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Legislation Review Committee

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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 3).

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 3).

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

1. Building and Construction Industry Long Service Payments Amendment Bill 2009

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

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

2. Gas Supply Amendment Bill 2009

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

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

3. Housing Amendment (Community Housing Providers) Bill 2009

Issue: Denial Of Compensation – Schedule 1 [11] – Division 6 – proposed section 67T – Provisions relating to operation of Divisions 4 and 5; and proposed section 67V – No compensation payable by Crown:

17. The Committee accepts the above advice and reasons provided by Housing NSW concerning the proposed section 67T and the proposed section 67V of Division 6 of Schedule 1 [11]. The Committee does not find, in this instance, an undue trespass on individual rights or liberties.

4. James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009

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

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

5. Sydney Olympic Park Authority Amendment Bill 2009

Issue: Property – use or enjoyment of land (emission of noise) – Schedule 1 [7] Amendment of *Sydney Olympic Park Authority Act 2001* - proposed section 48A - Legal proceedings and other noise abatement action; Schedule 2 Amendment of *Protection of the Environment Operations (General) Regulation 2009* – proposed clause 95A – Noise control – Sydney Olympic Park:

13. The Committee also notes that proposed section 48A (3) states that this proposed section does not apply to or in respect of noise that exceeds the maximum permissible noise level at the closest residential façade. Proposed subsection 48A (5) defines the maximum permissible noise level. The Committee observes that the insertion of proposed clause 95A in Schedule 2 applies only if the Director-General has approved a noise management plan for Sydney Olympic Park and the activities are carried out in accordance with that noise management plan.

14. The Committee weighs up the general public interest and the temporary nature of a specific major event. The Committee also takes into consideration of the above with respect to the proposed section 48A of Schedule 1 [7] as not applying in respect of noise that exceeds the maximum permissible noise level at the closest residential façade, and that Schedule 2 (proposed clause 95A in the *Protection of the Environment Operations (General) Regulation 2009*) as only applying if there is an approved noise management plan for Sydney Olympic Park. Therefore, the Committee refers to Parliament to consider whether Schedule 1 [7] and Schedule 2 unduly trespass on personal rights and liberties.

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

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

Part One – Bills

SECTION A: Comment on Bills

1. BUILDING AND CONSTRUCTION INDUSTRY LONG SERVICE PAYMENTS AMENDMENT BILL 2009

Date Introduced:	3 December 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Robertson MLC
Portfolio:	Industrial Relations

Purpose and Description

1. The object of this Bill is to make amendments to the Building and Construction Industry Long Service Payments Act 1986 (**the Principal Act**) as follows: to provide for notification by employers to the Building and Construction Industry Long Service Payments Corporation (***the Corporation***) of the employment of workers performing building and construction work, to clarify the process of registering workers for the purposes of the Principal Act, including enabling the Corporation to register workers on the Corporation's own initiative, to clarify the effect of the cancellation or suspension of registration of such workers, and to remove the requirement that an employer provide a worker with a certificate of service at the end of each financial year, after the worker ceases employment and at other specified times.

2. The Bill also aims to clarify how the number of days' service of part-time workers is to be calculated, to provide that the Corporation is not required to serve an annual notice of service credits on a person whose registration has been cancelled, and to provide a maximum period of 38 hours per week for calculating long service payments.

3. The Bill provides a right of appeal to the Building and Construction Industry Long Service Payments Committee (***the Committee***) for a worker or employer who is dissatisfied with the calculation of a payment and requires that that persons contracting with a Crown instrumentality must provide the Crown instrumentality with evidence that the relevant long service levies have been paid. Further, the Corporation may pay a long service levy refund to a person other than the person who paid the long service levy if, in the Corporation's opinion, it is in the interests of justice to do so.

Background

4. *The Building and Construction Industry Long Service Payments Act 1986* was established to compensate for the transient nature of building and construction work which makes workers in this industry eligible for long service leave.

5. The scheme ensures that all building and construction workers are entitled to a long service leave payment after working in the industry for a cumulative 10 year period or beyond. Benefits are also payable to workers upon retirement, permanent incapacity and death after 55 days of work have been recorded in the scheme.

6. The scheme does not impose a direct cost to employers or workers as it is funded by a levy on building projects costed at above $25,000.

7. This Bill updates the 1986 Act to recognise a number of key changes. Firstly, it accommodates changes at the Commonwealth level such as the requirements of the new Federal *Fair Work Act 2009*. Secondly the Bill reflects technological shifts to online service delivery and a streamlined registration and reporting process. Thirdly the Bill clarifies the registration process, including an employer's obligation to advise the corporation of the commencement date etc of a worker within seven days of his/her commencement.

8. The Bill contains a reserve regulatory power to set minimum and maximum limits on pay rates used to calculate long service payments in order to prevent potential abuse by companies setting above industry award payments for friends or family. The appropriate level of maximum pay is yet to be determined and will be done in consultation between the Minister and the Industry Committee.

9. In 2007 the NSW Audit Office raised concerns about the large numbers of inactive workers on the register. In early 2009 a bulk cancellation of 150,000 inactive members was undertaken. Accordingly, the Bill extends the rights of appeal to challenge a decision to cancel registration or refuse service credits.

10. The Bill also clarifies the calculation of service credits for part-time workers and enables the corporation to determine the person to whom a refund of a long service levy is to be paid as a result of the large number of homebuilders going into administration or liquidation.

11. According to the Agreement in Principle Speech this amendment Bill "follows an extensive consultation process with the industry over a number of years and represents changes that are driven by business needs. It is fully supported by both workers and employers in the building and construction industry".

The Bill

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
Clause 3 repeals the *Building and Construction Industry Long Service Payments Amendment Act 1998*.

Schedule 1 Amendment of Building and Construction Industry Long Service Payments Act 1986 No 19

Schedule 1 [1] substitutes the definition of ***Commonwealth industrial instrument*** in the Principal Act to take account of changes to Commonwealth legislation. Under the proposed new definition, the regulations specify awards, workplace agreements or other agreements under Commonwealth legislation (or classes of them) for the purposes of the definition.

Schedule 1 [2] and [27] make law revision amendments to take account of the change of name of "Employers First" to the "Australian Federation of Employers and Industries".
Schedule 1 [4] and [5] make amendments relating to the registration of workers in the building and construction industry long service payments scheme under the Principal Act (***the scheme***). Currently, a building and construction worker may apply for registration, but section 16 (2) of the Principal Act also provides that an employer must apply for registration of the employer's workers within 7 days after the worker commences to perform building and construction work (unless the worker is already registered or an application for registration is pending).
Schedule 1 [4] and [5] omit section 16 (2) of the Principal Act and insert instead proposed section 16A to provide that an employer of a building and construction worker must notify the Corporation within 7 days after the worker commences to perform building and construction work.
Schedule 1 [5] also substitutes section 17 (Registration) of the Principal Act to enable the Corporation to register a person as a worker under the scheme in response to an application by the person or on the Corporation's own initiative.
Schedule 1 [5] makes further law revision amendments to modernise the language used in relation to registration. Under the new provisions a person comes under the scheme by being "registered" rather than having the person's "registration approved". **Schedule 1 [3], [6], [23] and [24]** make consequential amendments.
Schedule 1 [7] and [8] make law revision amendments that omit archaic language that refer to the cancellation of registration by the removal of a name from the register. In future a person's registration is simply "cancelled".
Section 19 (1B) of the Principal Act provides that a worker's registration may be suspended in certain circumstances. **Schedule 1 [9]** inserts provisions to clarify the effect of such a suspension.
Schedule 1 [10] removes the requirement that an employer of a worker provide a worker with a certificate of service at the end of each financial year, after the worker ceases employment and at such other times specified by the Corporation. It is noted that workers are served with an annual notice of their service credits under section 25 of the Principal Act and can also view their accumulated service credits on the Corporation's website at any time.
Schedule 1 [11] makes an amendment to provide that, when calculating the number of days' service for part-time workers, the Corporation is to:
(a) count any day on which the registered worker performed building and construction work for more than half the worker's ordinary work day as a full day of employment, and (b) disregard any day on which the registered worker performed non-building and construction work for more than half the worker's ordinary work day.
Schedule 1 [12] removes a redundant provision. **Schedule 1 [13]** makes a law revision amendment.
Schedule 1 [14] makes an amendment to provide that the Corporation is not required to serve an annual notice of service credits on a person whose registration has been cancelled or whose registration, in the opinion of the Corporation, is likely to be cancelled. If the Corporation has not served a notice on a person because the person's registration was likely to be cancelled and by the following 30 June the person's registration has not been cancelled, the Corporation must, as soon as possible, ensure that the relevant notice is served on the person.
Schedule 1 [15] and [16] provide that when calculating long service payments, a maximum figure of 38 hours per week (or such other period as is prescribed by the regulations) is to be used as the hours in which ordinary pay is payable for the worker concerned.
Schedule 1 [17] provides that when calculating a reimbursement payment to be paid

to an employer who has provided alternative benefits to a worker (such as a long service payment under another long service leave scheme), the calculation is not to include the number of any days' service that the employer notified to the Corporation more than 2 years after the time required by section 20 of the Principal Act. This provision will not have effect until 1 July 2011.

Schedule 1 [18] provides that an employer who has provided alternative benefits to a worker (such as a long service payment under another long service leave scheme) is entitled to be paid a reimbursement payment under section 32 of the Principal Act in respect of a worker whose registration has been cancelled.

Schedule 1 [19] provides that, for the purpose of calculating long service payment amounts under sections 29 and 32 of the Principal Act, the regulations may make provision for the determination of minimum and maximum amounts for the rate of pay to be used in the calculation. The Minister administering the Principal Act is to consult with the Committee before recommending the making of such a regulation. The Committee is to advise and make recommendations to the Minister on the operation of, and any amendment to or repeal of, any such regulation.

The proposed section also provides that if an amount of a long service payment to a worker or a payment to an employer is, because of the operation of such a regulation, less than the amount it would have been in the absence of the regulation, the Corporation is to notify the worker or employer in writing of that fact and give an explanation of the operation of the regulation.

Schedule 1 [25] provides that a worker or employer who has received such a notification and is dissatisfied with the calculation of the long service payment may appeal to the Committee. The Committee, in determining the appeal, may confirm the calculation of the long service payment or set it aside and make a new calculation in substitution for that calculation. Section 38 of the Principal Act provides that where the Crown enters into a contract with a person to erect a building (or execute part of the work of erecting the building) that contractor (and not the Crown) is liable to pay any relevant long service levy.

Schedule 1 [20] inserts a new section to provide that where section 38 applies, it is the duty of the Crown instrumentality concerned to withhold any instruction to, or permission, approval or authorisation for, the person to commence work under the contract, unless the person has produced to the Crown instrumentality evidence that the long service levy due in respect of the building has been paid by the person (such as a receipt from the Corporation). The proposed new section also provides that it is the duty of the Crown instrumentality to keep a copy of any such evidence for at least 6 years after it was produced.

Section 42 (6) of the Principal Act allows persons to apply for a refund of certain long service levies paid in error. Such an application must be made within 3 months after the payment concerned was made, or within such further time as the Corporation may in a particular case allow. **Schedule 1 [21]** makes an amendment to increase the time within which such an application must be made from 3 months to 12 months (or such other period as may be prescribed by the regulations) after the payment concerned was made.

Schedule 1 [22] inserts new provisions into the Principal Act to provide that the Corporation may pay a refund under section 42 of that Act to a person other than the person who paid the long service levy if, in the Corporation's opinion, it is in the interests of justice to do so.

Schedule 1 [26] provides that the personal representative of a deceased worker may make certain appeals under the Principal Act on behalf of the person.

Schedule 1 [28] and [29] make amendments of a savings and transitional nature.

Issues Considered by the Committee

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

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

12. 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: "commencement is by proclamation rather than on asset as commencement of certain provisions of the Bill will be deferred to a later date".

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

The Committee makes no further comment on this Bill.

