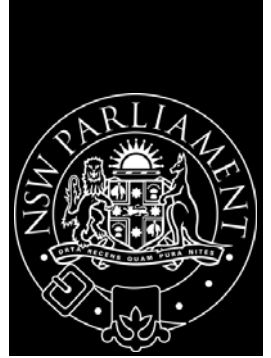


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 2 of 2010

8 March 2010

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, 2010, 50p; 30cm

Chair: Mr Allan Shearan MP

8 March 2010

ISSN 1448-6954

1. Legislation Review Committee—New South Wales
 2. Legislation Review Digest No. 2 of 2010
- I Title.
- II Series: New South Wales. Parliament. Legislative Assembly. Legislation Review Committee Digest; No. 2 of 2010

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

Appendix 1: Index of Bills Reported on in 2010

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

Appendix 2: Index of Ministerial Correspondence on Bills

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

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Casino Control Amendment Bill 2010

Issue: Proposed Clause 28 – Removal of Criminal Liability – Personal Physical Integrity

- 15. The Committee is concerned about the immunity provided to individuals who are involved in the removal of an excluded person from casino premises. In particular, the Committee draws attention to a previous incident in which the unjustifiably forceful removal of a casino patron occasioned in that person's death.**
- 16. The life, health and safety of all individuals is of paramount concern and the Committee is of the view that the criminal justice system is best left to determine criminal conduct in circumstances where a casino patron has been injured or killed while being removed.**
- 17. The Committee is concerned that affording immunity to a class of individuals in certain circumstances may facilitate conduct that will directly compromise the life, health or safety of casino patrons, unduly trespassing on personal rights and liberties. To this end, the Committee refers this matter to Parliament.**
- 18. The Bill is not specific about what the standard of 'in good faith' will actually be and with which party the onus will lie. The Committee resolves to write to the Minister and the Attorney-General to seek advice on this matter.**

Issue: Proposed Clause 27 – Excludes Merits Review

- 23. The Committee recognises the public interest in information-sharing about excluded individuals by Commissioners across the States and Territories, especially concerning the exclusion of individuals due to criminal associations or gambling problems. However, the Committee expresses its concern with administrative decisions – such as exclusion orders – that may be either non-reviewable and / or where the reasons for the decision are not required to be disclosed.**
- 24. As proposed clause 26 seeks to extend the operation of exclusion orders by requiring its application to casinos Australia-wide, the Committee refers this matter to Parliament for consideration that it may be unduly dependent on non-reviewable decisions.**

2. Credit (Commonwealth Powers) Bill 2010

Issue: Strict Liability Offences in the Commonwealth legislation – implications arising from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

25. The Committee notes that there are various sections under the national legislation containing strict liability offences as identified in the Standing Committee for the Scrutiny of Bills' *Alert Digest Report No. 9 of 2009*.
26. The Committee considers the letter received from the Senate's Standing Committee for the Scrutiny of Bills and its' *Alert Digest 9 of 2009*, where the Senate Standing Committee drew attention to the substantial number of strict liability offences included in the national legislation. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.
27. In particular, the Committee notes that under the Commonwealth *National Consumer Credit Protection Act 2009*, section 290 (2) deals with a person who must not refuse or fail to comply with a requirement made under sections 258 (2)(a) or 274 (4), 284 (1), (2) or (4), which are all strict liability offences. Under section 290 (2), the criminal penalty is 10 penalty units or 3 months' imprisonment or both.
28. The Committee is concerned with the Bill's adoption of the national legislation (such as under clauses 4 and 6), in relation to the strict liability offences contained in the national legislation where such offences carry a possible criminal penalty of 3 months' imprisonment. The imposition of strict liability with potential a penalty of imprisonment is generally considered as inappropriate. Therefore, the Committee refers this to Parliament to consider whether the adoption of the national legislation may lead to undue trespasses on individual rights and liberties with regard to the strict liability offences attracting potential penalties of imprisonment under the national legislation.
29. The Committee also resolves to write to the Minister to seek advice on whether the concerns identified by the Senate's Standing Committee for the Scrutiny of Bills with regard to the strict liability offences in the national legislation may require further attention given the context of the Bill's adoption of the national legislation.

Issue: Henry VIII clauses (which allow amendment of an Act by a Regulation) of the Commonwealth legislation - implications arising from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

- 38. The Committee notes the letter received from the Standing Committee for the Scrutiny of Bills, especially in relation to their concerns with regard to the extent to which 'Henry VIII' clauses have been used to change powers, entitlements and obligations conferred by the principal Commonwealth legislation. The Standing Committee for the Scrutiny of Bills expressed that they do "not condone the use of 'Henry VIII' clauses as a standard drafting practice, even in cases where the explanatory memorandum provides reasons for that use or where the bill reflects COAG agreement". They considered that "the apparent increasing reliance on the use of regulations to potentially alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation is cause for concern".**
- 39. The Committee shares the concerns of the Senate's Standing Committee for the Scrutiny of Bills and refers to Parliament the question of whether the Bill's adoption of the national legislation (such as provided by clauses 4 and 6), may also give rise to 'Henry VIII' clauses that would permit subordinate legislation such as regulations to amend or take precedence over the principal legislation, which could constitute an inappropriate delegation of legislative power.**
- 40. The Committee resolves to write to the Minister to seek advice on whether the concerns expressed by the Senate's Standing Committee for the Scrutiny of Bills with regard to the 'Henry VIII' provisions in the national legislation may require further attention in the context of this Bill's adoption of the national legislation.**

Issue: Matters which should be regarded by Parliament – implications from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

- 43. The Committee resolves to write to the Minister to seek advice on whether the concerns raised by the Senate's Standing Committee for the Scrutiny of Bills with regard to sections 171 (4) and (5) under the national legislation as not being subject to Parliamentary scrutiny could constitute an inappropriate delegation of legislative power (since this may involve matters that should be regarded by Parliament), and could require further attention with the proposed adoption of the national legislation.**

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

- 45. The Committee accepts the above reasons provided in the Agreement in Principle speech and has not identified any issues regarding Clause 2.**

3. Crimes (Administration Of Sentences) Amendment Bill 2010

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

4. Crimes Amendment (Police Pursuits) Bill 2010

Issue: Schedule 1 – Excessive Punishment

15. Although the Committee shares the view that driving a vehicle recklessly or dangerously to escape pursuit by a police officer is a serious offence, the penalties provided for may be regarded as disproportionate to the gravity of the offence.
16. The Committee notes that prevention of police pursuits is an issue of public safety. However, in light of that fact that no damage, injuries or deaths are required for a prison sentence to be imposed and given the Bill's potential effects on young drivers and first offenders, the Committee considers that the penalties may be regarded as excessive and refers the matter to Parliament.

5. National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010

Issue: Clause 2 – Commencement by proclamation – Provides the executive with unfettered control over the commencement

10. The Committee recognises the difficulties in determining commencement dates for projects that are reliant on the actions of other jurisdictions and notes that the short term trading market is not yet ready for operation. It has therefore not identified any issues under s 81(1)(b)(iv) of the *Legislation Review Act 1987*.

Issue: Clause 1 - Insufficient scrutiny of legislative power

6. National Parks And Wildlife Amendment Bill 2010

Issue: Strict Liability – Schedule 1 [32] – proposed section 86(4) – Harming or desecrating Aboriginal objects and Aboriginal places:

25. The Committee notes that proposed section 84(4) is a strict liability offence. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the authorities prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

26. The Committee recognises the seriousness of the offence of harm to Aboriginal places as they are culturally significant sites. The imposition of strict liability with a potential penalty of imprisonment for 2 years will generally be considered as inappropriate especially in the absence of any defences or reasonable excuse. Therefore, the Committee refers this to Parliament to consider whether the proposed section 86(4) of Schedule 1 [32] may lead to undue trespasses on personal rights and liberties with regard to its' strict liability attracting a potential penalty of imprisonment.
27. The Committee also notes that the proposed section 86(2) is a strict liability offence in relation to harming an Aboriginal object (whether or not the person knows it is an Aboriginal object). However, this offence does not attract a penalty of imprisonment. Furthermore, there are defences available under the proposed section 87 such as subsections (1), (2) and (3) for this offence. In particular, proposed section 86(2) provides a defence of due diligence. Accordingly, the Committee does not consider the strict liability offence provided by the proposed section 86(2) as unduly trespassing on personal rights and liberties.

Issue: Retrospectivity – Schedule 1 [116] – proposed section 188D(9) –Validation – provisions relating to certain existing access roads on National Park Estate lands:

30. The Committee will always be concerned with any retrospective effect of legislation which may adversely impact on personal rights when the proposed section 188D(9) provides that the section is taken to have commenced on 1 January 1999. The Committee refers this to Parliament to consider whether the retrospective application of the proposed section 188D may adversely impact and unduly trespass on personal rights.
31. The Committee asks Parliament to consider whether the proposed section could include a provision that the amendment does not operate to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing at the relevant time, or to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done at the relevant time when the proposed section is taken to have commenced on 1 January 1999.

Issue: Matters such as definitions which should be regarded by Parliament – Schedule 1 [2] – proposed section 5(1)(g):

33. The Committee notes that the exclusion from the definition of 'harm' in relation to an object or place for the purposes of the Principal Act could be re-defined and modified by regulations (subordinate legislation) under the proposed section 5(1)(g) of schedule 1 [2], and refers to Parliament to consider whether this may inappropriately delegate legislative power.

Issue: Ill-Defined and Wide Powers – Schedule 1 [117] – proposed section 204; and Schedule 2 [10] – proposed section 141M – Orders regarding monetary benefits - No default maximum of penalty:

39. Proposed section 204(2) of Schedule 1 [117] of Division 3 of the new Part 15 to be inserted into the *National Parks and Wildlife Act 1974*, reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.
40. Proposed section 141M(2) of Schedule 2 [10] of Division 3 of the new Part 9B to be inserted into the *Threatened Species Conservation Act 1995*, reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.
41. Therefore, no default maximum amount appears to be set by the Bill for the above provisions. The Committee is concerned that the failure to provide a default maximum amount of an additional penalty may constitute ill-defined or wide powers and an inappropriate delegation of legislative power, and refers this to Parliament.

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

43. The Committee accepts the advice received above and has not identified any issues regarding Clause 2.

7. State Senate Bill 2010*

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

8. Workers Compensation Amendment (Commission Members) Bill 2010

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CASINO CONTROL AMENDMENT BILL 2010

Date Introduced:	25 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Kevin Greene MP
Portfolio:	Gaming and Racing

Purpose and Description

1. The object of this Bill is to amend the *Casino Control Act 1992* in relation to controlled contracts, training and licensing requirements for special employees, the making and notification of exclusion orders, liability following removal of a person from a casino, penalty notices and other miscellaneous matters.

Background

2. The Bill represents the second tranche of reforms to the regulation of the casino in NSW. The Bill makes multiple amendments relating to various different aspects of casino governance.
3. Firstly, the Bill ensures that an exclusion order by a police commissioner, who acts under the requisite casino legislation in another State or Territory, applies in NSW. For example, if the Victorian Commissioner of Police advises their NSW counterpart that an individual has been excluded at Melbourne's Crown Casino, the NSW Commissioner is required to direct the casino in NSW to also exclude that individual. Similarly, the NSW Commissioner of Police would be required to notify their counterparts in other States and Territories about any individual who has been excluded from the casino in NSW. The same requirement would be placed on any revocation of exclusion orders.
4. Secondly, the Bill confers a limited protection from legal liability, both civil and criminal, in respect of the implementation of the casino's exclusion requirements. The civil protection does not extend to individuals whose negligence causes personal injury or the death of a person.
5. Thirdly, the Bill amends the Act's provision in relation to controlled contracts. Controlled contracts are those that require the Casino, Liquor and Gaming Authority (the Authority) to investigate the contents and provide either approval or disapproval of the contractors involved. Moving forward, the Bill facilitates that controlled contracts will only be contracts for the supply or servicing of approved gaming equipment and contracts that the Authority declares by notice in writing to the casino operator as being materially significant to the integrity of the operation of the casino. According to the Agreement in Principle Speech, this amendment will reduce the

number of controlled contracts from approximately 160 at present, to approximately 30.

