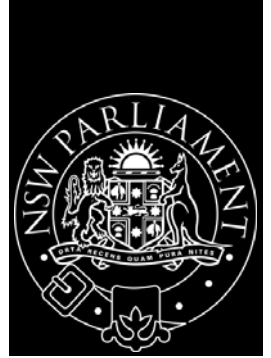


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 7 of 2009

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[Table of Contents](#)

Membership & Staff.....	ii
Functions of the Legislation Review Committee.....	3
Guide to the <i>Legislation Review Digest</i> .....	4
<b>Summary of Conclusions</b> .....	<b>6</b>
<b>Part One – Bills</b> .....	<b>9</b>
SECTION A: Comment on Bills.....	9
1. Crimes (Forensic Procedures) Amendment Bill 2009.....	9
2. Electricity Supply Amendment (energy savings) bill 2009.....	16
3. Energy Legislation Amendment (Infrastructure Protection) Bill 2009.....	21
4. Heritage Amendment Bill 2009.....	28
5. Land Acquisition (Just Terms Compensation) Amendment Bill 2009.....	38
6. Mining Amendment (Safeguarding Land and Water) Bill 2009*.....	41
7. Motor Accidents (Lifetime Care and Support) Amendment Bill 2009.....	44
SECTION B: Ministerial Correspondence.....	48
1. Correspondence On Explanatory Materials And Explanatory Memoranda Accompanying Bills.....	48
Appendix 1: Index of Bills Reported on in 2009.....	55
Appendix 2: Index of Ministerial Correspondence on Bills.....	57
Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009.....	58
Appendix 4: Index of correspondence on regulations.....	60
* Denotes Private Member's Bill	

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

### 8A Functions with respect to Bills

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

### 9 Functions with respect to Regulations:

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

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## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### **Section A: Comment on Bills**

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page 3).

#### **Section B: Ministerial correspondence – Bills previously considered**

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

### Part Two – Regulations

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

#### **Regulations for the special attention of Parliament**

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

#### **Regulations about which the Committee is seeking further information**

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

#### **Copies of Correspondence on Regulations**

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

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## Appendix 1: Index of Bills Reported on in 2009

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

## Appendix 2: Index of Ministerial Correspondence on Bills for 2009

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

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

## Appendix 4: Index of correspondence on Regulations reported on in 2009

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

## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. Crimes (Forensic Procedures) Amendment Bill 2009

##### Issue: Rights of the Child

17. Taking into consideration of the above protections afforded by the Bill, the Committee is of the view that this Bill does not constitute an undue trespass on the rights of the child under the age of 10 years old.
18. The Committee also notes from the Agreement in Principle speech with regard to a magistrate making an order for a child under 10 to undergo a forensic procedure for a particular purpose, that: "these orders are designed to assist law enforcement activities. They do not aim to allow, nor do they empower, the police to investigate or act against children under 10 in any way".
19. However, the Committee suggests that to remove any doubt and to clarify any uncertainty that may undermine the rights of the child, a similar wording to the effect that 'the orders are not to allow or empower investigation against a child under 10 years of age' could be considered by Parliament for insertion into any relevant parts of the proposed Act including in the proposed section 81F (1).

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

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

#### 2. Electricity Supply Amendment (energy savings) bill 2009

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

#### 3. Energy Legislation Amendment (Infrastructure Protection) Bill 2009

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

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



#### 4. Heritage Amendment Bill 2009

##### Issue: Clause 2 (2) – Schedule 1 [18]-[23] and Schedule 2 [7]-[9] - Retrospectivity:

29. The Committee was advised that amendments to section 118 of the *Environmental Planning and Assessment Act 1979* “relates to planning panels”. In this regard, the Committee was informed “that the retrospective commencement of the provision does not, in itself, extend the powers of any existing panels to deal with development control plans and contributions plans as this would require orders to be made which could not apply retrospectively”.
30. The Committee was also advised that the amendments to section 36 of the *Heritage Act 1977* in respect of “the Planning Assessment Commission are minor statute law revision arrangements required by amendments made to the *Environmental Planning and Assessment Act* in 2008. The amendments are proposed to have commenced on 3.11.08 to coincide with the establishment of the Planning Assessment Commission on that date”.