2. GAS SUPPLY AMENDMENT BILL 2009

Date Introduced:	3 December 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Peter Primrose MLC
Portfolio:	Regulatory Reform, Minister for Mineral Resources

Purpose and Description

1. The object of this Bill is to implement the recommendations contained in the Review Report: Reforming arrangements for regulating gasfitting, gas installations and appliances, published by the Better Regulation Office in June 2009, by:

   (a) amending the *Gas Supply Act 1996* to allow for the responsibility for standards and requirements relating to gasfitting work and autogas work to be transferred to the Minister for Fair Trading, and

   (b) clarifying that a gas installation begins at the gas meter and ensuring that the definition of gas installation is consistent in the *Gas Supply Act 1996* and the regulations made under that Act, and

   (c) clarifying that gasfitting work does not include the connection of a gas container, gas regulator or gas appliance to, or the disconnection of a gas container, gas regulator or gas appliance from, a gas installation where it is designed to be readily detachable from the installation whether by the use of a tool, mechanical force or otherwise.

2. It is intended that the recommendations in the report also be implemented by way of amendments to the regulations made under the *Gas Supply Act 1996*. It is also anticipated that the amendments to the regulations will also re-organise and consolidate the regulatory framework.

Background

3. The Bill amends the *Gas Supply Act 1996* to consolidate regulatory authority for gasfitting, autogas mechanics, gas installations and gas appliances within the Office of Fair Trading. The Bill implements recommendations of the Better Regulation Office in its Review Report (June 2009), which was conducted in consultation with the four government agencies involved in gas regulation in NSW as well as key industry stakeholders.

4. The Bill makes it clear that the Office of Fair Trading is the sole agency with regulatory responsibility for gas installations, gasfitting work and autogas work. The Bill clarifies the definitions of "gas installation" and "gasfitting work" and ensures that definitions are consistent across the relevant legislation.

5. Prior to the reforms, the regulation of gasfitters, gasfitting work, installations and appliances was spread across the Office of Fair Trading, Industry and Investment NSW, the Roads and Traffic Authority and the WorkCover Authority. Under the proposed amendments, all four agencies will retain some regulatory responsibility regarding gas. However, the Bill makes it clear that the Office of Fair Trading is the sole agency with regulatory responsibility for gas installations, gasfitting and autogas work.

6. As stated in the Agreement in Principle Speech, currently sections 83 and 83A *Gas Supply Act 1996* provide for regulations to be made with respect to certain matters. Those made under section 83 are the responsibility of the Minister for Energy and those under section 83A are the responsibility of the Minister for Fair Trading. According to the Agreement in Principle Speech, this arrangement led to confusion among tradespeople and consumers.

7. Under the proposed amendments, the power to make regulations with respect to gas installations, gasfitting work, autogas installations and work will be in section 83A and the clear responsibility of the Minister for Fair Trading. The Bill confirms that the carrying out of work involving the installation or replacement of a gas meter or basic metering equipment remains a matter dealt with under section 83.

8. Further, The Office of Fair Trading will become responsible for the standards to which gasfitters and autogas mechanics must work, which will provide a more effective regime for enforcing compliance by licensed gasfitters, handling complaints and resolving disputes. The standards will continue to be those developed by Standards Australia and referenced in the regulations.

9. The Bill also clarifies the definitions of the key terms "basic metering equipment", "consumer service", "gas appliance", "gas container", "gas installation", "gas installation end point", "gas network", "gas supply point", and "gasfitting work". It ensures that definitions are consistent across all relevant legislation.

10. The Bill also clarifies that a "gas installation" means any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment that are downstream of the "gas supply point", but does not include anything beyond the "gas installation end point".

11. In re-defining key terms, the Bill clarifies that changing a pigtail is not considered to be gasfitting work. A pigtail is a short length of small-bore pipe or a hose assembly used for the high-pressure connection between a liquid petroleum gas cylinder and the cylinder regulator or the cylinder manifold.

12. As stated in the Agreement in Principle Speech, this clarification is required because of the decision in *Deborah Lynn Webber & Others v West Lindfield Bowling Club Co-op* [2008] NSWDC 215. In this case, the Court interpreted the definition of gasfitting to include any work on a pigtail if it requires the use of a spanner. Pigtails were deemed to be within the definition of an installation and any work on them, such as replacing a defective pigtail, had to be performed by a licensed gasfitter.

13. As stated in the Agreement in Principle Speech, a pigtail is a device that can be easily and safely replaced by anyone with minimum of technical skill. Some gas cylinder delivery companies have carried spare pigtails in their delivery vans. The

spare pigtails are used to replace worn or defective pigtails, free of charge, before attaching a new gas cylinder.

14. The effect of the judgment was that if gas cylinder delivery staff found a worn or defective pigtail, they could not replace it. As stated in the Agreement in Principle Speech, the judgment may lead to an increase in the number of worn or defective pigtails remaining in operation. Accordingly, the Bill clarifies that changing a pigtail does not fall within the definition of "gasfitting work" if it is designed to be readily detachable from the installation.

The Bill

15. **Outline of provisions**

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

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

Schedule 1 Amendment of Gas Supply Act 1996 No 38

Schedule 1 [3] and [4] amend the regulation-making powers in sections 83 and 83A of the *Gas Supply Act 1996* as described in paragraph (a) of the Overview. Section 83 is currently administered by the Minister for Energy and section 83A is currently administered by the Minister for Fair Trading. Section 83 currently enables regulations to be made with respect to the carrying out of gasfitting work. The amendment to section 83 limits the power in that section to gasfitting work involving the installation or replacement of a gas meter or any part of the basic metering equipment. The amendment to section 83A enables the making of regulations relating to gas installations and the carrying out of any kind of gasfitting work (apart from gasfitting work involving the installation or replacement of a gas meter or any part of the basic metering equipment). The amendment also transfers the regulation-making power relating to autogas installations and the carrying out of autogas work from section 83 to section 83A.

Schedule 1 [2] inserts a note relating to the appointment of investigators under the *Fair Trading Act 1987* for the purposes of any legislation administered by the Minister for Fair Trading (section 83A of the *Gas Supply Act 1996* and the regulations made under that section are currently administered by the Minister for Fair Trading).

Schedule 1 [1] allows investigators under the *Fair Trading Act 1987* to enter any premises for the purpose of ascertaining whether an offence against any regulations made under section 83A of the Act has been committed. Investigators also have certain powers under the *Fair Trading Act 1987*.

Schedule 1 [7] amends the Dictionary:

(a) to ensure consistency between the definitions of basic metering equipment, gas appliance, gas container, gas installation, gas network and gasfitting work across all legislation relating to gas supply, and

(b) to provide that a gas installation begins at the gas meter (or at the control valve or other connection point in the case of a gas installation that is not supplied from a gas network), and

(c) to clarify that gasfitting work does not include the connection of a gas container, gas regulator or gas appliance to, or the disconnection of a gas container, gas regulator or gas appliance from, a gas installation where it is designed to be readily detachable from the installation whether by the use of a tool, mechanical force or otherwise (so that, for example, a person need not hold the necessary qualifications for gasfitting work in order to detach and re-attach a pigtail device during the connection of a gas cylinder).

Schedule 1 [5] makes it clear that regulations may be made under section 83A for or with respect to fees, charges and payments relating to the other matters specified in that section.

Schedule 1 [6] enables regulations of a savings and transitional nature to be made as a consequence of the enactment of the proposed Act.

Issues Considered by the Committee

Inappropriately Delegates Legislative Powers [s 8A(1)(b)(iv) *LRA*]:

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

16. The Committee notes that Clause 2 of the proposed Act will commence on a day to be appointed on 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 advice that "it is proposed that the amending Act will commence on proclamation rather than assent so that the necessary administrative arrangements can be put in place and commencement is also co-ordinated with the start date for the amending regulations".

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

The Committee makes no further comment on this Bill.

3. HOUSING AMENDMENT (COMMUNITY HOUSING PROVIDERS) BILL 2009

Date Introduced:	3 December 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Borger MP
Portfolio:	Housing

Purpose and Description

1. This Bill amends the *Housing Act 2001* to make further provision in relation to community housing providers; and for other purposes.

2. This Bill will provide a means to transfer Government owned social housing to community housing providers. The Governor, by way of publishing a notice in the *Government Gazette*, can vest land in a registered community housing provider.

3. Under new provisions, the Government will be able to register an ongoing interest on the land title to the properties that have been vested to the ownership of a community housing provider or for houses purchased with government funds. This registered interest restricts the community housing provider from selling, mortgaging or otherwise dealing in the land without consent. The intent of these provisions is to not prevent the sale or mortgaging of assets but to provide a review process.

4. Regulatory powers will be introduced to allow the independent regulator, the Registrar of Community Housing, to recommend the appointment of Special Adviser to assist a community housing provider to improve his or her performance.

5. This Bill also provides the Government with powers to intervene when the situation is serious, such as when a provider has their registration cancelled or is insolvent. The Government can then instruct a community housing provider to transfer the properties in which the Government has a registered interest to another registered community housing provider or to the New South Wales Land and Housing Corporation.

Background

6. The Bill supports the implementation of the Government's decision to transfer the ownership of government-funded social housing delivered under the Commonwealth's Nation Building Economic Stimulus plan to not-for-profit community housing providers.

7. The Agreement in Principle speech explained that:

> By transferring ownership of selected properties to community housing providers we are laying the foundation for a viable and independent not-for-profit housing sector in New South Wales that is able to deliver more housing for lower income people in need. Ownership will allow community housing providers to actively plan for the growth of their housing portfolio and provide a much-needed asset base that can be used to

> secure finance from banks for investment in new housing. The sector currently manages over 17,500 homes for lower income people in New South Wales and we have set a target to grow the sector to manage 30,000 homes by 2016…We have also committed to transfer the ownership of 500 homes already under community housing management to selected community housing providers.

8. The amendments are measures aim to manage the risks of transferring ownership of government assets and to protect tenants of community housing.

9. According to the Agreement in Principle speech:

> We have already introduced a strong, robust regulatory system for the community housing sector. This system, which began in May this year, requires community housing providers to be registered and meet the ongoing requirements of a regulatory code focused on ensuring tenants receive high-quality services, that assets are well maintained and that community housing providers are well managed and financially viable. This bill provides important additional safeguards to manage the risks of providers holding title to government-funded housing.

10. This also provides for a staged process of intervention where the issues facing the provider can be addressed before their registration is cancelled.

The Bill

11. The object of this Bill is to amend the *Housing Act 2001* (***the Principal Act***):

> (a) to enable the Governor to vest land owned by the New South Wales Land and Housing Corporation (***the Corporation***) in a registered community housing provider that is also a company registered under the *Corporations Act 2001* of the Commonwealth, and
> (b) to provide for the registration by the Corporation of an interest in certain land such as land that has been so vested or the purchase of which was funded by the Corporation, and
> (c) to prevent certain dealings with land in which the Corporation has an interest without the consent of the Corporation, and
> (d) to provide other measures for the protection of the Corporation's interest in certain land.

12. **Outline of provisions**

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

Schedule 1 Amendment of *Housing Act 2001* No 52

Schedule 1 [1] makes an amendment by way of statute law revision.
Schedule 1 [2] inserts proposed section 67AA into the Principal Act which defines certain terms used in the amendments made by the proposed Act.
Schedule 1 [3] amends section 67C of the Principal Act to require the Registrar of Community Housing (***the Registrar***) to include in the register of community housing providers a copy of each notice of intent to cancel the registration of a community housing provider issued under section 67F of the Principal Act.
Schedule 1 [4] substitutes section 67F of the Principal Act which currently enables the Registrar to notify a registered community housing provider if it is failing to comply with the

Principal Act or the regulations. The Registrar may then issue a notice of intent to cancel the provider's registration if the relevant matters are not rectified within a specified time. The Registrar may take action to cancel the registration without waiting for the relevant periods to expire if the failure to comply is serious and requires urgent action.

The amendments enable the Registrar to issue a notice of intent to cancel registration that allows a further period to address compliance matters if the community housing provider appoints a special adviser with specified qualifications in accordance with proposed section 67FA to assist it in addressing those matters. The amendments also enable the Registrar to issue a notice of intent to cancel registration without giving a prior notice if the failure to comply concerned is serious and requires urgent action.

Schedule 1 [5] inserts proposed section 67FA into the Principal Act which deals with the appointment of a special adviser by a community housing provider. The person appointed must be independent of the community housing provider.

Schedule 1 [6] amends section 67G of the Principal Act to enable the Registrar to cancel the registration of a community housing provider if the provider has not appointed a special adviser within the time specified in a notice of intent to cancel registration issued to the provider.

