



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.



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# Membership

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# Functions of the 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.

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 Digest

## COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

### 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.

## COMMENT ON 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 are set out in s 9 of the *Legislation Review Act 1987*.

### 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 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 2: 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.

# Conclusions

## PART ONE - BILLS

### 1. ELECTRICITY GENERATOR ASSETS (AUTHORISED TRANSACTIONS) BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Right to freely engage in contracts and employment*

The Committee will always comment in relation to the granting of such authority to the Government which allows for the transfer of a person's employment contract to a third party. However, the Committee notes that sufficient safeguards exist in the legislation to ensure that the individual does not suffer any loss as a result of this transfer. For these reasons the Committee does not make any adverse comments in relation to this issue.

#### *Compensation/access to judicial review*

The Committee notes that clause 23(2) has the effect of limiting actions for breach of contract and other civil actions. However, clause 23(3) provides that the rights and obligations of the parties in relation to a transaction arrangement under this Bill are not affected. As such, the Committee does not make an adverse comment in relation to this issue.

#### *Compensation*

The Committee notes that clause 24(1) prohibits the payment of compensation by or on behalf of the State. However, the Committee also notes that clause 24(2) provides that clause 24(1) does not extend to parties to a transaction arrangement under the Bill. As such, the Committee does not make an adverse comment in relation to this issue.

#### *Strict liability*

Whilst the Committee will always comment on strict liability offences, the Committee notes that it is common for strict liability offences to exist with respect to corporate management offences, and that the application of the offence in Schedule 5 clause 4 is not unreasonable in the circumstances.

#### *Self incrimination and the right to silence*

Whilst the Committee notes that legislation relating to commercial arrangements will often include clauses that outline reporting duties, the Committee refers to the Parliament whether Schedule 5 clause 7 infringes on a person's right to silence and the freedom from self-incrimination.

#### *Retrospectivity*

The Committee will always be concerned to comment on a provision in the Act to make regulations that may be taken to have effect before the date of the publication of those regulations. The Committee notes that the proposed subsection 1 (4) of Schedule 6 provides safeguards insofar as it outlines that the rights and liabilities of individuals are to be protected and refers to Parliament whether this is sufficient.

**Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA**

*Proper process*

The Committee notes that this Bill contains safeguards with respect to the Treasurer's powers of direction, including that the directions operate in relation to an existing relevant authorisation that is currently in force and is subject to the same terms, conditions or endorsements, and a requirement to consult with that public sector agency before giving a direction. As such, the Committee makes no adverse comment in relation to this issue.

**Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA**

*Commencement by proclamation*

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature. The Committee recognises that appropriate administrative arrangements need to take place before the Bill can commence operation and for this reason the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power.

**2. INDUSTRIAL RELATIONS AMENDMENT (DISPUTE ORDERS) BILL 2012**

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

*Excessive Punishment*

The Committee notes the increase in penalties for contravention of dispute orders but also notes that the new penalty is comparable with equivalent provisions in other jurisdictions, notably Queensland.

**3. INDUSTRIAL RELATIONS AMENDMENT (INDUSTRIAL REPRESENTATION) BILL 2012**

The Committee makes no comment on the Bill in respect of issues set out under section 8A of the *Legislation Review Act 1987*.

**4. POLICE INTEGRITY COMMISSION AMENDMENT BILL 2012**

**Trespasses unduly on personal rights and liberties: s 8A(1)(b)(i) of the LRA**

*Retrospectivity*

The Committee will always be concerned to comment on regulations that may be taken to have effect before the date of the publication of those regulations. The Committee notes that the proposed subsection 1 (3) of Schedule 3 provides safeguards in relation to the rights and liabilities individuals and refers to Parliament whether this is a sufficient safeguard against retrospectivity.

**Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA**

*Closed justice*

The Committee is always concerned to comment when proposed legislation provides for a quasi-judicial process in private. However, the Committee notes the purpose of legislation and the factors that the Commission may consider when determining whether a hearing should be wholly or partly in public pay particular attention to the benefit to the public. In circumstances where the public benefit and the protection of an individual's reputation are matters to be considered, the Committee makes no comment in relation to this subsection.

## 5. PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT AMENDMENT BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

### *Retrospectivity*

The Committee will always be concerned with retrospective legislation that may adversely impact on any person. The Committee notes that these amendments may have an adverse impact on public sector employees who may have been preparing to bring proceedings before the Industrial Court and refers this retrospective application to Parliament.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

### *Exclude judicial review*

The Committee will always be concerned about legislation that authorises administrative decision-making but also limits the right of those directly affected by such decisions to have their views heard.

However, the Committee notes that whilst the Bill excludes the jurisdiction of the Industrial Court it does not exclude the jurisdiction of other Courts to review complaints concerning provisions under the *Public Sector Employment and Management Act 2002*.

