104 and 105 and *Kelly v Commissioner of the Department of Corrective Services* (2001) 52 NSWLR 533. That there is no stipulation of a right to remove “at pleasure” is irrelevant: *Commissioner for Police of NSW v Jarratt* [2003] NSWCA 326 at paragraph 80.

This liability was originally covered by the law of nuisance, but since the 1994 case of *Burnie Port Authority v General Jones Pty Limited* it has been subsumed into the law of negligence.⁷⁹

39. Fire damage sustained by a property adjoining a railway line could easily exceed \$50,000. Similarly, stock or produce which was destroyed by fire when being transported or stored on railway authority property could easily exceed that sum.

40. The Committee considers that setting a limit of \$50,000 to compensation payable in respect of fire damage in proposed s 92 of the *Transport Administration Act 1988* constitutes a trespass on the personal right to seek adequate compensation for loss due to the negligence of a rail authority.

41. The Committee has written to the Minister for Transport Services seeking his advice as to the reasons for this limitation on compensation payable.

42. The Committee refers to the Parliament the question of whether the limitation of compensation trespasses unduly on personal rights.

Proposed s 93: Search of vehicles and luggage on certain railway premises.

Trespass on individual rights.

43. Proposed s 93 of the TAA provides that an authorised officer may:

- stop any vehicle or person on any land that is vested in or under the control of a State rail operator and that is used for the receipt, dispatch or delivery of any luggage or freight;
- search any such vehicle or any luggage or other article on that vehicle or in the possession of any such person;
- require any such person to produce consignment notes, delivery dockets or other documents relating to the receipt, dispatch, delivery or ownership of any such luggage or article; and
- seize any such luggage or article that the authorised officer has reasonable grounds for suspecting has been stolen.

44. This power to search includes the power to open any part of the vehicle or any luggage or other article on the vehicle or in the possession of the person. [s 93(3)].

45. Any person who obstructs or hinders an authorised officer, or does not comply with any reasonable requirement made by an authorised officer, for the purposes of proposed s 93, is guilty of an offence [s 93(4)].

The maximum penalty under proposed s 93 is \$2,300.

⁷⁹ (1994) 179 CLR 520. More recently, in *Bonic v Fieldair* [1999] NSWSC 636 the Supreme Court held that damage to an adjoining vineyard caused by a farmer using chemical spray on a windy day was reasonably foreseeable, and that the farmer had breached his duty of care not to cause damage to his neighbour's property.

46. An authorised officer must produce his or her authority if requested to do so by any person required to comply with a requirement made by that officer under s 93 [s 93(4)].

Proposed s 93(6) defines an authorised officer to mean an officer of a State rail operator, or a person employed in the transit police service, appointed in writing by the chief executive officer of the State rail operator to be an authorised officer.

47. Only an officer of a State rail operator, or a person employed in the transit police service, appointed in writing by the chief executive officer may exercise this power.
48. The person or vehicle affected must be on rail authority land used for freight receipt, etc; and the authorised officer must have reasonable grounds for suspecting that the luggage or article is stolen before it can be seized. Thus, the power is largely for the protection of persons and businesses using rail freight.

49. The Committee notes that the power to search vehicles and seize property without a warrant in proposed section 93 of the *Transport Administration Act 1988* is a significant trespass on rights to privacy and property.

50. The Committee further notes that this power can only be exercised by a designated class of officers authorised in writing and is limited to land under the control of a State rail operator used for the receipt, dispatch or delivery of luggage or freight.

51. The Committee refers to the Parliament whether, having regard to the aims of the section, this power to search vehicles and seize property without a warrant unduly trespasses on personal rights.

Proposed Schedule 6 clause 18: exemption from compliance with Privacy and Personal Information Protection Act 1998

Trespass on individual rights

52. The Bill inserts into a new cl 18 into Sch 6 of the TAA. Schedule 6 of the TAA deals with transfer of staff between the various rail authorities, and is given effect by proposed s 95.
53. Proposed cl 18 provides that the SRA is not required to comply with the *Privacy and Personal Information Protection Act 1998* (the Privacy Act) in respect of the disclosure of information about employees, transferred, or proposed to be transferred, under Sch 6, to the new or proposed employer of those employees.
54. The Privacy Act aims to promote the protection of the privacy of individuals, by specifying information protection principles that relate to the collection, use and disclosure of personal information held by public sector agencies.⁸⁰
55. The aim of Sch 6 of the TAA is to facilitate the transfer of staff from SRA and RIC to RailCorp and TIDC, and *vice versa*, by means of written order of the Minister of

⁸⁰ Explanatory Note, *Privacy and Personal Information Protection Bill 1998*.