Schedule 1 [7] inserts proposed section 67GA into the Principal Act to require the Registrar to give to the Corporation copies of certain documents relating to action taken by the Registrar in respect of community housing providers, such as each notice of intent to cancel registration.

Schedule 1 [8] inserts proposed section 67HA into the Principal Act which sets out the circumstances in which the Corporation is taken to have an interest in land of a community housing provider for the purposes of Part 9A (Community housing) of the Principal Act. Those circumstances are where land owned by the Corporation has been vested in the community housing provider under the Principal Act, where land has been acquired by the community housing provider using funds of the Corporation, where the Corporation makes improvements on the land or where a
community housing agreement identifies the land as being land in which the Corporation has an interest.

Schedule 1 [9] amends section 67J of the Principal Act to provide that the Corporation may enter into a community housing agreement with a registered community housing provider for the purposes of providing assistance (as is currently the case under section 67I of the Principal Act) and with respect to land that has been vested or transferred by order, or in accordance with an instruction given, under Part 9A of the Principal Act.

Schedule 1 [10] inserts proposed sections 67K–67N into the Principal Act.

Proposed section 67K enables a community housing agreement to contain conditions relating to land in which the Corporation has an interest and specifies some examples of the types of conditions that may be included.

Proposed section 67L prevents a community housing provider from transferring or otherwise dealing with land in which the Corporation has an interest without the Corporation's consent.

The Corporation may register its interest in the land on the Register kept under the *Real Property Act 1900* and, if the interest is registered, the Registrar-General is not to register any dealing with the land unless the consent of the Corporation has been obtained to the dealing.

Proposed section 67M enables a community housing agreement to provide that land of a community housing provider that is a party to the agreement is to be charged with the payment of money that is or may become payable under the agreement. If the land is land to which the *Real Property Act 1900* applies, the charge over the land is to be registered in accordance with that Act.

Proposed section 67N states that a community housing agreement is binding on the community housing provider that is a party to the agreement and enables the Corporation to monitor the activities of a community housing provider to determine whether it is complying with the terms of the agreement.

Schedule 1 [11] inserts proposed Divisions 4–6 into Part 9A of the Principal Act.

Proposed Division 4 consists of the following proposed sections:

Proposed section 67O enables the Governor, by order published in the Gazette, to vest land owned by the Corporation in a registered community housing provider that is also a registered company under the *Corporations Act 2001* of the Commonwealth.

Proposed section 67P states the effect of the vesting, including that the rights and liabilities of the Corporation in relation to the land become the rights and liabilities of the community housing provider in which the land is vested.

Proposed Division 5 contains the following proposed sections:

Proposed section 67Q enables the Director-General of the Department of Human Services to require, by notice in writing, a registered community housing provider or an officer of the community housing provider to provide specified information and records relating to the assets and liabilities of the community housing provider or any financial matter relating to the community housing provider or to take specified measures to facilitate the Director-General's access to such information.

Proposed section 67R enables the Corporation to give instructions to a community housing provider that holds land in which the Corporation has registered an interest under proposed section 67L, or an officer of such a community housing provider, if the Corporation cancels the registration of the provider, the provider becomes insolvent or the land has been vested in or transferred to the provider under Part 9A of the Principal Act and the provider has failed to enter into a community housing agreement with the Corporation in respect of the land within a specified period. The instructions may require the transfer of the land to the Corporation or a specified registered community housing provider or compliance with a term or condition of a community housing agreement that is binding on the community housing provider.

An officer of a community housing provider includes a receiver, liquidator or administrator of the community housing provider.

Proposed section 67S declares proposed sections 67Q and 67R to be Corporations legislation displacement provisions for the purposes of section 5G of the *Corporations Act 2001* of the Commonwealth. The effect of the declaration is to

enable those proposed sections to prevail despite any inconsistencies with the Commonwealth Act.

Proposed Division 6 consists of the following proposed sections:

Proposed section 67T contains provisions relating to the operation of proposed Divisions 4 and 5 including provisions that ensure that the operation of those proposed Divisions will not give rise to any claim for compensation or be taken as a breach of contract.

Proposed section 67U provides that no duty is payable under the *Duties Act 1997* in relation to vestings or transfers of land under proposed Division 4 or 5.

Proposed section 67V provides that no compensation is payable by the Crown in connection with the operation of Part 9A of the Principal Act.

Schedule 1 [12] amends Schedule 3 to the Principal Act to enable regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Denial Of Compensation – Schedule 1 [11] – Division 6 – proposed section 67T – Provisions relating to operation of Divisions 4 and 5; and proposed section 67V – No compensation payable by Crown:

13. Proposed section 67T contains provisions relating to the operation of proposed Divisions 4 and 5 including provisions that ensure that the operation of those proposed Divisions will not give rise to any claim for compensation or be taken as a breach of contract.

14. Proposed section 67V provides that no compensation is payable by the Crown in connection with the operation of Part 9A of the Principal Act.

15. The Committee usually holds concerns when a Bill proposes to deny compensation or remove a right to compensation, which may trespass unduly on a person's rights.

16. However, the Committee notes the advice and reasons provided by Housing NSW:

> "The Bill provides the means by which the NSW Government can give effect to the transfer of ownership of public assets to the community housing sector. These assets are being transferred at no cost to community housing providers through a process of statutory vesting. The properties represent a significant investment by government and it is not considered appropriate that over and above vesting at no cost, that a community housing provider should then be able, in addition, to sue the very body which is in fact its source of properties and on going funding. It is not in the public interest…to have bodies which the government funds and which depend on the government for a substantial part of their income to have, in addition to this fact, a right of compensation. The transfer of land and its improvements at nil cost and compliance by a community housing provider with the regulatory regime is considered a fair quid pro quo. It is not considered good public policy to burden the funder with the risk of claims for compensation over and above the value of the transferred asset. The community housing sector has grown to its current size and scale of operation through targeted government assistance over very many years. The more current policy of transferring ownership to the community housing sector is a shared industry and government objective. The industry model represented through the bill is a non adversarial one based on close regulation. It is not desirable…to encourage an adversarial position over a regulatory model".

17. The Committee accepts the above advice and reasons provided by Housing NSW concerning the proposed section 67T and the proposed section 67V of Division 6 of Schedule 1 [11]. The Committee does not find, in this instance, an undue trespass on individual rights or liberties.

The Committee makes no further comment on this Bill.

4. JAMES HARDIE FORMER SUBSIDIARIES (WINDING UP AND ADMINISTRATION) AMENDMENT BILL 2009

Date Introduced:	2 December 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

The Bill passed both Houses on 2 December 2009. The preparation of this report was done in accordance with the *Legislation Review Act 1987* with respect to commenting on Bills as originally presented to Parliament.

Purpose and Description

1. This Bill amends the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* to make further provision with respect to the funding of claims against certain former subsidiaries of the James Hardie corporate group.

2. This Bill proposes four main elements to the approved payment scheme amendments. Firstly, it makes it clear that an approved payment scheme can commence before the fund completely runs out of money. Item [13] of schedule 1 clarifies that the scheme period may commence before the time at which there will be insufficient funds if the court is satisfied that this will result in claimants being treated more equally. Secondly, the Bill allows the court to approve an interest rate to apply to deferred payments which compensates for inflation but which need not be a commercial interest rate. Thirdly, the Bill proposes that the fund be able to pay small claims in full, rather than by instalment. Item [3] of schedule 1 introduces a definition of small claim. It is any claim of $25,000 or less, with the limit of $25,000 to be adjusted for inflation.

3. Lastly, the Bill allows the court to approve a scheme that provides for different payment options to be offered to claimants so that they can make a choice. If a scheme allows claimants a choice, the Bill will also require that it specify a default payment option so that claimants are not forced to make a choice if they are unable to.

4. The main provision is item [10] of schedule 1, which inserts a new division in Part 4 of the Act. Proposed section 30A authorises the Asbestos Injuries Compensation Fund, as the SPF trustee, and the liable entities to enter into relevant loan facility agreements. The Bill requires that the State be a party to any relevant loan facility agreement.

5. Proposed section 30A also authorises the fund to give security for a loan facility, and authorises the liable entities to guarantee the obligations of the fund and to provide security for their guarantees.

6. Proposed section 30A ensures that the fund and the liable entities are authorised to comply with all of their obligations under an authorised loan facility agreement. This

will ensure that the fund is able to repay the loan and to pay any costs or charges associated with the loan.

7. The amendment in item [4] of schedule 1 makes it clear that an authorised loan facility does not change the status of the fund as a charitable trust and that repaying the loan is a valid application of the trust fund.

8. The amendment in item [5] of schedule 1 aims to ensure that the liable entities may comply with their obligations under any relevant loan facility agreement during the winding-up period under the Act, and the amendment in item [7] of schedule 1 allows the fund to issue directions to the liable entities in relation to any loan facility agreement and any authorised loan facility.

9. The amendment in item [19] of schedule 1 aims to ensure that the current protection in the Act for the exercise of certain functions during the winding-up period will not prevent any party from enforcing or taking action under a relevant loan facility agreement.

10. Item [20] of schedule 1 extends the current exemption from State taxes to any relevant loan facility agreement, including any guarantee or security under a relevant loan facility agreement.

11. Item [21] of schedule 1 inserts a new section 64A into the Act under which the Minister will table a copy of the relevant loan facility agreements as soon as is reasonably practicable after the agreement has been signed. This is the approach the Government followed in relation to the Final Funding Agreement.

Background

12. The *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* enabled James Hardie Industries NV to set up a special purpose trust fund (the ***SPF***) to provide funding with respect to the payment of certain asbestos-related liabilities (the ***payable liabilities***) of former subsidiaries of the James Hardie group of companies (the ***liable entities***). The Act also sets up a State scheme for the winding up and other external administration over an extended period of the liable entities.

13. Funding contributions to the SPF for the payment of the payable liabilities of the liable entities is governed by an agreement entered into by the State and James Hardie Industries NV (the ***Final Funding Agreement***). The Final Funding Agreement requires James Hardie Industries NV to make funding contributions to the SPF during any particular financial year based on its free cash flow. If James Hardie Industries NV has negative free cash flow, it is not required to make any contribution for the relevant financial year. James Hardie Industries NV has not made any contribution to the SPF for the financial year of 2009–2010.

14. As a result, it appears likely that in the absence of alternative funding arrangements, the SPF will cease in the short term to be able to provide funding for the payment in full of all of the payable liabilities of the liable entities.

15. From the Agreement in Principle speech:

> In April this year the Asbestos Injuries Compensation Fund notified James Hardie and the New South Wales Government that it had determined that it was reasonably foreseeable that within two years the available assets of the fund were likely to be

> insufficient to fund the payment of all reasonably foreseeable liabilities. The gravity of that announcement cannot be underestimated. We are living in difficult times with unprecedented challenges. The financial crisis that started in the United States of America has deeply affected the bottom line of James Hardie. That financial crisis has now spread across the world causing a global recession, and whilst this has meant that James Hardie's payments to the fund are affected, it is bound by an agreement, underpinned by law, which it cannot resile from… The Parliament enshrined in legislation the final funding agreement, which is worth some $1.78 billion in today's terms over the next 40 years. The agreement provides that there is no overall cap on James Hardie's liabilities or any cap on payments to individuals. Nothing about these challenging times means that compensation cannot or will not be paid. That is because the New South Wales and Federal governments are providing a loan to the fund. On 7 November 2009 Premier Rees and Prime Minister Rudd announced that the New South Wales and Federal governments would provide a loan of up to $320 million to ensure that the victims of James Hardie's asbestos continue to receive full compensation payments. The bill enables that loan to proceed.

16. The Agreement in Principle speech explained that the loan will have no impact on James Hardie's obligation to pay under the Final Funding Agreement. The funding mechanism requires James Hardie to keep making payments until all claims are paid in full. Although the agreement limits the amount James Hardie has to pay in any year to a maximum 35 per cent of its free cash flow, there is no limit on its overall payments under the agreement. This means that the cash flow cap affects the timing of James Hardie's payment obligations but not James Hardie's obligation to pay in full under the agreement.

17. The loan is currently being negotiated, with the State being the lender of up to $320 million. It is intended that the State will take security over a number of assets, including the proceeds of the insurance policies held by the liable entities. These proceeds are currently valued at about $320 million.