## PART TWO - REGULATIONS

### 1. POLICE AMENDMENT (DEATH AND DISABILITY) REGULATION 2011

Pursuant to the Committee's responsibilities in relation to section 4 of the *Subordinate Legislation Act 1989*, the Committee seeks to identify the steps taken to ensure that the guidelines outlined in Schedule 1 have been complied with.

#### PROPOSED COURSE OF ACTION

That the Committee write to the Minister to ascertain what steps the Minister has undertaken to meet the requirements outlined in Schedule 1 of the *Subordinate Legislation Act 1989* with respect to this Regulation.

### 2. WATER MANAGEMENT (GENERAL) AMENDMENT (WATER SHARING PLANS) REGULATION (NO 2) 2011

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA; and

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

### *Rule of law*

Whilst the Committee notes the circumstances relating to the making of this Regulation, particularly with respect to entitlements that are to become access licences, the Committee will always comment in circumstances where regulations amend legislation. The Committee will be particularly concerned in circumstances where a regulation has the effect of amending legislation, but that amendment is not subsequently recorded in the legislation.

#### PROPOSED COURSE OF ACTION

That the Committee write to the Minister responsible as follows:

- Noting the objective of the regulation; and
- Inquiring as to whether the Minister has considered a method of achieving that objective which does not use a regulation to amend the legislation; and
- Inquiring as to whether, in circumstances where the Minister considers it appropriate to use a Regulation to amend the legislation, the Minister has considered utilising a method of statutory construction that does not involve clauses being taken to be inserted in the legislation that do not appear in the text of the legislation.

## Part One - Bills

# 1. Electricity Generator Assets (Authorised Transactions) Bill 2012

Date introduced	6 March 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Mike Baird MP
Portfolio	Treasurer

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise and provide for the transfer of the State's electricity generator assets.

### BACKGROUND

2. In 2011, a Special Commission of Inquiry into Electricity Transactions was conducted by the Hon. Brian Tamberlin, QC.
3. The Special Commission released its findings into the sale of the electricity assets of New South Wales in October 2011. The report recommended that the Government sell or lease the Delta Coastal, Delta West, Eraring and Macquarie Generation generators and power station development sites. The report also recommended the sale of the Cobbora coalmine.

### OUTLINE OF PROVISIONS

#### Part 1 Preliminary

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of assent except for Schedule 5 (Ownership restrictions in floated transaction companies) which is to commence on a day to be appointed by proclamation.
6. Clause 3 contains definitions of key terms used in the proposed Act. Schedule 1 contains other definitions. The clause defines authorised transaction to mean the transfer of electricity generator assets authorised by Part 2.

#### Part 2 Authorised transfers of electricity generator assets

7. Clause 4 authorises the transfer to the private sector of the State's electricity generator assets.
8. Clause 5 authorises the transfer of electricity generator assets between public sector agencies.

9. Clause 6 requires the proceeds of the transfer of the State's electricity generator assets, after deduction of certain amounts for debt repayment and payment of expenses, to be paid into the Restart NSW Fund.

### **Part 3 Facilitating authorised transactions**

10. Clause 7 provides that the Treasurer has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction.
11. Clause 8 provides for the establishment of statutory State owned corporations as transaction SOC's for the purposes of an authorised transaction.
12. Clause 9 provides for the establishment of companies as transaction companies for the purposes of an authorised transaction (including by means of the corporate conversion of an electricity generator or transaction SOC).
13. Clause 10 provides that each electricity generator and transaction entity (a transaction SOC or transaction company) has and may exercise all such functions as are necessary or convenient for the purposes of an authorised transaction. The clause also authorises the Treasurer to act for or on behalf of an electricity generator or transaction entity in the exercise of any of its functions for the purposes of an authorised transaction.
14. Clause 11 provides that electricity generators and transaction entities are subject to the direction and control of the Treasurer in the exercise of any of their functions for the purposes of an authorised transaction.
15. Clause 12 establishes the Electricity Assets Ministerial Holding Corporation to hold electricity generator assets acquired by it or transferred to it and to carry on any activities or business that relate to any electricity generator assets held by it.

### **Part 4 Arrangements for transfer of assets, staff and functions**

16. Clause 13 authorises the Treasurer to make vesting orders under Schedule 4 for the purposes of an authorised transaction.
17. Clause 14 provides a power for the Treasurer to transfer the employment of an employee of an electricity generator to the employment of another public sector agency for the purposes of an authorised restructuring.
18. Clause 15 deals with the transfer of electricity generator assets between public sector agencies and provides that a public sector agency to which electricity generator assets are transferred is, as the new operator of those assets, deemed to be an electricity generator and is entitled to be issued with any relevant operating licence.
19. Clause 16 provides for the Treasurer to give directions for the issue of any relevant authorisation under various laws to a person who becomes or is proposed to become the new operator of electricity generator assets pursuant to an authorised transaction.
20. Clause 17 authorises the Electricity Assets Ministerial Holding Corporation to acquire land for the purposes of an authorised transaction by agreement or compulsory acquisition that the Corporation determines to be land on which electricity generator assets of an electricity generator are situated or land used or occupied by an electricity generator.

