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No 11 of 2004

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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.

Part One – Bills section A: COMMENT ON BILLS

1. ADMINISTRATIVE DECISIONS TRIBUNAL AMENDMENT BILL 2004

Date Introduced:	1 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

- 1. The objects of this Bill are:
 - (a) to amend the Administrative Decisions Tribunal Act 1997:
 - (i) to provide that any appeal to an Appeal Panel of the Administrative Decisions Tribunal (the **Tribunal**) in respect of an interlocutory decision of the Tribunal may be instituted only with the leave of the Panel;
 - (ii) to enable the President of the Tribunal to direct that an Appeal Panel of the Tribunal be constituted by a single presidential judicial member to deal with an interlocutory matter; and
 - (iii) to enable the President or (subject to any direction of the President) a Divisional Head to direct that one judicial member of a Division deal with an interlocutory matter arising in proceedings in the Division, and
 - (b) to amend the *Architects Act 2003*, the *Surveying Act 2002*, the *Veterinary Practice Act 2003* and the *Veterinary Surgeons Act 1986* to remove any right to appeal certain decisions of the Tribunal to an Appeal Panel and to provide instead for such appeals to be made directly to the Supreme Court, and
 - (c) to amend the *Children and Young Persons (Care and Protection) Act 1998* to enable the regulations under that Act to provide for certain decisions in relation to family day care children's services to be reviewed by the Tribunal.

Background

2. In setting out the reasons for the Bill in the second reading speech, the Parliamentary Secretary stated:

The bill amends the *Administrative Decisions Tribunal Act 1997* to streamline the interlocutory and appeals processes in the Administrative Decisions Tribunal. ...

This bill will allow the tribunal to realise considerable annual savings and reduce administrative delays. It will also allow tribunal members to concentrate on the tribunal's core jurisdiction, which is to make and review administrative decisions that affect people's rights and resolve general complaints. ... The savings will result chiefly

Administrative Decisions Tribunal Amendment Bill 2004

from single member hearings of interlocutory matters and introducing appeals by leave in respect of interlocutory matters. ...

The benefit of this reform is twofold. The first benefit is that matters can proceed more quickly. ... The second benefit is a considerable reduction in costs.

A third reform is to remove the right of appeal to the appeal panel of the tribunal in matters involving architects, surveyors and veterinary surgeons. A decision of the tribunal at first instance in these professional proceedings may now be appealed directly to the Supreme Court. ...

Individuals subject to disciplinary hearings, fighting for their professional reputation and their professional livelihood, will typically refuse to accept adverse findings. They will continue to appeal to the ultimate level of the Supreme Court before they accept a finding. In doing so, they can place a considerable burden on the resources of the tribunal. ...

The abolition of the intermediate right of appeal was implemented in 2001 in relation to legal practitioners and licensed conveyancers. That reform has been uncontroversial.¹

The Bill

- 3. The Bill enables:
 - the President to direct that an Appeal Panel be constituted by one presidential judicial member to deal with an *interlocutory matter²* arising in an *internal* appeal³ or *external appeal*⁴; and
 - the President or (subject to any direction of the President) a Divisional Head to direct that one judicial member of a Division deal with an interlocutory matter arising in proceedings in the Division [proposed s 24A].
- 4. The Bill also prevents appeal to the Appeal Panel from an interlocutory decision of the Tribunal *except* by leave of the Appeal Panel. For an application for such leave, the President may direct that a single presidential judicial member constitute the Appeal Panel [proposed amendment to s 113].
- 5. Schedule 2 of the Bill amends the following Acts to remove the right to appeal to an Appeal Panel of the Tribunal against decisions of the Tribunal and instead provides

(d) extensions of time for any matter (including for the lodgment of applications or appeals),

- (f) disqualification of members,
- (g) joinder of parties to proceedings,
- (h) summary dismissal of proceedings,

¹ Mr Graham West, Parliamentary Secretary, *Legislative Assembly Hansard*, 1 September 2004.

Interlocutory matters include:

⁽a) stays or adjournments,

⁽b) prohibition or restriction of the disclosure, broadcast or publication of matters by order under section 75, (c) summonses,

⁽e) evidential matters,

⁽i) any other interlocutory issue before the Tribunal [PROPOSED S 24a(1)].

³ *Internal appeal* means an appeal made under Part 1 of Chapter 7 of the Act against a decision of the Tribunal [s 4 of the Act].

⁴ **External appeal** means an appeal referred to in Part 1A of Chapter 7 of the Act [s 4 of the Act], ie, an appeal against a decision made under an Act where that Act provides that an appeal may be made to the Tribunal against the decision and specifies that any such appeal is an external appeal.

for such appeal to be made to the Supreme Court directly in relation to proceedings commenced these Acts:

- the Architects Act 2003;
- the Surveying Act 2002;
- the Veterinary Practice Act 2003; and
- the Veterinary Surgeons Act 1986.
- 6. Schedule 2 also amends the *Children and Young Persons (Care and Protection) Act 1998* to enable the regulation under that Act to provide for certain decisions in relation to family day care children's services to be reviewed by the Tribunal.

Issues Considered by the Committee

Issue: Clause 2- Commencement by proclamation

- 7. Apart from the amendments to the *Children and Young Persons (Care and Protection) Act 1998*, which commence on assent, the Bill commences on a day or days to be appointed by proclamation.
- 8. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act, or a part of the Act, at all.
- 9. The Minister's office has advised the Committee that the Bill is to commence on proclamation to allow time to ensure that all Tribunal members are made aware of the new appeal arrangements under the Bill.

In particular, the President of the Tribunal may require time to for administrative arrangements to be put in place.

10. The Minister's office does not anticipate these processes to take much longer than a couple of weeks.

The Committee makes no further comment on this Bill.

Professional Standards Amendment Bill 2004

2. PROFESSIONAL STANDARDS AMENDMENT BILL 2004

Date Introduced:	1 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

- 1. The Professional Standards Amendment Bill 2004 amends the *Professional Standards Act 1994* to make further provision for the operation of schemes under that Act for limiting the occupational liability of members of occupational associations.
- 2. These amendments are proposed with a view to national consistency of professional standards legislation and to implement recommendations of the Professional Standards Council.⁵

Background

- 3. The objects of the *Professional Standards Act 1994* are:
 - (a) to enable the creation of schemes to limit the civil liability of professionals and others;
 - (b) to facilitate the improvement of occupational standards of professionals and others;
 - (c) to protect the consumers of the services provided by professionals and others; and
 - (d) to constitute the Professional Standards Council to supervise the preparation and application of schemes and to assist in the improvement of occupational standards and protection of consumers.
- 4. According to the second reading speech:

In August 2003, at a ministerial meeting on insurance issues, all States and Territories agreed to implement nationally consistent professional standards legislation. It was recognised that a national approach to professional standards legislation is one of a number of strategies to address the ongoing availability and affordability of professional indemnity insurance. Through the Standing Committee of Attorneys General, New South Wales also encouraged other jurisdictions to adopt a national approach to professional standards legislation. The standing committee agreed to a national approach on this issue at its meeting in August 2003.

Professional standards legislation facilitates the capping of occupational liability, while also protecting consumer interests through requirements for insurance and the implementation of risk management strategies and complaints and disciplinary procedures. In New South Wales there are currently seven schemes approved under the Professional Standards Act 1994. These schemes cover accountants, solicitors,

⁵ Mr Graham West, Parliamentary Secretary, *Legislative Assembly Hansard*, 1 September 2004.

engineers, surveyors and valuers. The Professional Standards Council is currently considering a draft scheme for barristers.

The Professional Standards Amendment Bill will implement a number of changes to ensure that the New South Wales Act is consistent with the Victorian Professional Standards Act 2003 and with professional standards bills developed in other States and Territories, and will implement a number of improvements to the New South Wales Act suggested by the Professional Standards Council, which is the independent body that administers the legislation.

The Bill

- 5. The Bill amends the *Professional Standards Act 1994*:
 - so that the definition of *occupational association* includes associations that comprise members of more than one occupational group sch 1[1] & [2]];
 - to remove the exclusion from coverage under the Act relating to liability arising from the negligence of legal practitioners in acting for clients in personal injury [sch 1[5];
 - to extend occupational liability limitation (OLL) schemes to officers (including directors) of a corporation that is a member of an occupational association [sch 1[6]];
 - to clarify that OLL schemes limit the liability of partners, officers, employees and associates of members of an occupational association that arises in connection with the liability of that member [sch 1[7]];
 - to make it clear that the cap on liability of the amount payable under a policy of insurance includes any excess payable under the policy [sch 1[9]];
 - to allow a member of the scheme to rely on business assets alone (as an alternative to business assets together with an insurance policy) to establish the ability to satisfy a claim [sch 1[10]];
 - to provide that, where an OLL scheme provides for a limitation amount to be calculated as a multiple of a reasonable charge for the service, liability for damages is limited to the greater of that limitation amount or any minimum cap determined by the Professional Standards Council and specified in the scheme [sch 1[10]];
 - to allow an OLL scheme to set different caps on liability for different cases and permit the relevant occupational association to assign a higher cap to a person covered by a scheme on the application of that person [sch 1[11];
 - to allow OLL schemes to set different insurance standards for its members on the basis of different kinds of work or any other relevant circumstances [sch 1[15]]; and
 - to remove the requirement of Ministerial approval for the Professional Standards Council to conduct forums [sch 1[16]] or establish committees [sch 1[17]] and to require the Council to include in its annual report details of any such forums conducted or committees established [sch 1[18]].
- 6. The Minister stated that:

Professional Standards Amendment Bill 2004

... [T]he bill increases the flexibility for specifying different caps on liability in a scheme for different cases or classes. It also enables individual scheme members to apply for a higher cap than would otherwise apply to them under a scheme. These amendments recognise that members of occupational associations may offer different services or undertake different activities that attract different levels of risk.

Secondly, the bill enables multiples, monetary ceilings and caps on liability within schemes to be expressed as a formula, instead of being limited to a single, fixed numeral. This enables different variables to be taken into account.

Thirdly, the bill enables different insurance standards to be set for members within an occupational association. Different standards may be set for different kinds of work or on the basis of any other differing circumstances that are relevant.

...Finally, the bill contains a number of clarifying amendments... [P]rovisions enabling a cap on liability to be calculated as a multiple of the fee charged will be amended to clarify that if the multiple produces an amount less than the minimum cap, liability for damages will be limited to the minimum cap. The Act currently provides for a minimum cap of \$500,000.⁶

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

- 7. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act, or parts of the Act, at all.
- 8. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.
- 9. The Minister's offices advises that the Act is commencing on proclamation to ensure that the professional groups involved in schemes under the Act are made aware of the changes under the Bill.
- 10. The Minister's office does not anticipate that these processes will take much longer than a couple of weeks.

The Committee makes no further comment on this Bill.

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⁶ Mr Graham West, Parliamentary Secretary, *Legislative Assembly Hansard*, 1 September 2004.