##### Issue: Right of Appearance – clauses which allow amendment of Act by a regulation - Schedule 1 [19] - Proposed Section 36 (1); Schedule 1 [30] – Proposed Section 72; and Schedule 1 [31] – Proposed Section 79 – Amendment of *Heritage Act 1977*:

34. The Committee observes that from the Bill’s Explanatory Note: Schedule 1 [19]; Schedule 1 [30] and Schedule 1 [31] will “enable regulations to be made to remove or change the right of a party to legal or other representation” “at a review by the Planning Assessment Commission of a recommendation that an item be listed on the State Heritage Register” [item 19]; or “at a review by the Planning Assessment Commission of an appeal against a decision by the Heritage Council about an application for approval of actions in relation to an item that is subject to an interim heritage order or listed on the State Heritage Register” [item 30]; or “at a review by the Planning Assessment Commission of an appeal under the Planning Act or other Act that is to be determined by the Minister for Planning” [item 31].
35. The Committee was advised that “the proposed amendments to the Heritage Act are simply to ensure consistency with the provisions that relate to the Planning Assessment Commission under the *Environmental Planning and Assessment Act 1979*”.
36. The Committee notes that the right of appearance by the affected person will not be removed by this Bill but the right of appearance by the person’s legal practitioner or their agent may be precluded or changed by regulations. The Committee refers this to Parliament and asks whether this may constitute an inappropriate delegation of legislative powers by limiting or changing the right of appearance by a legal or other representation through regulations rather than by legislation.

##### Issue: Clause 2 (1) - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

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

## **5. Land Acquisition (Just Terms Compensation) Amendment Bill 2009**

### **Issue: Schedule 1 [1] - Right to Property**

9. The Committee is always concerned about infringements on individual property rights. However, the Committee is satisfied that the Bill is necessary to clarify that native title land and land vested in an authority must be acquired under the restrictions of the authority's parent legislation which is more onerous than s7A and 7B of the *Land Acquisition (Just Terms Compensation) Act 1991*.
10. The Committee also does not consider that, in clarifying that land subject to native title and land vested in councils falls within Part 1 of Chapter 8 of the *Local Government Act 1993*, the powers of councils to compulsorily acquire land from private landowners has been unduly extended.

### **Issue: Schedule 1 [4] - Retrospectivity**

14. The Committee accepts that the retrospective application of the Bill is necessary to ensure certainty of land tenure and, as it does not affect previous court determinations, the Committee considers that it does not unduly trespass on personal rights and liberties.