The Bill

18. The object of this Bill is to amend the J*ames Hardie Former Subsidiaries (Winding up and Administration) Act 2005*:

> (a) to authorise the trustee of the SPF (the ***SPF trustee***) and the liable entities to enter into agreements to which the State is a party with respect to the provision of a loan facility (which will be partly funded by the Commonwealth) to the SPF trustee to assist in funding the payment of the payable liabilities of the liable entities, and
> (b) to make certain other amendments to the Act that facilitate the provision and use of funds under the loan facility, and
> (c) to clarify the powers of the Supreme Court in relation to the approval of a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities.

19. Outline of provisions

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

Schedule 1 Amendment of *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* No 105:

James Hardie Former Subsidiaries (Winding Up and Administration) Amendment Bill 2009

Authorisation of loan facility

Schedule 1 [10] inserts a new Division in Part 4 of the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005* (the ***Principal Act***) to authorise the SPF trustee and the liable entities to enter into one or more agreements (the ***relevant loan facility agreements***) to which the State is to be a party for the provision of a loan facility to the SPF trustee (an ***authorised loan facility***) and the provision by the SPF trustee and the liable entities of guarantees and securities in respect of such an agreement or facility.

Schedule 1 [2] amends section 4 of the Principal Act to provide that a loan security expense of a liable entity is one of its operating expenses for the purposes of the Act.

Schedule 1 [1] also amends section 4 of the Principal Act to insert definitions of certain terms and expressions relating to an authorised loan facility that are used in the amendments made to the Act, including a definition of ***loan security expense***.

The expression ***loan security expense*** is defined to mean any amount that a liable entity is required to pay under, or in connection with, a relevant loan facility agreement.

Schedule 1 [4] amends section 8 of the Principal Act to confirm that:

(a) funds provided to the SPF trustee under an authorised loan facility are provided for the purposes, and are subject to the trust requirements, of the SPF, and

(b) the SPF trustee is acting within the terms of the SPF trust when making repayments in relation to an authorised loan facility.

Schedule 1 [7] amends section 24 of the Principal Act to enable the SPF trustee to give directions to a liable entity regarding compliance with the entity's obligations under a relevant loan facility agreement, the giving or granting of guarantees and securities in connection with an authorised loan facility or relevant loan facility agreement (or proposed authorised loan facility or relevant loan facility agreement).

Schedule 1 [5] amends section 23 of the Principal Act to confirm that a liable entity is acting within power when it complies with its obligations under a relevant loan facility agreement or acts in accordance with any such directions from the SPF trustee. **Schedule 1 [6], [8] and [12]** make amendments to the Principal Act that are consequential on the amendments made by Schedule 1 [5] and [7].

Schedule 1 [9] amends section 30 of the Principal Act to make it clear that the section (or any regulation made under that section) does not prevent or limit the making of loan repayments under an authorised loan facility or the giving of directions by the SPF trustee under section 24 (as amended by the proposed Act).

Schedule 1 [11] amends section 33 of the Principal Act to make it clear that any funding available under an authorised loan facility is relevant in determining whether or not there are sufficient funds for the payment of payable liabilities of a liable entity.

Schedule 1 [19] amends section 59 of the Principal Act to make it clear that the section does not prevent or limit the enforcement of a relevant loan facility agreement by the parties to the agreement.

Schedule 1 [20] amends section 63 of the Principal Act to provide that entry into a relevant loan facility agreement, or the giving of a guarantee or the granting of a security under or as contemplated by any such agreement, is not subject to State tax.

Schedule 1 [21] inserts proposed section 64A in the Principal Act to require the Minister to cause a copy of any relevant loan facility agreement to be tabled in each House of Parliament as soon as is reasonably practicable after it is signed.

Approved payment schemes

Schedule 1 [13]–[18] amend section 35 of the Principal Act to enable the Supreme Court to approve a payment scheme under the Act for the payment of claims for payable liabilities of the liable entities that:

(a) commences before the time when the SPF ceases to have sufficient funds to pay all of the payable liabilities of the liable entities as and when they fall due for payment, and

(b) sets an interest rate to be applied in calculating the interest payable on any part of the payable liabilities of the liable entities that would otherwise be payable as interest because that part is not paid during the currency of the scheme, and

(c) enables small claims to be paid in full during the currency of the scheme, and

(d) allows claimants for the payment of proven personal asbestos claims to elect between different instalment options for the part payment of their claims during the currency of the scheme.

Schedule 1 [3] inserts proposed section 4A in the Principal Act to define the term ***small claim***. Initially, a small claim is defined to mean a claim that does not exceed $25,000. The proposed section provides for the indexation of this amount during each year that an approved payment scheme is in force, by order of the Minister, by reference to changes in the consumer price index.

Issues Considered by the Committee

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

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

20. 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 Attorney General's office: the reason is that the loan agreement is still being negotiated.

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

The Committee makes no further comment on this Bill.

5. SYDNEY OLYMPIC PARK AUTHORITY AMENDMENT BILL 2009

Date Introduced:	3 December 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Borger MP
Portfolio:	Western Sydney

Purpose and Description

1. This Bill amends the *Sydney Olympic Park Authority Act 2001* to make provision with respect to noise management at major events carried on at Sydney Olympic Park; to make provision with respect to the functions of the Sydney Olympic Park Authority in relation to residential facilities; and for other purposes.

2. The amendments deal with noise management issues. This Bill will provide legal protection for Sydney Olympic Park's status to allow major events to proceed without the potential for noise-related litigation. The noise-related amendments are consistent with other major event precinct legislation for both Luna Park and Mount Panorama.

3. Amendments to the Act reflect changes and ongoing development at the park by: changing the Act's wording to reflect the introduction of residential development within the park; clarifying the objects and functions of the authority; and protecting the name "Sydney Olympic Park".

4. This Bill is aimed for major events, for example, those designed for more than 10,000 patrons.

Background

5. The consent authority to the noise management plan is the Director General of the Department of Environment, Climate Change and Water. This is the same framework that has managed events such as U2 Concerts, State of Origin, André Rieu concerts and other events.

6. The amendment will not affect noise management of the Sydney 500 V8 Supercar race, which is governed by the *Homebush Motor Race Authority Act*.

7. According to the Agreement in Principle speech:

> Maximum noise limits still apply. We have a responsibility to residents and businesses to adhere to the prescribed legal decibel limit. Another physical provision to limit noise includes smarter urban planning, with buildings acting as noise barriers between the event precinct and residential developments These amendments are designed to allow Sydney Olympic Park to continue to be Sydney's epicentre of major public events. This bill is introduced to support the growth and development of the precinct, essentially setting up a framework that supports and protects the continued success of commercial

operations whilst also supporting the establishment of a new residential population at Sydney Olympic Park.

The Bill

8. The object of this Bill is to amend the *Sydney Olympic Park Authority Act 2001* (***the principal Act***):

(a) to make provision for the management of noise emissions in respect of major events carried on at Sydney Olympic Park, and
(b) to expand the functions of the Sydney Olympic Park Authority to include the function of promoting, co-ordinating, organising, managing, undertaking, securing, providing and conducting residential facilities, and
(c) to make other minor amendments to facilitate the administration of the principal Act or by way of statute law revision.

This Bill also amends the *Protection of the Environment Operations (General) Regulation 2009* to provide for certain exceptions to the provisions of the *Protection of the Environment Operations Act 1997* dealing with noise but only in relation to activities at Sydney Olympic Park carried out in accordance with an approved noise management plan.

9. Outline of provisions

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

Schedule 1 Amendment of *Sydney Olympic Park Authority Act 2001* No 57:

Schedule 1 [1] amends the objects of the principal Act to remove a reference to Sydney Olympic Park becoming a vibrant town centre. Instead, the object of the principal Act will be to ensure that Sydney Olympic Park becomes a vibrant centre within metropolitan Sydney.
Schedule 1 [2] amends the objects of the principal Act to include taking all reasonable steps to ensure that any new development carried out under or in accordance with the principal Act accords with best practice accessibility standards as well as best practice environmental and town planning standards.
Schedule 1 [3] updates the definition of ***Environmental Guidelines*** in section 4 of the principal Act.
Schedule 1 [4] inserts definitions for the terms ***Minister for Planning*** and ***ranger***, which are used in the principal Act.
Schedule 1 [5] provides that the functions of the Sydney Olympic Park Authority include the function of promoting, co-ordinating, organising, managing, undertaking, securing, providing and conducting residential facilities.
Schedule 1 [6] makes it clear that provisions of the master plan for Sydney Olympic Park may apply to the whole or any part of the Park.
Schedule 1 [7] inserts proposed section 48A. The proposed section prevents criminal proceedings, civil proceedings or noise abatement action from being taken in respect of the emission of noise from major events held at Sydney Olympic Park that does not exceed the maximum permissible noise level which is defined. The proposed section is similar to a provision enacted with respect to Luna Park.
Schedule 1 [8] amends section 79 of the principal Act to provide that an authorized officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence against section 67 of the principal Act. That section makes it an

offence to use the name Sydney Olympic Park without the consent of the Sydney Olympic Park Authority. Currently, a penalty notice may only be issued in respect of an offence against the regulations. **Schedule 1 [9]** makes a consequential amendment.
Schedule 1 [10] amends Schedule 8 to the principal Act to enable regulations to be made containing provisions of a savings or transitional nature as a consequence of the enactment of the proposed Act.

Schedule 2 Amendment of Protection of the Environment Operations (General) Regulation 2009:

Schedule 2 amends the *Protection of the Environment Operations (General) Regulation 2009* to provide that activities carried out at Sydney Olympic Park are exempt from certain provisions of the *Protection of the Environment Operations Act 1997* (relating to the emission of noise) so long as the Director-General of the Department of Environment, Climate Change and Water has approved a noise management plan for Sydney Olympic Park and the activities are carried out in accordance with that noise management plan. The proposed clause is similar to a provision made with respect to Luna Park.

Issues Considered by the Committee

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

Issue: Property – use or enjoyment of land (emission of noise) – Schedule 1 [7] Amendment of *Sydney Olympic Park Authority Act 2001* - proposed section 48A - Legal proceedings and other noise abatement action; Schedule 2 Amendment of *Protection of the Environment Operations (General) Regulation 2009* – proposed clause 95A – Noise control – Sydney Olympic Park:

10. Schedule 1 [7] inserts proposed section 48A. This prevents criminal proceedings, civil proceedings or noise abatement action from being taken in respect of the emission of noise from major events held at Sydney Olympic Park that does not exceed the maximum permissible noise level which is defined. The proposed section is similar to a provision already enacted with respect to Luna Park.

11. Schedule 2 amends the *Protection of the Environment Operations (General) Regulation 2009* to provide that activities carried out at Sydney Olympic Park are exempt from certain provisions of the *Protection of the Environment Operations Act 1997* (relating to the emission of noise) so long as the Director-General of the Department of Environment, Climate Change and Water has approved a noise management plan for Sydney Olympic Park and the activities carried out in accordance with that noise management plan. The proposed clause is similar to a provision already made with respect to Luna Park.

12. The Committee notes that the tort of nuisance is committed by a person who unlawfully interfered with a person's use or enjoyment of land, or in connection with it. Examples of such interferences which may amount to nuisance include noise, vibration, smells, or pollution of air.

13. The Committee also notes that proposed section 48A (3) states that this proposed section does not apply to or in respect of noise that exceeds the maximum permissible noise level at the closest residential façade. Proposed subsection 48A (5) defines the maximum permissible noise level. The Committee observes that the insertion of proposed clause 95A in Schedule 2 applies only if the Director-General has approved a noise management plan for Sydney Olympic Park and the activities are carried out in accordance with that noise management plan.

14. The Committee weighs up the general public interest and the temporary nature of a specific major event. The Committee also takes into consideration of the above with respect to the proposed section 48A of Schedule 1 [7] as not applying in respect of noise that exceeds the maximum permissible noise level at the closest residential façade, and that Schedule 2 (proposed clause 95A in the *Protection of the Environment Operations (General) Regulation 2009*) as only applying if there is an approved noise management plan for Sydney Olympic Park. Therefore, the Committee refers to Parliament to consider whether Schedule 1 [7] and Schedule 2 unduly trespass on personal rights and liberties.