6. The Bill also makes multiple amendments that affect the day-to-day operations of casino governance. For example, the Bill:

confirms existing regulations that prohibit agents of the casino or casino employees from offering certain inducements to individuals to enter into and / or gamble at the casino;

makes way for innovative developments in gaming equipment by conferring on the Authority the power to determine what equipment is relevant to the integrity of gaming and therefore requiring its approval;

accommodates changes the way money is moved around the casino, such as providing for virtual chips; and

makes changes to the training and certification of special employees to ensure that their functions are compatible with the certificate of competency.

7. The Bill also makes various machinery amendments, including what matters are to be included in the Authority's annual report as well as other administrative and accounting procedures;

The Bill

8. Outline of provisions

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

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

Schedule 1 Amendment of *Casino Control Act 1992 No 15*

Division 2 of Part 3 of the principal Act requires a casino operator to give notice to the Casino, Liquor and Gaming Control Authority (the **Authority**) when it enters into, or varies, a controlled contract. Such contracts may be terminated by the Authority in certain circumstances.

Schedule 1 [1] substitutes the definition of **controlled contract** so that it covers only contracts relating to the supply or servicing of gaming equipment and contracts that are materially significant to the integrity of the operation of the casino.

Schedule 1 [1], [2] and [3] make consequential amendments.

Schedule 1 [5] amends the requirements relating to the licensing of special employees. Currently, a special employee must be licensed and must carry out his or her functions in accordance with the authority conferred by the licence and the conditions of the licence. The amendment maintains the requirement for special employees to be licensed but also requires special employees to hold a certificate of competency for the functions that the special employee exercises.

Schedule 1 [15]

provides that certificates of competency are to be issued by a casino operator. These certificates may be issued to a person only if the person has completed training in those functions and in responsible practices for the conduct of gaming (being training provided by the casino operator) or if the person has already completed appropriate training or has appropriate qualifications. Any such training or qualifications on the basis of which a certificate of competency is issued must comply with any standards or other requirements set by the Authority from time to time. A casino operator is also required to maintain records of training provided and certificates of competency issued.

Schedule 1 [4] and [6]–[14] make consequential amendments.

Schedule 1 [16] and [23] make provision for certain types of devices or things that fall within the definition of *gaming equipment* (but are not an intrinsic element of gaming) to be excluded from the licence condition that requires all gaming equipment to be approved under the principal Act before being used in accordance with the approval.

Schedule 1 [17]–[20] make minor amendments to the licence conditions relating to the conduct of gaming to reflect changes in the way poker is now dealt and changes to the making of wagers.

Schedule 1 [21] makes it clear that the licence condition preventing casino employees or agents from inducing people to enter the casino or take part in gaming in the casino applies only in relation to persons outside the casino (the regulations contain a provision prohibiting certain gambling inducements in relation to persons inside the casino).

Schedule 1 [24] amends the definition of *junket* so that it includes an arrangement involving a person, or a group of people, who is introduced to a casino operator by a promoter who receives a commission based on the turnover of play in the casino attributable to the persons introduced by the promoter (or otherwise calculated by reference to such play).

Schedule 1 [26] requires the Commissioner of Police to notify the relevant authorities in other States and Territories when an order is made (at the direction of the Commissioner) excluding a person from a casino. The Commissioner is also to provide the relevant authorities with the name of the person subject to the exclusion order and, where practicable, a photograph of that person and notify the relevant authorities when an order is revoked.

Schedule 1 [25] makes a consequential amendment.

Schedule 1 [27] requires the Commissioner of Police to give a direction that a person be excluded from a casino if the person is subject to exclusion from another casino following the making of a similar direction under a corresponding law of another State or a Territory.

Schedule 1 [28] and [29] provide certain protections from civil and criminal liability in relation to the exclusion of persons from a casino.

Schedule 1 [33] provides that the amount of a penalty prescribed for a penalty notice offence must not exceed the maximum amount of penalty which could be imposed for the offence by a court.

Schedule 1 [32] makes a consequential amendment.

Schedule 1 [22], [30] and [31] make statute law revision amendments.

Schedule 1 [34] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [35] inserts savings and transitional provisions.

Schedule 2 Amendment of *Casino Control Regulation 2009*

Schedule 2 [1] and [2] make consequential amendments.

Schedule 2 [3] and [4] make law revision amendments.

Issues Considered by the Committee

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

Issue: Proposed Clause 28 – Removal of Criminal Liability – Personal Physical Integrity

9. Clause 28 provides that no criminal liability is incurred by a person for any act done, or omitted to be done, in the removal an excluded person from the casino where it is done in good faith.
10. The Committee expresses its deep concerns about the protection from criminal liability by this clause as it effectively protects casino staff and their agents from charges arising from the injury or death of a casino patron who sustained their injuries at the hands of staff or agents while being removed.
11. The Committee is aware of at least one earlier incident at the casino in which an excluded person was removed by casino staff that occasioned in that person's death. The subsequent coronial inquest uncovered that the physical restraint of the excluded person, and in particular the compression of that person's neck and chest, caused death by asphyxiation.
12. The Committee is of the view that it is the role of the criminal justice system to determine criminal liability and that it is improper to restrict access to criminal justice where the life, health or safety of an individual is directly compromised.
13. In addition, the Committee is concerned that the removal of criminal liability has the potential to facilitate abuse of the protection it affords. For example, this immunity raises the risk that casino staff or their agents may act in a more cavalier fashion when removing an excluded person from casino premises.

14. Lastly, the Bill is not specific about what the standard of 'in good faith' will actually be and with which party the onus will lie.

15. The Committee is concerned about the immunity provided to individuals who are involved in the removal of an excluded person from casino premises. In particular, the Committee draws attention to a previous incident in which the unjustifiably forceful removal of a casino patron occasioned in that person's death.

16. The life, health and safety of all individuals is of paramount concern and the Committee is of the view that the criminal justice system is best left to determine criminal conduct in circumstances where a casino patron has been injured or killed while being removed.

17. The Committee is concerned that affording immunity to a class of individuals in certain circumstances may facilitate conduct that will directly compromise the life, health or safety of casino patrons, unduly trespassing on personal rights and liberties. To this end, the Committee refers this matter to Parliament.

18. The Bill is not specific about what the standard of 'in good faith' will actually be and with which party the onus will lie. The Committee resolves to write to the Minister and the Attorney-General to seek advice on this matter.

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

Issue: Proposed Clause 27 – Excludes Merits Review

19. Proposed clause 26 requires the Commissioner of Police (the Commissioner) to notify the appropriate authorities in each State or Territory that a particular individual is subject to an exclusion order. Similarly, proposed clause 27 requires the Commissioner to issue a direction that an individual who is subject to an exclusion order from a casino in another State or Territory must similarly be excluded from the casino in NSW.

20. The Committee notes that section 80(1A) of the parent *Casino Control Act 1992* makes exclusion orders given by the Casino, Liquor and Gaming Control Authority (the Authority) or the Commissioner non-reviewable and that such orders cannot be challenged or otherwise called into question. In addition, the *Casino Control Act 1992* does not provide a list of grounds for subjecting an individual to an exclusion order, raising the risk that individuals could be excluded for unfair, trivial or personal reasons. Further, the *Casino Control Act 1992* does not provide that reasons must be disclosed.

21. To this end, the non-reviewable exclusion orders given by the Authority or the Commissioner, together with those exclusion orders issued which could be based on unfair, trivial or personal considerations, will now have further application, affecting excluded individuals from entering casinos Australia-wide.

22. However, the Committee also notes there is a public interest in ensuring casinos are secure from criminal elements and in ensuring that problem gamblers do not have easy access to casinos Australia-wide.

- 23. The Committee recognises the public interest in information-sharing about excluded individuals by Commissioners across the States and Territories, especially concerning the exclusion of individuals due to criminal associations or gambling problems. However, the Committee expresses its concern with administrative decisions – such as exclusion orders – that may be either non-reviewable and / or where the reasons for the decision are not required to be disclosed.**
- 24. As proposed clause 26 seeks to extend the operation of exclusion orders by requiring its application to casinos Australia-wide, the Committee refers this matter to Parliament for consideration that it may be unduly dependent on non-reviewable decisions.**

The Committee makes no further comment on this Bill.

2. CREDIT (COMMONWEALTH POWERS) BILL 2010

Date Introduced:	24 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Virginia Judge MP
Portfolio:	Fair Trading

Purpose and Description

1. This Bill adopts the *National Consumer Credit Protection Act 2009* of the Commonwealth and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth, and to refer certain matters relating to the provision of credit and certain other financial transactions to the Parliament of the Commonwealth, for the purposes of section 51 (xxxvii) of the Commonwealth Constitution; and for other purposes.
2. The proposed Act will form part of the new national credit protection regime being established under Commonwealth law. It is to be enacted for the purposes of section 51 (xxxvii) of the Commonwealth Constitution which enables State Parliaments to refer matters to the Commonwealth Parliament or to adopt Commonwealth laws that have been enacted pursuant to such referrals.
3. The Bill transfers regulatory responsibility for credit and finance broking from this State to the Commonwealth.
4. The States and Territories have decided to make a text-based adoption with a limited amendment power to ensure that power is transferred to regulate and amend only the National Consumer Credit Protection legislation as passed by the Commonwealth Parliament.
5. In the future, all contracts regulated by the Consumer Credit Code prior to transfer will be administered by the Australian Securities and Investments Commission [ASIC]. All future consumer credit will also be regulated by the Commonwealth and administered by ASIC, but in accordance with the new National Code and the overarching licensing and responsible lending regime. The one qualification is that for a period of one year following the referral, New South Wales will continue to impose a maximum annual percentage rate on all code contracts. This is by agreement with the Commonwealth Minister who has not included in the national legislation a maximum rate on consumer credit contracts.
6. The Bill also amends the *Consumer, Trader and Tenancy Tribunal Act* and regulation to reflect the repeal of legislation. However, it allows certain matters to be heard while New South Wales has jurisdiction on a temporary and time-limited basis, such as maximum annual percentage rates, or on matters that are commenced but not concluded before referral takes place.

7. Division 2 of Schedule 3 relates to the maximum annual percentage rate of interest that can be charged in this State. The rate cap will sunset one year after the referral of the Consumer Credit Code. However, when it is still in operation, it will include an amendment to ensure that unscrupulous lenders cannot avoid the rate cap by artificially separating their business into a broker plus lender structure so that they can hide their fees. The Bill requires the inclusion of certain fees to third parties in the calculation of the maximum rate. This will overcome the problem of fee splitting in New South Wales, which is used as a loophole to avoid the interest rate cap legislation.
8. The Bill also authorises the Director General of the Department of Services, Technology and Administration to provide ASIC with documents, information and assistance that is reasonably required by ASIC in relation to its functions under the national credit legislation.

Background

9. With the enactment of the Commonwealth laws, the remaining States will adopt the Commonwealth laws under section 51 (xxxvii) of the Commonwealth Constitution. The adopted laws are the *National Consumer Credit Protection Act 2009* of the Commonwealth (as amended at the time of the adoption by the *National Consumer Credit Protection Amendment Act 2010* of the Commonwealth) and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth.
10. Since the enactment of the initial Tasmanian legislation, the Commonwealth and the States have agreed on certain exclusions (or “carve outs”) to the amendment reference. These carve outs are reflected in the proposed Act. They will be recognised under the *National Consumer Credit Protection Act 2009* of the Commonwealth by amendments made to that Act by the *National Consumer Credit Protection Amendment Act 2010* of the Commonwealth.
11. The national legislation imposes a licensing system on credit providers and finance brokers and requires membership of an Australian Securities and Investments Commission [ASIC] approved external dispute resolution scheme as a condition of licensing. This seeks to ensure that disreputable traders are excluded from the industry and that consumers have affordable access to justice for consumer complaints.
12. The Consumer Credit Code, the State-based uniform legislation regulating all credit for personal domestic and household purposes, will be transferred across with amendments to close loopholes.
13. According to the Agreement in Principle speech:

The Commonwealth has added two important protections to those amendments. The first is to raise the ceiling for hardship and stay of enforcement applications to \$500,000. The second is to extend the application of the code to residential investment property...A most important addition to the regulatory scheme is a set of requirements for responsible lending conduct that will apply to both credit providers and brokers.
14. With regard to the requirement for membership of an ASIC approved dispute resolution scheme, there are two such schemes operating currently—the Financial

Ombudsman Scheme and the Credit Ombudsman Scheme. Both schemes deal with matters arising under the code as well as finance broking issues. Matters that need to be heard in a court will be heard in the Federal Court and the State courts. Under the Constitution, the Commonwealth is not able to confer jurisdiction for credit matters on tribunals. This means the Consumer, Trader and Tenancy Tribunal will no longer hear credit matters, except for the maximum annual percentage rate and broking laws on a temporary basis.