3. REGISTERED CLUBS LEGISLATION AMENDMENT BILL 2004

Date Introduced:	1 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Purpose and Description

- 1. The Bill's object is to amend the *Registered Clubs Act 1976* (the Act) and other Acts to:
 - enable employee organisations to make complaints against registered clubs;
 - require members of the governing bodies of registered clubs and top executives of registered clubs to disclose fees received from affiliated bodies;
 - make it clear that an inquiry under Part 4A of the Act may arise out of information or allegations of corrupt or improper conduct by or in relation to a registered club made by any person;
 - clarify the circumstances in which a person presiding at such an inquiry may make findings as to whether there has been corrupt or improper conduct by or in relation to a registered club;
 - enable the findings of such an inquiry to be divulged or published by the Director of Liquor and Gaming (the Director) with the approval of the Minister;
 - make it an offence to take reprisals against an employee of a registered club or a member of the governing body of a registered club who discloses information to the Director;
 - make it an offence for an employee of a registered club or a member of the governing body of a registered club to disclose information to the Director that the employee or member knows is false or misleading in a material respect;
 - extend the current powers of the Director with respect to investigation of grounds for complaints against registered clubs to other matters for which action may be taken under the Act;
 - enable matters arising out of an inquiry or an investigation under that Act, and relating to the employment, including termination of employment, of a member of staff of a registered club, to be referred to the Industrial Relations Commission or the head of any Government Department involved in the administration of the *Industrial Relations Act 1996*;
 - enable the Director to recover the reasonable costs of an inquiry or investigation from a registered club or a licensee, manager, close associate or non-proprietary association within the meaning of the *Liquor Act 1982* (Liquor Act);

Registered Clubs Legislation Amendment Bill 2004

- make it clear that the Liquor Administration Board (the Board) may suspend or cancel gaming machine authorisations if a registered club or licensee fails to pay gaming machine tax or a monitoring fee;
- enable the disclosure of information arising out of, or relating to, the administration of the *Gaming Machine Tax Act 2001* if, in the opinion of the Minister or Treasurer, it is in the public interest to do so;
- give a defence of absolute privilege in proceedings for defamation in relation to disclosures to or by the Minister or Director of a report of an inquiry under Part 4A of the Act; and
- make other consequential amendments and provision of a savings and transitional nature.
- 2. The Act commences on assent [proposed s 2].

Background

- 3. In August 2003, the Minister for Gaming and Racing established a Club Industry Task Force.⁷ Stage 1 of the task force's deliberations resulted in the *Registered Clubs Amendment Act 2003* (the 2003 Act), and amendments to the *Registered Clubs Regulation 1996*.⁸
- 4. The 2003 Act dealt specifically with amendments to club governance, probity and various reporting requirements. It aimed to raise and set a uniform high standard of transparency and accountability in reporting the activities of registered clubs to help ensure that club members are adequately informed of the decisions made by members of the governing body and senior club management.

The 2003 Act was also aimed at establishing improved standards of accountability and assisting in dispelling perceptions and allegations concerning mismanagement of clubs.⁹

- 5. The Task force is currently in Stage 2 of its deliberations. These involve further consultation with key stakeholders and club industry participants regarding club amalgamations, election of club directors, codes of conduct and industry benchmarking.¹⁰
- 6. A Special Ministerial Advisory Group has also been established to assist and augment the role and duties of the Club Industry Task Force. The advisory group constitutes the

⁷ The task force comprises representatives of ClubsNSW, the Services Clubs Association, the New South Wales Bowling Association, the Club Managers Association of Australia, the Leagues Clubs Association of New South Wales, the Liquor, Hospitality and Miscellaneous Workers Union, the Department of Gaming and Racing and members of the Minister's staff: Hon G A McBride MP, Minister for Gaming and Racing, Second Reading speech of the *Registered Clubs Amendment Bill 2003*, Legislative Assembly *Hansard*, 14 November 2003.

⁸ The *Registered Clubs Amendment Bill 2003* was considered by the Committee in its *Digest* No. 7 of 2003 of 1 December 2003.

⁹ Hon G A McBride MP, Minister for Gaming and Racing, second reading speech of the *Registered Clubs Amendment Bill 2003*, Legislative Assembly *Hansard*, 14 November 2003.

¹⁰ Hon G A McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 1 September 2004.

chief executive officers of nine significant registered clubs, and provides a wide range of detailed advice on policy and management issues by people who have lengthy experience in the long-term management of clubs.¹¹

The Bill

Complaints by employee organisations (Whistleblowing)

7. The Bill amends the Act to enable a person authorised by an employee organisation to make a complaint against a registered club that may result in the club's certificate of registration being cancelled [proposed amended s 17].

Such a complaint must be made on the grounds for complaints set out in s 17(1AA) of the Act.¹²

- (iii) undue competition and economic waste will result if the certificate of registration continues in force,
- (iv) the quiet and good order of the neighbourhood in which the premises of the club are situated will be disturbed if the certificate of registration continues in force,
- (v) the supply of liquor to the club or on the premises of the club has not been under the control of the governing body of the club,
- (vi) liquor has been illegally sold, supplied or disposed of on the premises of the club during the period of 2 years that last preceded the making of the complaint,
- (vii) the secretary of the club or one or more members of the governing body of the club are not fit and proper persons to act as such,
- (viii) the club has habitually been used mainly for the supply of liquor,
- (ix) persons have already habitually carried liquor away, or have attempted to carry liquor away, from the premises of the club in contravention of section 46,

(x) the club has failed to comply with the provisions of section 37, 39, 40, 48 or 49, whether or not it has been convicted of an offence in respect of that failure,

- (xi) a rule of the club referred to in section 30 (1) has been broken or any other rule of the club has been habitually broken,
- (xia) (Repealed)
- (xii) the club has been conducted, or the premises of the club have been habitually used, for an unlawful purpose,
- (xiii) intoxicated persons have frequently been on the premises of the club or have frequently been seen to leave those premises,
- (xiv) the club has failed to comply with a condition to which its certificate of registration is subject,
- (xv) that the club has engaged in conduct or activities that are likely to encourage misuse or abuse of liquor (such as binge drinking or excessive consumption),
- (xvi) that acts involving violence against persons or damage to property have frequently been committed on or near the premises of the club by persons who have been on the premises of the club,(xvii) (Repealed)
- (b) on the ground that the club has done anything in respect of which it may make an application under Division 2 without the Licensing Court or Board, as the case may require, having granted an application for it to do that thing,

- (d) on the ground that the club has ceased to exist,
- (e) on any other ground that the person issuing the summons is satisfied is not frivolous or vexatious.

¹¹ Hon G A McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 1 September 2004. ¹² These are:

⁽a) on the ground that any one or more of the following subparagraphs is applicable:

⁽i) the requirements specified in section 10 (1) are not being met, or have not been met, in relation to the club,

⁽ii) having regard to existing facilities and social amenities available to meet the purposes of the club, the club is not required to meet a genuine and substantial need,

⁽c) (Repealed)

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- 8. An employee organisation is:
 - (a) an industrial organisation of employees registered under the *Industrial Relations Act 1996*; or
 - (b) an association of employees registered as an organisation under the *Workplace Relations Act 1996* of the Commonwealth [proposed s 17(8)].
- 9. According to the Minister, this amendment addresses an anomaly by bringing the Act into line with the Liquor Act, which currently nominates employee organisations as one of the parties that may make a formal complaint against a licensee.¹³

Disclosure of fees

10. The Bill requires a member of the governing body of a registered club or a top executive of a club¹⁴ to declare to the secretary of the club any remuneration, fee for services or similar payment received from an affiliated body if it exceeds \$500 [proposed amended s 41E].

Currently, it is only *gifts* from such bodies that are required to be declared.

11. The aim of this amendment is to require the disclosure of fees that a club director would receive from a football club, or other enterprise, where there is an interdependent financial relationship.¹⁵

Inquiries arranged by Director

- 12. The Act currently enables the Director to arrange for the holding of an inquiry for the purposes of investigating an allegation about any corrupt or other improper conduct in relation to a registered club [Division 6 of Part 4A].
- 13. The Bill amends the Act to make it clear that the Director may arrange an inquiry into information about corrupt or improper behaviour, as well as allegations, and that this applies in relation to allegations made, or information provided, by *any* person [proposed s 41X(1A)].
- 14. A report to the Director on the findings of the inquiry may contain any one or more of the following:
 - (a) findings in relation to the subject-matter of the inquiry and to other matters arising in the course of the inquiry;
 - (b) a finding or opinion as to whether there has been corrupt or improper conduct by a registered club or by any person in relation to a registered club; or
 - (c) a recommendation that the Director refer a matter to a law enforcement agency, or other person or body under the proposed section, or that the

¹³ The relevant section is s 67(e) of the *Liquor Act 1982*.

¹⁴ A *top executive* of a registered club means a person who is one of the five highest paid employees of the club at each separate premises of the club: s 41B(1) of the *Registered Clubs Act 1976*.

¹⁵ Hon G A McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 1 September 2004. *Fee* means remuneration, a fee for services or any similar payment: proposed s 41E(5) of the *Registered Clubs Act 1976*.

Director take other action in relation to the subject-matter of the inquiry or to other matters arising in the course of the inquiry [proposed s 41Z(2)].¹⁶

- 15. However, the person presiding at the inquiry is *not* authorised to include in a report to the Director a statement as to a finding or opinion that a specified person is guilty of, or has committed, or is committing, a criminal offence, whether or not a specified criminal offence [proposed s 41Z(4)].
- 16. The Bill enables the Director, with the approval of the Minister, to divulge or publish the whole or part of the report of an inquiry. The Minister may give an approval only if of the opinion that it is *in the public interest* to do so [proposed s 41ZAA].¹⁷

Protection of employees from reprisals

17. The Bill makes it an offence for a person or registered club to take detrimental action (including dismissal from employment or loss of office) against an employee or a member of the governing body of the club who discloses information to the Director concerning conduct that is or may be the subject of a complaint under the Act.

The maximum penalty is 100 penalty points (\$110,000) [proposed s 43B(1)].

- 18. It is a defence to an offence under proposed s 43B(1) if the defendant proves that the disclosure was frivolous or vexatious [proposed s 43B(2)].
- 19. According to the Minister, this amendment is based on provisions in the *Protected Disclosures Act* 1994.¹⁸
- 20. The Bill also makes it an offence for an employee or a member of the governing body of a registered club to disclose information to the Director concerning the conduct of a club or a person that the employee or member knows is *false or misleading in a material respect*.

The maximum penalty is 100 penalty points (\$110,000) [proposed s 43C].

¹⁶ A finding or opinion referred to in proposed s 41Z(2)(b) may be included in a report *only* if the person presiding:

⁽a) has the powers and authorities conferred by s 41Y(1)(b); and

⁽b) is of the opinion that the conduct concerned may involve a criminal offence or a disciplinary offence: proposed s 41Z(3) of the *Registered Clubs Act 1976*.

¹⁷ Schedule 1 [16] to the *Registered Clubs Legislation Amendment Bill 2004* inserts Part 19 into Sch 2 to the *Registered Clubs Act 1976*. The proposed Part applies the amended and substituted provisions relating to inquiries to any *existing* inquiries for which a final report has not yet been provided.

¹⁸ Hon G A McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 1 September 2004. The relevant section appears to be s 20 of the *Protected Disclosures Act 1994*:

⁽¹⁾ A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.

⁽¹A) In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

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Investigations and related powers of Director

21. Currently, the Director may carry out investigations to ascertain whether a complaint should be made in relation to the secretary, or a member of the governing body, of a registered club.

The Director may request the Commissioner of Police to inquire into and report on matters, and to make other requirements of other persons to produce documents and information [s 57].

- 22. The Bill extends these powers to investigations to ascertain:
 - (a) whether a complaint should be made in relation to a registered club; or
 - (b) whether a member of the governing body or an employee of a club is complying with Part 4A of the Act (relating to accountability requirements) [proposed s 57E].
- 23. The Bill enables the Director to refer to a law enforcement agency, or other person or body, matters arising out of an investigation or inquiry under proposed s 57E, if satisfied that such matters relate to a breach of the law, or constitute, or may constitute grounds for taking other proceedings [proposed s 57F(1)].¹⁹
- 24. The Bill also enables the Director to refer to the Industrial Relations Commission, or the head of any Government Department involved in the administration of the *Industrial Relations Act 1996*, matters arising out of the employment including termination of employment of an employee of a registered club [proposed s 57F(2)].

Amendment of other Acts

25. The Bill amends the *Defamation Act 1974* to provide a defence of absolute privilege in proceedings for defamation in relation to disclosures to or by the Minister or Director, of a report of an inquiry under Part 4A of the Act [proposed s 17V].