## **6. Mining Amendment (Safeguarding Land and Water) Bill 2009\***

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

## **7. Motor Accidents (Lifetime Care and Support) Amendment Bill 2009**

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

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

## **1. Correspondence On Explanatory Materials And Explanatory Memoranda Accompanying Bills**

8. The Committee thanks the Premier for his reply.

## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. CRIMES (FORENSIC PROCEDURES) AMENDMENT BILL 2009

Date Introduced:	15 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

### Purpose and Description

1. This Bill amends the *Crimes (Forensic Procedures) Act 2000* to make further provision with respect to the carrying out of forensic procedures and the use of forensic material and DNA profiles; and for other purposes.
2. The main amendment concerns the introduction of a legislative scheme to govern the conduct of forensic procedures on children under 10 years of age. At present, children under 10 are excluded from the provisions of the *Crimes (Forensic Procedures) Act 2000*.
3. Schedule 1 [9] provides for a two-part scheme concerning the conduct of forensic procedures on children under 10. The first part operates with the consent of a person who has parental responsibility for a child under 10, or a close relative of the child where a parent is unavailable. Where a parent is suspected of committing an offence against the child, that parent cannot consent on his or her behalf. In these circumstances, only another parent or close relative can consent. Consent can be given only for a forensic procedure that is required to exclude the child's forensic material from a crime scene, or if the child under 10 is a victim of an offence against his or her person.
4. The second part of the scheme allows a magistrate, on application, to order that a child under 10 undergo a forensic procedure for a particular purpose. The purposes for which an order can be made are limited to assisting in the identification or location of a missing person, assisting in the identification of a deceased person, or assisting in the investigation of an offence. A magistrate may also make an order where a parent or guardian cannot consent or refuses to consent to a procedure.
5. There are certain protections in the scheme, such as the requirement that a parent, guardian or lawyer be present at the time the procedure is carried out if practicable. A magistrate must allow a child's parent, guardian or lawyer the opportunity to be heard before making an order. Forensic material obtained under the part must be destroyed within 12 months of being acquired, unless being used in the ongoing investigation of the offence for which it was obtained. Schedule 1 [9] also contains provisions on protections for children under 10 that mirror protections granted to other classes of people under the principal Act.

Crimes (Forensic Procedures) Amendment Bill 2009

6. Schedule 1 [3] clarifies the definition of destruction in the principle Act, in the nature of statute law revision. Schedule 1 [6] provides that in order for a person who is not a suspect to validly volunteer to undergo a forensic procedure under the Act, the person must be told that the procedure might produce evidence that could be used against them in court. Schedule 1 [7] clarifies the Act to ensure that the procedures relating to magisterial orders apply in appropriate circumstances after the withdrawal of consent by a volunteer or their parents or guardians. Schedule 1 [8] makes an amendment consequential to this.
7. Schedule [1] 10 clarifies the Act to require the destruction of forensic material, unless there is a pending investigation. After a successful appeal against a conviction and there is no reasonable prospect of a retrial, it requires the destruction of forensic material. Previously, the application of the Act to this situation was not clear.
8. Schedule 1 [15] amends the Act to limit the usage of DNA profiles belonging to children or incapable persons who volunteer their DNA under the Act. The amendment ensures that the DNA can be used only for the purpose for which it was acquired, unless a magistrate orders otherwise.

## Background

9. From the Agreement in Principle speech:

The bill contains important protections for certain classes of people who provide their DNA to the police to assist with capturing offenders, finding missing persons, and identifying deceased persons whose identity is unknown.

10. In the case of the second part of the scheme, where it allows an application to be made to the magistrate, to order that a child under 10 undergo a forensic procedure for a particular purpose. These purposes are limited to assisting in the identification or location of a missing person, assisting in the identification of a deceased person, or assisting in the investigation of an offence. According to the Agreement in Principle speech, “these orders are designed to assist law enforcement activities. They do not aim to allow, nor do they empower, the police to investigate or act against children under 10 in any way”.

## The Bill

11. The object of this Bill is to amend the *Crimes (Forensic Procedures) Act 2000* (**the Principal Act**):
  - (a) to prohibit the carrying out of forensic procedures on a child who is under the age of 10 years, unless ordered by a Magistrate (or otherwise authorised under the Principal Act) and carried out in accordance with the Principal Act, and
  - (b) to require police to inform a volunteer (and, if relevant, the parent or guardian of a volunteer who is a child aged 10 years or more or an incapable person) that a forensic procedure may produce evidence that may be used in court, including evidence that may be used against the volunteer, as part of obtaining the informed consent of the volunteer or parent or guardian of the volunteer, and
  - (c) to make it clear that a Magistrate may, in certain circumstances, order that forensic material or information obtained from a volunteer may be retained if either the volunteer, or the parent or guardian of the volunteer, withdraws consent to the retention of that material or information, and

Crimes (Forensic Procedures) Amendment Bill 2009

(d) to provide that forensic material taken, by consent or by order of a Magistrate, from a suspect who is subsequently convicted of an offence must be destroyed if the suspect's conviction is set aside or quashed, unless there is a reasonable prospect of a retrial or rehearing, and

(e) to limit the use of the DNA profile of a volunteer who is a child aged 10 years or more or incapable person to the purpose for which the DNA profile was placed on the DNA database system and to provide that such a DNA profile must not be matched against any index on the DNA database system, unless otherwise ordered by a Magistrate, and

(f) to make other minor and consequential amendments.