15. To promote access to justice, the Commonwealth will set up a small claims division of the Federal Court that can waive fees and will not make costs orders except in the case of vexatious litigation.

16. The Agreement in Principle speech explained that:

Registration of credit providers and brokers will commence on 1 April 2010, with licensing applications to commence from 1 July 2010. The National Credit Code will also start on 1 July 2010 along with high-level responsible lending requirements...States will retain responsibility for administering the Consumer Credit Code until the National Code commences. Importantly, the New South Wales broking legislation as set out in part 1A of the *Consumer Credit Administration Act 1995* will be retained until 1 January 2011 when the equivalent Commonwealth provisions commence. This will ensure that consumers have appropriate protection from rogue brokers until the Commonwealth protections take effect.

17. The Agreement in Principle speech further explained that:

New South Wales will continue to administer pre-code credit contracts that were regulated under the *Credit Act 1984* and the *Credit (Home Finance Contracts) Act 1984*. New South Wales will also continue to have responsibility for finance broking transactions undertaken prior to the repeal of the New South Wales laws and the commencement of the full responsible lending provisions in the national laws. Brokers have been regulated under the *Consumer Credit Administration Act 1995* since 2004, and while the nature of broking, which is a transaction rather than an ongoing contract, means that issues are likely to arise within a relatively short time of that transaction taking place, New South Wales will retain responsibility for a few years.

The Bill

18. The objects of this Bill are as follows:

- (a) to refer to the Commonwealth Parliament certain matters relating to credit and certain other financial transactions,
- (b) to repeal the existing consumer credit legislation operating in New South Wales and to make consequential and related amendments to other legislation,
- (c) to continue, on a transitional basis, provisions relating to the maximum annual percentage rate for credit contracts and the regulation of finance broking activities.

The proposed Act will form part of the new national credit protection regime being established under Commonwealth law. It is to be enacted for the purposes of section 51 (xxxvii) of the Commonwealth Constitution which enables State Parliaments to refer matters to the Commonwealth Parliament or to adopt Commonwealth laws that have been enacted pursuant to such referrals.

The reference to support the enactment of the initial Commonwealth legislation was provided by Tasmania by the enactment of the *Credit (Commonwealth Powers) Act 2009* of that State which commenced on 17 November 2009.

The proposed Act also provides for the referral of certain matters relating to credit to the Commonwealth Parliament in order to support future amendments to the *National Consumer Credit Protection Act 2009* of the Commonwealth and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009* of the Commonwealth (the *amendment reference*).

19. Outline of provisions

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

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

Clause 3 defines certain words and expressions used in the proposed Act. The definitions reflect the fact that there is to be an **adoption** of the relevant existing Commonwealth laws mentioned above, together with the conferral of an **amendment reference**. Those existing laws, as amended from time to time, comprise the **National Credit legislation**.

Clause 4 provides for the adoption, under section 51 (xxxvii) of the Commonwealth Constitution, of the relevant existing Commonwealth laws.

Clause 5 enables the Governor, by proclamation, to fix a day on which the adoption of the relevant existing Commonwealth laws is to terminate.

Clause 6 refers to the Commonwealth Parliament the matters of amending the National Credit legislation as in force from time to time (the **amendment reference**). The amendment reference will enable the Commonwealth to make express amendments to its National Credit legislation about the provision of credit to which the National Credit Code applies and about consumer leases to which Part 11 of that Code applies. The National Credit Code is set out in Schedule 1 to the *National Consumer Credit Protection Act 2009* of the Commonwealth.

Clause 7 provides for the exclusion from the amendment reference of certain matters relating to the imposition of State taxes, the system for recording of estates or interests in land, the priority of estates or interests in land and State statutory rights.

Clause 8 enables the Governor, by proclamation, to fix a day on which the amendment reference is to terminate.

Clause 9 makes it clear that the National Credit legislation may be amended on account of any reference or adoption or by Commonwealth laws or instruments enacted or made on the basis of powers vested in the Commonwealth apart from any reference or adoption.

Clause 10 makes it clear that the separate termination of the period of the amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the adoption is also terminated.

Schedule 1 Repeals

Schedule 1 repeals the existing New South Wales consumer credit legislation.

Schedule 2 Consequential amendment of other legislation

Schedule 2 amends various Acts and regulations as a consequence of the repeal of existing consumer credit legislation and its replacement by the new national credit protection regime.

Schedule 3 Savings, transitional and other provisions

Schedule 3 includes savings and transitional provisions consequent on the enactment of the proposed Act (including a power to make regulations of a savings and transitional nature). Provision is made for the continuation of the financial counselling trust fund under the *Credit Act 1984*. The maximum annual percentage rate that currently applies to credit contracts will continue to apply for a period of 12 months (including in relation to new credit contracts under the National Credit Code). Provision is also made to continue the regulation of finance broking activities under the former credit legislation until such time as the Commonwealth commences relevant provisions of the National Credit legislation that regulate the provision of credit assistance.

Issues Considered by the Committee**Trespasses on personal rights and liberties [s 8A(1)(b)(i) LRA]**

Issue: Strict Liability Offences in the Commonwealth legislation – implications arising from the Bill’s adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

20. Clause 4 of this Bill provides for the adoption, under section 51 (xxxvii) of the Commonwealth Constitution, of the relevant existing Commonwealth laws comprising the National Credit legislation.
21. Subject to proposed section 7 (matters which are excluded from reference), clause 6 of the Bill sets out the amendment reference, which refers to the Commonwealth Parliament the matters of amending the National Credit legislation as in force from time to time. The amendment reference enables the Commonwealth to make express amendments to its National Credit legislation about the provision of credit to which the National Credit Code applies and about consumer leases to which Part 11 of that Code applies. The National Credit Code is set out in Schedule 1 to the Commonwealth *National Consumer Credit Protection Act 2009*.
22. The Committee notes the letter received on 17 August 2009, from the Senate’s Standing Committee for the Scrutiny of Bills, which drew the Committee’s attention to the extensive use of strict liability offences provided in the Commonwealth *National Consumer Credit Protection Bill 2009*, which has now been enacted as the *National Consumer Credit Protection Act 2009*.
23. This Bill aims to adopt the Commonwealth legislation of the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, under section 51 (xxxvii) of the Commonwealth Constitution.
24. Therefore, the Committee considers that the concerns raised by the Senate’s Standing Committee for the Scrutiny of Bills would still hold relevance in the context of this Bill.

25. The Committee notes that there are various sections under the national legislation containing strict liability offences as identified in the Standing Committee for the Scrutiny of Bills' *Alert Digest Report No. 9 of 2009*.¹
26. The Committee considers the letter received from the Senate's Standing Committee for the Scrutiny of Bills and its' *Alert Digest 9 of 2009*, where the Senate Standing Committee drew attention to the substantial number of strict liability offences included in the national legislation. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.
27. In particular, the Committee notes that under the Commonwealth *National Consumer Credit Protection Act 2009*, section 290 (2) deals with a person who must not refuse or fail to comply with a requirement made under sections 258 (2)(a) or 274 (4), 284 (1), (2) or (4), which are all strict liability offences. Under section 290 (2), the criminal penalty is 10 penalty units or 3 months' imprisonment or both.
28. The Committee is concerned with the Bill's adoption of the national legislation (such as under clauses 4 and 6), in relation to the strict liability offences² contained in the national legislation where such offences carry a possible criminal penalty of 3 months' imprisonment. The imposition of strict liability with potential a penalty of imprisonment is generally considered as inappropriate. Therefore, the Committee refers this to Parliament to consider whether the adoption of the national legislation may lead to undue trespasses on individual rights and liberties with regard to the strict liability offences attracting potential penalties of imprisonment under the national legislation.
29. The Committee also resolves to write to the Minister to seek advice on whether the concerns identified by the Senate's Standing Committee for the Scrutiny of Bills with regard to the strict liability offences in the national legislation may require further attention given the context of the Bill's adoption of the national legislation.

¹ *National Consumer Credit Protection Act 2009*: Sections 258 (3), 274 (5), 284 (5), 300 (2) and 319 (4); Schedule 1 (National Credit Code): sections 33(5), 36(7), 38(9), 51(4), 53(3), 64(6), 65(4), 66(4), 67(3), 68(3), 71(6), 72(4), 73(3), 85(11), 87(4), 88(7), 90(2), 91(3), 94(3), 95(4), 108(4), 109(5), 136(3), 143(3), 145(4), 173(4), 174(4), 175(3), 178(3), 190(3). See page 60 of the *Alert Digest No 9 of 2009*, Standing Committee for the Scrutiny of Bills, Australian Senate.

² Strict liability offence provisions – as identified in footnote 1 above.

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

Issue: Henry VIII clauses (which allow amendment of an Act by a Regulation) of the Commonwealth legislation - implications arising from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

30. The letter received on 17 August 2009, from the Senate's Standing Committee for the Scrutiny of Bills, drew the Committee's attention to the extensive use of 'Henry VIII' clauses contained in the now enacted *National Consumer Credit Protection Act 2009*.
31. This Bill adopts the Commonwealth legislation of the *National Consumer Credit Protection Act 2009* and the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*, under section 51 (xxxvii) of the Commonwealth Constitution.
32. The Committee refers to the Standing Committee for the Scrutiny of Bills' concerns with regard to Part 1-2 of Chapter 1 of the *National Consumer Credit Protection Act 2009*, which contains definitions. In particular, section 14 defines a 'person' to generally include a partnership. However, section 14 (3)(b) of the national legislation provides that regulations may exclude or modify the effects of subsections 14 (1) and 14 (2). Section 15 of the national legislation also provides a definition of a 'person' to generally include multiple trustees. However, section 15 (5)(b) provides that regulations may exclude or modify the effect of subsections 15 (2), (3) and (4).
33. Part 2-6 of Chapter 2 of the Commonwealth *National Consumer Credit Protection Act 2009* provides for the exemptions and modifications relating to the licensing of persons who engage in credit activities. Division 2 prohibits a person from engaging in credit activities without an Australian credit licence. The prohibition does not apply to employees and directors of licensees or related bodies corporate of licensees, or to credit representatives of licensees. However, section 110 of the national legislation enables regulations to allow exemptions from the licensing provisions and credit activities and to omit, modify or vary these provisions.
34. Division 6 of Part 3-1 of the Commonwealth *National Consumer Credit Protection Act 2009* addresses licensees that provide credit assistance in relation to credit contracts under Chapter 3 (responsible lending conduct) and prohibits licensees suggesting, or assisting with, unsuitable credit contracts. Section 123 of the national legislation prohibits suggesting, or assisting consumers to enter, or increase the credit limit under unsuitable contracts; and section 124 prohibits suggesting to consumers to remain in unsuitable credit contracts. Sections 123 (2) and 124 (2) also prescribe when a contract will be unsuitable for a consumer.
35. However, as commented on by the Standing Committee for the Scrutiny of Bills, section 123 (5) of the national legislation enables regulations that may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2). Similarly, section 124 (5) of the national legislation provides that regulations may prescribe particular situations in which a credit contract is taken not to be unsuitable for a consumer, despite subsection (2).
36. Division 2 of Chapter 7 of the national legislation deals with when a person will be liable for the conduct of others. Section 326 provides that regulations may modify

Division 2 'for the purposes prescribed in the regulations'. The Senate's Standing Committee for the Scrutiny of Bills commented that this is a very broad regulation-making power.

37. Division 5 of Chapter 7 of the national legislation contains section 333 (1) which provides that a contravention of a requirement in the Act does not affect the validity or enforcement of any transaction, contract, instrument or other arrangement. However, subsection (2) provides that this is subject to any express provision to the contrary in regulations. Subsection (3) enables that regulations can provide that a failure to comply with a specified requirement in subsection (1) has a specified effect on the validity or enforcement of a transaction, contract, instrument or arrangement. Again, the Senate's Standing Committee for the Scrutiny of Bills noted the use of this broad regulation-making power.