Gaming Machines Act 2001

- 26. The Bill amends the *Gaming Machines Act 2001* to make it clear that the Board may suspend or cancel the authorisation of a holder of an authorisation to keep approved gaming machines if the holder fails to pay a monitoring fee or gaming machine tax under the *Gaming Machine Tax Act 2001*, or instalments of tax, or tax penalties.
- 27. The Minister noted that this is a power that the Board previously exercised when it also had responsibility for collecting revenue due to the gaming machine provisions being located in the Act and the Liquor Act. Maintaining the power to revoke the right

¹⁹ Proposed s 57G enables the Director to require a registered club to pay the Director's reasonable costs of an investigation or inquiry if it results in a complaint and an order is made by the Licensing Court that the costs be awarded to the Director in the proceedings. Schedule 1 [16] of the *Registered Clubs Legislation Amendment Bill 2004* inserts a transitional provision that applies proposed s 57G to investigations or inquiries commencing on or after the commencement of the proposed section.

to keep gaming machines was overlooked when the revenue-collecting role was transferred to the Office of State Revenue.²⁰

- 28. The Bill also amends the *Gaming Machines Act 2001* to:
 - enable the Minister, Treasurer, or Director-General of the Department of Gaming and Racing, to publish information arising out of, or relating to, the administration or execution of the *Gaming Machines Act 2001* if, in the opinion of the Minister or Treasurer, it is in the *public interest* to do so [proposed s 206B]; and
 - enable regulations to be made containing savings and transitional provisions consequential on the enactment of the proposed Act.

Liquor Act 1982

- 29. The Bill amends the Liquor Act to enable the Director to:
 - refer to a law enforcement agency or other person or body matters arising out of an investigation or inquiry under s 66A of that Act, if satisfied that they relate to a breach of the law or constitute or may constitute grounds for taking other proceedings [proposed s 66B]; and
 - require a licensee, manager, close associate or non-proprietary association to pay the Director's reasonable costs of an investigation or inquiry if it results in a complaint and an order is made by the Licensing Court that the costs be awarded to the Director in the proceedings [proposed s 66C].²¹

Issues Considered by the Committee

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

Onus of proof: proposed s 43B(2)

- 30. As noted above, when charged under proposed s 43B(1) with taking detrimental action against a person for the disclosure of illegal or improper conduct (whistleblowing), a person or club so charged may rely on the defence that the disclosure was frivolous or vexatious.
- 31. Pursuant to proposed s 43B(2), once the prosecution has shown that the person or club took detrimental action against a whistleblower substantially based on that person's act of disclosure, it is then incumbent upon the person or club to prove that the whistleblowing was frivolous or vexatious in order to escape liability.
- 32. The Committee notes that this provision has the effect of creating an offence of retaliating against "legitimate" whistleblowing, with the onus of proving the legitimacy or otherwise of any whistleblowing being shifted from the prosecution to the defence.

 ²⁰ Hon G A McBride MP, Minister for Gaming and Racing, Legislative Assembly *Hansard*, 1 September 2004.
²¹ Schedule 2.3 [4] inserts Part 22 into Sch 1 to the *Liquor Act 1982*. The proposed Part applies proposed s 66C to investigations or inquiries commencing on or after the commencement of that section.

Registered Clubs Legislation Amendment Bill 2004

- 33. The Committee notes, however, that reversing the onus of proof in this way places an onus on the club or person to satisfy themselves that any whistleblowing was in fact vexatious or frivolous before taking any detrimental action against the whistleblower. It would be reckless of the person or club to take action against a whistleblower if not sufficiently satisfied of such vexatiousness or frivolity.
- 34. Given that it is consistent with the objects of the Bill that a person or club would need to be satisfied that any disclosure of illegal or improper conduct was vexatious or frivolous before taking any detrimental action against the person making the disclosure, the Committee does not consider that putting the onus of proving such vexatiousness or frivolity on the defendant inappropriately trespasses on personal rights or liberties.

The Committee makes no further comment on this Bill.

Rural Communities Impacts Bill 2004*

4. RURAL COMMUNITIES IMPACTS BILL 2004*

Date Introduced:	2 September 2004
House Introduced:	Legislative Assembly
Member Responsible:	Mr Andrew Stoner MP
Portfolio:	Private Member's Bill

Purpose and Description

- 1. The Bill's object is to require Ministers to consider the likely impact of certain legislation and other government proposals on rural communities.
- 2. *Rural community* is defined in the Bill as that part of New South Wales that is outside the Sydney, Newcastle and Wollongong metropolitan areas [proposed s 3].

Background

3. According to the second reading speech, the fundamental aim of the Bill is to enshrine in legislation the Government's policy of subjecting any major changes proposed by government departments in rural New South Wales to a *rural communities impact statement* (RCIS).²²

The Bill

- 4. Part 2 of the Bill deals with the requirements of an RCIS.
- 5. An RCIS that is required to be prepared under the ensuing Act in relation to a proposed Bill, statutory rule, environmental planning instrument or decision is *not* valid for the purposes of this Act unless it includes the following matters:
 - (a) a detailed description of any costs that are likely to be placed on businesses in the rural community in order to comply with the relevant legislation or decision (whether or not the same costs would be imposed on any other community);
 - (b) an examination of the likely impact of those costs on development and employment in the rural community (whether or not there would be the same impact on any other community);
 - (c) special emphasis on the modelling of the likely impact on the rural community that would occur or remain 5 years after the legislation or decision is made (whether or not there would be the same impact on any other community);
 - (d) an examination of the likely impact of the proposed legislation or decision on the social structures and well-being of the rural community (whether or not there would be the same impact on any other community);
 - (e) an examination of the likely impact of the proposed legislation or decision on the availability of public transport, health services, education facilities,

²² Mr A J Stoner MP, *Legislative Assembly Hansard*, 2 September 2004.

Rural Communities Impacts Bill 2004*

policing, courts, government advisory services and infrastructure provision in the rural community (whether or not there would be the same impact on any other community);

(f) an examination of the likely impact of the proposed legislation or decision on the natural environment, having regard to the need to balance economic and social well-being with environmental sustainability [proposed s 6(1)]

If any of the above matters is not applicable to the relevant legislation or decision under consideration, a RCIS complies with proposed s 6 if it merely states that the matter is not applicable [proposed s 6(2)].

- 6. In addition to the matters listed in proposed s 6, a RCIS may consider other aspects of the likely impact of the proposed legislation or decision on the rural community [proposed s 7].
- 7. If appropriate, a RCIS may merely state that the relevant Bill, statutory rule, environmental planning instrument, or decision has "no likely impact" on the rural community [proposed s 8].
- 8. The Bill requires an assessment of the likely impact on rural communities of proposed:
 - Acts;
 - statutory rules;
 - environmental planning instruments; and
 - Cabinet decisions [Parts 3 6].
- 9. With respect to Cabinet decisions, the Bill applies to every decision that is put before the Cabinet that:
 - (a) involves the proposed introduction of taxes, charges and fees that are, or are likely to be, imposed on residents or businesses in the rural community (whether or not they would also be imposed on any other community);
 - (b) involves the proposed increase of taxes, charges and fees that are, or are likely to be, imposed on residents or businesses in the rural community (whether or not they would also be imposed on any other community); or
 - (c) otherwise could reasonably be expected to have an impact on the rural community (whether or not it has the same impact on any other community) [proposed s 19].
- 10. The Speaker of the Legislative Assembly and the President of the Legislative Council are each to inform their respective Houses of any non-compliance with proposed s 10 or s 14, within 3 sitting days after becoming aware of such non-compliance [proposed s 25].
- 11. The Bill also provides for the establishment of a *Rural Communities Impact Assessment Unit* as a branch of the Cabinet Office, with a requirement that there be in each Department at least one person whose duties involve, or include, liaising with the Unit [Part 7].

- 12. The Rural Communities Impact Assessment Unit must maintain a website that allows free public access to rural communities impact statements [proposed s 23].
- 13. The Speaker of the Legislative Assembly and President of the Legislative Council are each to inform their House, within 3 sitting days, of any non-compliance with the requirements to table a copy of the rural communities impact statement in relation to a bill or a statutory rule set out in sections 10 and 14 [proposed s 25].

Issues Considered by the Committee

14. The Committee did not identify any issues arising under s 8A(1)(b) of the *Legislation Review Act 1989*

The Committee makes no further comment on this Bill.

5. SAVE ORANGE GROVE BILL 2004*

Date Introduced:	31 August 2004
House Introduced:	Legislative Council
Member Responsible:	The Hon John Ryan MLC
Portfolio:	Private Member

Purpose and Description

1. The Bill's object is to facilitate the continued use and operation of the Designer Outlets Centre on Orange Grove Road, Liverpool (Orange Grove Centre), by allowing development for the purposes of that Centre to be carried out with the consent of Liverpool City Council.

Background

2. Liverpool City Council consented to the development in Orange Grove Road on 15 November 2002.

The Orange Grove Centre opened on 21 November 2003.

- 3. On 16 January 2004,²³ the Land and Environment Court ordered:
 - that the development consent for the Orange Grove Centre was unlawful as it was prohibited in the zone in question; and
 - in effect, that the majority of the shops at the Centre should cease trading.

The orders to cease trading were postponed for 28 days.²⁴

- 4. On appeal, the Court of Appeal affirmed that the development consent was unlawful and void and gave similar orders that shops inconsistent with the zoning of the land must cease trading. Again, the orders to cease trading were stayed for 28 days.²⁵
- 5. The Court's orders affected shops prohibited under the Local Environmental Plan (LEP).

However, steps were taken under the *Environmental Planning and Assessment Act* 1979 (EPAA) to rezone the land and thereby allow those shops to trade.

The final decision on whether such rezoning took place lay with the Minister.

6. The Court granted a number of extensions to the stay of its order closing the shops as it thought "it proper to allow time for [Gazcorp to obtain the appropriate development

²³ The development consent was publicly notified on 9 April 2003. The proceedings were commenced on 17 June 2003 [*Westfield Management Pty Ltd v Gazcorp Pty Ltd* [2004] NSWLEC 7 at para 22].

²⁴ Westfield Management Pty Ltd v Gazcorp Pty Ltd [2004] NSWLEC 7.

²⁵ Gazcorp Pty Ltd v Westfield Management Pty Ltd [2004] NSWCA 63.

consent] without there being what in that event would be unwarranted hardship upon many persons beyond the commercial interests of Gazcorp and Westfield".²⁶

7. When the Minister declined to make an amending LEP, the Court's order was allowed to take effect.²⁷

The Bill

8. The Bill permits development to be carried out with the consent of Liverpool City Council for the purposes of an outlets centre at the Orange Grove Designer Outlets Centre site.

In effect, the Bill rezones the site.

Issues Considered by the Committee

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

Erosion of the Rule of Law: Clause 3

- 9. By permitting development for an outlet centre at the Orange Grove site, the Bill has the effect of overturning the result of a specific decision of the Court of Appeal.
- 10. In a constitutional democracy, citizens are entitled to expect that all arms of government will act in accordance with the separation of powers, and the Rule of Law. The Rule of Law embodies a set of principles for "legal restraint and fairness in the use of government power".²⁸

The Universal Declaration of Human Rights expressly recognizes the relationship between the Rule of Law and the protection of human rights.

The Rule of Law is also implicit in the Australian Constitution.²⁹

- 11. The specific aspects of the Rule of Law with which the proposed bill is arguably inconsistent are:
 - legislation should not be retroactive;
 - legal rules should be "sufficiently stable to allow people to be guided by their knowledge of the content of the rules"; and
 - government decisions in specific situations should be guided by applicable legal rules that are relatively general, stable and prospective.³⁰

²⁶ Giles JA in *Gazcorp Pty Ltd v Westfield Management Pty Ltd* [No 2] [2004] NSWCA 130 at para 9 and quoted by Sheller JA in *Gazcorp Pty Ltd v Westfield Management Pty Ltd* [No 3] [2004] NSWCA 215 at para 10.