Transport Services. Staff entitlements, conditions of employment, etc, remain unchanged by these transfers.

56. Practically, the “transfer” of rail staff is a nominal procedure, to facilitate the establishment of RailCorp and TIDC. There appears to be, in effect, no real *disclosure* of personal information from one public sector agency to another, to which the Privacy Act ought to apply.

57. The Committee notes that the exemption from the application of the *Privacy Act 1998* to the transfer of rail employees under Schedule 6 of the *Transport Administration Act 1988*.

58. Having regard to the nature of the transfer process the Committee does not consider that this exemption trespasses unduly on personal rights.

Inappropriate delegation of legislative powers – delegation to “authorised persons”

59. The Bill inserts a new Sch 8 into the TAA, dealing with the continuing SRA. Proposed Sch 8 cl 10 provides that SRA may delegate to an authorised person any of its functions, other than the power of delegation.

60. Further, a delegate may sub-delegate to an authorised person any function delegated by the SRA if the delegate is authorised in writing to do so by the SRA [cl 10(2)].

61. For the purposes of cl 10, an *authorised person* means:

- an officer of the SRA; or
- a person of a class prescribed by the regulations or approved by the Minister.

62. The Committee has previously expressed the view that, when legislation conveys on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.⁸¹

63. Allowing a class of persons to be approved by the Minister removes the oversight of the scope of the delegation power from the Parliament. This is particularly so, given the ability to sub-delegate in cl 10(2).

64. However, having regard to the nature of the functions of the SRA as set out in proposed Sch 8, it does not appear that the exercise of powers by delegates under that Schedule could significantly affect personal rights.

65. The Committee notes that the definition of “authorised persons” to whom delegation may be made may be expanded by Regulation or by the approval of the Minister for Transport Services.

66. However, the Committee considers that, having regard to the nature of the functions of the State Rail Authority set out in proposed Schedule 8 of the *Transport Administration Act 1988*, this does not inappropriately delegate legislative power.

The Committee makes no further comment on this Bill.

⁸¹ *Legislation Review Digest No 4 of 2003*, 27 October 2003, at 30-31.

11. WORKERS COMPENSATION AMENDMENT (INSURANCE REFORM) BILL 2003

Matters for comment raised by the Bill

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

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

Purpose and Description

1. The object of this Bill is to amend the *Workers Compensation Act 1987* (the 1987 Act) to provide a new framework for workers compensation insurance arrangements, with the following features:

- (a) The Workers Compensation Nominal Insurer (***the Nominal Insurer***) is established as a statutory legal entity that will operate as a licensed insurer in place of the existing managed fund licensed insurers. The Nominal insurer will issue workers compensation policies of insurance and deal with claims under those policies as insurer. The Nominal Insurer will be able to appoint agents (***scheme agents***) to exercise any of its functions.
- (b) The WorkCover Authority (***the Authority***) will act for the Nominal Insurer.
- (c) The Workers Compensation Insurance Fund (***the Insurance Fund***) will take the place of the existing managed funds of licensed insurers. It will be the fund into which workers compensation insurance premiums will be paid and from which claims for workers compensation (and associated common law claims) will be paid by the Nominal Insurer.
- (d) The Insurance Fund (like the existing managed funds of licensed insurers) will be subject to a statutory trust that ensures it is held for the benefit of workers and employers.

The State will have no responsibility for the liabilities of the Insurance Fund and no entitlement to its assets or any surplus.

- (e) The *Uninsured Liability and Indemnity Scheme* currently administered by the Authority will be replaced with a scheme under which the Nominal Insurer becomes the insurer for claims made against uninsured employers and which provides for the subsequent reimbursement of the Insurance Fund.
- (f) The Insurance Fund will be audited by the Auditor-General under a special audit power but will not form part of the Total State Sector Accounts.
- (g) Under transitional arrangements the existing managed fund licensed insurers will continue to act as agents for the Nominal Insurer in respect of policies of insurance that they have issued, until other agency arrangements are made.