38. The Committee notes the letter received from the Standing Committee for the Scrutiny of Bills, especially in relation to their concerns with regard to the extent to which 'Henry VIII' clauses have been used to change powers, entitlements and obligations conferred by the principal Commonwealth legislation. The Standing Committee for the Scrutiny of Bills expressed that they do "not condone the use of 'Henry VIII' clauses as a standard drafting practice, even in cases where the explanatory memorandum provides reasons for that use or where the bill reflects COAG agreement". They considered that "the apparent increasing reliance on the use of regulations to potentially alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation is cause for concern".

39. The Committee shares the concerns of the Senate's Standing Committee for the Scrutiny of Bills and refers to Parliament the question of whether the Bill's adoption of the national legislation (such as provided by clauses 4 and 6), may also give rise to 'Henry VIII' clauses that would permit subordinate legislation such as regulations to amend or take precedence over the principal legislation, which could constitute an inappropriate delegation of legislative power.

40. The Committee resolves to write to the Minister to seek advice on whether the concerns expressed by the Senate's Standing Committee for the Scrutiny of Bills with regard to the 'Henry VIII' provisions in the national legislation may require further attention in the context of this Bill's adoption of the national legislation.

Issue: Matters which should be regarded by Parliament – implications from the Bill's adoption of the existing national legislation under Clause 4 and reference of matters to the Commonwealth under Clause 6:

41. Part 11 of Schedule 1 (National Credit Code) to the Commonwealth *National Consumer Credit Protection Act 2009* regulates consumer leases. Division 1 of Part 11 contains application provisions, including descriptions of the leases regulated. Section 171 (4) of the National Credit Code enables that 'ASIC may exclude, from the application of this Part, a consumer lease specified by ASIC'. Further, section 171 (5) states that 'an exemption under subsection (4) is not a legislative instrument'.

42. The Standing Committee for the Scrutiny of Bills noted that this gave ASIC a broad discretion since the exemption made by ASIC would not be a legislative instrument. Therefore, it would also not be subject to Parliamentary scrutiny.

43. The Committee resolves to write to the Minister to seek advice on whether the concerns raised by the Senate's Standing Committee for the Scrutiny of Bills with regard to sections 171 (4) and (5) under the national legislation as not being subject to Parliamentary scrutiny could constitute an inappropriate delegation of legislative power (since this may involve matters that should be regarded by Parliament), and could require further attention with the proposed adoption of the national legislation.

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

44. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee notes the reasons provided in the Agreement in Principle speech that explained the following:

The referral bill provides for the commencement of the legislation, which will, as a result of changes announced by the Commonwealth last year, be 1 April 2010. These changes were negotiated in order to allow industry sufficient time to change systems where necessary. Registration of credit providers and brokers will commence on 1 April 2010, with licensing applications to commence from 1 July 2010. The National Credit Code will also start on 1 July 2010 along with high-level responsible lending requirements. This will require financial providers to assess consumers' capacity to repay and to not provide unsuitable products. States will retain responsibility for administering the Consumer Credit Code until the National Code commences. Importantly, the New South Wales broking legislation as set out in part 1A of the *Consumer Credit Administration Act 1995* will be retained until 1 January 2011 when the equivalent Commonwealth provisions commence. This will ensure that consumers have appropriate protection from rogue brokers until the Commonwealth protections take effect.

45. The Committee accepts the above reasons provided in the Agreement in Principle speech and has not identified any issues regarding Clause 2.

The Committee makes no further comment on this Bill.

3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT BILL 2010

Date Introduced:	24 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Phillip Costa MP
Portfolio:	Corrective Services

Purpose and Description

1. This Bill amends the *Crimes (Administration of Sentences) Act 1999* and other legislation with respect to the making of parole orders for Norfolk Island prisoners, corrective services dogs and the provision of information; and for other purposes.
2. This Bill makes amendments to the *Crimes (Administration of Sentences) Act 1999*, the *Crimes (Administration of Sentences) Regulation 2008*, and the *Criminal Records Act 1991* including:
 - conferring on the State Parole Authority functions relating to parole orders for Norfolk Island prisoners held in custody in New South Wales;
 - updating references to Community Offender Services field officers;
 - enabling Corrective Services staff responsible for the Victims Register to provide certain information to victims on behalf of the State Parole Authority and the Serious Offenders Review Council;
 - enabling spent convictions to be required to be disclosed by persons seeking employment as members of staff of Corrective Services NSW;
 - enabling an inmate to be compelled to attend the Mental Health Review Tribunal.
3. The Bill makes amendments to the *Companion Animals Act 1998* and the *Companion Animals Regulation 2008* to provide that Corrective Services dogs are to be managed the same as police dogs under the Companion Animals Legislative Scheme.

Background

4. The *Crimes (Administration of Sentences) Act 1999* is the principal Act that governs the administration of sentences in New South Wales.
5. Items [4], [1], and [9] of schedule 1 relate to parole for Norfolk Island inmates. These amendments aim to address a gap in the Act with respect to inmates convicted of offences on Norfolk Island. This gap has arisen because Norfolk Island passed its *Sentencing Act 2007* without reference to the New South Wales legislation or notification to Corrective Services NSW. Currently, there are three Norfolk Island inmates held in New South Wales custody by arrangement with the Government of

Norfolk Island. One of these inmates becomes eligible for parole on 14 March 2010. Norfolk Island legislation covers the parole of Norfolk Island inmates and refers to a Parole Board, but Norfolk Island does not have a Parole Board. Its legislation provides that references to the Parole Board must be read as a reference to the Parole Board of a State or Territory holding the Norfolk Island inmate.

6. The Norfolk Island legislation does not provide for the release-on-parole procedure to be applied to Norfolk Island inmates. The proposed amendments will enable the State Parole Authority to consider the release to parole of Norfolk Island inmates and set appropriate parole conditions, following the same procedure applied to New South Wales inmates.
7. The Bill's proposed amendment will not require Norfolk Island inmates to remain in New South Wales and be subject to New South Wales parole, nor are such inmates compelled to return to Norfolk Island. If the parolee remains in New South Wales, then the parolee will be subject to New South Wales parole. If the parolee returns to Norfolk Island, then the amending provisions provide that neither the State Parole Authority nor the Probation and Parole Service are required to exercise any functions in respect of an offender who is not in New South Wales unless they are doing so in accordance with an agreement with the administration of Norfolk Island.
8. The Mental Health Review Tribunal will be included as an appropriate authority following the commencement of amendments to the *Mental Health (Forensic Provisions) Act 1990* that require the tribunal to consider the release of a forensic patient. Forensic patients may be held in correctional centres.
9. Appearances under section 77 involve court or tribunal appearances by inmates in legal proceedings, inquests or inquiries in criminal, administrative and civil jurisdictions when there is no remand or criminal procedure warrant available (such as, appeals, Family Court matters and appearance as a witness). An appropriate authority may issue a section 77 order, directing the commissioner to cause the inmate to appear at the court or other place at which the proceeding, inquest or inquiry is being held, or is to be held. This order requires the inmate's continued custody and subsequent return of the inmate to the correctional centre from which the inmate had come from.
10. The State Parole Authority and Serious Offenders Review Council are currently authorised to provide information to registered victims. Item [7] of schedule 1 relates to the provision of information to victims. The Restorative Justice Unit within Corrective Services operates the victims register as its core function, subject to legislative provisions. It provides a coordinating role with regard to services for victims, such as notification to victims of impending hearing dates. The Bill's amendment will allow Corrective Services staff to assist in the provision of certain information to victims on behalf of the State Parole Authority and the Serious Offenders Review Council.
11. The items in schedule 2.2 relate to exemptions for dogs used by Corrective Services NSW under the *Companion Animals Act* and regulation. The amendments will apply the same exemptions as they currently apply to police dogs. The Agreement in Principle speech explained that:

When the exemptions were granted to police dogs it was a drafting oversight that resulted in Corrective Services canines being excluded. This amendment applies to Corrective Services canines while performing their duties.

12. The Agreement in Principle speech also explained about the amendments with regard to spent convictions:

Schedule 2.4 enables spent convictions to be required to be disclosed by persons seeking employment with Corrective Services by exempting those circumstances from the prohibition on such disclosures. Up until now it has been only a requirement for people seeking employment as a correctional officer. This amendment reflects the reality that a huge cross-section of staff who are not custodial staff have regular or daily contact with inmates and offenders. In fact, the majority of criminals are monitored and supervised in the community by non-custodial staff. This amendment is both logical and necessary in order to ensure equitable screening of staff and to ensure integrity in the recruitment process.

Furthermore, suitably qualified and trained staff are encouraged to transfer internally from one job to another, rendering different levels of security clearance an anomaly. In recent years the Independent Commission Against Corruption has had cause to investigate allegations of corrupt conduct by both custodial and non-custodial staff. Recent amendments to the Act providing for compliance and monitoring officers highlight the inconsistency of the current non-disclosure exemption applying only to applicants for employment as correctional officers. Section 235G of the Act permits the commissioner to appoint:

any member of staff of CSNSW (including any correctional officer or any probation and parole officer) as a compliance and monitoring officer to exercise such of the ... as are specified in the instrument of his or her appointment or in a subsequent instrument executed by the Commissioner.

Section 235G (2) (c), (e) and (f) all nominate particular functions of a correctional officer that may be included in the functions exercisable by a compliance and monitoring officer; yet under the current state of the law, compliance and monitoring officers working side-by-side could be subject to different levels of criminal record disclosure depending on where their intra-organisational employment originated. Hence the amendments proposed will redress this anomaly.

The Bill

13. The object of this Bill is to amend the *Crimes (Administration of Sentences) Act 1999* and other legislation as follows:

- (a) to confer on the State Parole Authority functions relating to parole orders for Norfolk Island prisoners held in New South Wales,
- (b) to update references to certain officers,
- (c) to enable members of staff responsible for the Victims Register kept under the *Crimes (Administration of Sentences) Act 1999* to provide certain information to victims on behalf of the State Parole Authority and the Serious Offenders Review Council,
- (d) to provide for corrective services dogs to have the same treatment under the *Companion Animals Act 1998* as police dogs,
- (e) to enable spent convictions to be required to be disclosed by persons seeking employment as members of staff of Corrective Services NSW,

- (f) to enable an inmate to be compelled to attend before the Mental Health Review Tribunal,
- (g) to make a provision of a savings and transitional nature.

14. Outline of provisions

Schedule 1 Amendment of *Crimes (Administration of Sentences) Act 1999 No 93*

Norfolk Island prisoners

Prisoners sentenced under Norfolk Island law may be removed to New South Wales correctional centres under the *Removal of Prisoners Act 2004* of Norfolk Island. Under Part 6 of the *Sentencing Act 2007* of Norfolk Island parole orders may be granted to Norfolk Island prisoners by the State Parole Authority.

Schedule 1 [4] inserts proposed Division 4A of Part 6 (proposed sections 160AB and 160AC). The proposed Division empowers the State Parole Authority to exercise the functions conferred on it under the Norfolk Island legislation with respect to parole orders. It also applies the *Crimes (Administration of Sentences) Act 1999* and the regulations under that Act to the exercise of those functions in so far as they are consistent with the Norfolk Island legislation. Functions are also conferred on the Probation and Parole Service with respect to Norfolk Island prisoners. The State Parole Authority and the Probation and Parole Service are not required to exercise any functions with respect to a Norfolk Island prisoner who is not in New South Wales, unless doing so in accordance with an agreement with the Administration of Norfolk Island.

References to officers

Schedule 1 [2], [3], [5] and [6] update references to community offender services field officers.

Provision of information and documents to victims

Schedule 1 [7] enables members of staff of the agency responsible for keeping the Victims Register under the *Crimes (Administration of Sentences) Act 1999* to assist the Serious Offenders Review Council and the State Parole Authority to notify the victims of a serious offender after that Council forms an initial intention to recommend a low security classification for the offender or that Authority forms an initial intention to make a parole order for the offender. Such staff may also assist the State Parole Authority to give the victim of a serious offender or the victim's authorised agent access to documents held in relation to the offender, being documents that the Authority has determined are to be provided, and assist with related ancillary functions.

Savings and transitional provisions

Schedule 1 [8] enables regulations containing savings and transitional provisions to be made consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts and instruments

Companion Animals Act 1998 No 87

Schedule 2.1 [3] exempts corrective services dogs from section 13 of the *Companion Animals Act 1998* (the **Act**), which makes it an offence for a person to have a dog in a public place if the person does not have the dog under the person's effective control by means of an adequate chain, cord or leash. The Act currently exempts police dogs and other types of dogs.