²⁷ Gazcorp Pty Ltd v Westfield Management Pty Ltd [2004] NSWCA 294.

²⁸ G Walker, *The Rule of Law* (1988), p 3.

²⁹ Australian Communist Party v Commonwealth (1951) 83 CLR 1.

³⁰ See J Finnis, *Natural Law and Natural Rights* (1980) pp 270-271.

- 12. Rights associated with the rule of law are particularly infringed by the enactment of legislation that overturns the result of a judicial decision where that legislation simply gives effect to the Parliament's preferred outcome, rather than altering a substantive legal rule or principle.
- 13. The use of the NSW Parliament's supreme law-making power in this way is by no means unprecedented, particularly in the environmental planning context.³¹ However, given the effect of such legislation on the rule of law and its impact on the rights and legitimate expectations of those whose interests are affected, it is necessary to consider whether such a provision *unduly* trespasses on personal rights and liberties.
- 14. The Committee previously discussed these issues in its consideration of the *Clyde Waste Transfer Terminal (Special Provisions) Act 2003.*³²

As with the current Bill, the *Clyde* legislation overturned the result of a judicial decision which held that proposed development was prohibited under the provisions of the relevant LEP and therefore development consent could not be given to allow it to go ahead.

- 15. There are, however, significant points of contrast with the *Clyde Act*.
 - The *Clyde Act deemed* development consent to have been granted. It effectively made a decision on the merits rather than putting in place a process that would allow a decision to be made by the consent authority. Under the *Save Orange Grove Bill*, the Liverpool Council is still allowed to determine the question of whether consent should be granted, with the assistance of advice from its officers, and any comment from members of the public which it chooses to take into account.³³ The Council would also be able to attach appropriate conditions to such consent.
 - The *Clyde* legislation effectively overrode the decision of the Land and Environment Court, whereas the current Bill seeks to amend the Liverpool LEP to make the proposed development permissible with consent rather than prohibited.
- 16. The current Bill is the equivalent of an amending LEP which rezones a specific piece of land. Such LEPs, which zone particular pieces of land to allow development consent to be given to a particular development (spot rezoning) are common features of the planning system.

It is notable, however, that the Bill bypasses the Minister's power of veto in relation to such amending LEPs put forward by local councils when they are made under the procedures set out in the EPAA.

The Bill also bypasses provisions in the current legislation allowing members of the public to comment on draft LEPs and to have their comments taken into account.

³¹ See D Farrier, R Lyster & L Pearson, *The Environmental Law Handbook* (2nd ed, 1993) p 44.

³² Legislation Review Digest, No 7 of 2003.

³³ There is no *requirement* under the EPAA for the Council to advertise the development application for public comment

17. With respect to Westfield, the successful litigant in the *Gazcorp* decision, the Bill deviates from Rule of Law principles by infringing on its right to rely on the outcome of judicial proceedings in its favour.

By effectively neutralising the decision of the Court of Appeal, the Bill denies the objectors the anticipated benefit of their successful litigation (ie, stopping the development, at least until an amending LEP is made under the provisions of the EPAA).

18. Even if it is acknowledged that a successful litigant has no absolute right to benefit from a 'win' in the courts, the proposed bill may be considered more generally to diminish the quality of access to justice — in this case, the right to participate in decisions affecting the environment.

Section 5(c) of the EPAA states that one of the objects of the Act is to "provide increased opportunity for public involvement and participation in environmental planning and assessment". Although the proposed bill does not formally limit opportunities for individuals to participate in planning decisions, including by objecting and seeking judicial review, the message conveyed by the bill is that such opportunities are fragile, and may, in practical terms, be rendered meaningless in a given case.

At the same time, in bringing the proceedings, Westfield would have been aware of the possibility that a Court decision in its favour could always be overridden by an amendment made to the LEP in accordance with well-established procedures spelt out in the EPAA — procedures in which they would have had a right to comment.

- 19. The Committee is of the view that erosion of the rule of law can only be justified as being in the public interest in extreme circumstances.
- 20. The Committee notes that the Bill, by effectively overturning the result of a specific decision of the Court of Appeal:
 - (a) infringes the rule of law by having Parliament substitute its view of a planning decision for that found by the Court and made by the Minister; and
 - (b) nullifies the beneficial outcome of legal proceedings for the successful party.
- 21. At the same time, the Committee notes that:
 - (a) there are precedents for Parliament intervening in the planning system in similar ways;
 - (b) the intervention is limited in its scope and does not set aside the need for Council approval or prevent the imposition of conditions;
 - (c) the general effect on the law, and on the outcome of the legal proceedings, could have been achieved within the existing law by a decision of the Minister; and
 - (d) the successful party was always subject to the risk of not being able to rely on the outcome of judicial proceedings in its favour.

22. The Committee refers to the Parliament the question of whether this infringement of the rule of law unduly trespasses on personal rights and liberties.

The Committee makes no further comment on this Bill.

6. THREATENED SPECIES LEGISLATION AMENDMENT BILL 2004

Date Introduced:	1 September 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	The Environment

Purpose and Description

1. The Bill amends threatened species legislation with a view to making further provision for the conservation of threatened species and better integrating that legislation with natural resource management and land use planning laws and processes.

The Bill amends the *Threatened Species Conservation Act 1995* (the **TS Act**), the *Fisheries Management Act 1994* (the **FM Act**) and various other threatened species legislation as follows:

(a) the Bill enables the Minister to provide biodiversity certification of the native vegetation reform package,³⁴ and environmental planning instruments (**EPI**)³⁵ which seek to promote conservation of threatened species.

The Minister must take likely social and economic consequences and certain other factors into account in deciding whether to confer biodiversity certification on an EPI;

- (b) while biodiversity certification of the native vegetation reform package is in force, land within the area of operations of a catchment management authority has the benefit of that certification. As a result:
 - clearing of native vegetation authorised by a property vegetation plan will *not* need a license under provisions of the *National Parks and Wildlife Act 1974* (the **NPWA**) that prevent harm to threatened species; and
 - obtaining of development consent for the clearing of native vegetation on the land will not require the preparation of a species impact statement or consultation between Ministers;

³⁴ The *native vegetation reform package* is the package of reforms comprising the following:

⁽a) the Native Vegetation Act 2003 and the regulations under that Act;

⁽b) State-wide standards and targets for natural resource management issues recommended under the *Natural Resources Commission Act 2003* and adopted by the Government;

⁽c) catchment action plans under the Catchment Management Authorities Act 2003; and

⁽d) protocols and guidelines adopted or made under the regulations under the *Native Vegetation Act 2003*, the *Catchment Management Authorities Act 2003* and the *Natural Resources Commission Act 2003* [proposed 126B].

³⁵ An *environmental planning instrument* means a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental planning instrument [s 4 EPA Act]

Threatened Species Legislation Amendment Bill 2004

- (c) when an EPI has biodiversity certification, development or an activity under the EPI will be deemed not likely to significantly affect threatened species for the purposes of Parts 4 and 5 of the *Environmental Planning and Assessment Act 1979* (the **EPA Act**), thereby removing the need to address the *test of significance* for threatened species and the need for preparation of a species impact statement;
- (d) the Bill replaces existing exemptions in respect of routine agricultural activities with provisions that adopt exemptions for routine agricultural management activities that parallel exemptions under the *Native Vegetation Act 2003* (the **NVA**).

These will operate as a defence to the offence of harming protected fauna (not only threatened fauna, as at present);

- (e) the Bill inserts an additional regulation making power into the TS Act to authorise the making of regulations to deem development or an activity to constitute, or not constitute, development or an activity that is likely to significantly affect threatened species;
- (f) the Bill replaces the existing statutory priorities for the preparation of recovery plans and threat abatement plans with provisions for the Director-General to prepare and adopt a *Threatened Species Priorities Action Statement*;
- (g) recovery plans and threat abatement plans will be required to be prepared in accordance with the priorities established by a *Priorities Action Statement*;
- (h) the Bill makes the nomination and listing provisions of the FM Act more consistent with the procedures under the TS Act (in particular, the Schedules of threatened species will be amended by the Fisheries Scientific Committee rather than by the Minister as at present);
- a Threatened Species Social and Economic Advisory Council will be established to advise the Minister, the Director-General and the Natural Resources Commission on likely social and economic impacts of listing determinations and related matters;
- (j) the existing *Biological Diversity Advisory Council* will be re-established with an expert (rather than stakeholder) membership, and altered functions with respect to advising the Minister, the Director-General and the NRC on likely impacts on biological diversity resulting from listing decisions, and related matters;
- (k) investigative powers of authorised officers under Ch 7 of the *Protection of the Environment Operations Act 1997* (POEO Act) will be conferred on authorised officers under the NPWA for the purposes of functions under that Act, the TS Act, the *Wilderness Act 1987* and the *Marine Parks Act 1997*;
- (I) the Bill creates a presumption that a person who causes damage to the habitat of a threatened species knew that the land concerned was habitat of that kind if the person did not obtain required development consent or approval under Part 4 or 5 of the EPA Act or failed to comply with such a consent or approval; and

(m) the NPWA will provide that, for purposes of offences concerning harm and threats to protected fauna or threatened species, the landholder of the land concerned is presumed to have carried out the offending activity unless it was carried out by some other person and the landholder did not cause or permit it to be carried out.

Background

2. The Bill builds on the *Catchment Management Authorities Act 2003*, *Native Vegetation Act 2003* and the *Natural Resources Commission Act 2003*,³⁶ based on the Wentworth Agreement between the State Government, conservationists and farmers.³⁷

Together with the State-wide standards and targets for natural resource management issues recommended under the *Natural Resources Commission Act 2003* and adopted by the Government, these constitute the *native vegetation reform package* [proposed s 126B].

3. With respect to the TS Act, the Minister noted that:

[i]n 1995 (the TS Act) was at the forefront of biodiversity conservation in Australia. Economic, social and conservation pressures are, however, vastly different today than they were in 1995 and it is time to reform our threatened species framework to meet these many new challenges.³⁸

4. According to the NSW Department of Environment and Conservation, the Bill's reforms:

acknowledge that threatened species conservation is best achieved through genuinely strategic land-use and landscape planning, expressed within new environmental planning instruments.

The new system will provide greater flexibility to maintain and enhance viable areas of habitat and corridors, offset the impacts of development and identify restoration priorities. It will also provide more certainty for applicants, councils and the community, cut red tape and reduce the frequent tensions that arise during the assessment of development applications.³⁹

5. To effect this, the Bill allows for certification of an environmental planning instrument that promotes conservation of threatened species and biodiversity more generally, so that threatened species conservation will be satisfactorily resolved at the beginning of

³⁶ The Committee reported on these Acts in its *Digest* No. 6 of 2003.

³⁷ Those Acts aimed to put into practice the recommendations contained in the October 2003 *Final Report of the Native Vegetation Reform Implementation Group* (NVRIG). The deliberations of the NVRIG were based upon the model of native vegetation management developed by the Wentworth Group, a group of leading Australian environmental scientists and economists.

³⁸ Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

³⁹ Department of the Environment and Conservation, *Threatened species conservation in NSW: reform proposal*, August 2004, www.nccnsw.org.au/veg/projects/upload/TS%20reform%20proposal.pdf. The Minister also noted that consultation on the Bill included key groups, such as the Total Environment Centre, the Wilderness Society and the Nature Conservation Council, the New South Wales Farmers' Association, the Urban Taskforce, the Urban Development Institute of Australia, the New South Wales Minerals Council and the Local Government and Shires Associations.

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the planning process when the local environmental plan, regional environmental plan or other planning instrument is being prepared.⁴⁰

6. According to the Minister:

The major lesson of the past decade is that too often a threatened species decision involves the winner taking all—only one side of a dispute usually wins. From time to time, costly disputes arise which pit a particular development against a particular threatened species. The current Act no longer provides the best mechanism to resolve this kind of dispute in which one side or the other prevails—either the development has to be substantially reconfigured or the threatened species has to be sacrificed to social or economic needs. ... The provisions of this bill will establish a robust framework to resolve conflicts in a way that will better protect threatened species.