Background

2. According to the Parliamentary Secretary's second reading speech,⁸² the Bill implements reforms recommended by a review conducted by McKinsey and Company entitled "*Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers compensation in New South Wales*".
3. The Parliamentary Secretary stated that:

the report recommends changes to the existing arrangements whereby licensed insurers perform the majority of functions required within the scheme, such as funds investment, claims management, premium assessment and collection, and related activities. It recommends instead allowing specialist businesses to tender for these specific roles and functions. This approach will introduce greater competition into the scheme by opening up the market to enable businesses other than insurance companies to participate. The report recommends replacing the existing open-ended licensing system with fixed-term contract arrangements to allow the appointment of the most efficient providers, which of course may include the current insurers, and to facilitate greater accountability and contestability.

The report also recommends that WorkCover take a more active role in the management of the scheme and its contracted agents. More active management will enable the setting of strict performance criteria and benchmarks through the contracts with agents and to promote the best performers through outcomes-based remuneration and contract renewals. It will also provide a scheme-wide focus on matters of significance, including performance measurement and reporting. McKinsey anticipate that savings to the scheme from the implementation of these reforms will be in the order of \$2 billion over the next 5 to 10 years. The majority of these savings come from the increased specialisation, particularly in the area of claims management, and the introduction of contract arrangements. Savings of this magnitude also require the adoption of a more active role by WorkCover in the management of the scheme and its agents.
4. The report does not recommend any changes to workers' benefits or increases to employer benefits.⁸³

The Bill

5. The Parliamentary Secretary outlined the bill in the following terms:

The bill provides for new administrative arrangements for the framework of workers compensation insurance to support the implementation of the report's recommended reforms. The bill retains the current insurance arrangements of the scheme but replaces the six current managed fund insurers and their separate trust funds with a single nominal insurer, which will hold a single Workers Compensation Insurance Fund and contract with scheme agents to conduct insurance business on its behalf. Like the existing statutory funds, the new insurance fund is a purpose trust. The nominal insurer will be a legal entity, which will be able to act as an insurer and hold the funds of the scheme in the Workers Compensation Insurance Fund.

⁸² Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

⁸³ Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

The nominal insurer will issue policies of insurance and handle claims under policies as the insurer for the scheme. The nominal insurer will not represent the State and its liabilities will be able to be satisfied only from the insurance fund. It will be able to contract with agents, to issue policies of insurance and/or to handle claims on its behalf, and to provide funds management advice and services. By and large, employers will have a choice in selecting the best agents to manage their claims. However, the nominal insurer will have a power to assign claims to specific agents to ensure that policies and claims are allocated to appropriate agents, for example, a specialist agent that deals with catastrophic injuries.

...The WorkCover Authority of New South Wales will act for the nominal insurer and exercise the powers of the nominal insurer. In this way, WorkCover will be able to oversee the management of the scheme. However, WorkCover will not act as insurer and will not manage individual claims. The new framework will allow for more efficient use of scheme resources by centralising scheme funds into a single fund and allowing their investment to be determined centrally. ...

The [Workers Compensation Insurance] fund will comprise premiums, investment income and other money related to the scheme and will be used to meet claims costs and the expenses of the scheme. Employers will be entitled to participate in the distribution of assets of the fund and will be liable to contribute to any deficit in the fund. The fund will not be part of the assets of the Government. Similarly, the assets of the fund cannot be used to pay dividends to the Consolidated Fund. Not the State, the nominal insurer, WorkCover or any authority of the State will have any interest in the fund and are neither liable to meet any deficit in the fund nor entitled to any surplus in the fund.⁸⁴

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

6. Clause 2 provides that the Act commences on a day or days to be proclaimed.
7. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act at all.

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

- | |
|---|
| <p>8. The Committee has written to the Minister to seek his advice as to the reasons why the proposed Act will not commence on assent and to ask for an indication of the likely date for commencement of this Bill.</p> |
|---|

Schedule 1, Proposed s 154N: Regulations

9. Proposed section 154N enables the Governor to make regulations with respect to the keeping and handling or records by scheme agents and their obligations with respect to confidentiality and disclosure.

⁸⁴ Mr Graham West MP, Parliamentary Secretary, *Parliamentary Debates (Hansard)* Legislative Assembly, 12 November 2003.

10. Scheme agents will hold sensitive personal information relating to claimants. It does not appear that this information will be covered by the NSW *Privacy and Personal Information Protection Act 1998*⁸⁵ or *Health Records and Information Privacy Act 2002*⁸⁶ or by the Commonwealth *Privacy Act 1988*.⁸⁷

There are restrictions on the disclosure of information under the *Workplace Injury Management and Workers Compensation Act 1998*⁸⁸ but it is not clear that these would apply to a scheme agent under the *Workers Compensation Act*.