Schedule 2.1 [4] exempts corrective services dogs from section 14 of the Act, which prohibits dogs from being in certain public places, such as children's play areas and food

preparation areas. Section 14 does not currently apply to police dogs or dogs being used to assist a person with a disability.

Schedule 2.1 [5] and [6] provide that offences under sections 16 and 17 of the Act, which relate to dog attacks, do not apply to corrective services dogs.

Schedule 2.1 [5] also provides that section 25 of the Act, which imposes liability on a dog owner for injury or damage caused by the dog, does not apply to corrective services dogs. These sections do not currently apply to police dogs.

Schedule 2.1 [2] inserts a definition of **corrective services dog**, which means a dog that is being used on official duty by a correctional officer, into the Act.

Schedule 2.1 [1] makes a consequential amendment to a note in the definition of **companion animal**.

Companion Animals Regulation 2008

Schedule 2.2 provides that corrective services dogs (or attacks involving corrective services dogs while working or training) are not required to be registered under the *Companion Animals Act 1998*. Similar exemptions apply to police dogs.

Crimes (Administration of Sentences) Regulation 2008

Schedule 2.3 [1]–[3] update references to community offender services field officers.

Schedule 2.3 [4] specifies provisions of the *Crimes (Administration of Sentences) Act 1999* that do and do not apply to the granting of parole orders to Norfolk Island prisoners in New South Wales correctional centres.

Schedule 2.3 [5] enables the Mental Health Review Tribunal to direct the Commissioner of Corrective Services to cause an inmate to attend before the Tribunal.

Criminal Records Act 1991 No 8

Schedule 2.4 enables spent convictions to be required to be disclosed by persons seeking employment as members of staff of Corrective Services NSW by exempting those circumstances from the prohibition on such disclosures.

Issues Considered by the Committee

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| <p>15. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

4. CRIMES AMENDMENT (POLICE PURSUITS) BILL 2010

Date Introduced:	25 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Daley MP
Portfolio:	Police

Purpose and Description

1. The object of this Bill is to create a new indictable offence of failing to stop a vehicle and driving the vehicle recklessly, or at a speed or in a manner dangerous to others, after becoming aware that police officers are in pursuit of the vehicle.
2. The Bill also makes other consequential amendments including license disqualification.

Background

3. Discussion of this Bill was prompted by circumstances surrounding the death of Skye Sassine, who was killed when motorists fleeing a police pursuit struck the car she was travelling in.
4. This Bill creates a new offence under section 51B of the *Crimes Act 1900*, targeting people who participate in police pursuits while driving in a reckless or dangerous manner.
5. There are existing offences for people who flee from police, including dangerous driving occasioning grievous bodily harm or death that carry maximum penalties of between 11 and 14 years. At the most serious end of the offences spectrum, a driver who kills another person during a police pursuit can be charged with manslaughter or murder.
6. This new offence is designed for circumstances where an individual flees a police pursuit in a vehicle but where no one is injured or killed.
7. Specifically, the new offence will involve three elements: first, a person knows that police are in pursuit of their vehicle and that they are required to stop; second, they do not stop their vehicle; and, third, they drive their vehicle recklessly or at a speed or in a manner dangerous to others.
8. The maximum penalties for this offence are three years imprisonment for the first offence and five years imprisonment for second or subsequent offences.
9. The new offence also introduces automatic driver license disqualification of three years for a first offence and five years for second or subsequent offences.

The Bill

10. Outline of provisions

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

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

Schedule 1 Amendment of *Crimes Act 1900 No 40*

Schedule 1 amends the Act to create a new indictable offence of failing to stop a vehicle and driving the vehicle recklessly, or at a speed or in a manner dangerous to others, after becoming aware that police officers are in pursuit of the vehicle. The maximum penalty will be imprisonment for 3 years for a first offence, or imprisonment for 5 years for an offence on a second or subsequent occasion.

Schedule 2 Amendment of *Criminal Procedure Act 1986 No 209*

Schedule 2 amends the Act to enable the new indictable offence to be tried summarily by the Local Court unless the prosecutor elects to have the offence dealt with on indictment before a jury.

Schedule 3 Amendment of *Road Transport (General) Act 2005 No 11*

Schedule 3 amends the Act to apply the driver licence disqualification provisions to persons convicted of the new offence (by extending the definition of **convicted person** in section 188 of the Act to include those persons). As a consequence, the conviction will also amount to a “major offence” for the purposes of the Act. Classification as a major offence makes any such convicted person liable to a declaration that the person is an “habitual traffic offender” and therefore subject to longer periods of disqualification from holding a driver licence.

Issues Considered by the Committee

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

Issue: Schedule 1 – Excessive Punishment

11. The maximum penalty for driving a vehicle in a reckless or dangerous manner to escape pursuit by a police officer is three years for a first offence and five years for second or subsequent offences. By way of comparison, section 42(1)(a) of the *Road Transport (Safety and Management) Act 1999*, provides a maximum penalty of 18 months for negligent driving occasioning death and nine months for negligent driving where grievous bodily harm is occasioned.
12. The Committee recognises the public interest in preventing police pursuits and ensuring road safety. However, the imposition of three-year and five-year sentences appear disproportionate when considering the penalties for driving offences under the *Road Transport (Safety and Management) Act 1999*, in which serious injury or death occur, are less than what is being proposed in this Bill.

13. The Committee also recognises that there are related offences provided for under 52A(1)(c) of the *Crimes Act 1900*, in which dangerous driving occasioning death attracts a penalty of up to 10 years imprisonment. Section 52A(7) of the *Crimes Act 1900* provides for circumstances of aggravation which impose a lengthier sentence when dangerous driving that occasions death occurs when the driver flees police pursuit.
14. The Committee is also concerned that the new penalties will disproportionately impact young drivers. Media reports have identified young drivers as frequent culprits in fleeing pursuit by police. A three-year imprisonment penalty for a young person who, although committing a serious offence ultimately did not damage anything or injure anybody, appears excessive and has the potential to have adverse affects.
- 15. Although the Committee shares the view that driving a vehicle recklessly or dangerously to escape pursuit by a police officer is a serious offence, the penalties provided for may be regarded as disproportionate to the gravity of the offence.**
- 16. The Committee notes that prevention of police pursuits is an issue of public safety. However, in light of that fact that no damage, injuries or deaths are required for a prison sentence to be imposed and given the Bill's potential effects on young drivers and first offenders, the Committee considers that the penalties may be regarded as excessive and refers the matter to Parliament.**

The Committee makes no further comment on this Bill.

5. NATIONAL GAS (NEW SOUTH WALES) AMENDMENT (SHORT TERM TRADING MARKET) BILL 2010

Date Introduced:	24 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Frank Sartor MP
Portfolio:	Environment and Climate Change

Purpose and Description

1. This Bill amends the *National Gas (New South Wales) Act 2008* to apply national laws that establish the short term trading market for wholesale gas in

Background

2. The establishment of the short term trading market at distinct hubs, including the Sydney / Wollongong / Newcastle region, will mean that all of the major centres of demand for natural gas serviced by the interconnected gas pipeline system will operate as open and transparent wholesale markets. The short term trading market is regarded as a very important step towards the emergence of a national gas market.
3. The end goal is to establish the foundations for a national gas market for the supply of gas to domestic gas users.
4. The short term trading market is part of the national energy market reform program, which the Ministerial Council on Energy has been implementing under the auspices of the Council of Australian Governments. These reforms are designed to encourage transparency, facilitate new market entrants, investment in gas infrastructure and set a market mechanism to factor in supply and demand interruptions.
5. The short term trading market will create a market for the trade of natural gas and set an observable spot price. By allowing for the trade in between pipelines, participants and production centres, it is envisaged that increased participation and competition will encourage more cost-effective gas prices.
6. The scheme sets penalties for suppliers who deliver less gas to market than they agreed to deliver. In addition, oversight will involve where gas will be injected into the system when there is a supply shortfall, and extracted from the system when there is a supply surplus.
7. Significant preparations within the New South Wales and South Australian gas supply industries are currently underway with a focus for commencing operation of the short term trading market in mid 2010.

The Bill

8. Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day to be proclaimed.

Clause 3 amends the *National Gas (New South Wales) Act 2008*. The National Gas Law that applies in New South Wales and other Australian jurisdictions is set out in the Schedule to the South Australian *National Gas (South Australia) Act 2008*. The National Gas Law is applied as a law of this State by the New South Wales *National Gas (New South Wales) Act 2008*.

Provisions relating to the establishment of a national short term trading market in natural gas were inserted into the Schedule to the South Australian Act by the *National Gas (South Australia) (Short Term Trading Market) Amendment Act 2009* (Division 2A of Part 6 of Chapter 2). Section 91BRA of the new Division provides that these short term trading market provisions do not apply in a jurisdiction unless they are specifically applied by a law of that jurisdiction. The amendment made by clause 3 of the proposed Act applies those provisions as part of the law of New South Wales.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation – Provides the executive with unfettered control over the commencement

9. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses, or not at all. However, the Committee recognises that this Bill is part of a federatively cooperative exercise, requiring action by other jurisdictions, and NSW may not be in a position to unilaterally determine the commencement date. It is also noted that, according to the Agreement in Principle speech, the short term trading market will only be ready to commence operation some time in mid 2010 and it may not be possible to set a date at this stage.

- 10. The Committee recognises the difficulties in determining commencement dates for projects that are reliant on the actions of other jurisdictions and notes that the short term trading market is not yet ready for operation. It has therefore not identified any issues under s 81(1)(b)(iv) of the *Legislation Review Act 1987*.**

Parliamentary scrutiny of legislative power [s 8A(1)(b)(v) LRA]

Issue: Clause 1 - Insufficient scrutiny of legislative power

11. Under the legislative scheme adopted in this Bill, each State, Territory and the Commonwealth applies the National Gas Law set out in the Schedule to the *National Gas (South Australia) Act 2008* of South Australia, as well as regulations made under

that law. By this reference, amendments to that Schedule by the South Australian parliament become applicable in New South Wales.

12. As noted in Bills Digest 5 of 2008, when the parent legislation was enacted, the reforms of *National Gas (New South Wales) Act 2008* was designed to achieve nationwide consistency in the gas industry sector. The participating jurisdictions have agreed to achieve this through reference to the South Australian legislation in their own legislation.
13. This scheme gives rise to the question of whether the applied law is subject to insufficient scrutiny by the NSW Parliament. This question is compounded by the fact that the *National Gas (South Australia) (Short Term Trading Market) Amendment Act 2009* referred to in the present Bill has already been enacted, with effect taken on 1 January 2010. To this end, there is no scope for the NSW Parliament to properly debate – or vary – the amendments that have taken place.
14. However, the Committee has previously recognised that the need for national oversight and co-ordination on energy policy and practice provide adequate justification for the legislative arrangements that have been developed.
15. The Committee also notes the procedural ease in enabling uniform legislation by the common reference to legislation in one State rather than attempts at multiple mirror legislation. To this end, the Committee appreciates that the nature of federalism will, at times, affect the ability of the NSW Parliament from examining matters otherwise in its remit.

The Committee makes no further comment on this Bill.

6. NATIONAL PARKS AND WILDLIFE AMENDMENT BILL 2010

Date Introduced:	25 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Frank Sartor MP
Portfolio:	Climate Change and the Environment

Purpose and Description

1. This Bill amends the *National Parks and Wildlife Act 1974*, the *Threatened Species Conservation Act 1995* and various other Acts to make further provision with respect to the protection of Aboriginal objects and places, the protection of fauna, native plants and threatened species, and general administration and enforcement matters; and for other purposes.
2. The amendments relate to Aboriginal cultural heritage regulation, management of Aboriginal owned parks, reserve management, wildlife licensing and improvements to the enforceability of the legislation.
3. The amendments aim to address enforceability issues and bring the offences and penalties relating to Aboriginal cultural heritage in line with other environment protection legislation.
4. The Bill introduces a new two-tiered system for Aboriginal cultural heritage penalties. The first tier of penalties is for the two most serious offences where a person knowingly harms or desecrates an Aboriginal object or harms or desecrates an Aboriginal place.
5. The second tier of offences attracts a lower penalty and imposes strict liability. For these offences, the prosecutor is only required to prove the act of harm to an Aboriginal object, with no requirement to prove knowledge or intent. The main defence for such a strict liability offence is due diligence. Due diligence involves the taking of reasonable and practicable measures to determine whether an activity will harm Aboriginal objects and whether an application for a permit should be sought. Maximum penalties apply for offences by individuals where the offence is committed in aggravated circumstances, which is defined as a second or subsequent offence or where a person has acted for financial gain. Lower penalties for individuals apply where there are no aggravating circumstances.
6. However, due diligence defence will not apply to the strict liability offence of harm to an Aboriginal place.
7. The Bill also contains amendments to provide greater clarity and certainty to applicants for Aboriginal cultural heritage impact permits. A single and more flexible Aboriginal heritage impact permit will replace the current dual permit system. There will no longer be a requirement to obtain a permit when surveying for Aboriginal

objects if the activity is undertaken in accordance with an archaeological code to be prescribed by the regulations.