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

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

15. 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: "commencement is by proclamation rather than on asset as clause 95A is ultimately reliant on a noise management plan having been signed off by the Director General of DECC. The noise management plan has not yet been signed off, and so this would otherwise have no effect".

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

The Committee makes no further comment on this Bill.

Part Two – Regulations

SECTION A: REGULATIONS FOR THE SPECIAL ATTENTION OF PARLIAMENT UNDER S 9 (1)(B) OF THE *LEGISLATION REVIEW ACT 1987*

Children's Services Amendment (Fees) Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve that

   (a) this Regulation requires no further action, and

   (b) the reasons provided by the Minister's office with regard to the introduction of the fees are reasonable.

Person contacted	**Mr Stewart Scarlett, Policy Advisor, Office of Linda Burney, Minister for Community Services.**

Explanatory Note

The object of this Regulation is to amend the *Children's Services Regulation 2004*:

(a) to provide for the charging of fees in connection with the administration of the licensing of the providers of children's services, and
(b) to increase the maximum term for which a licence for the provision of a children's service may be granted from 3 years to 5 years.

This Regulation is made under the *Children and Young Persons (Care and Protection) Act 1998*, including sections 220 and 264 (the general regulation-making power).

Comment

1. The following information is a summary of the advice provided by the Minister's Office and the NSW Department of Human Services (Community Services).

2. The NSW Government announced in November 2008 (Mini Budget) that fees would be payable by licensed children's services. The intent of the licence fee is to raise funds from the regulated sector to contribute to the cost of regulation that is borne by Government.

3. Section 220 of the *Children and Young Persons (Care and Protection) Act 1998* has been amended to establish the regulation making power for the licence fee, and states: 'Without limiting section 264 (Regulations) or the other provisions of this Part, the regulations may make provision for or with respect to the following: (r) the

charging of fees in connection with the administration of the licensing scheme under this Chapter (including the waiver, reduction, deferral, and refund of any such fees)'.

4. The NSW children's services licence fee scheme will have two fee types:

    1. An annual fee, pegged to service size and payable on the anniversary date of the granting of the licence, and

    2. A new children's service licence application fee, also pegged to service size, payable on licence application, and inclusive of the first 12 months annual fee.

5. Both fee types are graded to reflect the amount of work involved in providing the regulatory services. Generally, the size of the service has been used as a proxy for measuring this amount.

6. The impact of the fee scheme on someone who intends to open a new service, or take over an existing service, is summarised as follows:

7. If no new children's service application fee was payable on making the licence application, then the anniversary date of the currently licensed service rolls forward and the annual fee is payable whenever this anniversary date falls. If a new children's service application fee was payable on making the licence application, then a new anniversary date is created and the annual fee is payable in 12 months.

8. The attachment provides a detailed implementation of the fee scheme.

9. The Committee notes the above reasons and information provided by the Minister's Office with regard to the fees as reasonable, and finds this Regulation requires no further action.

Attachment:

NSW DEPARTMENT OF HUMAN SERVICES
COMMUNITY SERVICES

IMPLEMENTATION OF A FEE SCHEME FOR APPLICATION TO NSW LICENSED CHILDREN'S SERVICES

A. CONTEXT

The NSW Government announced in November 2008 (Mini Budget) that fees would be payable by licensed children's services. The intent of the licence fee is to raise funds from the regulated sector to contribute to the cost of regulation that is borne by Government.

Section 220 of the *Children and Young Persons (Care and Protection) Act 1998* has been amended to establish the regulation making power for the licence fee, and states: '*Without limiting section 264 (Regulations) or the other provisions of this Part, the regulations may make provision for or with respect to the following: (r) the charging of fees in connection with the administration of the licensing scheme under this Chapter (including the waiver, reduction, deferral, and refund of any such fees)'.*

B. DESIGN OF THE LICENCE FEE SCHEME

The NSW children's services licence fee scheme will have two fee types, these are:

1. an annual fee, pegged to service size and payable on the anniversary date of the granting of the licence, and
2. a new children's service licence application fee, also pegged to service size, payable on licence application, and inclusive of the first 12 months annual fee.

As noted above, both fee types are graded to reflect the amount of work involved in providing the regulatory services. Generally the size of the service has been used as a proxy for measuring this amount.

For the purpose of the annual licence fee:

- centre based services are allocated across the three size categories based on the maximum number of places they can offer,
- family day care schemes are allocated across the three size categories based on the number of equivalent full time child places they provide,
- home based carers are all allocated to the small category, given they can care for no more than seven children, and
- mobile services are all allocated to the medium category, given that they are licensed to operate a number of mobile venues under a single licence.

For the purposes of the new children's services licence application fee:

- centre based services are allocated across the three size categories based on the maximum number of places they are licensed to offer,
- home based carers are all allocated to the small category, given they can care for no more than seven children,

- family day care schemes are all allocated to the medium category, as the licence application assessment resources required are estimated to fall between the small and large children's service categories, and
- mobile services are all allocated to the medium category, given that they typically intend to operate one or more mobile venues under a single licence, which may each require the regulator's assessment of a venue management plan.

NB: A 'new' children's service is a children's service that does not have a current licence at the time of the application for licence being made to the Department.

C. ADMINISTRATION OF THE LICENCE FEE SCHEME

The way in which the licence fee scheme will integrate with the Department's licensing activities is described in **Table C.1** below.

Table C.1: Application of the fee scheme to major licensing events

Type of licensing event	Application of the licence fee scheme
Current (in term) licence	Annual fee is payable on the anniversary of the date the licence was granted All current licences will have a fee payable in the 2010 calendar year.
New provider or an existing licensed provider makes licence application to be the licensee of a service that is currently licensed to another provider. (Generally referred to as transfer of ownership).	New licence granted and no licence application fee payable. Annual fee payable at the anniversary date of the currently licensed service. In the event that the former licence holder has paid their annual fee they receive no refund from the Department of Community Services.
New provider or an existing licensed provider makes licence application for service that is not currently licensed. (Generally referred to as new licence application).	Application fee payable – this fee includes annual fee paid 12 months in advance. In the event application does not proceed to licence, the Department of Community Services may refund up to 50% of the application fee. In the event that the application does proceed to licence but the Department of Community Services grants a licence with a term of less than 12 months, then the Department will refund that part of the application fee that is attributable to the non-granted component of the annual fee.
Existing licensed provider makes application for a further licence at the end of the licence term. (Referred to as an application for a further licence).	This licensing event will occur in very few cases in 2010 because all licences will generally have been varied in 2009 so that they continue past the end of 2010. The exception may be a very small number of licences issued for a shorter period for compliance purposes. No fee will apply in the case of a further licence application for these licences. It is expected that after 2010 the new Regulation

	will have removed the requirement to apply for a further licence.

NB: The impact of the fee scheme on someone who intends to open a new service, or take over an existing service, can be summarised as follows:

If no new children's service application fee was payable on making the licence application, then the anniversary date of the currently licensed service rolls forward and the annual fee is payable whenever this anniversary date falls. If a new children's service application fee was payable on making the licence application, then a new anniversary date is created and the annual fee is payable in 12 months.

Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to report to Parliament on the Regulation; and

2) write to the Attorney-General to seek further clarification and advice with regards to the service of fact sheets in lieu of briefs of evidence.

Grounds for comment

Personal rights/liberties	The Committee holds concerns that this Regulation may trespass unduly on individual rights and liberties, in particular the right to a fair trial and procedural fairness.
Business impact	
Objects/spirit of Act	The object of this Regulation is to amend the Criminal Procedure Regulation 2005 (which lists the kind of proceedings for which prosecutors are not required to serve briefs of evidence) to remove the requirement of the prosecution to serve a brief of evidence on the accused for offences relating to driving without a license, possession of a restricted substance or possession of a prohibited drug.
Alternatives/effectiveness	As noted in previous Digests, the Regulation may not be effective and may lead to an increase in the number of defended hearings in the Local Court; an increase in the court time set aside for defended hearings; a need for police and witnesses to attend court to give evidence; and an increase in the number of guilty pleas on the hearing date
Duplicates/overlaps/conflicts	
Needs elucidation	**The Agreement in Principle speech for the related Bill (which enables regulations such as this one), noted that a brief of evidence may be replaced by a comprehensive fact sheet with copies of police evidence to be attached. However, the enabling legislation does not provide for this nor is it set out in the regulations. The risk remains that in the absence of statutory compulsion, there is little certainty that an equivalent fact sheet will**

	be required to replace a brief of evidence.
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	Office of the Attorney-General

Explanatory Note

The object of this Regulation is to expand the list of offences in which a prosecutor is no longer required to serve a brief of evidence on the accused. The following offences have been added to the list under clause 24 of the Regulation:

> (a) Offences under the *Road Transport (Driver Licensing) Act 1998* relating to driving while a license has been cancelled, suspended or disqualified, or driving when a license has been refused, or driving having never been licensed;
>
> (b) Offences under the *Drug Misuse and Trafficking Act 1985* relating to the possession of a prohibited drug; and
>
> (c) Offences under the *Poisons and Therapeutic Goods Act 1966*, relating to the possession of a prescribed restricted substance.

Comment

1. The initial amendments to the *Criminal Procedure Regulation 2005*, through the *Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007* introduced a trial scheme relating to short briefs of evidence.

2. The initial Regulatory amendment prescribed a list of proceedings in which prosecutors are not required to serve briefs of evidence. This list of offences include offensive conduct, the use or attempted use of a vehicle under the influence of alcohol or any other drug, proceedings for an offence in which a penalty notice may be issued (subject to certain exceptions) and summary offences for which there is a penalty notice only.

3. A trial period was initially designated for the year commencing 12 November 2007 and concluding 11 November 2008. However, the trial period has been extended twice by subsequent regulations.

4. The Committee has repeatedly expressed its concerns that the lack of a requirement on the prosecution to serve a brief of evidence on the accused unduly trespasses on the rights of the accused to be fully apprised of the evidence to be used against them in court. To this end, the Committee is particularly concerned that the Regulation compromises the rights of the accused to procedural fairness and a fair trial. The Committee reiterates these concerns with respect to the additional offences stipulated under clause 24 for which briefs of evidence are now no longer required.

5. The Committee is advised that these reforms are designed to reduce the administrative workload of police in high volume matters where there is a high rate of guilty pleas. During the Agreement in Principle Speech for the related *Criminal Procedure Amendment (Local Court Process Reforms) Bill 2007* (which enabled

regulations such as this one), then Police Minister David Campbell MP advised Parliament that a comprehensive fact sheet, with copies of police evidence attached, could be served in lieu of a brief of evidence. The Committee is advised that an accused will receive a fact sheet when charged with any of the offences affected by this Regulatory amendment. However, the *Criminal Procedure Amendment (Local Court Process Reforms) Act 2007* does not specifically provide for this, nor is it set out elsewhere in regulation. To this end, the risk remains that in the absence of statutory compulsion, there is little certainty that a fact sheet will be required to be served in lieu of a brief of evidence.

6. The Committee notes that this is the third time the Regulation has been amended since it was first made in 2007. The previous two amendments extended the duration of the trial scheme so that it now lapses on 1 July 2011, more than 2.5 years after the initial end date. Although this Regulatory amendment does not push back the end date for the trial period, it does expand the reach of the scheme. At this point, the Committee expresses its concerns that the function of the scheme has 'crept' from merely trialling new criminal procedures – with a view to evaluating the trial at the conclusion of a designated period – to creating more permanent arrangements on a *de facto* basis with regulatory coverage beyond what was initially envisaged.

7. The Committee expresses its preference that a comprehensive review of the trial occurs at the end of the designated trial period, with any attendant issues addressed, before any new offences are added to the list of offences not requiring a brief of evidence.

8. The Committee notes that this Regulatory amendment also reinstates, for a limited time and in the local court sitting at Manly only, the rules relating to the service of briefs of evidence that had effect before the Local Court Process Reforms were made. That is, offences for which briefs of evidence are ordinarily not required, including those stipulated by this Regulatory amendment, must be served where proceedings are held in Manly. The Committee notes that the service of briefs of evidence are regarded as more onerous for the prosecution and generally seen to be in the favour of the accused. Additionally, in the interests of properly comparing the current Local Court Process Reforms with previous procedures, the Committee recognises the need in having different trial processes in place concurrently for effective evaluation.