11. The records kept by scheme agents in the exercise of functions on behalf of the Nominal Insurer remain the property of the Nominal Insurer. Scheme agents must comply with the directions of the Nominal Insurer regarding the control of and access to those records (maximum penalty 1,000 penalty units (currently \$110,000)) [proposed s 154K].

- 12. The Committee has written to the Minister to seek clarification as to what protection exists for personal information held by scheme agents apart from that to be prescribed in regulations**
- 13. The Committee has also asked the Minister to explain why the protections envisaged to be made in regulations should not be made in the Act.**
- 14. The Committee refers to Parliament the question of whether providing for the protection of personal information to be made by regulation rather than in the Act is an inappropriate delegation of legislative power.**

Schedule 2 [31] and [32], Significant increases in penalties

15. The Bill increases the penalties for licensed insurers and self-insurers for failing to keep records relating to policies and claims as required by s 163 of the Act from 20 penalty units (currently \$2,200) to 1,000 penalty units (currently \$110,000) – an increase of 5,000%.
16. The Bill also increases the penalties for wilfully breaching an insurance premium order from 100 penalty units (currently \$11,000) to 1,000 penalty units (currently \$110,000) – an increase of 1,000%.
17. The Committee notes that the second reading speech provides no explanation for these significant increases in penalties.

- 18. The Committee refers to Parliament the question as to whether the increases in these penalties are so severe as to trespass unduly on personal rights.**

⁸⁵ This Act applies to public sector agencies.

⁸⁶ This Act excludes employee records from “personal information” [s 4].

⁸⁷ This Act has exemptions for employee records, which is defined to include health information.

⁸⁸ Section 248.

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

19. The proposed Part 19A of Schedule 2 provides for the cancellation of the licence of a managed fund insurer on the “relevant date”. The relevant date is the date appointed by the Authority by order published in the Gazette [cl 1].
20. Clause 6 provides that no compensation (including compensation for loss of business or any goodwill associated with a business) is payable in respect of the cancellation of such a licence. Nor is a managed fund insurer entitled to compensation as a result of not being appointed as a scheme agent.
21. It is apparent that the cancellation of these licences is consequential to the establishment of the scheme proposed in the Bill. It is also necessary that such managed fund insurers have no special entitlement to appointment as scheme agents in order to establish the competitive market for such agents as contemplated by the Bill.
22. The Committee notes, however, that removing a right to compensation is, on its face, a significant trespass to personal rights.

23. The Committee has written to the Minister to seek an explanation of the reasons for the need to remove the right to compensation and the scope of rights likely to be affected.

24. The Committee refers to Parliament the question of whether the removal of these compensation rights unduly trespasses on personal rights.

Schedule 3[6], s 238 Workplace Injury Management and Workers Compensation Act 1998: Powers of entry and inspection by officers of Authority

25. Schedule 3[6] amends the *Workplace Injury Management and Workers Compensation Act 1998* to enable the Nominal Insurer to authorise officers of the Authority to give such officers the powers of entry and inspection under s 238 of that Act.
26. This does not appear to be a significant change to the existing law, given that the Authority will act for the Nominal Insurer and the Authority already has power to authorise its officers for the purposes of that section.

27. Given that this provision does not expand the class of person on whom powers of search and entry can be conveyed or the nature of those powers of search and entry, the Committee does not consider that this provision unduly trespasses on personal rights.

Schedule 3[11], s 243A Workplace Injury Management and Workers Compensation Act 1998: Information gathering and use by Authority and Nominal Insurer

28. Schedule 3[11] enables the Authority and Nominal Insurer to collect, analyse, use and disclose data, statistics and other information in relation to a range of matters regarding workers compensation insurance.

29. This provision specifically authorises the Authority and Nominal Insurer to disclose to such persons or classes of persons as may be prescribed by the regulations, personal information about the health of an individual, but only in relation to the collection, analysis and disclosure of the data as set out in the provision.

30. Given the public benefit from the use of such data and the restrictions on the use of personal information and the class of persons to whom such personal information can be disclosed, the Committee considers that this provision does not unduly trespass on personal rights.

The Committee makes no further comment on this Bill.

PART TWO – REGULATIONS

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

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

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Aboriginal Land Rights Amendment (Rate Exemptions) Regulation 2003 ← Letter to the Minister for Aboriginal Affairs dated 20 August 2003 → Letter from the Minister for Aboriginal Affairs dated 30 October 2003	04/07/03 p. 6805



PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

The Hon Dr Andrew Refshauge MP
Minister for Aboriginal Affairs
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Our ref:LRC240

20 August 2003

Dear Minister

Aboriginal Land Rights (Rate Exemptions) Regulation 2003

The Legislation Review Committee recently considered the above regulation and resolved to write to you in relation to the new Ministerial discretion conferred by clause 7(4)(d).