8. Around one-third of the parks estate is subject to formal joint management arrangements with Aboriginal people. One type of joint management involves the nine parks that have been handed back to Aboriginal owners and leased to the Government for management as a reserve under part 4A of the *National Parks and Wildlife Act 1974*. For these part 4A parks, machinery amendments aim to provide clarity around issues relating to constitution and procedure of boards of management, lease variation, exclusion from liability for board members acting in good faith, and the application of plans of management for the reserve.
9. Another amendment relating to part 4A reserves will be changes to allow for a park of a different reserve category to be added to an existing part 4A park.
10. This Bill contains provisions relating to the administration of wildlife management and licensing under the *National Parks and Wildlife Act 1974*. Amendments aim to clarify directions that can be given in relation to protected fauna. There is a proposed new offence for the sale of untagged, protected native plants.
11. The Bill will allow the Department of Environment, Climate Change and Water to recover costs incurred in providing public health and building services in national parks such as Kosciuszko National Park. Such charges will be at similar levels to local government charges. Charges will be levied on commercial operators within the park to recover the department's costs for municipal and associated services but park entry fees will not be affected.
12. There are minor amendments relating to the adjustment of road boundaries in parks. These amendments aim to improve the management and administrative arrangements relating to roads and boundary adjustments in national parks and to remove ambiguity in the current legislation. The proposed amendments will provide for the adjustment of park boundaries that adjoin public roads so as to align the boundary on paper with the actual roads as surveyed on the ground. They will enable the Minister for Climate Change and the Environment to use gazettal notices to include within the park, the land removed from the road corridor on paper and then exclude from the park, the land that becomes part of the road corridor.
13. Other amendments include remediation directions to repair damage to reserved lands, threatened species, endangered ecological communities or their habitats, Aboriginal objects and Aboriginal places; strengthening the effectiveness of interim protection orders; and extending the statute of limitations period to two years from when an offence came to the attention of an authorised officer.
14. The remediation direction power will allow measures to be taken soon after an offence takes place, rather than under a court order as part of a prosecution. This seeks to allow for quicker remediation that will allow habitats to regenerate and prevent further degradation such as weed infestation.

Background

15. According to the Agreement in Principle speech:

The Government has committed to a broad reform process and will consider new stand-alone legislation in New South Wales to protect Aboriginal cultural heritage. The proposal for new stand-alone legislation will be developed by a working party comprised of representatives from both Government and community groups, within a two-year period. It is important that we move to stand-alone legislation to protect Aboriginal heritage and remove it from what is really an Act more concerned about the protection of flora and fauna in our national parks.

16. The Bill aims to bring the legislation more in line with other States, such as Queensland and Victoria, where the maximum penalties for harming Aboriginal cultural heritage can be up to \$1 million for corporations.
17. The Department of Environment, Climate Change and Water, together with an interagency working group, has developed a due diligence code of practice in order to provide guidance on the steps people should take in due diligence. Industry-specific codes of practice that deal with due diligence for Aboriginal cultural heritage can be considered for adoption under the regulation and will also confer a due diligence defence. However, the due diligence defence will not apply to the strict liability offence of harm to an Aboriginal place as the Agreement in Principle speech explained that Aboriginal places are culturally significant sites which are publicly notified through the *Government Gazette*, the Department of Environment, Climate Change and Water website, and signage at the location.
18. In New South Wales there are over 60 declared Aboriginal places which are assessed for their special cultural significance to Aboriginal people before declaration by the Minister and protected under the *National Parks and Wildlife Act 1974*. Appropriate exemptions and defences for emergencies, bush fire hazard reduction work, the carrying out of Aboriginal cultural activities, and low impact activities have been included in the Bill and proposed regulations.
19. Provisions for the transfer, variation, suspension, revocation and surrender of permits have been proposed. Consultation requirements with Aboriginal people relating to permit applications will be statutory requirements prescribed by the regulation. This will also give certainty to both applicants for permits and Aboriginal communities about the consultation process. The current policy guideline has been updated, which further explains the regulation requirements.
20. The Agreement in Principle speech stated that the consultation draft of the *National Parks and Wildlife Regulation 2010* and the revised consultation draft of the document entitled "Due Diligence Code of Practice for the Protection of Aboriginal Objects in NSW" have been tabled. There will also be the opportunity for additional targeted consultation with key stakeholders on the draft regulation and draft code prior to the Bill being debated.

The Bill

21. The object of this Bill is to amend the National Parks and Wildlife Act 1974 (**the Principal Act**), the Threatened Species Conservation Act 1995 (**the TSC Act**) and other legislation so as:
 - (a) to streamline and improve the operation of Part 6 of the Principal Act relating to the protection of Aboriginal objects and Aboriginal places, and

- (b) to clarify certain provisions relating to Aboriginal lands reserved under Part 4A of the Principal Act, and
- (c) to strengthen provisions relating to stop work orders and interim protection orders, and
- (d) to enable remediation directions to be given where certain damage or harm has occurred in or as a result of the commission of offences under the Principal Act, and
- (e) to strengthen provisions relating to protected fauna directions, and
- (f) to increase the penalties for certain offences to include additional penalties per day for each day that the offence continues, and
- (g) to create an offence of selling a protected native plant without a tag (where a flora plan of management requires such a tag), and
- (h) to clarify that easements, rights of way and licences may be granted through or over land reserved under the Principal Act for the purposes of enabling access to other land for occupiers as well as owners of that other land, and
- (i) to provide that easements, rights of way and licences may be granted for the erection, use or maintenance of broadcasting facilities, and
- (j) to insert new provisions (broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*) into the Principal Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence, and
- (k) to bring together certain provisions of the Principal Act relating to criminal and other proceedings into a new Part for ease of use by the reader, and
- (l) to alter the composition of the Aboriginal Cultural Heritage Advisory Committee and ensure that all appointed members of that Committee are Aboriginal persons, and
- (m) to insert new provisions (broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*) into the TSC Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence, and
- (n) to bring together certain provisions of the TSC Act relating to criminal and other proceedings into a new Part for ease of use by the reader, and
- (o) to insert provisions into the TSC Act to deal with matters relating to offences by corporations, the time within which criminal proceedings may be commenced, ancillary offences and evidentiary matters, and
- (p) to provide that land that is vested in an Aboriginal Land Council and that is reserved under Part 4A of the Principal Act is exempt from local government rates, other than water supply special rates and sewerage special rates, and
- (q) to make other miscellaneous amendments to the Principal Act, the TSC Act and other legislation.

22. Outline of provisions

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

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

Clause 3 repeals the *National Parks and Wildlife Amendment Act 2001*.

Schedule 1 Amendment of *National Parks and Wildlife Act 1974 No 80*

Amendments relating to terminology:

Schedule 1 [1]–[7], [13] and [15]–[17] make amendments:

- (a) to replace the outdated term “Aboriginals” with the currently used “Aboriginal persons”, and
- (b) to take account of the change in name of the Department of Environment and Conservation to the Department of Environment, Climate Change and Water, and
- (c) to amend existing, and include a number of new, definitions for the purposes of the Principal Act, including the definitions for **damage** (in relation to damaging habitat), **harm** (in relation to harming an object or place) and **pick** (in relation to picking plants).

Schedule 1 [8] - [12] contain amendments relating to administrative matters.

Schedule 1 [14], [121] and [122] contain amendments relating to advisory committees.

Schedule 1 [18] – [29] contain amendments relating to Part 4A Aboriginal lands:

Part 4A of the Principal Act deals with the lease and reservation under that Act of certain Aboriginal lands as national parks, historic sites, state conservation areas, regional parks, nature reserves, karst conservation reserves or Aboriginal areas. Section 71AK of the Principal Act provides that a lease under Part 4A of the Principal Act may be varied only by the agreement of the parties, not inconsistent with that Act, or by an Act of Parliament.

Schedule 1 [127] inserts proposed Schedule 14A into the Principal Act which contains provisions with respect to the constitution and procedure of boards of management.

Amendments relating to Aboriginal objects and Aboriginal places:

Part 6 of the Principal Act contains various provisions to protect Aboriginal objects and Aboriginal places. **Schedule 1 [30]–[36]** amend various provisions of that Part to streamline and improve the operation of the Part.

Schedule 1 [32] inserts a new offence provision (proposed section 86) into the Principal Act to replace the offences currently contained in sections 86 and 90 of the Principal Act.

Proposed section 86 (1) and (2) create 2 offences relating to harming Aboriginal objects—a strict liability offence in cases to criminalise harming an Aboriginal object (whether or not the person knew it was an Aboriginal object) (proposed section 86 (2)) and a knowledge offence with a higher penalty where it can be proved that the offender knew the harmed or desecrated object was an Aboriginal object (proposed section 86 (1)).

Specifically, proposed section 86 (1) makes it an offence to harm or desecrate an object that the person knows is an Aboriginal object. The offence carries a maximum penalty of 2,500 penalty units (currently \$275,000) or imprisonment for 1 year, or both, or (in circumstances of aggravation) 5,000 penalty units (currently \$550,000) or imprisonment for 2 years, or both (in the case of an individual) and 10,000 penalty units (currently \$1,100,000) (in the case of a corporation). Proposed section 86 (2) makes it an offence to harm an Aboriginal object (whether or not the person knows it is an Aboriginal object). The offence carries a maximum penalty of 500 penalty units (currently \$55,000) or (in circumstances of aggravation) 1,000 penalty units (currently \$110,000) (in the case of an individual) and 2,000 penalty units (currently \$220,000) (in the case of a corporation).

The circumstances of aggravation that will trigger the increased individual penalty are:

- (a) that the offender engaged in the act or omission that constituted the offence for financial gain, or

(b) that the offence was the second or subsequent occasion on which the offender was convicted of an offence under the proposed section.

Proposed section 86 (3) deals with harm to Aboriginal places. Declarations of Aboriginal places are published in the Gazette (see section 84 of the Principal Act). The new provision makes it an offence to harm an Aboriginal place (whether or not the person knows it is an Aboriginal place). The offence carries a maximum penalty of 5,000 penalty units (currently \$550,000) or imprisonment for 2 years, or both (in the case of an individual) and 10,000 penalty units (currently \$1,100,000) (in the case of a corporation).

Schedule 1 [2] provides that *harm* in relation to an object or place is defined to include any act or omission that:

- (a) destroys, defaces or damages the object or place, or
- (b) in relation to an object—moves the object from the land on which it had been situated, or
- (c) is specified by the regulations, or
- (d) causes or permits the object or place to be harmed in a manner referred to in paragraph (a), (b) or (c), but does not include any act or omission that:
 - (e) desecrates the object or place, or
 - (f) is trivial or negligible, or
 - (g) is excluded from the definition by the regulations under the Principal Act.

Schedule 1 [32] also inserts a new provision (proposed section 87) into the Principal Act to provide for defences to the new offences. Proposed section 87 (1) provides that it is a defence to a prosecution for an offence against proposed section 86 (1), (2) or (3) if the defendant shows that:

- (a) the harm or desecration concerned was authorised by an Aboriginal heritage impact permit, and
- (b) the conditions to which that Aboriginal heritage impact permit was subject were not contravened.

Proposed section 87 (2) provides that it is a defence to a prosecution for an offence under proposed section 86 (2) if the defendant shows that the defendant exercised due diligence to determine whether the act or omission constituting the alleged offence would harm an Aboriginal object and reasonably determined that no Aboriginal object would be harmed. The regulations may provide that compliance with requirements specified in the regulations, or in a code of practice adopted or prescribed by the regulations, is taken for the purposes of this subsection to constitute due diligence in determining whether the act or omission constituting the alleged offence would harm an Aboriginal object.

Other defences may also be created by regulation, but only if the Aboriginal Cultural Heritage Advisory Committee has been consulted before making such a regulation.