## 12. Outline of provisions

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

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

**Clause 3** amends the *State Records Regulation 2005* to except proposed sections 81D (2) and 81M (3) from the operation of section 21 of the *State Records Act 1998* so that the requirements to destroy the information specified in those proposed sections prevail over the requirements of that Act.

## Schedule 1 Amendment of *Crimes (Forensic Procedures) Act 2000 No 59*

### Destruction of forensic material

**Schedule 1 [3]** amends section 3 (5) of the Principal Act to make it clear that a person who is required to destroy forensic material must remove any information that relates any DNA profile derived from that material to a person whose DNA it describes from the DNA database system, as well as destroying the material itself. Currently, section 87 of the Principal Act provides that if a forensic procedure is carried out on a person convicted of an offence and that conviction is quashed, the forensic material taken from that person should be destroyed as soon as practicable after the time limit for an appeal has elapsed.

**Schedule 1 [10]** extends the application of that section to suspects who are subsequently convicted of an offence and provides that forensic material obtained from persons to whom that section applies should not be destroyed if there is a reasonable prospect of a retrial or rehearing. The proposed amendment also extends that section to both the quashing and setting aside of convictions.

### Carrying out of forensic procedures on volunteers

Section 77 of the Principal Act specifies those matters about which a police officer must inform a volunteer, or parent or guardian of a volunteer, in order for that volunteer, or parent or guardian, to give informed consent to the carrying out of a forensic procedure on a child or an incapable person. **Schedule 1 [6]** makes it clear that a police officer must inform a volunteer, or parent or guardian of a volunteer, that a forensic procedure carried out on the volunteer may produce evidence that may be used in a court of law, including evidence that may be used against the volunteer. Section 81 of the Principal Act provides that a Magistrate may, in certain circumstances, order that forensic material or information obtained from carrying out a forensic procedure be retained if a volunteer withdraws consent to the retention of that material. **Schedule 1 [7]** makes it clear that section 81 of the Principal Act applies whether the withdrawal of consent is made by the volunteer or by a parent or guardian of a child or incapable person who is a volunteer. **Schedule 1 [8]** makes a consequential amendment.

**Carrying out of forensic procedures on persons under 10 years of age**

Currently, the Principal Act does not apply to persons under 10 years of age. **Schedule 1 [9]** inserts proposed Part 8A into the Principal Act to prohibit the carrying out of forensic procedures within the meaning of the Act on persons under 10 years of age except in limited circumstances. Proposed section 81A inserts a definition of **child** for the purposes of proposed Part 8A, which means a person under 10 years of age. Proposed section 81B provides that if the parent or guardian of a child is a suspect in the investigation of an offence in relation to which a forensic procedure is proposed to be carried out, a reference to the parent or guardian of a child in proposed Part 8A is to be read as a reference to firstly a parent or guardian of the child who is not a suspect in relation to the offence or, secondly, the **closest available relative** of the child. That relative must not be a suspect in relation to the offence under investigation, must be available at the relevant time and be at least 18 years of age.

Proposed section 81C authorises the carrying out of a forensic procedure for certain purposes on a child with the informed consent of the parent or guardian of the child or, if that consent cannot be obtained or is withdrawn, by order of a Magistrate under proposed section 81F. The purposes for which a forensic procedure may be carried out are those in relation to certain offences (for example, assault, kidnapping or robbery) of which the child is a victim and to eliminate the child's forensic material from other forensic material found at a crime scene.

Proposed section 81D makes it clear that if the parent or guardian of a child withdraws consent to the carrying out of a forensic procedure, the forensic procedure is to be treated as a forensic procedure for which consent has been refused and the forensic procedure is not to proceed except by order of a Magistrate under proposed section 81F.