The Ministerial discretion conferred in this clause is unfettered. We understand from your Office that the discretion is intended to give you, as Minister, the opportunity to assess if an Aboriginal Land Council has complied with clause 7(4) in determining land it holds to be of cultural or spiritual significance to Aboriginal people. The Committee understands that the discretion is not intended to be used as a veto or to second-guess the determination by an Aboriginal Land Council.

In accordance with this intention, the Committee is of the view that it is appropriate that Clause 7(4)(d) of the Regulation be amended to require that reasons be given for any exercise of the discretion to refuse to approve a resolution.

We look forward to your response.

Yours sincerely



Barry Collier MP
Chairperson



NEW SOUTH WALES

MINISTER FOR ABORIGINAL AFFAIRS

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

30 OCT 2003

Dear Mr Collier

I refer to your letter of 20 August 2003 regarding the ambiguity of the scope of my discretion conferred by clause 7(4)(d) of the Aboriginal Land Rights Regulation 2002.

The original drafting of clause 7(4)(d) required that an Aboriginal Land Council (ALC) notify me that a resolution declaring land to be of spiritual or cultural significance to Aboriginal people had been passed in accordance with the procedures prescribed by subclauses (3) and (4). The amendment made on 30 June 2003 replaced notification with the requirement that I approve the resolution before the land is eligible for rate exemption.

I have received advice from the Crown Solicitor's Office that my discretion is fettered by the matters referred to in clause 7 as being relevant to my decision whether or not to approve a resolution. They are, the use of the land and the validity of the resolution with respect to subclauses (3) and (4). I note that the Committee indicates that it is aware of this limit on my discretion.

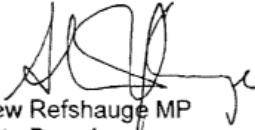
I am forming a roundtable of stakeholders with an interest in the rate exemption provisions. The NSW Aboriginal Land Council, Department of Local Government, Local Government Association of NSW, Shires Association of NSW, and the Department of Aboriginal Affairs have been invited to be represented on the roundtable. The roundtable will discuss the current operation of the rate exemption provisions and make recommendations for future amendments, if any are considered necessary. I have asked that the roundtable consider the amendment the Committee has suggested.

Level 31 Governor Macquarie Tower 1 Farrer Place SYDNEY NSW 2000

I will write to the Committee again following the first meeting of this roundtable to inform its members of the roundtable's progress.

If you require any further information regarding the rate exemption provisions please contact Anthony Seiver at the Department of Aboriginal Affairs on 9219 0752.

Yours sincerely



Andrew Refshauge MP
Deputy Premier
Minister for Education and Training
Minister for Aboriginal Affairs

Level 31 Governor Macquarie Tower 1 Farrer Place SYDNEY NSW 2000

Appendix 1: Index of Bills Reported on in 2003

	Digest Number
Appropriation (Health Super-Growth Fund) Bill 2003	5
Catchment Management Authorities Bill 2003	6
Child Protection Legislation Amendment Bill 2003	2,5
Children and Young Persons (Care and Protection) Amendment (Child Abuse or Neglect) Bill 2003	6
City Tattersall's Club Amendment Bill 2003	6
Commonwealth Powers (De Facto Relationships) Bill 2003	2
Community Relations Commission and Principles of Multiculturalism Amendment Bill 2003	3
Constitution Amendment (Governor's Salary) Bill 2003	5
Coptic Orthodox Church (NSW) Property Trust Amendment Bill 2003	5
Coroners Amendment Bill 2003	5
Courts Legislation Amendment Bill 2003	5
Crimes Amendment (Protection of Innocent Accused) Bill 2003	2
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	1
Defamation Amendment (Costs) Bill 2003	3
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	2
Education Amendment (Computing Skills) Bill 2003	2
Environmental Planning and Assessment Amendment (Development Consents) Bill 2003	4
Environmental Planning and Assessment Amendment (Quality of Construction) Bill 2003	6
Evidence (Audio and Audio Visual Links) Amendment Bill 2003	6
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	3
Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003	5
Funeral Funds Amendment Bill 2003	4
Gaming Machines Amendment (Miscellaneous) Bill 2003	3
Hairdressers Bill 2003	4
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	5
Industrial Relations Amendment (Public Vehicles and Carriers) Bill 2003	4
Local Government Amendment (Cudgegong (Abattoir) County Council Dissolution) Bill 2003	5
Local Government Amendment (No Forced Amalgamations) Bill 2003	2,3
Lord Howe Island Amendment Bill 2003	5
Marketing of Primary Product Amendment (Rice Marketing) Bill 2003	6
Motor Accidents Legislation Amendment Bill 2003	6