As things stand at the moment ... [t]here is a much too narrow focus on individual threatened species or isolated populations and far too little focus on the protection of wider habitat on which the threatened species depend. The issues also tend to be considered in detail only after land has been bought and a development application has been submitted—rather than at the very beginning of the planning process when the planning rules are being written. In this situation, decision-makers can easily lose sight of the bigger and more important picture. The reformed Act will provide the direction and the opportunities for the Government, local councils, catchment management authorities and the broader community to focus on achieving landscape-wide conservation within their local areas.⁴¹

7. The Minister also advised that:

these reforms are the product of an extensive consultation process involving all key interest groups. First, a discussion paper was released and widely circulated. It outlined the Government's proposed framework for reform and a series of specific proposals. Submissions received in response were used to draft the bill before the House. The views of key groups are therefore reflected in the bill's provisions. Second, a series of consultative meetings have been held with a range of key groups, including peak environment and industry organisations. They have included the Total Environment Centre, the Wilderness Society and the Nature Conservation Council, the New South Wales Farmers' Association, the Urban Taskforce, the Urban Development Institute of Australia, the New South Wales Minerals Council and the Local Government and Shires Associations.⁴²

The Bill

Threatened Species Conservation Act 1995

8. The Bill includes various amendments to the procedures for nomination and listing of threatened species, including the following:

⁴⁰ Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

⁴¹ Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

⁴² Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

- the Minister will be able to refer a proposed final listing determination by the Scientific Committee⁴³ back to the Committee for further consideration for reasons of a scientific nature [proposed s 23A(2)];
- the Scientific Committee will be required to consider and determine listing proposals by reference to criteria prescribed by the regulations and to reference the relevant criteria in its reasons for a determination [proposed s 24(2A)];
- the validity of a final determination will not be open to challenge on the ground that statutory timeframes were not met [proposed s 23A(4)];
- a legal challenge to the validity of a final determination will not be permitted more than 3 months after the final determination is notified [proposed s 24(4)];
- the Natural Resources Commission (NRC) will be able to refer a species to the Scientific Committee for a listing determination [proposed s 26(1A)]; and
- the NRC and the Minister will be able to give advice and make recommendations to the Scientific Committee as to priorities in the consideration of nominations for listing [proposed s 25A(2)].

Important definitions

- 9. Currently under the TS Act, the *Scientific Committee* is responsible for determining whether any species, population, ecological community or threatening process should be inserted in or omitted from Sch 1, 2 or 3 to the TS Act, or whether any matter in those Schedules should be amended [s 17(1) of the TS Act].
- 10. Important definitions of *species* in the Bill, based on the opinion of the Scientific Committee, include:
 - a *species presumed extinct* if, at a particular time if it has not been recorded in its known or expected habitat in New South Wales, despite targeted surveys, over a time frame appropriate to its life cycle and form;
 - a *critically endangered species* if it is facing an extremely high risk of extinction in New South Wales in the immediate future, as determined in accordance with criteria prescribed by the regulations;
 - an *endangered species* if:
 - $\circ~$ it is facing a very high risk of extinction in New South Wales in the near future, as determined in accordance with criteria prescribed by the regulations; and
 - it is not eligible to be listed as a critically endangered species;
 - a *vulnerable species* if:

⁴³ The Scientific Committee is established under s 127 of the TS Act. Although its 11 expert members are appointed by the Minister, it is not subject to Ministerial control: s 135 of the *Threatened Species Conservation Act 1995*.

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- it is facing a high risk of extinction in New South Wales in the medium-term future, as determined in accordance with criteria prescribed by the regulations; and
- it is not eligible to be listed as an endangered or critically endangered species [proposed s 10].
- 11. Similar definitional classifications are included for *populations* [proposed s 11] and *ecological communities* [proposed s 12].
- 12. A *threatening process* is eligible to be listed as a *key threatening process* if, in the opinion of the Scientific Committee:
 - it adversely affects threatened species, populations or ecological communities, or
 - it could cause species, populations or ecological communities that are not threatened to become threatened [proposed s 13].⁴⁴

Priorities Action Statement

- 13. Proposed s 90B(1) provides that as soon as practicable after the section's commencement, the Director-General is to prepare and adopt a *Threatened Species Priorities Action Statement* (also called a *Priorities Action Statement*) for the purposes of the Act.
- 14. A Priorities Action Statement is a statement that:
 - sets out the strategies (*recovery and threat abatement strategies*) to be adopted for promoting the recovery of each threatened species, population and ecological community to a position of viability in nature and for managing each key threatening process as provided by s 74(1)⁴⁵;
 - establishes relative priorities for the implementation of recovery and threat abatement strategies; and
 - establishes performance indicators to facilitate reporting on achievements in implementing recovery and threat abatement strategies [proposed s 90A].
- 15. Prior to adopting a Priorities Action Statement, the Director General must publish a draft of the Statement [proposed s 90C(1)] and consider all written submissions made in response to the draft [proposed s 90D].

⁴⁴ *Key threatening processes* are set out in Sch 3 to the *Threatened Species Conservation Act 1995*.

⁴⁵ Section 74(1) of the *Threatened Species Conservation Act 1995* provides that the Director-General may prepare a threat abatement plan for each key threatening process to manage the threatening process:

⁽a) so as to abate, ameliorate or eliminate its adverse effects on threatened species, populations or ecological communities; or

⁽b) in the case of a key threatening process that could cause species, populations or ecological communities that are not threatened to become threatened, so as to prevent those species, populations or ecological communities from becoming threatened.

Regulations

- 16. The Bill provides that regulations may provide that development or an activity of a specified type constitutes, or does not constitute, development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats [proposed s 113A(1)].
- 17. Any such regulations have effect despite the provisions of the TS Act or any other Act for the purposes of the operation of:
 - (a) Part 6 (Licensing) of the TS Act; and
 - (b) Parts 4 and 5 of the EPA Act, including the operation of those Parts as applying under any other Act [proposed s 113A(2)].⁴⁶

Biodiversity certification

- 18. As noted above, the Bill provides for the *biodiversity certification* by the Minister of the *native vegetation reform package*, and of environmental planning instruments (*EPIs*) that seek to promote conservation of threatened species.⁴⁷
- 19. An EPI is generally defined in s 4 of the EPA Act to mean a State environmental planning policy, a regional environmental plan (REP), or a local environmental plan (LEP).
- 20. Biodiversity certification has the following effects:
 - the clearing of native vegetation as authorised by a property vegetation plan that is approved for land while the land has the benefit of biodiversity certification is a defence to a prosecution for certain offences under Part 8A of the NPW Act; and
 - (b) development consent to clearing of native vegetation on land that has the benefit of biodiversity certification does not require the preparation of a species impact statement or consultation between Ministers [note to proposed s 126D].⁴⁸
- 21. The Minister must take into account likely social and economic consequences and certain other factors in deciding whether to confer biodiversity certification on an EPI [proposed s 126G].⁴⁹
- 22. On this point, the Minister noted that:

a certified LEP could include a special zone within its area to protect high conservation value habitat for threatened species or endangered ecological communities. The LEP could specify that the permissible uses within that zone will be

⁴⁶ Exceptions for the carrying out of routine agricultural management activities are provided for in s 118G of the *National Parks and Wildlife Act 1974*.

⁴⁷ The Director-General is to institute arrangements for the accreditation of suitably qualified and experienced persons to undertake and prepare surveys and assessments for use in connection with biodiversity certification of EPIs: s 126N of the *Threatened Species Conservation Act 1995*.

⁴⁸ See s 14 (4) of the *Native Vegetation Act 2003*.

⁴⁹ Orders conferring biodiversity certification on an EPI must be published in the Gazette: proposed s 126(1) of the *Threatened Species Conservation Act 1995*.

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only those that will not harm those conservation values, that is, the zones in the LEP will ensure that habitat for threatened species is conserved and that development proposals will not harm those threatened species.⁵⁰

- 23. Biodiversity certification of an EPI remains in force for such period as the Minister determines and specifies in the certification. If no period is specified, biodiversity certification remains in force for 10 years [proposed s 126J].
- 24. When an EPI has biodiversity certification, development or an activity under the EPI will be deemed not likely to significantly affect threatened species for the purposes of Parts 4 and 5 of the EPA Act, thereby removing the need to address the *test of significance* for threatened species, and the need for preparation of a species impact statement [proposed s 126I].⁵¹
- 25. Certification of an EPI may be revoked or suspended if the Minister is of the opinion that:
 - (a) the EPI fails (or will, as a result of any proposed amendment of the EPI, fail) to make appropriate provision for the conservation of threatened species, populations and ecological communities; or
 - (b) the consent authority under the EPI has failed to adequately comply with a direction by the Minister to review the EPI in response to any new listing of a species, population or ecological community or the discovery of a species, population or ecological community not previously known in an area [proposed s 126].⁵²

Fisheries Management Act 1994

- 26. The Bill amends the FM Act in the same manner as is set out above in relation to the TS Act, by:
 - adding definitions of categories of species [proposed s 220F];
 - providing for Priorities Action Statement [proposed s 220VA s 220ZVE]; and
 - providing a Regulation-making power [proposed s 221NA].

Damage to habitat of threatened species, population or ecological community

27. Section 220ZD of the FM Act currently provides that a person must not, by an act or omission, do anything that causes damage to any habitat (other than critical habitat) of a threatened species, population or ecological community *if the person knows that the area concerned is habitat of that kind*.

⁵⁰ Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

⁵¹ Biodiversity certification of an EPI may be subject to conditions, including conditions that limit the certification to specified threatened species, populations and communities, or to a specified part of the land to which the EPI applies. Unless so limited, biodiversity certification of an EPI applies to the whole of the land to which the EPI applies, and to all threatened species, populations and ecological communities: proposed s 126H of the *Threatened Species Conservation Act 1995*.

⁵² Revocation may occur as the result of an audit by the Natural Resources Commission: Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.
- 28. The Bill adds a new s 220ZD(2) to the effect that in proceedings for an offence under s 220ZD, it is to be *conclusively presumed* that the person knew that the land concerned was habitat of that kind if it is established that the act or omission:
 - (a) occurred in the course of the carrying out of development or an activity for which development consent under Part 4 of the EPA Act, or an approval to which Part 5 of that Act applies, was required but not obtained; or
 - (b) constituted a failure to comply with any such development consent or approval.
- 29. As noted above, the Bill replaces existing exemptions in respect of routine agricultural activities with provisions adopting exemptions that parallel exemptions under the NVA [proposed s 220ZFA].

The exemption provisions will be extended to operate as a defence to the offence of harming protected fauna and the new provisions include regulation -making powers to extend, vary or limit these exemptions [proposed s 220ZFA(5)].

National Parks and Wildlife Act 1974

- 30. The Bill amends the NPWA Act in the same manner as is set out above in relation to the FM Act, by:
 - providing that in proceedings for an offence under s 118D of the NPWA, it is to be *conclusively presumed* that the person knew that the land concerned was habitat of a particular kind [proposed s 118D(4)];
 - replacing existing exemptions in respect of routine agricultural activities with provisions adopting exemptions that parallel exemptions under the NVA [proposed s 118G]; and
 - including regulation-making powers to extend, vary or limit these exemptions [proposed s 118G(5)].