## **Part 5 Operation of other laws**

21. Clause 18 provides that various State taxes and charges are not payable by public sector agencies in connection with transactions for the purposes of an authorised transaction and authorises the Treasurer to exempt other persons from liability for State taxes and charges in connection with an authorised transaction.
22. Clause 19 confers exemption from the Competition and Consumer Act 2010 of the Commonwealth and the Competition Code of New South Wales for agreements entered into by an electricity generator or transaction entity in connection with the management of electricity trading risks.
23. Clause 20 provides for the provisions of the proposed Act to prevail in the event of an inconsistency between the proposed Act and other State legislation.
24. Clause 21 authorises the release of information by the Auditor-General for the purposes of an authorised transaction.
25. Clause 22 exempts contracts for the sale of land from section 52A of the Conveyancing Act 1919 when entered into for the purposes of an authorised transaction.
26. Clause 23 prevents the operation of the proposed Act and the various arrangements and actions that it authorises from constituting a breach of various civil obligations.
27. Clause 24 protects the State from claims for compensation in connection with the enactment or operation of the proposed Act.

## **Part 6 Miscellaneous**

28. Clause 25 authorises the Treasurer to delegate any function of the Treasurer under the proposed Act to the Secretary of the Treasury or any other officer of the Government Service prescribed by the regulations.
29. Clause 26 provides for the proposed Act to bind the State and all other Australian jurisdictions.
30. Clause 27 provides for the operation of the proposed Act outside the State.
31. Clause 28 provides for the interpretation of the proposed Act so as not to exceed the legislative power of the State.
32. Clause 29 provides for the issue of evidentiary certificates by the Treasurer.
33. Clause 30 provides for how documents are to be given or served for the purposes of the proposed Act.
34. Clause 31 is a general regulation-making power.

## **Schedule 1 Interpretative provisions**

35. Schedule 1 contains definitions and other interpretative provisions for the purposes of the proposed Act.



### **Schedule 2 Provisions concerning transaction SOCs**

36. Schedule 2 contains special provisions for the board of directors, chief executive officer, dividends scheme and other procedures of a transaction SOC.

### **Schedule 3 Corporate conversion of electricity generators and transaction SOCs**

37. Schedule 3 provides the procedure for the corporate conversion of an electricity generator or transaction SOC to a transaction company.

### **Schedule 4 Vesting of assets, rights and liabilities**

38. Schedule 4 provides for the making of vesting orders by the Treasurer for the purposes of an authorised transaction. Vesting orders operate to vest assets, rights and liabilities of an electricity generator or transaction entity in the transferee specified in the order.

### **Schedule 5 Ownership restrictions in floated transaction companies**

39. Schedule 5 provides for a maximum shareholding restriction to be applicable to a transaction company that is sold by means of an initial public offer of shares in the company.

### **Schedule 6 Savings, transitional and other provisions**

40. Schedule 6 enacts a savings and transitional regulation-making power and contains special provisions for the transfer of power stations and associated assets operated by Eraring Energy.

### **Schedule 7 Amendment of Subordinate Legislation Act 1989 No 146**

41. Schedule 7 makes an amendment that will exempt regulations under the proposed Act from being stage repealed.

## **ISSUES CONSIDERED BY COMMITTEE**

### **Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA**

#### *Right to freely engage in contracts and employment*

42. The Bill permits the Treasurer to transfer a contract of employment for an employee of an electricity generator to the employment of another public sector agency for the purposes of an authorised transaction (clause 14).

**The Committee will always comment in relation to the granting of such authority to the Government which allows for the transfer of a person's employment contract to a third party. However, the Committee notes that sufficient safeguards exist in the legislation to ensure that the individual does not suffer any loss as a result of this transfer. For these reasons the Committee does not make any adverse comments in relation to this issue.**

#### *Compensation/access to judicial review*

43. Clause 23 prevents:
- the operation of the Act;
  - the transfer of electricity assets for the purposes of an authorised transaction;

- the entering into or performance of obligations under a transaction arrangement by a public sector agency; or,
- a disclosure of information by or on the behalf of a public sector agency for the purposes of an authorised transactions;

from being regarded as a breach of confidence, a civil wrong, a breach of an instrument, a breach of an Act which forbids disclosure of information or gives rise to any right or remedy by a party to a contract or other instrument.

**The Committee notes that clause 23(2) has the effect of limiting actions for breach of contract and other civil actions. However, clause 23(3) provides that the rights and obligations of the parties in relation to a transaction arrangement under this Bill are not affected. As such, the Committee does not make an adverse comment in relation to this issue.**

### *Compensation*

44. Clause 24 states that compensation is not payable by or on behalf of the state as a result of the enactment or operation of this Act or because of any statement of conduct relating to the enactment of this Act. The Bill defines "conduct" to include any act or omission, whether unconscionable, misleading, deceptive or otherwise. Providing a blanket denial of compensation for all acts, without regard for the circumstances,, may contravene the principle of fairness in providing compensation where a loss is suffered as a result of the actions of another.