	Digest Number
Motor Accidents Compensation Amendment (Terrorism) Bill 2003	5
National Park and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	5
Native Vegetation Bill 2003	6
Natural Resources Commission Bill 2003	6
Police Association Employees (Superannuation) Amendment Bill 2003	4
Police Legislation Amendment (Civil Liability) Bill 2003	6
Powers of Attorney Bill 2003	2,4
Prevention of Cruelty to Animals (Penalties) Bill 2003	3
Privacy and Personal Information Protection Amendment Bill 2003	4
Quarantine Station Preservation Trust Bill 2003	2
Road Transport Efficiency Bill 2003	3
Royal Blind Society (Corporate Conversion) Bill 2003	4
Superannuation Legislation Amendment (Family Law) Bill 2003	6
Sydney Water Amendment (Water Restrictions) Bill 2003	4,5
Sydney Water Catchment Management Amendment Bill 2003	5
Sporting Venues (Pitch Invasion) Bill 2003	2
Transport Administration Amendment (Rail Agencies) Bill 2003	6
Transport Legislation Amendment (Safety and Reliability) Bill 2003	5
Veterinary Practice Bill 2003	5
Voluntary Euthanasia Trial (Referendum) Bill 2003	3
Workers Compensation Amendment (Insurance Reform) Bill 2003	6

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

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

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2003

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Catchment Management Authorities Bill 2003	R	C		C	C
Child Protection Legislation Amendment Bill 2003	N			C	
Commonwealth Powers (De Facto Relationships) Bill 2003				N	
Coroners Amendment Bill 2003	N		N	C	
Courts Legislation Amendment Bill 2003	N			C	
Crimes Amendment (Protection of Innocent Accused) Bill 2003	R				
Criminal Procedure Amendment (Sexual Offence Evidence) Bill 2003	N				
Defamation Amendment (Costs) Bill 2003	R				
Drug Summit Legislative Response Amendment (Trial Period Extension) Bill 2003	N		N		
Environmental Planning and Assessment Amendment (Development Consents) Bill 2003	N		N	C	
Environmental Planning and Assessment (Quality of Construction) Bill 2003	C			C	
Evidence Legislation Amendment (Accused Child Detainees) Bill 2003	N			N	
Evidence (Audio and Audio Visual Links) Amendment Bill 2003	N			N	
Firearms and Crimes Legislation Amendment (Public Safety) Bill 2003	N				
Funeral Funds Amendment Bill 2003	N			N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Gaming Machine Amendment (Miscellaneous) Bill 2003	N			C	
Hairdressers Bill 2003				N	
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003				C	
Industrial Relations Amendment (Public Vehicles and Carriers) Bill 2003	N			N	
Lord Howe Island Amendment Bill 2003				C	
Motor Accidents Legislation Amendment Bill 2003	R			C	
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	C			C	
Native Vegetation Bill 2003	R	C		C	C
Natural Resources Bill 2003	R	C		C	C
Police Legislation Amendment (Civil Liability) Bill 2003	N			R	
Powers of Attorney Bill 2003	N			C	
Privacy and Personal Information Protection Amendment Bill 2003	R			C	R
Quarantine Station Preservation Trust Bill 2003		R			
Road Transport Efficiency Bill 2003				R	N
Royal Blind Society (Corporate Conversions) Bill 2003	N		N		
Sporting Venues (Pitch Invasion) Bill 2003	R				
Superannuation Legislation Amendment (Family Law) Bill 2003				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Sydney Water Amendment (Water Restrictions) Bill 2003	R	R		C	
Transport Administration Amendment (Rail Agencies) Bill 2003	R		R	N	R
Transport Legislation Amendment (Safety and Reliability) Bill 2003	N,R	C		R	
Veterinary Practice Bill 2003	C,R			C	
Voluntary Euthanasia Trial (Referendum) Bill 2003				R	N
Workers Compensation Amendment (Insurance Reform) Bill 2003	C			C,R	

Key

- R Issue referred to or brought to the attention of Parliament
- C Correspondence with Minister/Member
- N Issue Notes