Issues Considered by the Committee

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

Proposed s 118D(4) of the NPWA and s 220ZD(2) of the FM Act: Onus of proof

- 31. In respect of both s 118D(4) of the NPWA and s 220ZD(2) of the FM Act, the Bill provides that in proceedings for an offence under s 118D or s 220ZD, it is to be *conclusively presumed* that the person knew that the land concerned was habitat of that kind if it is established that the act or omission:
 - (a) occurred in the course of the carrying out of development or an activity for which development consent under Part 4 of the EPA Act, or an approval to which Part 5 of that Act applies, was required but not obtained; or
 - (b) constituted a failure to comply with any such development consent or approval.
- 32. The relevant offence under both sections is damaging a relevant habitat of a threatened species, population or ecological community. Accordingly, knowledge that

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it *was* such a habitat would normally be a pivotal point of any case against a defendant.

- 33. However, under the Bill, once the act or omission which damages the habitat occurs in relation to development for which there *ought* to have been approval under the EPA Act, or which contravened a development consent, the person proceeded against under either the NPWA or the FM Act is *deemed* to have known that the land was habitat of that kind, thereby removing from the prosecution the responsibility for proving that the defendant in fact knew that it was such a habitat.
- 34. This constitutes a reversal of the traditional onus of proof, in which the prosecution must prove each element of an offence. This is a trespass on a basic and internationally recognised human right.⁵³
- 35. However, the apparent trespass on this human right is ameliorated when it is taken into account that a person is only deemed to have such knowledge in the wake of a failure to apply for the appropriate development consent under the EPA, or as a result of going outside the bounds of such a consent in some manner.
- 36. Accordingly, it does not seem unreasonable, having regard to the processes of the EPA Act, that a person should in fact be aware of the nature of the relevant habitat on which they are undertaking development in these circumstances.
- 37. The Committee notes that deeming a person to be cognisant of a factor that is a vital element of an offence effectively removes from the prosecution the onus of proving that part of the offence, thereby trespassing on the traditional right to be considered innocent until proven guilty.
- 38. The Committee notes, however, the requirements of the amendments to both the *National Parks and Wildlife Act 1974* and the *Fisheries Management Act 1994* that a person will only be deemed to have the requisite knowledge in the event of either a failure to obtain, or to comply with, development consent under the *Environmental Protection and Assessment Act 1979*.
- 39. The Committee considers that, having regard to the aims of the Bill, and the connection of the deeming of the knowledge with failure to comply with the *Environmental Protection and Assessment Act 1979*, the amendments do not constitute an undue trespass on individual rights and liberties.

⁵³ See, eg, the International Covenant on Civil and Political Rights, Article 14(2); and the Universal Declaration of Human Rights, Article 11.

Proposed s 159A of the NPWA: Onus of proof

- 40. Proposed s 159A of the NPWA provides that in any criminal proceedings for an offence under s 98⁵⁴ or Part 8A⁵⁵ of the NPWA, the landholder of any land on which the offence is alleged to have occurred is taken to have carried out the activity constituting the alleged offence *unless* it is established that:
 - (a) the activity was carried out by another person; and
 - (b) the landholder did not cause or permit the other person to carry out the activity.⁵⁶
- 41. "Landholder" is not defined in the NPWA. However, it *is* defined in s 4(1) of the NVA to mean:

a person who owns land or who, whether by reason of ownership or otherwise, is in lawful occupation or possession, or has lawful management or control, of land.

- 42. Pursuant to this definition, any owner, leaseholder, licensee or property manager could be liable under proposed s 159A, to a maximum penalty of 100 penalty units (currently \$11,000) and/or imprisonment for 6 months [s 98]; or up to 2,000 penalty units (currently \$220,000) and/or imprisonment for 2 years [Part 8A].
- 43. Traditionally, the responsibility for proving all the elements of a criminal offence has fallen on the prosecution (consistent with the presumption of innocence).
- 44. Under proposed s 159A the burden of proof is effectively reversed. Once it has been established that the activity constituting an offence under s 98 or Part 8A has occurred, the landholder must prove that on the *balance of probabilities* he or she was not responsible for the clearing in order to avoid liability.
- 45. Although it is increasingly common for legislation to reverse the burden of proof in relation to the issue of whether the accused had a culpable state of mind (*mens rea*), it is still quite unusual to require the accused to show that they did not in fact engage in the prohibited acts (*actus reus*).
- 46. Placing the onus on the accused in relation to the prohibited acts component of a criminal offence is not unprecedented in New South Wales. For example, a similar presumption of guilt for vehicle owners operates in relation to certain road traffic offences.⁵⁷

⁵⁴ Namely, harming protected fauna, other than threatened species, endangered populations or endangered ecological communities.

⁵⁵ Namely, offences relating to threatened species, populations and ecological communities, and their habitats, and critical habitat.

⁵⁶ Proposed s 159A of the *Threatened Species Conservation Act 1995* does not prevent proceedings being taken against the person who actually carried out the activity.

⁵⁷ Such provisions deem the owner of a vehicle (*Roads Act* 1993, s 244; *Sydney Olympic Park Authority Act* 2001, s 78) or the responsible person (*Road Transport (General) Act* 1999, ss 43, 7) to be guilty of specified offences, such as camera-detected traffic light and speeding offences and parking and toll offences, unless:

[•] they can show that the vehicle in question was stolen or illegally taken; or

[•] they provide a statutory declaration identifying the person who was in charge of the vehicle at the relevant time; or

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47. The Committee notes, however, that car owners can generally exercise greater control over who drives their car than owners and occupiers of land can exert over who has access to the land they own or occupy. The former are in a better position to identify the actual offender and avoid legal responsibility.

Consequently, the burden imposed on land owners and occupiers is relatively greater.

- 48. The Committee has previously noted the difficulties faced by owners and occupiers of land in discharging an onus of proof in relation to acts that lead to criminal responsibility when those acts have occurred on land which they own or occupy.⁵⁸
- 49. At the same time, the Committee also recognises that, in the circumstances of large or isolated land holdings, the absence of a provision such as s 159A renders more difficult the successful prosecution of the relevant offences.
- 50. The Committee notes that the Bill reverses the onus of proof for landholders in relation to offences under s 98 or Part 8A of the *National Parks and Wildlife Act 1974*. The Bill effectively deems such persons guilty unless they can provide satisfactory evidence regarding the matters set out in proposed s 159A.
- 51. The Committee refers to Parliament the question of whether this trespass on personal rights is undue, given the object of facilitating the protection of native flora and fauna.

Insufficiently defined administrative powers [s 8A(1)(b)(ii) LRA]

Proposed s 156B of the NPWA: Powers of authorised officers

52. The Bill provides that the Director-General may appoint any person (including a class of persons) to be an authorised officer for the purposes of *national parks legislation* [proposed s 156B].⁵⁹

Such an appointment is to be made under Ch 7 of the POEO Act, as applied under s 156A. 60

- (a) the National Parks and Wildlife Act 1974;
- (b) the Threatened Species Conservation Act 1995;
- (c) the Wilderness Act 1987; and
- (d) the Marine Parks Act 1997: proposed s 156B(6) of the National Parks and Wildlife Act 1974.
- Section 187 of the *Protection of the Environment Operations Act 1997* provides that:
- (1) The EPA may appoint any person (including a class of persons) as an authorised officer for the purposes of this Act;
- (2) Any other regulatory authority may appoint any officer or employee of the authority (including a class of such officers or employees) as an authorised officer for the purposes of this Act;
- (2A) In addition, a regulatory authority that is a local council may appoint any officer or employee of another local council (including a class of such officers or employees) as an authorised officer for the purposes of this Act in respect of the appointing local council's area;

[•] they can show that they did not know, and could not with reasonable diligence have discovered the identity of that person.

⁵⁸ See *Digest* No.4 of 2003, Report on *Sydney Water Amendment (Water Restrictions) Bill* 2003; and *Digest* No.6 of 2003, Report on *Catchment Management Authority Bill 2004* and cognate Bills.

For the purposes of s 156B, *national parks legislation* means each of the following Acts and the regulations made thereunder:

- 53. An authorised officer has, and may exercise, the following functions of an authorised officer under Ch 7 (except Part 7.6) of the POEO Act for the following purposes:
 - determining whether there has been compliance with or a contravention of national parks legislation;
 - obtaining information or records for purposes connected with the administration of national parks legislation; and
 - generally for administering national parks legislation.
- 54. The provisions of Ch 7 of the POEO Act apply to and in respect of national parks legislation as if:
 - references in those provisions to an authorised officer were references to authorised officers appointed as referred to in s 156B;
 - references in those provisions to "this Act" were references to an Act or regulation forming part of the national parks legislation;
 - references in those provisions to the EPA were references to the Director-General; and
 - the Director-General were the appropriate regulatory authority for matters concerning national parks legislation [proposed s 156B(3)].
- 55. The functions that an authorised officer has under Ch 7 of the POEO Act are, for the purposes of any provision of national parks legislation, taken to be functions under national parks legislation [proposed s 156B(4)].⁶¹
- 56. The Committee has previously expressed the view that, when legislation bestows on persons administrative powers that can significantly affect personal rights, it should include appropriate limits as to who may be authorised to exercise those powers.⁶² This may include limiting the exercise of those powers to a defined group of persons or persons holding a specified office or rank or possessing some qualification or attribute.
- 57. Given that the POEO Act gives authorised persons extensive powers to, eg, require information and records [Part 7.3], enter and search premises [Part 7.4], and question and identify persons [Part 7.5], the Committee is of the view that the power should only be given to persons of appropriate responsibility and with sufficient accountability for their actions.
- 58. Moreover, the Bill amends the NPWA in a number of instances to substitute "authorised officer" for "the Director-General or any person duly authorised by the

⁽³⁾ In this section: *employee* of an authority includes a person whose services are used by the authority and who is, in respect of those services, subject to the direction and control of the authority.

⁶¹ If an authorised officer has functions in respect of a matter under both Ch 7 of the POEO Act (as applying under proposed s 156B) and under any *other* provision of national parks legislation, the fact that there is a restriction on the exercise of a function under national parks legislation does not of itself operate to restrict the exercise by an authorised officer of any similar or the same function under Ch 7 of the POEO Act: proposed s 156B(5)] of the *National Parks and Wildlife Act* 1974.

⁶² Legislation Review Digest No 4 of 2003, 27 October 2003, at 30-31.

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Director-General in that behalf", eg, in s 164, relating to powers of entry and seizure under the NPWA.

59. In commenting on a Bill which would allow "a person authorised in writing by the Minister to be an officer" under the Commonwealth *Migration Act 1958*, the Senate Scrutiny of Bills Committee commented:

The Committee often draws attention to provisions which delegate power to anyone who fits the all-embracing description of 'a person'. ... As a general rule, the Committee would prefer that potential appointees be required to have some qualifications or attributes before they are eligible for appointment.⁶³

- 60. The Committee has written to the Minister to seek his advice as to why there are no requirements regarding the qualifications or attributes of persons who may be appointed as authorised persons for the purposes of the Bill.
- 61. The Committee refers to Parliament the question of whether an unfettered discretion to appoint authorised persons under the Bill makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers.

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

Proposed s 24(4) of the TS Act: Limitation of the judicial review period

- 62. The Bill provides that the validity of a final determination regarding the listing of a threatened species cannot be questioned in any legal proceedings, except those commenced in a court within three months of the date of publication of the determination in the Gazette [proposed s 24(4) of the TS Act].
- 63. While any limitation of judicial review has the potential for trespassing on personal rights and liberties, there is also a strong public interest in the ongoing validity of the determination of threatened species as such determinations are pivotal to the operation of the TS Act.
- 64. The Committee considers that having a reasonable limit to the judicial review period provides an appropriate balance between a person's right to challenge the legality of a final determination and the need for ongoing validity of such determinations.

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

Clause 2: Commencement

- 65. The ensuing Act commences on proclamation.
- 66. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent or not to commence the Act, or parts of the Act, at all.

⁶³ Senate Scrutiny of Bills Committee, *Alert Digest No 6 of 1999.*

³⁶ Parliament of New South Wales

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

67. The Minister's office has advised the Committee that a range of administrative procedures need to be undertaken before the Bill can be fully commenced.