Retirement Villages Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve to review and report to Parliament on the Regulation; and

2) write to the Minister to seek further clarification and advice with regard to the Regulation including any potential undue trespasses on individual rights and liberties as well as the impact on business.

Grounds for comment

Personal rights/liberties	The Committee notes the concerns raised in relation to clause 8 (definition of 'resident') especially if it may potentially form an undue trespass on personal rights and liberties and right to housing by the removal of 'occupants' without the requirement of the relevant termination provisions usually applicable for 'residents' if beneficiaries seek to claim a return of an ingoing contribution after the death of the other resident. The Committee is also concerned that the clause 8 definition may have an adverse potential to bring liabilities to persons who are not parties to the residency contract.
Business impact	The Committee notes the concerns that the RIS did not adequately address the costs and benefits of the proposed regulatory changes such as: variations in impact according to different ownership structures (strata title, leasehold etc); the impact on existing contracts; or the likely industry wide consequences such as reduced competitiveness, which may lead to a broad impact on business.
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	Office of the Minister for Fair Trading

Explanatory Note

The object of this Regulation is to remake with amendments the provisions of the *Retirement Villages Regulation 2000* which is repealed by this Regulation. This Regulation includes a number of new matters as a consequence of the commencement of the *Retirement Villages Amendment Act 2008*.

This Regulation makes provision with respect to the following:

(a) the provision of information about retirement villages,
(b) the content of village contracts and village rules,
(c) the financial management of retirement villages,
(d) the conduct of meetings,
(e) applications to the Consumer, Trader and Tenancy Tribunal,
(f) the storage and disposal of uncollected goods,
(g) miscellaneous matters including liability of former occupants, membership of a Residents Committee, disputes, termination notices, ongoing contributions and the issue of penalty notices for offences under the *Retirement Villages Act 1999*,
(h) repeals, savings and formal matters.

This Regulation is made under the *Retirement Villages Act 1999*, including sections 4 (1) (definitions of capital maintenance, item of capital, operator, optional services and resident), 5 (3) (i), 17A (5A), 18 (2), (3A) (a) and (3B), 20 (1) (k), 24 (4) (b), 38 (2) and (2A), 31 (3), 41A (7) (b), 42 (1), 43 (8) (b), 44B (1) (d) and (4), 46 (2) (i), 58A (2) (e), 67 (2) (g), 70A (1), 72A (6), 72B (3) (b), 77 ((2), 97 (3) (e), 99 (3) and (5) (c), 100 (3), 105 (2) (c), 105A (4) (c), 106 (2) (e), 107 (6) (a) and (b), 112 (3) and (4) (e), 115A, 119 (7) (a), 120C (3) (c), 122 (2), 128 (1) (l), 131 (2), 147 (1) (b), 155 (3), 180 (4) (b) and (5) (b), 181 (7) (b), 182A (1) (b), 184 (6), 201 (1) (c) and (2) (c) and 203 (the general regulation-making power) and clauses 3 (1) (b) and 5 of Schedule 1 and clause 1 of Schedule 4.

Comment

1. This Regulation has been made under the staged repeal process established by the *Subordinate Legislation Act 1989* and will commence on 1 March 2010. The aim of this Regulation is to provide administrative support to the effective operation of the *Retirement Villages Act 2000*. The Regulation incorporates changes needed for the implementation of the *Retirement Villages Amendment Act 2008*. The draft Regulation and the Regulatory Impact Statement (RIS) were released for public comment on 7 October 2009.

2. By letter received on 6 January 2010, the Minister for Fair Trading has attached a copy of the RIS and advised that the copies of the 805 submissions will be sent by the Office of Fair Trading.

3. The Committee notes that many of the submissions from key stakeholder groups recommended that the definition of 'resident' be removed (formerly clause 9 of the draft Regulation and currently clause 8 of the Regulation). For example, the submission from the Aged & Community Services Association of NSW and ACT (ACS) quoted advice from Gadens that:

> "Definition of 'resident' has opened up the difficult question of de facto relationships and mere consensual occupation in villages. It also opens up the issue of interrogating the terms of a departed residents' will including the judgment call of what is meant by 'directly or indirectly' and therefore potential disputes of having to remove 'occupants' where beneficiaries are seeking to claim a return of an ingoing contribution. Invariably, relationships that arise in a village will not be properly or even at all addressed in residents' wills. The effect of the amendments has the potential to bring liabilities to persons who are not named as parties to the contract".

4. Legal Aid NSW raised a similar concern with regard to clause 8 and recommended its removal. Legal Aid NSW suggested that once a person has been afforded the status of 'resident' under clause 8 (1)(b), the person should be entitled to the benefit of the legislation including the termination provisions. However, clause 8 (2) provides that clause 8 (1) does not apply if the other resident has died and the terms of the will require (whether directly or indirectly) the person to vacate. Legal Aid NSW submitted that:

> "This fails to allow for a challenge to the will by the spouse or de facto partner and, most importantly, the use of the word 'indirectly', as the Note at the foot of the clause makes clear, alters what is otherwise the statutory order in which bequests are satisfied. Monetary gifts are the last to be met".

5. Wesley Mission also submitted similar concerns: "…in some situations may require 'occupants' to be removed, where beneficiaries are seeking to claim a return of an ingoing contribution".

6. The Committee notes the concerns raised in the above submissions in relation to clause 8 (definition of 'resident') especially if the clause may potentially form an undue trespass on personal rights and liberties and right to housing by the removal of 'occupants' without the requirement of the relevant termination provisions usually applicable for 'residents' if beneficiaries seek to claim a return of an ingoing contribution after the death of the other resident. The Committee is also concerned that the clause 8 definition may have an adverse potential to bring liabilities to persons who are not parties to the residency contract.

7. Retirement Village Association Ltd (RVA) has written to the Minister regarding their concerns that the RIS did not adequately address the costs and benefits of the proposed regulatory changes such as: variations in impact according to different ownership structures (strata title, leasehold etc); the impact on existing contracts; or the likely industry wide consequences such as reduced competitiveness. This may lead to a broad impact on business. The RVA's concerns have also been based on advice from Access Economics which had been commissioned by the RVA to review the RIS.

8. RVA pointed out that the RIS did not distinguish between the different impacts for various ownership structures such as the extent of capital gain that may be received by registered interest holders as some leaseholders may share in capital gains with the operator at the time of exit. According to RVA, the costs to parties with resigning or re-negotiating existing contracts or the costs of maintaining current contracts have also not been examined in the RIS as it has not measured how the residents' contracts will accommodate the proposed changes.

9. The Committee notes the above concerns identified by some of the key stakeholders, and resolves to write to the Minister to seek further clarification and advice with

regard to the Regulation including any potential undue trespasses on individual rights and liberties as well as the impact on business.

Tow Truck Industry Amendment (Maximum Fees) Regulation 2009

Recommendation

That the Committee:

1) for the purposes of s 9(1A) of the *Legislation Review Act 1987*, resolve that
   (a) this Regulation requires no further action, and
   (b) the reasons provided by the RTA with regard to the introduction of the fees are reasonable.

Person contacted	**Mr Terry Hickey, RTA Group General Manager of Driver and Vehicle Services.**

Explanatory Note

The objects of this Regulation are:

(a) to fix the maximum fees that can be charged by the holder of a tow truck operators licence or a tow truck drivers certificate for the towing, salvage or storage of a motor vehicle that has been involved in an accident or that has been stolen, or for any service that is related to the towing, salvage or storage of such a motor vehicle, and
(b) to prohibit the charging of a separate fee for certain specified services that are related or ancillary to the towing, salvage or storage of such a motor vehicle.

Section 20 of the *Tow Truck Industry Act 1998* makes it a condition of a licence that a licensee must not charge a fee for the towing, salvage or storage of a motor vehicle, or for any service that is related to or ancillary to the towing, salvage or storage of a motor vehicle, if the charging of the fee would be in contravention of the regulations, and must not demand, receive or accept such a fee. Section 29 imposes a similar condition on drivers certificates. The holder of a licence or a drivers certificate may be disciplined for breach of such a condition.

This Regulation is made under the *Tow Truck Industry Act 1998*, including section 54 (which deals with fees for towing, salvage, storage and related service and was substituted by the *Tow Truck Industry Amendment Act 2008*) and 105 (the general regulation-making power).

Comment

1. The following information is a summary of the advice provided by the RTA.

2. Section 54 of The Tow Truck Industry Act 1998 prescribed that the Tow Truck Authority may, by order published in the Gazette, determine the maximum charges

that may be charged by tow truck operators and drivers for the towing, salvage or storage of motor vehicles.

3. On 30 November 2007 the Act was amended to enable the dissolution of the Tow Truck Authority and the RTA to become the body responsible for regulation of the industry. The RTA then had the power under section 54 to prescribe the fees.

4. Following consultation with Parliamentary Counsel they recommended that the maximum fees be prescribed by regulation.

5. Regarding the fees, the former Tow Truck Authority and its predecessors only ever prescribed maximum fees for towing salvage and storage of accident damaged vehicles for light and heavy towing. No other form of towing - such as breakdown towing etc had maximum fees prescribed and market forces determined the fees.

6. The basis of prescribing maximum fees for accident towing was because motorists involved in an accident were vulnerable and a significant segment of the towing industry took advantage of the situation by over charging or retaining the vehicle once they towed it and imposing additional charges on the motorist for its subsequent release.

7. In 2002 the then Tow Truck Authority engaged Tasman Economics to review the process of maximum fees and develop a model for their determination. The basis of that model is still used today and is based on several components adjusted annually for CPI to determine the maximum charges.

8. The new Regulations are the current maximum fee schedule transcribed to regulation.

9. The Committee notes the above reasons and information provided by the RTA with regard to the fees as reasonable, and finds this Regulation requires no further action.

SECTION B: Postponement Of Repeal Of Regulations

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5295

NOTIFICATION OF THE PROPOSED POSTPONEMENTS OF THE REPEAL OF THE CONSUMER CREDIT ADMINISTRATION REGULATION 2002 (4); GAS SUPPLY (GAS METERS) REGULATION 2002 (4); LANDLORD AND TENANT (RENTAL BONDS) REGULATION 2003 (3); MOTOR VEHICLE REPAIRS REGULATION 1999 (6); PROPERTY, STOCK AND BUSINESS AGENTS REGULATION 2003 (3)

...

Files Ref: LRC 3025; 372; 689; 323

Minister for Fair Trading

Issues

1. By correspondence received 19 January 2010, the Minister advised the Committee that she has written to the Premier seeking postponements of the automatic repeal of the above five regulations.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponements of the repeal of these regulations.

Comment

1. Consumer Credit Administration Regulation 2002

3. The Minister has proposed the postponement of the repeal of the above regulation for the fourth time.

4. The Minister advised that the responsibility for the regulation of consumer credit and finance broking is to be transferred to the Commonwealth. The *Credit (Commonwealth Powers) Bill 2010* is currently scheduled for introduction into the NSW Parliament during the Budget Session 2010. Transfer of responsibility will take place in stages. In relation to consumer credit, States will retain responsibility for administering the Consumer Credit Code until the National Credit Code commences on 1 July 2010. Schedule 1 to the *Credit (Commonwealth Powers) Bill* repeals all current consumer credit legislation, including the *Consumer Credit Administration Regulation 2002*. Schedule 1 will commence on a day to be proclaimed. In relation to finance broking, the NSW finance 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. To enable NSW to continue to regulate finance broking, Clause 13 of Schedule 3 to the *Credit (Commonwealth Powers) Bill* states that the provisions relating to the regulation of finance broking, including Part 2 of the *Consumer Credit Administration Regulation*, will continue to apply to finance broking activities as if they had not been repealed by Schedule 1. Clause 13 will be repealed on 1 January 2011.

5. The need for the postponement has arisen because at present, there is a delay in finalising the referral of powers from the States. Until this referral occurs, the Commonwealth cannot enact its National Credit Code. It would be inappropriate at this stage to let the Consumer Credit Administration Regulation lapse in case there is some delay in the enactment or commencement of the Commonwealth legislation. Consequently, postponement of the repeal is sought. The Regulation will then be repealed in stages by Schedule 1 and Schedule 3 of the *Credit (Commonwealth Powers) Bill*.