Proposed section 81F provides that a Magistrate may order the carrying out of a forensic procedure on a child to investigate an offence, to assist in locating or identifying a missing person or to assist in identifying a deceased person. The Magistrate must take certain matters into consideration in determining whether to make the order. An authorised applicant may apply for such an order in accordance with proposed section 81E.

Proposed sections 81A (4) and 81G–81L apply existing provisions in the Principal Act to a child on whom a forensic procedure is being carried out, including restrictions on who may carry out the forensic procedure, who may be present during the forensic procedure, the recording of the forensic procedure and the making of certain material and information available to the parent or guardian of the child.

Proposed sections 81M and 81N restrict the use and retention of forensic material taken from a child under proposed Part 8A and any information obtained from the analysis of that material. A Magistrate's order is required to retain such material or information if the parent or guardian of the child withdraws consent to the retention of that material or information.

**Schedule 1 [1], [2], [4], [5], [11]–[14] and [16]–[21]** make amendments consequential on the insertion of proposed Part 8A. **Schedule 1 [22] and [23]** insert savings and transitional provisions consequent on the enactment of the proposed Act.

**Use of DNA profiles of certain volunteers**

**Schedule 1 [15]** inserts proposed section 93A into the Principal Act to limit the use of the DNA profile of a volunteer who is a child or incapable person to the purpose for which the DNA profile was placed on the DNA database system and to provide that such a DNA profile must not be matched against any index of the DNA database system, unless otherwise ordered by a Magistrate.

## Issues Considered by the Committee

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

#### Issue: Rights of the Child

13. This Bill aims to introduce a scheme to regulate the conduct of forensic procedures on children under the age of 10 years old. At present, children under 10 are excluded from the provisions and operation of the *Crimes (Forensic Procedures) Act 2000*, since under its current section 111, this Act does not authorise the carrying out of a forensic procedure on a person who is under 10 years of age.
14. The Committee notes that the *Convention on the Rights of the Child* provides for the protection and interests of the child, including Article 3 (1)<sup>1</sup> and (2)<sup>2</sup> with respect to the best interests of the child as a primary consideration when taking all actions concerning children by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, as well as, taking into account the rights and duties of the child's parents, legal guardians or other individuals legally responsible for the child.
15. The Committee observes that the Bill operates with the consent of a person who has parental responsibility for a child under 10 or a close relative of the child when a parent is not available. Where a parent is a suspect of an offence against the child, that parent cannot consent on the child's behalf. Consent can only be given for a forensic procedure that is needed to exclude the child's forensic material from a crime scene or if the child is a victim of an offence. On the application to a magistrate, an order that a child under 10 undergoes a forensic procedure will only be made for a particular purpose. The purposes for such an order are limited to assisting in the identification or location of a missing person, assisting in the identification of a deceased person, or assisting in the investigation of an offence.
16. The Committee notes that there are further protections for the child under 10 years of age provided in the Bill, including:
  - Requirement that a parent, guardian or lawyer be present at the time of the forensic procedure is conducted;
  - The magistrate must allow a child's parent, guardian or lawyer the opportunity to be heard before making an order for the forensic procedure to be carried out for a particular purpose;
  - Where an application is made to the magistrate to order that a child under 10 undergoes a forensic procedure for a particular purpose, these purposes are limited to assisting in the identification or location of a missing person, assisting in the identification of a deceased person, or assisting the investigation of an offence;

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<sup>1</sup> Article 3 (1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

<sup>2</sup> Article 3 (2): States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Crimes (Forensic Procedures) Amendment Bill 2009