These include the preparation of guidelines for local councils, model local environment plans and drafting of Regulations.

68. The Minister's office further advised that they wish to have the Bill fully operational as soon as possible, and that it is anticipated that those provisions which do not commence on assent will commence by the end of 2004, or shortly thereafter.

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

Proposed s 221NA(1) of the FM Act: Regulation making power

Proposed s 113A(1) of the TS Act: Regulation making power

- 69. The Bill provides that regulations may provide that development or an activity of a specified type constitutes, or does not constitute, development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats [proposed s 221NA(1) of the FM Act; proposed s 113A(1) of the NPWA].
- 70. These regulation making powers go to the core of the legislative scheme. Arguably, as matters central to the effective and fair operation of the Bill, they should not be left to regulation, but should be clearly enunciated in the body of the legislation given the importance of such plans to the effective operation of the legislative scheme of which the Bill is part.
- 71. However, in the second reading speech, the Minister stated that the Bill:

will allow the regulations to identify minor developments that will not have a significant effect on threatened species, thereby avoiding trivial and costly assessment and licensing processes. They will cover the majority of applications...The new regulations will identify developments that will have a significant effect on threatened species so that a species impact statement can immediately be prepared, thereby eliminating a two-stage assessment process.⁶⁴

- 72. The Committee notes that allowing for regulations to effectively determine whether development or activity of a specified type constitutes development that is likely to significantly affect threatened species, populations or ecological communities, or their habitats, is to delegate the power to make a fundamental component of the legislative scheme.
- 73. However, the Committee notes the Minister's statement that the regulation making power will be used to allow for the more effective application of the scheme's provisions.

⁶⁴ Hon R J Debus MP, Minister for the Environment, Legislative Assembly *Hansard*, 1 September 2004.

Threatened Species Legislation Amendment Bill 2004

74. Having regard to the aims of the Bill, and the Minister's statements, the Committee does not consider that the extensive regulation making power comprises an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette ret	Gazette reference		Response
	Date	Page	sought	Received
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	07/11/03	10369	05/03/04 30/04/04	01/04/04
Inclosed Lands Protection Regulation 2002	06/12/02	10370	29/05/03 12/09/03	29/08/03 11/03/04
Passenger Transport (Drug and Alcohol Testing) Regulation 2004	05/03/04	957	30/04/04	
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	17/10/03	10045	13/02/04	15/06/04
Road Transport (General) Amendment (Interlock Devices) Regulation 2003	29/08/03	8610	13/02/04 01/06/04	13/05/04
Children's Services Regulation 2004	21/05/04	2925	10/09/04	

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Operation of the Legislation Review Committee and the practice of protective	N/A
notices of motion to disallow regulations:	
Letter dated 18 December 2003 to the Premier	
Letter dated 12 July 2004 from the Premier	
Letter dated 27 August 2004 to the Premier	
Letter dated 20 August 2004 from the Premier	
Letter dated 1 September 2004 to the Premier	

7. REVIEW OF REGULATIONS

Background

- 1. On 18 December 2003, the Committee wrote to the Premier to advise him of the practice that the Committee had adopted on protective notices of motion to disallow regulations (below).
- 2. On 25 June 2004 the Committee wrote to all Minister's forwarding a copy of the Committee's report No 1 *Operations, Issues and Future Directions.*

In the report, the Committee noted that amending the *Legislation Review Act 1987* (the Act) to extend the Committee's jurisdiction beyond the period for which a regulation is subject to disallowance would enable the Committee to adequately consider regulations without using what may be interpreted as the "misleading procedure" of protective disallowance.

3. On 12 July 2004, the Premier replied to the Committee's letter of 25 June 2004 (below), to which the Committee replied on 27 August 2004 commending the recommendations of its report (below).

Minister's Reply

- 4. In a letter dated 20 August 2004 (below) the Premier advised that he would be prepared to consider an amendment to the Act to allow the Committee to report on a regulation after the disallowance period has expired where it has resolved to review that regulation prior to the expiry of the disallowance period.
- 5. The Premier requested the Committee's comments on such an amendment.

Committee's Response

- 6. In a letter dated 1 September 2004 (below) the Committee replied to the Premier.
- 7. The Committee advised the Premier that amending the Act to provide that the Committee could consider and report on a regulation after the disallowance period had expired where it has resolved to do so prior to the expiry of the disallowance period would greatly assist the Committee.
- 8. The Committee noted that such an amendment would ensure that the Committee had sufficient time to adequately consider regulations while maintaining a close nexus between the making of the regulation and the Committee's jurisdiction.
- 9. The Committee also noted that while this approach would not preserve each House of Parliament's power to disallow a regulation until such time as the Committee had reported, in nearly all cases the amendment would achieve both the flexibility the Committee requires in the time allowed for its reports and avoid the uncertainty created by protective notices of motion to disallow regulations.

10. The Committee thanks the Premier for his reply and urges him to introduce such an amendment as soon as possible.

The Committee makes no further comment.



PARLIAMENT OF NEW SOUTH WALES LEGISLATION REVIEW COMMITTEE

18 December 2003

Our Ref: LRC201

The Hon RJ Carr MP Premier Level 40 Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000

Dear Premier

PROTECTIVE NOTICES OF MOTION TO DISALLOW REGULATIONS

I am writing to advise you of the practice the Committee plans to adopt to preserve its authority to consider certain regulations beyond the 15 sitting day disallowance period after their tabling in Parliament.

You will be aware that, at the request of the Committee, the Honourable Don Harwin MLC gave notice of two motions to disallow certain regulations on 18 November 2003.

This was necessary as the Committee wished to continue to consider those regulations, in accordance with its function under s 9(1) of the *Legislation Review Act 1989*, beyond 15 sitting days after their tabling. Without the notices of motion, the disallowance period for the regulations would have expired before the Committee could complete its consideration of the regulations. Similar action was taken by the then Chairman of the Committee, Mr Gerard Martin MP, and Mr Harwin in relation to a regulation on 13 November 2002 and 31 October 2002 respectively.

The Committee is conscious that its function under s 9(1) relates to regulations *while they are subject to disallowance*. To put beyond doubt the Committee's authority to continue to examine a regulation and hold hearings beyond the fifteenth sitting day of the regulation's tabling, the Committee may require the disallowance period to be extended. This is effected by a Member giving a notice of motion to disallow the regulation.

The Committee has therefore resolved to adopt the practice of requesting me, as Chair, to give a notice of motion to disallow a regulation if the disallowance period on that regulation would otherwise expire before the Committee has substantially concluded its consideration.

Parliament of New South Wales - Macquarie Street - Sydney NSW 2000 - Australia Telephone (02) 9230 2899 - Facsimile (02) 9230 3052 - Email legislation.review@parliament.nsw.gov.au

I note that the giving of the notice in no way reflects a view of the member giving the notice, or the Committee as a whole, that the regulations should be disallowed. It is merely a device to extend the period for which the regulations are subject to disallowance.

While the practice of giving such "protective notices of motion" is relatively new to New South Wales, this device has long and often been used by the Senate Regulations and Ordinances Committee. As noted in *Odgers Australian Senate Practice*:

When [an instrument which may offend against the committee's principles] is identified, the usual practice is for the chair to give notice of a motion to disallow the instrument. ... Many notices to disallow instruments are protective notices in that they are given pending the receipt of a satisfactory explanation or undertaking from the relevant minister. (p 377)

Of course, the Committee's preference is to conclude its consideration of all regulations within 15 sitting days. The Committee is aware, however, that on occasion the complexity of issues raised by a regulation or the weight of the Committee's workload prevent this being achieved. Particular difficulties arise in this regard during the spring sittings when the Committee must consider a large number of new regulations replacing those automatically repealed on 1 September. The occasions when protective notices were given on behalf of the Committee were in regard to such regulations.

To help avoid the need to extend the disallowance period, the Committee appreciates prompt and full responses from Ministers to its requests for further information on regulations. Similarly, the Committee is grateful whenever regulatory impact statements and associated submissions are forwarded to the Committee as soon as possible after the making of the regulation in accordance with s 5(4) of the *Subordinate Legislation Act 1989*.

I also note that certain legislative changes could reduce or remove the need to give protective notices of motions. I would be pleased to discuss some proposals with you in this regard at another time.

Yours sincerely

an felen

BARRY COLLIER MP Chairperson



1 4 JUL 2004 LEGISLATION REVIEW COMMITTEE

Premier of New South Wales Australia

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

1 2 JUL 2004

Dear Mr Collier

I appreciate your advice about the practice that the Legislation Review Committee (the Committee) plans to adopt to consider certain regulations beyond the 15 sitting day disallowance period after their tabling in Parliament.

I note that it remains the Committee's preference to conclude its consideration of the regulations it decides to review within 15 sitting days. I would encourage the Committee to achieve this where possible so as to minimise the uncertainty associated with extending the disallowance period.

For the same reason, you will appreciate the importance of ensuring that regulations do not remain subject to disallowance for an indefinite period of time. This creates uncertainty not only for the Government but also for businesses and the community. Accordingly, I urge you to put in place procedures to ensure that any notice of motion to disallow a regulation is withdrawn once the Committee has completed its review. In cases of urgency, I note that the Government might need to bring on debate on a disallowance motion in order to resolve the matter.

Yours sincerely

Bob Carr

Premier

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PARLIAMENT OF NEW SOUTH WALES LEGISLATION REVIEW COMMITTEE

27 August 2004

Our Ref: LRC475

The Hon R J Carr MP Premier Level 40 Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000

Dear Premier

Operation of the Legislation Review Committee

Thank you for your letter of 12 July 2004 responding to my letter of 18 December 2004 regarding protective notices of motion to disallow regulations.

You will recall that in my earlier letter I also noted that certain legislative changes could reduce or remove the need to give protective notices of motions.

In this regard, I commend to you Chapter 4 of the Committee's recent report, *Operation, Issues and Future Directions*, (enclosed) which includes suggestions to improve the operation of the Committee relating to:

- the timeframe for the consideration of Bills;
- · protective disallowance notices; and
- sub-committees for the consideration of regulations.

I have also written to the Ministers requesting them to address those matters likely to arise under section 8A(1)(b) of the *Legislation Review Act*. This will, I believe, reduce both the need for correspondence and the workload of the Committee.

Yours sincerely Romy bellen BARRY COLLIER CHAIRPERSON

RECEIVED

- 1 SEP 2004

LEGISLATION REVIEW COMMITTEE



Premier of New South Wales Australia

TCO/LB

2 0 AUG 2004

Mr Barry Collier MP Chair Legislation Review Committee Macquarie Street Parliament House SYDNEY NSW 2000

Dear Mr Collier

Thank you for your recent letter forwarding a copy of the Committee's Report *Operation, Issues and Future Directions.*

I have carefully noted the matters you have raised in the Report. As you would be aware, I have previously written to you on some of the issues raised.

I note your suggestion that an amendment to the *Legislation Review Act* to allow the Committee to consider regulations beyond the date of expiry of the period of disallowance would assist your Committee and would avoid the need for a protective disallowance motion.

I agree that such a motion creates uncertainty and I have previously advised you it would be desirable to avoid this where possible. I am therefore prepared to consider an amendment which would allow the Committee to report on a regulation after the disallowance period has expired in circumstances where it has resolved to review that regulation prior to the expiry of the disallowance period. This is consistent with section 8A(2) of the Act as it relates to the Committee's legislation review function. Such an amendment would not involve extending the disallowance period.

I would appreciate your comments on such an amendment.

Yours sincerely Bob Carr Premier

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PARLIAMENT OF NEW SOUTH WALES LEGISLATION REVIEW COMMITTEE

1 September 2004

Our Ref: LRC475 Your Ref: TCO/LB

The Hon R J Carr MP Premier Level 40 Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000

Dear Premier

Review of Regulations

Thank you for your letter dated 20 August 2004 responding to the Committee's Report *Operation, Issues and Future Directions.*

Amending the *Legislation Review Act 1987* to provide that the Committee can consider and report on a regulation after the disallowance period has expired where it has resolved to do so prior to the expiry of the disallowance period would greatly assist the Committee.