**The Committee notes that clause 24(1) prohibits the payment of compensation by or on behalf of the State. However, the Committee also notes that clause 24(2) provides that clause 24(1) does not extend to parties to a transaction arrangement under the Bill. As such, the Committee does not make an adverse comment in relation to this issue.**

### *Strict liability*

45. The Bill includes a strict liability offence with respect to a floated company that fails to take all reasonable steps to ensure that a prohibited ownership situation does not exist at Schedule 5 clause 4. Whilst the Committee will always comment on strict liability offences, the Committee notes that it is common for strict liability to apply in corporate management offences, and that the application of the offence is not unreasonable in the circumstances.

**Whilst the Committee will always comment on strict liability offences, the Committee notes that it is common for strict liability offences to exist with respect to corporate management offences, and that the application of the offence in Schedule 5 clause 4 is not unreasonable in the circumstances.**

### *Self incrimination and the right to silence*

46. Schedule 5, clause 7 requires a person to provide to the Treasurer or a floated transaction company, information that is relevant to an ownership matter even if such information may tend to incriminate the person or expose the person to a penalty.
47. The requirement that a person provides information could infringe upon that person's right to silence as such information could incriminate them in some wrongdoing.

**Whilst the Committee notes that legislation relating to commercial arrangements will often include clauses that outline reporting duties, the Committee refers to the Parliament whether Schedule 5 clause 7 infringes on a person's right to silence and the freedom from self-incrimination.**

*Retrospectivity*

48. Schedule 6 of the Bill outlines that the Act allows for regulations to take effect from the date of assent to the Act or a later date, including provisions taking effect from a date that is earlier than the date of the publication of the regulations.

**The Committee will always be concerned to comment on a provision in the Act to make regulations that may be taken to have effect before the date of the publication of those regulations. The Committee notes that the proposed subsection 1 (4) of Schedule 6 provides safeguards insofar as it outlines that the rights and liabilities of individuals are to be protected and refers to Parliament whether this is sufficient.**

**Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA**

*Proper process*

49. Clause 16 of the Bill permits the Treasurer to give directions to a public sector agency for or with respect to the grant of any relevant authorisation including directions for the displacement or modification of any provision of a relevant law in its application to the grant of any such relevant authorisation.

**The Committee notes that this Bill contains safeguards with respect to the Treasurer's powers of direction, including that the directions operate in relation to an existing relevant authorisation that is currently in force and is subject to the same terms, conditions or endorsements, and a requirement to consult with that public sector agency before giving a direction. As such, the Committee makes no adverse comment in relation to this issue.**

**Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA**

*Commencement by proclamation*

50. The Bill provides for Schedule 5 to commence on a day to be appointed by proclamation. This may delegate to the Executive the power to commence the proposed Act on whatever day it chooses or not at all.

**The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature. The Committee recognises that appropriate administrative arrangements need to take place before the Bill can commence operation and for this reason the Committee does not regard the commencement by proclamation to be an inappropriate delegation of legislative power.**

## 2. Industrial Relations Amendment (Dispute Orders) Bill 2012

Date introduced	6 March 2012
House introduced	Legislative Council
Minister responsible	The Hon. Greg Pearce MLC
Portfolio	Finance and Services

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Industrial Relations Act 1996* to increase the maximum monetary penalties that may be imposed for a contravention of a dispute order by either an employer or by employees, and to enable costs to be awarded for the proceedings that relate to such contraventions.
2. The Bill also enables appeals to be made to the Court of Appeal on a question of law against penalties imposed, or other actions taken, by the Industrial Relations Commission in Court Session for contraventions of dispute orders.

### BACKGROUND

3. This Bill is in response to Government concerns that certain industrial organisations have been proceeding with industrial action despite direct orders from the Industrial Relations Commission to cease or refrain from doing so.
4. The Minister advised during his Second Reading Speech that strengthening the provisions of the *Industrial Relations Act 1996* to allow for greater penalties would have a greater deterrent effect thereby dissuading further unauthorised industrial action.

### OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
7. Schedule 1 [2] increases the maximum monetary penalty that may be imposed for a breach of a dispute order for a first offence to \$110,000 for the first day of an offence and \$55,000 for each subsequent day the offence continues (the current amounts are \$10,000 and \$5,000, respectively). The new maximum penalty for a subsequent breach will be \$220,000 for the first day of an offence and \$110,000 for each subsequent day the offence continues (the current amounts are \$20,000 and \$10,000, respectively).
8. Schedule 1 [3] removes the prohibition on the awarding of costs in proceedings of the Industrial Relations Commission in Court Session for a contravention of a dispute order.
9. Schedule 1 [5] confers on a party to proceedings for a contravention of a dispute order a right to appeal, with leave, to the Court of Appeal on a question of law of public

importance relating to a penalty imposed or other action taken by the Industrial Relations Commission. Dispute orders can be made against parties to industrial disputes, members, officers and employees of industrial organisations and persons engaged in secondary boycotts in connection with industrial disputes. The right to appeal to the Court of Appeal will only operate after any rights of appeal to the Full Bench of the Industrial Relations Commission in Court Session have been exhausted. On an appeal the Court of Appeal may remit the matter to the Full Bench of the Commission for determination in accordance with the decision of the Court of Appeal. Schedule 1 [1] and [4] make consequential amendments.

10. Schedule 1 [6] enables regulations containing savings and transitional provisions to be made consequent on the enactment of the proposed Act.
11. Schedule 1 [7] applies the amendments made by the proposed Act to proceedings for contraventions of dispute orders that occur on or after the day the proposed Act commences, whether or not the dispute order concerned was made before that day.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Excessive Punishment*

12. Schedule 1 [2] of the Bill provides that an industrial organisation or employer could be liable for a \$110,000 maximum penalty for the first day of a contravention of a dispute order that prohibits industrial action, and \$55,000 for each subsequent day.
13. The Committee notes that proposed penalties will be an eleven-fold increase compared with the current penalties. However, the Committee also notes that the new penalty is comparable with equivalent provisions in other jurisdictions, notably Queensland.

**The Committee notes the increase in penalties for contravention of dispute orders but also notes that the new penalty is comparable with equivalent provisions in other jurisdictions, notably Queensland.**

### 3. Industrial Relations Amendment (Industrial Representation) Bill 2012

Date introduced	6 March 2012
House introduced	Legislative Council
Minister responsible	The Hon. Greg Pearce MLC
Portfolio	Finance and Services

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Industrial Relations Act 1996* to enable industrial representation of the same or overlapping classes or groups of employees, bailees or contractors by one or more industrial organisations or associations, subject to safeguards relating to demarcation disputes.

#### BACKGROUND

2. At present, overlapping coverage of employees by industrial organisations is not provided for in State legislative arrangements. In his Second Reading Speech, the Minister responsible noted his concerns that without such arrangements, there is an inherent lack of competition between industrial organisations and consequentially, a lack of choice afforded to clients.
3. The amendments provided for in this Bill will harmonise industrial relations provisions with the current Commonwealth provisions of the *Fair Work (Registered Organisations) Act 2009* and equivalent provisions in its predecessor statutes that have been in place since 1996.

#### OUTLINE OF PROVISIONS

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
6. Schedule 1 [1] and [2] enable an organisation to be registered as an organisation of employees only if there is no other industrial organisation of employees to which members of the organisation might belong or, if there is such an organisation, it is not one to which the members could more conveniently belong or that would more effectively represent the members. An organisation may be registered even if there is such another organisation if it provides, and the Industrial Registrar accepts, an undertaking to avoid demarcation disputes arising from the overlapping registration. Currently, an organisation of employees cannot be registered if there is any other industrial organisation of employees to which the members might conveniently belong.
7. Schedule 1 [3] confers on the Industrial Registrar an express power to alter the rules of an organisation of employees, so as to remove the power to represent a class or group

of employees that are represented by another organisation, if the organisation breaches a demarcation dispute undertaking.

8. Schedule 1 [4] amends the provisions about consent to alterations of rules of industrial organisations of employees relating to eligibility for membership to reflect the changes to the circumstances in which registration may be granted where representation is possible by more than one organisation. As with consent to registration, the Industrial Registrar may accept an undertaking by the organisation seeking the rule change to avoid demarcation disputes arising from the overlapping registration. The Industrial Registrar may refuse to consent to a rule alteration if the alteration would contravene an agreement or understanding to which the organisation is a party that deals with its right to represent the industrial interests of a particular class or group of employees. Schedule 1 [5] makes a consequential amendment.
9. Schedule 1 [6] prevents the Industrial Relations Commission from making a determination as to the demarcation of the industrial interests of industrial organisations of employees unless it is satisfied that there is conduct or threatened conduct of an organisation, or an officer, employee or member of an organisation, that is preventing, obstructing or restricting the performance of work or is likely to have that effect. The Commission will also be required to consider other matters before making a demarcation order, including the wishes of affected employees, the effect of the order on employers, any agreement relating to industrial representation and any other demarcation orders applicable to the organisation concerned that are relevant.
10. Schedule 1 [7] enables an objection to registration of an association of contract carriers or contract drivers to be made on the ground that there is already an association to which the bailees or carriers concerned could more conveniently belong and that would more effectively represent those members. Currently an objection can be made if the members are already represented or there is an association to which they might conveniently belong.
11. Schedule 1 [8] enables the Industrial Registrar to register an association of contract drivers or contract carriers, even though an overlapping registration objection has been made out, if the applicant provides an undertaking to avoid demarcation disputes arising from the overlapping registration. The Industrial Registrar may refuse to accept an undertaking if registration would contravene an agreement or understanding to which the association is a party that deals with its right to represent the interests of a particular class or group of bailees or carriers.
12. Schedule 1 [9] requires the Industrial Relations Commission to have regard to any demarcation dispute undertaking, and any breach of such an undertaking, when determining any question as to the demarcation of the interests of associations in the regulation of conditions of contracts.
13. Schedule 1 [10] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