Schedule 1 [32] also inserts proposed sections 87A and 87B into the Principal Act to provide for exemptions for certain specified activities, including Aboriginal traditional cultural activities.

Section 91 of the Principal Act provides that a person who is aware of the location of an Aboriginal object that is the property of the Crown (or, not being the property of the Crown, is real property) must notify the Director-General (unless the person believes on reasonable grounds that the Director-General is already aware of the location of that Aboriginal object). Failure to so notify is an offence which currently carries a penalty of 100 penalty units

(currently \$11,000), in the case of an individual, and 200 penalty units (currently \$22,000) in the case of a corporation (see section 175 of the Principal Act). **Schedule 1 [34]** inserts a maximum penalty provision into section 91 to provide that in the case of continuing offences, the offender is also liable to a further maximum penalty of:

- (a) in the case of an individual—10 penalty units for each day the offence continues, or
- (b) in the case of a corporation—20 penalty units for each day the offence continues.

Schedule 1 [36] inserts proposed Division 2 (being proposed sections 90–90S) into Part 6 of the Principal Act to provide for Aboriginal heritage impact permits.

Aboriginal heritage impact permits are to replace permits under current section 87 and consents under current section 90. The proposed Division deals, amongst other things, with the following:

- (a) the issue of Aboriginal heritage impact permits (proposed section 90),
- (b) applications for the issue of such permits (proposed section 90A),
- (c) applications for the transfer of such permits (proposed section 90B),
- (d) the process for the grant or refusal of such applications (proposed section 90C),
- (e) variation of such permits (proposed section 90D),
- (f) restrictions on making applications to vary or transfer such permits (proposed section 90E),
- (g) requiring applicants to provide further information in connection with such applications (proposed section 90F),
- (h) suspension or revocation of such permits (proposed section 90G),
- (i) surrender of such permits (proposed section 90H),
- (j) the imposition of conditions on the suspension, revocation or surrender of such permits (proposed section 90I),
- (k) making it an offence to contravene the conditions of such permits or conditions on the suspension, revocation or surrender of such permits (proposed section 90J),
- (l) setting out the factors the Director-General must consider in making determinations regarding such permits (proposed section 90K),
- (m) appeals to the Land and Environment Court in relation to certain decisions regarding such permits (proposed section 90L),
- (n) other matters relating to the operation of such permits, the power to make regulations regarding consultation about such permits, the interaction of such permits with stop work and interim protection orders and the validity of such permits (proposed sections 90M, 90N, 90O and 90P),
- (o) matters relating to a database of information regarding Aboriginal objects and other objects, places and features of significance to Aboriginal people—the Aboriginal Heritage Information Management System (proposed section 90Q),
- (p) providing that certain Aboriginal heritage impact permits run with the land (proposed section 90R),
- (q) providing that, in certain circumstances, a subsequent permit is not required to destroy an Aboriginal object that was previously permitted to be destroyed under an earlier permit (proposed section 90S).

Schedule 1 [30], [31], [33] and [35] make consequential amendments.

Amendments relating to stop work orders, interim protection orders and remediation directions:

Section 91AA (6) of the Principal Act provides that a person must not contravene an order under that section. Section 91G of the Principal Act provides that a person who is given notice of an interim protection order under section 91F of that Act must not contravene its terms. **Schedule 1 [38]** and **[39]** amend those provisions to provide that a person must not only not contravene such an order, or its terms, but must also not cause or permit another person to contravene such an order, or its terms.

Schedule 1 [40] inserts proposed Division 3 (being proposed sections 91J–91T) into Part 6A of the Principal Act to provide for the issue of remediation directions. Proposed section 91K provides that the Director-General may direct a person to carry out specified remediation work in a specified manner and within a specified time, if the Director-General is satisfied that any of the following has been damaged in or as a result of the commission of an offence under the Principal Act:

- (a) any land reserved under the Principal Act or acquired under Part 11 of that Act,
- (b) any critical habitat, or habitat of threatened species, an endangered population or an endangered ecological community,
- (c) any plant or animal that is of, or is part of, a threatened species, an endangered population or an endangered ecological community.

Such a direction may be given whether or not any person has been proceeded against or convicted for the offence. The specified remediation work to be carried out by a person may include one or more of the following types of work:

- (a) work to control, abate or mitigate the damage to the land, habitat, plant or animal concerned,
- (b) work to maintain, remediate or restore the damaged land, habitat, plant or animal concerned (including replacing removed or dead plants or animals).

Proposed section 91L provides that the Director-General may direct a person to carry out specified remediation work in a specified manner and within a specified time, if the Director-General is satisfied that any Aboriginal object or any Aboriginal place has been harmed in or as a result of the commission of an offence under the Principal Act. Such a direction may be given whether or not any person has been proceeded against or convicted for the offence. The specified remediation work to be carried out by a person may include one or more of the following types of work:

- (a) work to control, abate or mitigate the harm to the Aboriginal object or Aboriginal place concerned,
- (b) work to protect, conserve, maintain, remediate or restore the harmed Aboriginal object or Aboriginal place concerned.

Other provisions of the proposed Division deal with the following:

- (a) defining certain terms for the purposes of the proposed Division (proposed section 91J),
- (b) specifying the persons to whom directions may be given (proposed section 91M),
- (c) specifying other ancillary actions that may be directed to be carried out (proposed section 91N),

- (d) providing that the Director-General may direct other persons to carry out the remediation work if the original person fails to comply with a direction (proposed section 91O),
- (e) providing that a person may enter land to carry out a direction under the proposed Division, other than any part of premises used only for residential purposes except with the consent of the occupier of the premises (proposed section 91P),
- (f) providing that it is an offence to fail to comply, without reasonable excuse, with a remediation direction (proposed section 91Q),
- (g) providing that it is an offence to wilfully delay or obstruct another person who is carrying out any action in compliance with a remediation direction or who is authorised to enter land and carry out work under the proposed Division (proposed section 91R),
- (h) providing that if a person given a remediation direction complies with the direction but was not the person who caused the damage or harm concerned, the cost of complying with the direction may be recovered as a debt in court from the person who actually caused the damage or harm concerned (proposed section 91S),
- (i) providing for appeal to the Land and Environment Court from directions of the Director-General under the proposed Division (proposed section 91T).

Schedule 1 [37] makes a consequential amendment.

Schedule 1 [41] – [43] contain amendments relating to protection of fauna.

Schedule 1 [45] – [49] contain amendments increasing penalties for certain offences to include additional penalties for continuing offences.

Schedule 1 [50] contains amendment relating to management plans for protected native plants.

Schedule 1 [51] – [61] contain amendments relating to threatened species, populations and ecological communities, and their habitats, and critical habitat.

Schedule 1 [44] and [63] – [66] contain amendments relating to licensing in respect of fauna, native plants and threatened species.

Schedule 1 [67] – [74] contain amendments relating to finance.

Schedule 1 [75] – [77] contain amendments relating to leases, licences, easements etc.

Schedule 1 [78] – [115] contain other miscellaneous amendments.

Amendment to insert various new miscellaneous provisions:

Schedule 1 [116] inserts proposed sections 188A–188G into the Principal Act. Proposed section 188A provides for a general exemption from the offences under the Principal Act or its regulations for things done by authorised officers and officers of the National Parks and Wildlife Service in determining whether there has been compliance with or a contravention of this Act or the regulations.

Proposed section 188B provides that section 138 (Works and structures) of the *Roads Act 1993*, being a provision that makes it an offence to take certain actions in relation to public roads (eg erect a structure or carry out a work in, on or over a public road) does not apply to anything done under a provision of the Principal Act in relation to a Crown road that is, or is on, land reserved under that Act.

Proposed section 188C allows for the adjustment of boundaries of reserved or acquired lands. A boundary that adjoins a public road may be adjusted from time to time to enable the

boundary to follow the formed path of the road or to provide an appropriate set back from the carriageway of the road. Such an adjustment may only take place if the Director-General certifies that the adjustment will not result in any significant reduction in the size or value of lands reserved under the Principal Act.

Proposed section 188D makes provision for the maintenance or improvement of certain access roads on National Park Estate lands and enables the Minister, in certain circumstances, to determine the width of such access roads.

Proposed section 188E makes it clear that a notice or direction given, or a condition of a licence or permit imposed, under the Principal Act or the regulations that specifies a time by which, or period within which, the notice, direction or condition must be complied with continues to have effect until the notice, direction or condition is complied with even though the time has passed or the period has expired. A notice or direction, or a condition of a licence or permit, that does not specify a time by which, or period within which, the notice, direction or condition must be complied with continues to have effect until the notice, direction or condition is complied with.

Proposed section 188F provides that the Director-General is to keep a public register containing:

- (a) details of each application for an Aboriginal heritage impact permit made to the Director-General,
- (b) details of each decision of the Director-General made in respect of any such application,
- (c) details of each Aboriginal heritage impact permit issued by the Director-General,
- (d) details of each variation of an Aboriginal heritage impact permit (including the conditions of any permit),
- (e) details of each decision to suspend, revoke or approve the surrender of any such Aboriginal heritage impact permit (including details of any conditions to which it is subject),
- (f) details of each Aboriginal place declared under section 84 of the Principal Act,
- (g) details of each remediation direction under Division 3 of Part 6A of the Principal Act given by the Director-General,
- (h) details of convictions in prosecutions under the Principal Act or the TSC Act,
- (i) the results of civil proceedings before the Land and Environment Court under the Principal Act or the TSC Act,
- (j) details of such other matters as are prescribed by the regulations (relating to matters under or relevant to the Principal Act or the TSC Act).

Proposed section 188G contains provisions relating to public access to the register under proposed section 188F.

Amendments relating to criminal and other proceedings and the layout of the Principal Act:

Schedule 1 [117] inserts proposed Part 15 into the Principal Act. The amendment inserts proposed new provisions in the Principal Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence.

The proposed provisions are broadly consistent with provisions in Chapter 8 of the *Protection of the Environment Operations Act 1997*. More specifically:

- (a) proposed section 190 provides that proceedings for offences under the Principal Act or the regulations under that Act may be commenced within (but not later than) 2 years after the date on which the offence occurred or on which evidence of the alleged offence first came to the attention of any authorized officer (currently such proceedings may only be commenced within 2 years of the date on which the offence occurred), and
- (b) proposed section 194 sets out the matters that a court must take into consideration (so far as they are relevant) when imposing a penalty for an offence against the Principal Act or the regulations, and
- (c) proposed section 195 provides that offences under the Principal Act and the regulations may be continuing offences, and
- (d) proposed section 196 provides that in any proceedings under the Principal Act, the onus of proving that a person had a reasonable excuse or lawful excuse (as referred to in any provision of that Act or the regulations) lies with the defendant, and
- (e) proposed Division 3 of the new Part (proposed sections 198–206) deals with the orders that a court may make after finding an offence against the Principal Act or the regulations proved (such as restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders). **Schedule 1 [62]** makes a consequential amendment to omit a now redundant section.

The amendment also (along with the amendments in **Schedule 1 [87], [100], [103], [108]** and **[114]**) brings together a number of current provisions into the new Part for ease of use by the reader. Some of those provisions are placed in three new Divisions (proposed Division 1 (Proceedings for offences generally), proposed Division 2 (General provisions) and proposed Division 3 (Court orders in connection with offences)).

Schedule 1 [118] – [120] contain savings and transitional amendments.

Schedule 1 [123] – [126] contain amendments relating to the Aboriginal Cultural Heritage Advisory Committee.

Schedule 2: Schedule 2 [1] – [9] and [11] – [14] contain amendments of *Threatened Species Conservation Act 1995 No 101*

Amendments relating to criminal and other proceedings and *Threatened Species Conservation Act* structure:

Schedule 2 [10] inserts proposed Part 9B into the TSC Act. The amendment inserts proposed new provisions (proposed Division 3 of the Part) into that Act relating to orders that courts may make after finding an offence against that Act or the regulations under that Act proved (such as restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders). The proposed provisions are broadly consistent with provisions in Part 8.3 of Chapter 8 of the *Protection of the Environment Operations Act 1997*.

The amendment also (along with the amendments in **Schedule 2 [13]** and **[15]**) brings together a number of current provisions into the new Part for ease of use by the reader. Some of those provisions are placed in three new Divisions (proposed Division 1

(Proceedings for offences generally), proposed Division 2 (Restraining orders) and proposed Division 3 (Court orders in connection with offences)).