Such an amendment would ensure that the Committee had sufficient time to adequately consider regulations while maintaining a close nexus between the making of the regulation and the Committee's jurisdiction. This is consistent with the Committee's current regulation review function and, as you point out, the approach in section 8A(2) of the Act in relation to bills.

I note that this approach would not preserve each House of Parliament's power to disallow a regulation until such time as the Committee had reported. However, I consider that in nearly all cases the amendment you propose would achieve both the flexibility the Committee requires in the time allowed for its reports while avoiding the uncertainty created by protective notices of motion to disallow regulations.

In view of the large number of regulations under the Committee's consideration, I urge you to introduce such an amendment as soon as possible.

Thank you for your positive response in this matter

Yours sincerely

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BARRY COLLIER MP CHAIRPERSON

Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Administrative Decisions Tribunal Amendment Bill 2004	11
Agricultural Livestock (Disease Control Funding) Amendment Bill 2004	10
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Appropriation Bill 2004	10
Appropriation (Budget Variations) Bill 2004	5
Appropriation (Parliament) Bill 2004	10
Appropriation (Special Offices) Bill 2004	10
Bail Amendment (Terrorism) Bill 2004	9
Botany Bay National Park (Helicopter Base Relocation) Bill 2004	5
Child Protection (Offenders Prohibition Orders) Bill 2004	9
Child Protection (Offenders Registration) Bill 2004	10
Children (Detention Centres) Amendment Bill 2004	4
Civil Liability Amendment (Offender Damages) Bill 2004	5,7
Commercial Agents and Private Inquiry Agents Bill 2004	9,10
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Compulsory Drug Treatment Correctional Centre Bill 2004	8
Constitutional Amendment (Pledge of Loyalty) Bill 2004*	7
Courts Legislation Amendment Bill 2004	7
Crimes Amendment (Child Neglect) Bill 2004	7
Crimes Legislation Amendment Bill 2004	3
Crimes Legislation Amendment (Terrorism) Bill 2004	10
Crimes (Administration of Sentences) Bill 2004	9
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004	9
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Criminal Procedure (Sexual Offence Evidence) Bill 2004	8
Cross-Border Commission Bill 2004	3
Crown Lands Legislation Amendment (Budget) Bill 2004	10
Crown Lands (Prevention of Sales) Bill 2004*	10
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Filming Approval Bill 2004	7,8

	Digest Number
Fines Amendment Bill 2004	9
Fisheries Management Amendment Bill 2004	6
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Greyhound and Harness Racing Administration Bill 2004	7,9
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	6
Health Legislation Amendment Bill 2004	6
Institute of Teachers Bill 2004	8
Legal Profession Amendment Bill 2004	9
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Liquor Amendment (Parliament House) Bill 2004	6
Liquor Amendment (Parliamentary Precincts) Bill 2004	8
Liquor Amendment (Racing Clubs) Bill 2004	9
Local Government Amendment (Council and Employee Security) Bill 2004	5
Local Government Amendment (Discipline) Bill 2004	9
Local Government Amendment (Mayoral Elections) Bill 2004	9
Lord Howe Island Amendment Bill 2003	10
Mine Health and Safety Bill 2004	8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	6,8
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004	7
National Competition Policy Liquor Amendment (Commonwealth Financial Penalties) Bill 2004	7
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	9
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Parliamentary Electorates and Elections Amendment (Prohibition on Voting by Criminals) Bill 2004*	5
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Passenger Transport Amendment (Bus Reform) Bill 2004	8,9
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Police Amendment (Senior Executive Transfers) Bill 2004	9,10
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4,6
Professional Standards Amendment Bill 2004	11
Public Lotteries Legislation Amendment Bill 2004	2

	Digest Number
Regional Development Bill 2004	7
Registered Clubs Legislation Amendment Bill 2004	11
Residential Tenancies (Public Housing) Bill 2004	9
Retail Leases Amendment Bill 2004	10
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (General) Amendment (Licence Suspension) Bill 2004	9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1,7
Rural Communities Impacts Bill 2004*	11
Snowy Mountains Cloud Seeding Trial Bill 2004	5
Save Orange Grove Bill 2004*	11
State Revenue Legislation Amendment Bill 2004	7
State Revenue Legislation Further Amendment Bill 2004	10
State Water Corporation Bill 2004	8
Statute Law (Miscellaneous Provisions) Bill 2004	9
Stock Diseases Amendment (Artificial Breeding) Bill 2004	6,8
Stock Diseases Amendment (False Information) Bill 2004	4,9
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
Sustainable Energy Development Repeal Bill 2004	10
Sydney Opera House Trust Amendment Bill 2004	10
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4,6
Threatened Species Legislation Amendment Bill 2004	11
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	6
Wool, Hide and Skin Dealers Bill 2004	2
Workers Compensation Legislation Amendment Bill 2004	9

Appendix 2: Index of Ministerial Correspondence on Bills in 2004

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Child Protection (Offenders Registration) Bill 2004	Minister for Police	27/08/04			10
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04	13/04/04		5,7
Commercial Agents and Private Inquiry Agents Bill 2004	Minister for Police	18/06/04	29/07/04		9,10
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Filming Approval Bill 2004	Minister for the Environment	11/05/04	12/05/04		7,8
Greyhound and Harness Racing Administration Bill 2004	Minister for Gaming and Racing	11/05/04	31/05/04		7,9
Lord Howe Island Amendment Bill 2003	Attorney General/ Premier	13/02/04	Premier 13/07/04		1,1065
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Mine Health and Safety Bill 2004	Minister for Mineral Resources	28/05/04	09/06/04		8,9
Mining Amendment (Miscellaneous Provisions) Bill 2004	Minister for Mineral Resources	30/04/04	17/05/04		6,8
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5

⁶⁵ Published under the title "Commencement of Acts."

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04 18/06/04	17/06/04		8,9
Police Amendment (Senior Executive Transfers) Bill 2004	Minister for Police	18/06/04	21/07/04		9,10
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	05/04/04		4,6
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (General) Amendment (Licence Suspension) Bill 2004	Minister for Roads	18/06/04			9
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04	05/05/04		1,7
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Stock Diseases Amendment (Artificial Breeding) Bill 2004	Minister for Agriculture and Fisheries	30/04/04	21/05/04		6,8
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	28/05/04		4,9
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming Racing	16/03/04	07/04/04		4,6
Threatened Species Legislation Amendment Bill 2004	Minister for the Environment	27/08/04			11
Water Management Amendment Bill 2004	Minister for Natural Resources	28/05/04			8
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2004

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Administrative Decisions Tribunal Amendment Bill 2004				Ν	
Agricultural Livestock (Disease Control Funding) Amendment Bill 2004				N	
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Bail Amendment (Terrorism) Act 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Child Protection (Offenders Prohibition Orders) Bill 2004	N			С	
Child Protection (Offenders Registration) Bill 2004	N,C			С	
Civil Liability Amendment (Offender Damages) Bill 2004	R			С	
Commercial Agents and Private Inquiry Agents Bill 2004	R			С	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Compulsory Drug Treatment Correctional Centre Bill 2004	N			N	
Courts Legislation Amendment Bill 2004				N	
Crimes Amendment (Child Neglect) Bill 2004				Ν	
Crimes Legislation Amendment (Terrorism) Bill 2004	N				
Crimes (Administration of Sentences) Bill 2004	N			Ν	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Crimes (Interstate Transfer of Community Based Sentences) Bill 2004				Ν	
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Criminal Procedure (Sexual Offence Evidence) Bill 2004	N				
Crown Lands (Prevention of Sales) Bill 2004*	N, R				
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N, R				С
Fair Trading Amendment Bill 2004				N	
Filming Approval Bill 2004				С	
Fines Amendment Bill 2004				N	
Fisheries Management Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Greyhound and Harness Racing Administration Bill 2004			R, C	N	
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	N		R		
Health Legislation Amendment Bill 2004	N			N	
Institute of Teacher Bill 2004				N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Liquor Amendment (Parliamentary Precincts) Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Local Government Amendment (Council and Employee Security) Bill 2004	N			Ν	
Local Government Amendment (Discipline) Bill 2004				N	
Mine Health and Safety Bill 2004	N, R	N	С	N, R	
Mining Amendment (Miscellaneous Provisions) Bill 2004	C, R			N	
National Parks and Wildlife Amendment (Jenolan Caves Reserve Trust) Bill 2004	N				
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	С			С	
Passenger Transport Amendment (Bus Reform) Bill 2004	N, R		N, C, R	Ν	
Police Amendment (Senior Executive Transfers) Bill 2004				С	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				С	
Professional Standards Amendment Bill 2004				N	
Public Lotteries Legislation Amendment Bill 2004				Ν	
Regional Development Bill 2004				Ν	
Registered Clubs Legislation Amendment Bill 2004	N				
Residential Tenancies (Public Housing) Bill 2004	N			Ν	
Retail Leases Amendment Bill 2004				Ν	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N, C				
Road Transport (General) Amendment (Licence Suspension) Bill 2004	N	С	R		
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				С	
Save Orange Grove Bill 2004*	R				
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
State Revenue Legislation Further Amendment Bill 2004	N				
State Water Corporation Bill 2004				N	
Stock Diseases Amendment (Artificial Breeding) Bill 2004	C, R			N	N
Stock Diseases Amendment (False Information) Bill 2004	С			С	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			С	
Sydney Opera House Trust Amendment Bill 2004	N				
Thoroughbred Racing Legislation Amendment Bill 2004				С	
Threatened Species Legislation Amendment Bill 2004	N,R		Ν	N	R,C
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	R			N	
Wool, Hide and Skin Dealers Bill 2004				N	
Workers Compensation Legislation Amendment Bill 2004	N			N	

- Key R Issue referred to Parliament
- С Correspondence with Minister/Member
- Ν Issue Noted

Appendix 4: Index of correspondence on regulations reported on in 2004

Regulation	Minister/Correspondent	Letter sent	Reply	Digest Number
Children and Young Persons (Savings and Transitional) Amendment (Out-of-Home Care) Regulation 2003 & Children and Young Persons (Care and Protection) Amendment (Out-of-Home Care) Regulation 2003	Minister for Community Services	13/02/04	21/04/04	1,7
Consultation on Regulations	Premier/Acting Premier	05/03/04	15/06/04	9
Crimes (Forensic Procedures) Amendment (DNA Database Systems) Regulation 2003	Attorney General	07/11/03	03/12/03	1
Determination of Regulatory Fee Increases	Premier	24/10/03	18/03/04	5
Environmental Planning and Assessment Amendment (Certifier Accreditation) Regulation 2003	Minister Assisting the Minister for Infrastructure and Planning (Planning Administration)	05/03/04 30/04/04	01/04/04 01/06/04	6,9
Landlord and Tenant (Rental Bonds) Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Occupational Health and Safety Amendment (Accreditation and Certification) Regulation 2003	Minister for Commerce	26/03/04 30/04/04	15/04/04 05/05/04	6,7
Pawnbrokers and Second-hand Dealers Regulation 2003	Minister for Fair Trading	24/10/03 18/11/03 23/12/03	05/11/03 10/02/04	1
Radiation Control Regulation 2003	Minister for the Environment	24/10/03	23/01/04	1
Review of Regulations	Premier	18/12/03 27/08/04 01/09/04	12/07/04 20/08/04	11
Road Transport (General) Amendment (Impounding Fee) Regulation 2003	Minister for Roads	13/02/04	15/06/04	9
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Privacy Commissioner	24/10/03	27/11/03	1
Road Transport (General) (Penalty Notice Offences) Amendment (Interlock Devices) Regulation 2003 and Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads	13/02/04 01/06/04	20/05/04	1,8