## ISSUES CONSIDERED BY COMMITTEE

**The Committee makes no comment on the Bill in respect of issues set out under section 8A of the *Legislation Review Act 1987*.**

## 4. Police Integrity Commission Amendment Bill 2012

Date introduced	7 March 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell MP
Portfolio	Premier

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Police Integrity Commission Act 1996*:
  - (a) to give equal prominence to the functions of the Police Integrity Commission (*the PIC*) of preventing corrupt conduct of administrative officers of the NSW Police Force and misconduct of NSW Crime Commission officers as is given to the function of preventing police misconduct; and
  - (b) to give guidance to the PIC in relation to the factors that are to be taken into account when it determines whether to conduct a hearing into a matter in private or in public; and
  - (c) to ensure that certain senior officers are under a duty to report all of the types of conduct referred to in paragraph (a) to the PIC; and
  - (d) to clarify the way in which the Inspector of the PIC is to carry out certain functions; and
  - (e) to ensure that a person about whom an adverse comment is to be made in a report prepared by the PIC or the Inspector of the PIC is given the grounds on which the comment is made and an opportunity to make submissions before the comment is included in the report.

### BACKGROUND

2. In November 2011, the Department of Premier and Cabinet published a review into the policy objectives and terms of the *Police Integrity Commission Act 1996*. The recommendations outlined in the review incorporated recommendations the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission had previously made.
3. This Bill seeks to implement the recommendations outlined in the November 2011 report.

### OUTLINE OF PROVISIONS

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



## Schedule 1 Amendment of Police Integrity Commission Act 1996 No 28

### *Investigative functions of the PIC*

6. Schedule 1 [1] amends section 3 of the Act to ensure that the objects of the Act give equal prominence to the functions of the PIC of preventing corrupt conduct of administrative officers of the NSW Police Force and misconduct of NSW Crime Commission officers as is given to the function of preventing police misconduct.
7. Schedule 1 [2] amends section 4 of the Act to define the term *officer misconduct* as meaning police misconduct, corrupt conduct of an administrative officer of the NSW Police Force or misconduct of a NSW Crime Commission officer.
8. Schedule 1 [5] substitutes section 13 of the Act and repeals sections 13A and 13B of the Act to combine the current provisions relating to preventing police misconduct (current section 13), preventing corrupt conduct of administrative officers of the NSW Police Force (current section 13A) and preventing misconduct of NSW Crime Commission officers (current section 13B) into one section dealing with officer misconduct. Section 13C of the Act which enables the allocation of the PIC's functions in relation to NSW Crime Commission officers by the Commissioner of the PIC to other staff of the PIC is also repealed. Those functions will be the subject of delegations made in accordance with section 11 of the Act in line with the PIC's functions in relation to police officers and administrative officers of the NSW Police Force.
9. Schedule 1 [3] and [4] make consequential amendments.

### *Duty of senior officers to report misconduct*

10. Currently, sections 75B and 75D of the Act contain requirements for specified senior officers (such as the Commissioner of Police and principal officers of public authorities) to notify the PIC of corrupt conduct of administrative officers of the NSW Police Force and misconduct of NSW Crime Commission officers. No such duty is imposed in relation to the notification of police misconduct.
11. Schedule 1 [7]–[9] repeal sections 75B and 75D and insert proposed Part 4C into the Act. The new Part will impose a duty on specified senior officers to notify all officer misconduct to the PIC.

### *Functions of Inspector of the PIC*

12. Schedule 1 [10] amends section 89 of the Act to include as a function of the Inspector of the PIC dealing with conduct amounting to maladministration by the PIC or officers of the PIC, including (without limitation) delay in the conduct of investigations and unreasonable invasions of privacy.
13. Schedule 1 [11] and [13] amend sections 89 and 101, respectively, to clarify the powers of the Inspector of the PIC to make recommendations and reports so that those powers are in line with powers conferred on the Inspector of the Independent Commission Against Corruption under the *Independent Commission Against Corruption Act 1988*.
14. Schedule 1 [12] makes a consequential amendment.

*Other amendments*

15. Schedule 1 [6] amends section 33 to specify certain criteria that the PIC is to consider when determining whether to conduct a hearing wholly or partly in public.
16. Schedule 1 [14] inserts section 137A into the Act to require the PIC and the Inspector of the PIC, before including an adverse comment about a person in a report, to give the person an opportunity to make submissions.
17. Schedule 1 [15] and [16] amend section 146 of the Act to require a review of the Act to be undertaken within 5 years after the date of assent to the proposed Act.
18. Schedule 1 [17] and [18] contain savings and transitional provisions.