2. Gas Supply (Gas Meters) Regulation 2002

6. The Minister has proposed the postponement of the repeal of the above regulation for the fourth time.

7. The Minister explained that at present, the National Measurement Institute (NMI), within the Commonwealth Department of Innovation, Industry, Science and Research, is consulting with industry and other stakeholders on the way in which gas meters, and other utility meters used in trade, are regulated by the *National Measurement Act (Cth) 1960*.

8. NSW Fair Trading has been involved in the consultation process. Following the completion of this review, which could extend the responsibilities of the NMI for regulating the accuracy of utility meters, NSW Fair Trading will consider whether it continues to be necessary to regulate gas meter accuracy at the State level. It had been anticipated that the NMI review would be completed some years ago. The review has been delayed by a number of issues, including resourcing issues within the NMI. If the review is not completed by the end of 2010, NSW Fair Trading plans to re-make the *Gas Supply (Gas Meters) Regulation 2002* in 2011.

3. Landlord and Tenant (Rental Bonds) Regulation 2003

9. The Minister has proposed the postponement of the repeal of the above regulation for the third time.

10. The regulation will be repealed upon commencement of the proposed new *Residential Tenancies Act 2010*, anticipated for late 2010. The proposed new Act will combine the current *Residential Tenancies Act 1987* and the *Landlord and Tenant (Rental Bonds) Act 1977*, and introduce over 100 tenancy reforms. It is proposed that the two current regulations – the *Residential Tenancies Regulation 2006* and the L*andlord and Tenant (Rental Bonds) Regulation 2003* – will be replaced by a combined new *Residential Tenancies Regulation 2010* under the new Act.

11. The Minister advised that it would be a duplication of work to remake the current *Landlord and Tenant (Rental Bonds) Regulation* on 1 September 2010 given that it will be repealed, along with the Act under which it is made, shortly thereafter, whilst simultaneously developing the new Regulation under the new Act. It would also be

confusing to stakeholders if consultation on both regulations were carried out at around the same time.

4. Motor Vehicle Repairs Regulation 1999

12. As the repeal of this regulation has already been postponed six times, the Minister advised that this postponement will be effected through the *Statute Law (Miscellaneous Provisions) Bill 2010*.

13. A consultation paper seeking stakeholder comment on a number of proposed amendments to the *Motor Vehicle Repairs Act 1980* is expected to be released in early 2010. Once consultation on the changes has taken place, a Bill amending the Act is planned for the Spring Session 2010. The Minister advised that it would be a more appropriate and efficient use of resources to conduct the review of the regulation after the passage of these amendments.

5. Property, Stock and Business Agents Regulation 2003

14. The Minister advised that this will be the third postponement of the repeal of this regulation.

15. The need for the postponement has arisen because at present, there is a statutory review of the *Property, Stock and Business Agents Act 2002*. This review will lead to amendments to the Act. Amendments to the Act will be made as part of the establishment of a national licensing system, which is expected to come into force in 2012. It would be a more appropriate and efficient use of resources to conduct the review of the regulation after the passage of these amendments.

NEW SOUTH WALES

MINISTER FOR FAIR TRADING
MINISTER FOR CITIZENSHIP
MINISTER ASSISTING THE PREMIER ON THE ARTS

RECEIVED
19 JAN 2010
LEGISLATION REVIEW COMMITTEE

CMC No: M09/4699
File No: 09032293

Mr Allan Shearan
Chairperson
Legislative Review Committee
Parliament House, Macquarie Street
NSW 2000

11 JAN 2010

Dear Mr Shearan

Subordinate Legislation Act 1989
Staged Repeal of Regulations on 1 September 2010

In accordance with section 11(4) of the *Subordinate Legislation Act 1989*, I am writing to advise the Committee that I have written to the Premier seeking a further postponement of the automatic repeal of the following regulations: *Consumer Credit Administration Regulation 2002*, *Gas Supply (Gas Meters) Regulation 2002*, *Landlord and Tenant (Rental Bonds) Regulation 2003*, *Motor Vehicle Repairs Regulation 1999* and the *Property, Stock and Business Agents Regulation 2003*.

1. Consumer Credit Administration Regulation 2002

Responsibility for the regulation of consumer credit and finance broking is to be transferred to the Commonwealth. The *Credit (Commonwealth Powers) Bill 2010* is currently scheduled for introduction into the NSW Parliament during the Budget Session 2010.

Transfer of responsibility will take place in stages. In relation to consumer credit, States will retain responsibility for administering the Consumer Credit Code until the National Credit Code commences on 1 July 2010. Schedule 1 to the *Credit (Commonwealth Powers) Bill* repeals all current consumer credit legislation, including the *Consumer Credit Administration Regulation 2002*. Schedule 1 will commence on a day to be proclaimed.

In relation to finance broking, the New South Wales finance 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.
To enable NSW to continue to regulate finance broking, Clause 13 of Schedule 3 to the *Credit (Commonwealth Powers) Bill* states that the provisions relating to the regulation of finance broking, including Part 2 of the *Consumer Credit Administration*

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Regulation, will continue to apply to finance broking activities as if they had not been repealed by Schedule 1. Clause 13 will be repealed on 1 January 2011.

At present there is a delay in finalising the referral of powers from the States. Until this referral occurs, the Commonwealth cannot enact its National Credit Code. It would be inappropriate at this stage to let the *Consumer Credit Administration Regulation* lapse in case there is some delay in the enactment or commencement of the Commonwealth legislation. Consequently postponement of the repeal is sought. The Regulation will then be repealed in stages by Schedule 1 and Schedule 3 of the *Credit (Commonwealth Powers) Bill*.

This will be the fourth postponement of the repeal of this Regulation.

2. Gas Supply (Gas Meters) Regulation 2002

Currently the National Measurement Institute (NMI), within the Commonwealth Department of Innovation, Industry, Science and Research, is consulting with industry and other stakeholders on the way in which gas meters, and other utility meters used in trade, are regulated by the *National Measurement Act (Cth) 1960*.

NSW Fair Trading has been involved in the consultation process. Following the completion of this review, which could extend the responsibilities of the NMI for regulating the accuracy of utility meters, NSW Fair Trading will consider whether it continues to be necessary to regulate gas meter accuracy at the State level. It had been anticipated that the NMI review would be completed some years ago. Unfortunately the review has been delayed by a number of issues, including resourcing issues within the NMI. Should the review not be completed by the end of 2010, NSW Fair Trading plans to re-make the *Gas Supply (Gas Meters) Regulation 2002* in 2011.

This will be the fourth postponement of the repeal of this Regulation.

3. Landlord and Tenant (Rental Bonds) Regulation 2003

This regulation will be repealed upon commencement of the proposed new Residential Tenancies Act 2010, anticipated for late 2010. The proposed new Act will combine the current *Residential Tenancies Act 1987* and the *Landlord and Tenant (Rental Bonds) Act 1977*, as well as introduce over 100 tenancy reforms.

It is proposed that the two current regulations – the *Residential Tenancies Regulation 2006* and the *Landlord and Tenant (Rental Bonds) Regulation 2003* – will be replaced by a combined new *Residential Tenancies Regulation 2010* under the new Act.

It would be a duplication of work to remake the current *Landlord and Tenant (Rental Bonds) Regulation* on 1 September 2010 given that it will be repealed, along with the Act under which it is made, shortly thereafter, whilst simultaneously developing the

new Regulation under the new Act. It would also be confusing to stakeholders if consultation on both regulations were carried out at around the same time.

This will be the third postponement of the repeal of this Regulation.

4. Motor Vehicle Repairs Regulation 1999

A consultation paper seeking stakeholder comment on a number of proposed amendments to the *Motor Vehicle Repairs Act 1980* is expected to be released in early 2010. Once consultation on the changes has occurred, a Bill amending the Act is planned for the Spring Session 2010.

It would be a more appropriate and efficient use of resources to conduct the review of the regulation after the passage of these amendments rather than before.

As the repeal of this regulation has already been postponed six times previously, this postponement will need to be effected through the *Statute Law (Miscellaneous Provisions) Bill 2010*.

5. Property, Stock and Business Agents Regulation 2003
A statutory review of the *Property, Stock and Business Agents Act 2002* is currently underway. This review will lead to amendments to the Act. Further amendments to the Act will be made as part of the establishment of a national licensing system, which is expected to come into force in 2012.

It would be a more appropriate and efficient use of resources to conduct the review of the above Regulation after the passage of these amendments rather than before.

This will be the third postponement of the repeal of this Regulation.

Should your officers require any further information on this matter, Ms Diana Holy of NSW Fair Trading can be contacted on 9338 8948.

Yours sincerely

Virginia Judge MP
Minister

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5296

NOTIFICATION OF THE PROPOSED POSTPONEMENTS OF THE REPEAL OF THE CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) REGULATION 2000 (5); ADOPTION REGULATION 2003 (3)

...

Files Ref: LRC 2565, 111

Minister for Community Services

Issues

1. By correspondence received 25 January 2010, the Minister advised the Committee that she has written to the Premier requesting postponements of the automatic repeal of the above two regulations.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponements of the repeal of these regulations.

Comment

1. Children And Young Persons (Care And Protection) Regulation 2000

3. The Minister has proposed the postponement of the repeal of the above regulation for the fifth and final time.

4. The Minister advised the reason for seeking this final postponement is that structural reforms to child protection services and legislative reforms proposed by the Special Commission of Inquiry into Child Protection Services in NSW will commence in 2010. A review of the Care Regulation will be undertaken in 2010, following the commencement of the amendments to both the Care Regulation and the C*hildren And Young Persons (Care And Protection) Act 1998*.

2. Adoption Regulation 2003

5. The Minister has proposed the postponement of the repeal of the above regulation for the third time.

6. The Minister explained that the reasons for seeking the postponement is that amendments to the Regulation arising from the review of the *Adoption Act 2000* are currently being made, which will take effect in January 2010. It is proposed to review the Adoption Regulation in the latter half of 2010, and for the regulation to be remade in September 2011.

Minister for Community Services

DHS 09/117981
21 JAN 2010

RECEIVED
25 JAN 2010
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan, MP
Chairperson
Legislative Review Committee
Parliament House
Macquarie Street
SYDNEY 2000 NSW

Dear Mr Shearan

Re: Automatic repeal of the *Children and Young Persons (Care and Protection) Regulation 2000* and the *Adoption Regulation 2003*

I am writing to advise that I have written to the Premier requesting a postponement of the repeal of the *Children and Young Persons (Care and Protection) Regulation 2000* (Care Regulation) and the *Adoption Regulation 2003* (Adoption Regulation), which are both due for automatic repeal on 1 September 2010.

This is the fifth and final postponement sought of the repeal of the Care Regulation. The reason for seeking this final postponement is that structural reforms to child protection services and legislative reforms proposed by the Special Commission of Inquiry into Child Protection Services in NSW will commence in 2010. A review of the Care Regulation will be undertaken in 2010, following the commencement of the amendments to both the Care Regulation and the *Children and Young Persons (Care and Protection) Act 1998*.

Regarding the Adoption Regulation, this will be the third postponement of the repeal of this regulation. The reason for seeking the postponement is that amendments to the Regulation arising from the review of the *Adoption Act 2000* are currently being made, which will take effect in January 2010. It is proposed to review the Adoption Regulation in the latter half of 2010, and for the regulation to be remade in September 2011.

Should further assistance be required, Community Services contact is Ms Julieanne Mahony, Manager, Legislative Review Unit on 9716 2336, or by email to julieanne.mahony@community.nsw.gov.au.

Yours sincerely

Linda Burney
Minister for the State Plan
Minister for Community Services

cc Premier

Level 30, Governor Macquarie Tower,
1 Farrer Place, Sydney NSW 2000
Phone: (02) 9228 4455 Fax: (02) 9228 4640

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5302

NOTIFICATION OF THE PROPOSED POSTPONEMENT OF THE REPEAL OF THE ABORIGINAL LAND RIGHTS REGULATION 2002 (3)

...

Files Ref: LRC 118

Minister for Aboriginal Affairs

Issues

1. By correspondence received 5 February 2010, the Acting Minister for Aboriginal Affairs advised the Committee that the Minister for Aboriginal Affairs has written to the Premier requesting a postponement of the automatic repeal of the above Regulation.

Recommendation

2. That the Committee approves the publication of this report to advise the Minister that it does not have any concerns with the postponement of the repeal of the Regulation.