Amendment to insert various new miscellaneous provisions:

Schedule 2 [16] contains amendment to insert various new miscellaneous provisions.

Schedule 2 [17] contains savings and transitional amendment.

Schedule 3 contains amendments of other Acts:

Dividing Fences Act 1991 No 72

Environmental Planning and Assessment Act 1979 No 203

Forestry and National Park Estate Act 1998 No 163

Land and Environment Court Act 1979 No 204

Licensing and Registration (Uniform Procedures) Act 2002 No 28

Local Government Act 1993 No 30

Lord Howe Island Act 1953 No. 39

National Park Estate (Reservations) Act 2002 No 137

National Park Estate (Reservations) Act 2005 No 84

National Park Estate (Southern Region Reservations) Act 2000 No 103

Native Title (New South Wales) Act 1994 No 45

Plantations and Reafforestation Act 1999 No 97

State Records Act 1998 No 17

Wilderness Act 1987 No 196

Issues Considered by the Committee

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

Issue: Strict Liability – Schedule 1 [32] – proposed section 86(4) – Harming or desecrating Aboriginal objects and Aboriginal places:

23. Schedule 1 [32] inserts a new offence provision (proposed section 86) into the Principal Act to replace the offences currently in sections 86 and 90 of the Principal Act.

24. Proposed section 86(4) reads: A person must not harm or desecrate an Aboriginal place (whether or not the person knows it is an Aboriginal place). Maximum penalty: (a) in the case of an individual – 5,000 penalty units or imprisonment for 2 years, or both, or (b) in the case of a corporation – 10,000 penalty units.

25. **The Committee notes that proposed section 84(4) is a strict liability offence. Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the authorities prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.**

26. **The Committee recognises the seriousness of the offence of harm to Aboriginal places as they are culturally significant sites. The imposition of strict liability with a potential penalty of imprisonment for 2 years will generally be considered as inappropriate especially in the absence of any defences or reasonable excuse. Therefore, the Committee refers this to Parliament to consider whether the proposed section 86(4) of Schedule 1 [32] may lead to undue trespasses on personal rights and liberties with regard to its' strict liability attracting a potential penalty of imprisonment.**
27. **The Committee also notes that the proposed section 86(2) is a strict liability offence in relation to harming an Aboriginal object (whether or not the person knows it is an Aboriginal object). However, this offence does not attract a penalty of imprisonment. Furthermore, there are defences available under the proposed section 87 such as subsections (1), (2) and (3) for this offence. In particular, proposed section 86(2) provides a defence of due diligence. Accordingly, the Committee does not consider the strict liability offence provided by the proposed section 86(2) as unduly trespassing on personal rights and liberties.**

Issue: Retrospectivity – Schedule 1 [116] – proposed section 188D(9) –Validation – provisions relating to certain existing access roads on National Park Estate lands:

28. Proposed section 188D makes provision for the maintenance or improvement of certain access roads on National Park Estate lands and enables the Minister, in certain circumstances, to determine the width of such access roads.
29. Proposed section 188D(9) reads: This section is taken to have commenced on 1 January 1999 and anything done on or after that date that could have been validly done under this section had it been in force is taken to have been validly done.

30. **The Committee will always be concerned with any retrospective effect of legislation which may adversely impact on personal rights when the proposed section 188D(9) provides that the section is taken to have commenced on 1 January 1999. The Committee refers this to Parliament to consider whether the retrospective application of the proposed section 188D may adversely impact and unduly trespass on personal rights.**
31. **The Committee asks Parliament to consider whether the proposed section could include a provision that the amendment does not operate to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing at the relevant time, or to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done at the relevant time when the proposed section is taken to have commenced on 1 January 1999.**

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

Issue: Matters such as definitions which should be regarded by Parliament – Schedule 1 [2] – proposed section 5(1)(g):

32. Proposed section 5(1) make amendments to definitions for the purposes of the Principal Act, including the definition of ‘harm’ (in relation to harming an object or place) but excludes any act or omission that: (e) desecrates the object or place; or (f) is trivial or negligible; or (g) is excluded from this definition by the regulations.

33. The Committee notes that the exclusion from the definition of ‘harm’ in relation to an object or place for the purposes of the Principal Act could be re-defined and modified by regulations (subordinate legislation) under the proposed section 5(1)(g) of schedule 1 [2], and refers to Parliament to consider whether this may inappropriately delegate legislative power.

Issue: Ill-Defined and Wide Powers – Schedule 1 [117] – proposed section 204; and Schedule 2 [10] – proposed section 141M – Orders regarding monetary benefits - No default maximum of penalty:

34. Schedule 1 [117] inserts proposed Part 15 into the *National Parks and Wildlife Act 1974*. The amendment inserts proposed new provisions in the Principal Act relating to sentencing, continuing offences, orders that courts may make in connection with offences and matters relating to evidence.

35. Proposed Division 3 of the new Part 15 (proposed sections 198–206) to be inserted into the *National Parks and Wildlife Act 1974*, deals with the orders that a court may make after finding an offence against the Principal Act or the regulations proved (such as restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders).

36. Proposed section 204(1) enables the court to order the offender to pay as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.

37. Schedule 2 [10] inserts proposed Part 9B into the *Threatened Species Conservation Act 1995*. The amendment inserts new provisions (proposed Division 3 of the Part) into that Act relating to orders that courts may make after finding an offence against that Act or the regulations under that Act proved (including restoration and prevention orders, costs, expenses and compensation orders, costs and expenses of investigation orders and monetary benefits orders).

38. Similarly, proposed section 141M(1) enables the court to order the offender to pay as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.

39. **Proposed section 204(2) of Schedule 1 [117] of Division 3 of the new Part 15 to be inserted into the *National Parks and Wildlife Act 1974*, reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.**
40. **Proposed section 141M(2) of Schedule 2 [10] of Division 3 of the new Part 9B to be inserted into the *Threatened Species Conservation Act 1995*, reads that: the amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere by or under this Act.**
41. **Therefore, no default maximum amount appears to be set by the Bill for the above provisions. The Committee is concerned that the failure to provide a default maximum amount of an additional penalty may constitute ill-defined or wide powers and an inappropriate delegation of legislative power, and refers this to Parliament.**

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

42. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Minister's office that:

There are a number of reasons as to why it is anticipated that the Bill commences on proclamation rather than on assent. It is proposed that there will be two separate commencement dates. The first date, for the majority of the amendments, is anticipated to be 1 July 2010 and the second, for the remainder, would be 1 September 2010. Set out below are the reasons for the delayed commencement:

It is necessary to delay commencement initially so as to ensure good communication with impacted stakeholders about the effect of the new laws. The amendments include changes to the offence provisions in relation to Aboriginal cultural heritage and it is important that there is adequate communication about the changes. A communication strategy has been developed so that stakeholders can be informed.

It is also important to ensure that the commencement is coordinated with the making of the amendment Regulation which was tabled in Parliament with the Bill and needs to go through targeted consultation. Importantly, the new strict liability offence of harming an Aboriginal object will have a due diligence defence and it is proposed to prescribe what due diligence is through a code adopted by the Regulation. The Regulation will also contain a number of other defences and exemptions to various offences. As such the making of the Regulation is critical before those offence provisions can commence.

It is also necessary to delay the commencement date as a number of the amendments require that administrative arrangements be put in place. Firstly, DECCW needs to develop and update internal and public databases and systems to enable the commencement of a number of the proposed amendments. Secondly DECCW needs to update internal systems and processes for the administration of the new permitting system in relation to Aboriginal cultural heritage before the laws can commence.

43. The Committee accepts the advice received above and has not identified any issues regarding Clause 2.

The Committee makes no further comment on this Bill.

7. STATE SENATE BILL 2010*

Date Introduced:	25 February 2010
House Introduced:	Legislative Council
Member with Carriage	Revd the Hon F J Nile MLC
Portfolio:	Private Member

Purpose and Description

1. The object of this Bill is to authorise the use of the terms 'State Senate' as a reference to the Legislative Council and 'State Senator' as a reference to a Member of the Legislative Council

Background

2. This Bill is a private member's Bill that seeks to authorise the use of the term 'State Senate' as an alternative to 'Legislative Council'. In the Second Reading speech, Revd the Hon Fred Nile MLC advised that this change is designed to remove the connotation of the term 'Legislative Council' from its traditional role as an advisory body to the Governor. In its place, the title 'State Senate' will afford the chamber proper recognition as a legislative body by conferring onto it a title that is internationally understood.
3. In addition, this Bill seeks to authorise the use of the term 'State Senator' for any individual who is a member of the Legislative Council. In his Second Reading speech, Revd Nile advised that 'State Senator' is more contemporary and relevant than the term 'the Honourable', which is regarded as archaic.

The Bill

4. Outline of provisions

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

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

Clause 3 gives effect to the object described above.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

8. WORKERS COMPENSATION AMENDMENT (COMMISSION MEMBERS) BILL 2010

Date Introduced:	24 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carmel Tebbutt MP
Portfolio:	Health

Purpose and Description

1. The object of this Bill is to enable more than two persons to be appointed as Deputy Presidents of the Workers Compensation Commission.
2. In addition, this Bill will enable the appointment by the Minister of one or more Arbitrators as Senior Arbitrators of the Commission as well as enabling the appointment by the Minister of Senior Arbitrators and other Arbitrators on a full-time basis.

Background

3. The Workers Compensation Commission (the Commission) was established in 2002 to resolve disputes between injured workers and employers regarding workplace compensation claims.
4. Since 2002, the Commission has contracted a pool of 50 arbitrators on a sessional basis.
5. In 2008, the Commission engaged with consultants to undertake a comprehensive organisational review. Among the recommendations that emerged from that review was for the introduction of full-time salaried arbitrators as well as the creation of a new position of senior arbitrator. This Bill gives effect to these recommendations. It is envisaged that these changes will improve the Commission's effectiveness in dispute resolution and case management practices.
6. In 2004, amendments to the Bill provided for Acting Deputy Presidents to assist the two permanent Deputy Presidents with the appeal workload. Acting Deputy Presidents have been appointed every year since 2004. This Bill provides another option for addressing this issue by removing the restriction on the number of ordinary Deputy Presidents that can be appointed.

The Bill

7. Outline of provisions

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

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

Schedule 1 Amendment of *Workplace Injury Management and Workers Compensation Act 1998 No 86*

Schedule 1 [1] substitutes section 368. The substituted section enables the Minister to appoint any number of Deputy Presidents to the Workers Compensation Commission (currently only two Deputy Presidents may be appointed). The substituted section also provides that all members of the Commission are to be appointed by the Minister (currently Arbitrators are appointed by the President of the Commission).

The substituted section further provides that the Minister may appoint one or more Arbitrators to be Senior Arbitrators, either by the instrument of appointment or by some later instrument executed by the Minister.

Schedule 1 [2] provides that Senior and other Arbitrators appointed on a full-time basis are to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975*.

Schedule 1 [3]–[6] make consequential and other minor amendments relating to Arbitrators.

Schedule 2 Amendment of *Statutory and Other Offices Remuneration Act 1975 (1976 No 4)*

Schedule 2 makes a consequential amendment to the *Statutory and Other Offices Remuneration Act 1975* to provide that the Statutory and Other Offices Remuneration Tribunal (and not the Minister) is to determine the remuneration of Senior Arbitrators and other full-time Arbitrators of the Commission.

Issues Considered by the Committee

<p>8. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p>
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The Committee makes no further comment on this Bill.

Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
Casino Control Amendment Bill 2010	2
Credit (Commonwealth Powers) Bill 2010	2
Crimes (Administration of Sentences) Amendment Bill 2010	2
Crimes Amendment (Police Pursuits) Bill 2010	2
Gas Supply Amendment Bill 2009	1
Housing Amendment (Community Housing Providers) Bill 2009	1
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009	1
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010	2
National Parks and Wildlife Amendment Bill 2010	2
State Senate Bill 2010	2
Sydney Olympic Park Authority Amendment Bill 2009	1
Workers Compensation Amendment (Commission Members) Bill 2010	2

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10					2
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12		
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1		2	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1		
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8		
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7			
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13		
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		2	
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2			

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Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1			
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes Amendment (Police Pursuits)	N, R				
Gas Supply Amendment Bill 2009				N	
Housing Amendment (Community Housing Providers) Bill 2009	N				
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	

Key

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

Appendix 4: Index of correspondence on regulations

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