**ISSUES CONSIDERED BY COMMITTEE**

**Trespasses unduly on personal rights and liberties: s 8A(1)(b)(i) of the LRA**

*Retrospectivity*

19. Clause 17 of the Bill outlines that Schedule 3 (1) of the Act be amended to allow for regulations to take effect from the date of assent to the Act or a later date, including provisions taking effect from a date that is earlier than the date of the publication of the regulations.

**The Committee will always be concerned to comment on regulations that may be taken to have effect before the date of the publication of those regulations. The Committee notes that the proposed subsection 1 (3) of Schedule 3 provides safeguards in relation to the rights and liabilities individuals and refers to Parliament whether this is a sufficient safeguard against retrospectivity.**

**Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA**

*Closed justice*

20. Clause 6 of the Bill seeks to insert a new subsection 33 (3A). This subsection outlines the factors that the Commission is to consider when determining whether or not it is in the public interest to conduct a hearing wholly or partly in public.

**The Committee is always concerned to comment when proposed legislation provides for a quasi-judicial process in private. However, the Committee notes the purpose of legislation and the factors that the Commission may consider when determining whether a hearing should be wholly or partly in public pay particular attention to the benefit to the public. In circumstances where the public benefit and the protection of an individual's reputation are matters to be considered, the Committee makes no comment in relation to this subsection.**

## 5. Public Sector Employment and Management Amendment Bill 2012

Date introduced	7 March 2012
House introduced	Legislative Assembly
Minister responsible	The Hon Barry O'Farrell MP
Portfolio	Premier

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Public Sector Employment and Management Act 2002*:
  - (c) to revise the provisions of that Act relating to excess officers of Public Service Departments and the circumstances in which the services of those officers may be dispensed with, and
  - (d) to exclude the unfair contracts jurisdiction of the Industrial Relations Commission in connection with any such excess officers and any excess employees of other public sector agencies, and
  - (e) to require the heads of public sector agencies to develop and implement performance management systems for their staff and to require the Public Service Commissioner to issue guidelines for that purpose.

### BACKGROUND

2. This Bill seeks to update the *Public Sector Employment and Management Act 2002* to introduce performance management systems and to ensure that provisions relating to excess employees are clear.
3. Under the Bill the Public Service Commissioner is required to issue guidelines on the essential elements of performance management systems. It was stated in the Agreement in Principle speech that performance management systems should not solely focus on poor or unsatisfactory performance but also recognise achievements, provide training and give feedback on results.
4. The Bill also amends the *Public Sector Employment and Management Act 2002* to ensure that provisions relating to excess employees are clear and practical to implement. In June 2011 the Government announced a new policy on managing excess employees which came into effect in August 2011. The Bill seeks to amend the *Public Sector Employment and Management Act 2002* to clearly enunciate the intentions of the new policy.

### OUTLINE OF PROVISIONS

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

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

### **Schedule 1 Amendment of Public Sector Employment and Management Act 2002**

7. Schedule 1 [2] substitutes section 56 to revise the current provisions of the Act relating to excess officers of Public Service Departments and the circumstances in which the services of those officers may be dispensed with. The revised provisions:
  - (a) require the Department Head to take all practicable steps to find an on-going position in the public sector for an excess officer, rather than any employment in the public sector, and
  - (b) enable the Department Head to dispense with the services of an excess officer if such a position is not found, rather than if useful work in the public sector cannot be found, and
  - (c) deal with excess officers arising in connection with the functions and activities of a part of a Department as well as of the whole of a Department.
8. Schedule 1 [3] makes a comparable amendment about placement in an on-going public sector position in connection with officers who are paid excessive salaries for the work performed in their current positions.
9. Schedule 1 [4] requires the heads of public sector agencies to develop and implement performance management systems for their staff and requires the Public Service Commissioner to issue guidelines for that purpose. Schedule 1 [1] makes a consequential amendment.
10. Schedule 1 [5] excludes the unfair contracts jurisdiction of the Industrial Relations Commission in connection with excess officers of Public Service Departments and excess employees of other public sector agencies. Schedule 1 [6] makes a consequential amendment.
11. Schedule 1 [7] authorises the making of savings and transitional regulations consequent on the enactment of the proposed Act.
12. Schedule 1 [8] enacts specific savings and transitional provisions to extend the exclusion of the unfair contracts jurisdiction to existing excess employees and to proceedings instituted after the giving of notice for the introduction of this Bill into Parliament. issues considered by committee

### **Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA**

#### *Retrospectivity*

13. The Bill inserts provisions which exclude Division 2 of Part 9 of Chapter 2 of the *Industrial Relations Act 1996* (Unfair contracts). Clause 8 of the Bill provides that these provisions commence on the date that notice was given in Parliament for the introduction of the Bill.