Comment

Aboriginal Land Rights Regulation 2002

3. The Minister has proposed the postponement of the repeal of the above Regulation for the third time. The reasons for seeking this postponement are explained by the Acting Minister:

- The 2007 amendments to the *Aboriginal Land Rights Act* and the recently passed *Aboriginal Land Rights Amendment Act 2009* (land dealing amendments) gave effect to the recommendations of the NSW Government's Aboriginal Land Rights Act Review Taskforce, that followed consultations with key stakeholders and Aboriginal communities across NSW during 2005/2006 and 2009 respectively;

- The implementation of the land dealing amendments is due to commence in early 2010, which will provide an opportunity for a review of the *Aboriginal Land Rights Regulation* in relation to the provisions of Division 4 of Part 2 of the *Aboriginal Land Rights Act* in 2011; and

- Completion of the *Aboriginal Land Rights Act* review and amendment process, with anticipated miscellaneous amendments in 2010, will provide the opportunity for a comprehensive review and remaking of the *Aboriginal Land Rights Regulation* in 2011.

C101
110

NSW GOVERNMENT

Office of the
Minister for Ageing
Minister for Disability Services
Minister for Aboriginal Affairs

Our Reference: 10LL/2020

RECEIVED
5 FEB 2010
LEGISLATION REVIEW COMMITTEE

Mr Allan Shearan MP
Chairperson
Legislative Review Committee
Parliament House
Macquarie Street
Sydney 2000 NSW

Dear Mr Shearan

Re: **Automatic repeal of the *Aboriginal Land Rights Regulation 2002***

I am writing to advise that on 21 October 2009, the Minister for Aboriginal Affairs, the Honourable Paul Lynch MP, wrote to the Premier requesting a postponement of the repeal of the *Aboriginal Land Rights Regulation 2002* (ALRR), which is due for automatic repeal on 1 September 2010.

The reasons for seeking a third postponement of the repeal of the ALRR are:

a) Substantial review of, and amendment to, the ALRR was effected as part of the process of significant amendments to the principal legislation, the *Aboriginal Land Rights Act 1983* (ALRA), which commenced operation on 1 July 2007;
b) The 2007 amendments to the ALRA and the recently passed *Aboriginal Land Rights Amendment Act 2009* (land dealing amendments), gave effect to the recommendations of the NSW Government's ALRA Review Taskforce, and followed a process of consultation with key stakeholders and Aboriginal communities across NSW during 2005/2006 and 2009 respectively;
c) The implementation of the land dealing amendments, due to commence operation in early 2010, will provide an opportunity for a review of the ALRR in relation to the provisions of Division 4 of Part 2 of the ALRA in 2011; and
c) Completion of the ALRA review and amendment process, through anticipated miscellaneous amendments in 2010, will provide the opportunity for a comprehensive review and remaking of the ALRR in 2011.

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Phone: (61 2) 9228 3333 Fax: (61 2) 9228 5551

Should further assistance be required, please contact Mr Ross Pearson, Manager, Compliance and Regulation, Aboriginal Affairs NSW on 9219 0763 or by email to Ross.Pearson@daa.nsw.gov.au.

Yours sincerely

Paul McCulloch MP
Acting Minister for Aboriginal Affairs

22 FEB 2010

Notification of Postponement

S. 11 Subordinate Legislation Act 1989
Paper No: 5309

NOTIFICATION OF THE PROPOSED POSTPONEMENTS OF THE REPEAL OF RADIATION CONTROL REGULATION 2003; FISHERIES MANAGEMENT (AQUATIC RESERVES) 2002

...

Files Ref: LRC379, 136

Minister for Climate Change and the Environment

Issues

1. By correspondence received 3 February 2010, the Minister advised the Committee that he has written to the Premier and requested the postponement of the above two regulations.

Recommendation

2. That the Committee advise the Minister that it does not have any concerns with the postponements of the repeal of these regulations.

Comment

1. Radiation Control Regulation 2003

3. The Minister has proposed the postponement of the repeal of this regulation for the third time.

4. The Minister advises that postponement is sought because a review of the *Radiation Control Act 1990* is currently underway. It is anticipated that significant changes may be made to the existing form of this regulation subsequent to this review. It is expected that the review will be completed by May 2010 and the regulation remade by August 2011.

2. Fisheries Management (Aquatic Reserves) Regulation 2002

5. The Minister has proposed the postponement of the repeal of this regulation for the fourth time.

6. The Minister advises that postponement is sought because of an expected review of the *Fisheries Management Act 1994* in 2010. It is anticipated that the review may result in changes to the *Fisheries Management Act 1994* that, in turn, will have implications on this Regulation and a postponement is sought to allow the DECCW to take into account the outcome of the review in remaking the regulation. It is expected that this Regulation will be remade by August 2011.

Hon Frank Sartor MP
Minister for Climate Change and the Environment and
Minister Assisting the Minister for Health (Cancer)

Our reference: DOC09/59381

The Hon Allan Shearan MP
Chair of the Legislation Review Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Shearan

In accordance with section 11(4) of the *Subordinate Legislation Act 1989*, I write to notify you of my intention to request a third postponement of the repeal of the *Radiation Control Regulation 2003* and a fourth postponement of the repeal of the *Fisheries Management (Aquatic Reserves) Regulation 2002*. Both regulations are administered for me by the Department of Environment, Climate Change and Water

1. Radiation Control Regulation 2003
I have written to the Premier requesting a third postponement of the repeal of this Regulation.

A major review of the *Radiation Control Act 1990* is currently underway and may result in significant changes being made to the existing form of this Regulation. The postponement of the staged repeal of this Regulation is sought because there has been more work on the review of the Radiation Control Act than had been anticipated, in terms of the inclusion of provisions for security of radioactive sources and the inclusion of mining and minerals processing within its scope. The review of the Radiation Control Act is expected to be completed by May 2010.

It is expected that this Regulation will be remade by August 2011.

2. Fisheries Management (Aquatic Reserves) Regulation 2002
I have written to the Premier requesting a fourth postponement of the repeal of this Regulation.

The Department of Industry and Investment will be conducting a review of the *Fisheries Management Act 1994* in 2010. The review may result in changes to the Fisheries Management Act that have subsequent implications for this Regulation. A postponement is sought to enable DECCW to take into account the outcome of the Act review in remaking the Regulation.

It is expected that this Regulation will be remade by August 2011.

Yours sincerely

1 FEB 2010

Frank Sartor MP

cc: Department of Premier and Cabinet

Level 35, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000
Phone: (61 2) 9228 5811 Fax: (61 2) 9228 5499

SECTION C: Correspondence on Regulations

FISHERIES MANAGEMENT LEGISLATION AMENDMENT (FISHING CLOSURES) REGULATION 2009

Ministerial Correspondence

Published in Gazette: 30 October 2009, page 522

Minister Responsible: Hon Steve Whan MP

Portfolio: Primary Industries

Background

1. The Committee reported on this Regulation in its *Legislation Review Digest 16 of 23 November 2009*.

2. The Committee resolved to write to the Minister for Primary Industries to seek clarification with regard to the Committee's concerns as to whether amending the *Fisheries Management Act 1994* by this Regulation is an appropriate delegation of legislative power, and whether the permanent prohibitions under the Regulation may be inconsistent with the duration of closures provided under the Act.

Minister's Reply

3. By letter dated 22 December 2009, the Minister replied to the Committee's concerns and advised that this Regulation ('Closures Regulation"):

    - Converted some fishing closures into permanent prohibitions.
    - It was considered that section 8 closures should be used for emergencies or for interim measures rather than to address what are in effect permanent prohibitions.

4. The Minister's reply clarified that:

> The converted closures are therefore "prohibited classes of fishing" rather than closures. These prohibited classes of fishing in clauses 8A, 8B and Schedule 2 of the *Fisheries Management (General) Regulation 2002* are not inconsistent with section 10 of the *Fisheries Management Act 1994* ("the Act") because they are not closures and are not made pursuant to the regulation making head of power for closures in section 13 of the Act. Rather, these prohibited classes of fishing are made under the regulation making head of power in sections 20, 40, 60 and 289 of the Act.
>
> Therefore, in response to the Committee's concerns, it is submitted that the Closures Regulation is not inconsistent with section 10 of the Act and does not attempt to amend a key feature of the Act, being the duration of closures, because ironically the Closures Regulation does not create closures. In hindsight it appears that the name of the Closures Regulation itself has probably caused some of the confusion.

Committee's Response

The Committee thanks the Minister for his reply.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

23 November 2009

Our Ref: LRC 3444

The Hon Tony Kelly MLC
Minister for Primary Industries,
Level 34 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009

Pursuant to its obligations under s 9 (1A) of the Legislation Review Act 1987, the Committee has resolved to report to Parliament on the above Regulation in its *Legislation Review Digest No 16 of 23 November 2009*.

The Committee has also resolved to write to you for your advice on clarifying the following questions of concern.

By aiming to convert some fishing closures that currently have effect under section 8 of the *Fisheries Management Act 1994* for a period of 5 years to permanent prohibitions, the Committee asks whether this Regulation may be inconsistent with, or contrary to the Act's duration of closures provided under its section 10 (2).

The Committee also asks whether this could appear to be a significant delegation of legislative powers by allowing the amendment of a key feature of the Act (duration of fishing closures not to exceed 5 years) by a regulation that will convert some of the fishing closures to permanent prohibitions.

Thank you for your attention to this matter. The Committee looks forward to receiving your advice. If you should have any further queries, please contact Catherine Watson, Committee Manager, on 9230 2036 or email: Catherine.Watson@parliament.nsw.gov.au

Yours sincerely

Allan Shearan MP
Chair

Parliament of New South Wales · Macquarie Street · Sydney NSW 2000 · Australia
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The Hon Steve Whan MP
Minister for Primary Industries
Minister for Emergency Services
Minister for Rural Affairs

MOC09/1719

Ms Carrie Chan
Senior Committee Officer
Legislation Review Committee
Parliament of NSW
Macquarie Street Sydney NSW 2000

22 [illegible] 2009

Email: Carrie.Chan@parliament.nsw.gov.au

Dear Ms Chan

I refer to the questions of concern raised by the Legislation Review Committee in relation to the *Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009* ("Closures Regulation").

As noted by the Committee, the Closures Regulation converted some fishing closures into permanent prohibitions. The closures selected for inclusion in the Closures Regulation involve matters which were considered to be more appropriately dealt with as permanent prohibitions in the regulation. In fact the majority of the closures identified have been in force (via a process of renewals) for a number of decades. It was considered that section 8 closures should be used for emergencies or for interim measures rather than to address what are in effect permanent prohibitions.

The converted closures are therefore "prohibited classes of fishing" rather than closures. These prohibited classes of fishing in clauses 8A, 8B and Schedule 2 of the *Fisheries Management (General) Regulation 2002* are not inconsistent with section 10 of the *Fisheries Management Act 1994* ("the Act") because they are not closures and are not made pursuant to the regulation making head of power for closures in section 13 of the Act. Rather, these prohibited classes of fishing are made under the regulation making head of power in sections 20, 40, 60 and 289 of the Act.

Therefore, in response to the Committee's concerns, it is submitted that the Closures Regulation is not inconsistent with section 10 of the Act and does not attempt to amend a key feature of the Act, being the duration of closures, because ironically the Closures Regulation does not create closures. In hindsight it appears that the name of the Closures Regulation itself has probably caused some of the confusion.

If staff in your office require further information on this matter, they should contact Ms Theresa Chidlac, Parliamentary Liaison Officer, in my office, on 9228 3800.

Yours sincerely

Steve Whan MP
Minister for Primary Industries

Level 33 Governor Macquarie Tower
1 Farrer Place, Sydney NSW 2000
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Fax: 9228 3804
Email: office@whan.minister.nsw.gov.au

Parliament House,
Macquarie Street
Sydney NSW 2000
Phone: 9230 2291
Fax: 9230 2086

Appendix 1: Index of Bills Reported on in 2010

	Digest Number
Building and Construction Industry Long Service Payments Amendment Bill 2009	1
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
Sydney Olympic Park Authority Amendment Bill 2009	1

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1		
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
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	8/08/09				10
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	6/02/09		9	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07	13/2/09	1		2
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1	
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8	
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7		
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13	
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	5/01/09		14	2
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07	22/01/09	1		2
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1, 2		
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1		
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 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	
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	
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		
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	
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		