**The Committee will always be concerned with retrospective legislation that may adversely impact on any person. The Committee notes that these amendments may have an adverse impact on public sector employees who may have been preparing to bring proceedings before the Industrial Court and refers this retrospective application to Parliament.**

**Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA**

*Exclude judicial review*

**The Committee will always be concerned about legislation that authorises administrative decision-making but also limits the right of those directly affected by such decisions to have their views heard.**

**However, the Committee notes that whilst the Bill excludes the jurisdiction of the Industrial Court it does not exclude the jurisdiction of other Courts to review complaints concerning provisions under the *Public Sector Employment and Management Act 2002*.**

## Part Two - Regulations

# 1. Police Amendment (Death and Disability) Regulation 2011

### PURPOSE AND DESCRIPTION

1. Part 9B of the *Police Act 1990*, as inserted by the *Police Amendment (Death and Disability) Act 2011* (the amending Act), rescinds the Crown Employees (Police Officers Death and Disability) Award 2005 and provides for death and disability payments to police officers in accordance with an approved death and disability insurance policy. The amending Act makes savings and transitional provisions for the continuation of existing death and disability payments, subject to any savings or transitional regulations. The objects of this Regulation are to amend the Police Regulation 2008:
  - (a) to specify the minimum scale for calculating total and permanent disability payments to police officers that must be provided under an approved death and disability insurance policy; and
  - (b) to alter the savings and transitional provisions so as to extend the continuation of lump sum payments for partial and permanent disability for police officers who had been medically assessed but not discharged before the commencement of the amending Act (and to restrict those provisions to police officers who are discharged within 12 months after the commencement of the amending Act); and
  - (c) to confirm that police officers who are contributors to the State Authorities Superannuation Fund and are covered by the additional benefit under the *State Authorities Superannuation Act 1987* are required to contribute to the cost of an approved death and disability insurance policy in order to receive income protection coverage under such a policy (and to confirm that they and other police officers to whom the policy is to apply are required to contribute from the commencement of the amending Act), and (d) to extend the savings and transitional provisions relating to existing payments to police officers who are contributors to the State Authorities Superannuation Fund and are covered by the additional benefit under the *State Authorities Superannuation Act 1987*.
2. This Regulation is made under the *Police Act 1990*, including sections 199G and 219 (the general regulation-making power).

### ISSUES CONSIDERED BY COMMITTEE

The requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or the guidelines and requirements in Schedules 1 and 2 of that Act appear not to have been complied with: s 9(1)(b)(viii) of the LRA

**Pursuant to the Committee's responsibilities in relation to section 4 of the *Subordinate Legislation Act 1989*, the Committee seeks to identify the steps**

**taken to ensure that the guidelines outlined in Schedule 1 have been complied with.**

#### **PROPOSED COURSE OF ACTION**

**That the Committee write to the Minister to ascertain what steps the Minister has undertaken to meet the requirements outlined in Schedule 1 of the *Subordinate Legislation Act 1989* with respect to this Regulation.**

## 2. Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make provision with respect to entitlements under the *Water Act 1912* that authorise the taking of water from certain water sources in the Boarder Rivers, Central West, Gwydir, Namoi and Western Water Management Areas, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the *Water Management Act 2000*.
2. This Regulation is made under the *Water Management Act 2000*, including section 400 (the general regulation-making power) and clause 1 of Schedule 9.

### ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA; and

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

#### *Rule of law*

3. The Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 inserts division 15 into Schedule 4, Part 2 of the Water Management (General) Regulation 2011. Clause 84D outlines that subclauses are taken to be inserted after clause 4; clause 4(4); and clause 5(4) of Schedule 10 to the Act. As such, the regulation has the effect of amending legislation.
4. Whilst clauses are "taken to be inserted", such clauses do not appear in the legislation.

**Whilst the Committee notes the circumstances relating to the making of this Regulation, particularly with respect to entitlements that are to become access licences, the Committee will always comment in circumstances where regulations amend legislation. The Committee will be particularly concerned in circumstances where a regulation has the effect of amending legislation, but that amendment is not subsequently recorded in the legislation.**

### PROPOSED COURSE OF ACTION

That the Committee write to the Minister responsible as follows:

- Noting the objective of the regulation; and
- Inquiring as to whether the Minister has considered a method of achieving that objective which does not use a regulation to amend the legislation; and



- **Inquiring as to whether, in circumstances where the Minister considers it appropriate to use a Regulation to amend the legislation, the Minister has considered utilising a method of statutory construction that does not involve clauses being taken to be inserted in the legislation that do not appear in the text of the legislation.**

# Appendix One – Index of Ministerial Correspondence on Bills

The Committee currently has no ministerial correspondence on Bills.

## Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

The Committee currently has no correspondence in respect of Regulations on which it has reported.