- In determining whether to make an order to carry out a forensic procedure on a child under 10, the magistrate is take into account a range of circumstances, including for example: the age of the child, the best interests of the child, whether the child understands what will be involved, any wishes expressed by the parent or guardian, any submissions or evidence by a lawyer on behalf of the child, the type of forensic procedure that is proposed, the purpose for which the forensic procedure is required, the seriousness of the circumstances surrounding the commission of the offence if the forensic procedure is proposed for the purposes of the investigation of a particular offence;
- The usage of DNA profiles of children (who is at least 10 years of age but under 18 years of age) or incapable persons who volunteer their DNA can only be used for the purpose for which it was acquired unless a magistrate orders otherwise;
- Forensic material must be destroyed within 12 months of being acquired unless being used in the ongoing investigation of the offence for which it was obtained;
- A volunteer under the Act does not include a person under 10 years of age, a suspect or an excluded volunteer (Schedule 1 [5] – proposed new section 76(1));
- Schedule 1 [9] contains provisions on protections for children under 10 that mirror protections granted to other classes of persons under the principal Act.

- 17. Taking into consideration of the above protections afforded by the Bill, the Committee is of the view that this Bill does not constitute an undue trespass on the rights of the child under the age of 10 years old.**
- 18. The Committee also notes from the Agreement in Principle speech with regard to a magistrate making an order for a child under 10 to undergo a forensic procedure for a particular purpose, that: “these orders are designed to assist law enforcement activities. They do not aim to allow, nor do they empower, the police to investigate or act against children under 10 in any way”.**
- 19. However, the Committee suggests that to remove any doubt and to clarify any uncertainty that may undermine the rights of the child, a similar wording to the effect that ‘the orders are not to allow or empower investigation against a child under 10 years of age’ could be considered by Parliament for insertion into any relevant parts of the proposed Act including in the proposed section 81F (1).**

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

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

20. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the office of the Attorney General, that there are two reasons:

“1. To ensure that police have enough time to develop standard operating procedures (SOPs) to deal with the introduction of the provisions regulating the conduct of forensic procedures on children under 10; and,



2. To allow for SOPs to be amended, if necessary, to reflect the other changes in the Bill.

As 1 and 2 may occur at different times, 'day or day's is necessary".

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

***The Committee makes no further comment on this Bill.***

## 2. ELECTRICITY SUPPLY AMENDMENT (ENERGY SAVINGS) BILL 2009

Date Introduced:	13 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Carmel Tebbutt
Portfolio:	Climate Change and the Environment

### Purpose and Description

1. The object of this Bill is to amend the *Electricity Supply Act 1995* (the *principal Act*) to establish an energy savings scheme. The scheme is intended to create a financial incentive to reduce the consumption of electricity by encouraging energy saving activities.
2. The other objects of the Bill are: (a) to assist households and businesses to reduce electricity consumption and electricity costs, and (b) to complement any national scheme for carbon pollution reduction by making the reduction of greenhouse gas emissions achievable at a lower cost, and (c) to reduce the cost of, and the need for, additional energy generation, transmission and distribution infrastructure.

### Background

3. According to the Agreement in Principle speech the Bill introduces the new Energy Savings Scheme which is a key component of the New South Wales Energy Efficiency Strategy.
4. The first core feature of the Energy Savings Scheme is that it will set mandatory energy savings targets for electricity retailers and other liable parties. Liable parties under the new scheme will include all holders of New South Wales electricity retail licences, New South Wales electricity generators that supply directly to retail customers in New South Wales, and market customers in New South Wales who purchase their electricity directly from the National Electricity Market.
5. Retailers and other liable parties will achieve their target by obtaining and surrendering energy saving certificates, which represent delivered energy savings. The incentive to surrender sufficient certificates will be in the form of a penalty for any shortfall of certificates.
6. The Bill allows exemptions from the scheme for industrial activities that are trade exposed and emissions intensive. Trade-exposed and emissions-intensive industrial activities will be given assistance under the proposed Carbon Pollution Reduction Scheme and will be given partial exemption from the Commonwealth Renewable Energy Target. The rationale for these exemptions is that these activities face competition from industries in countries that are not faced with meeting similar environmental obligations. The Energy Savings Scheme is intended to complement these two national schemes.

Electricity Supply Amendment (energy savings) bill 2009

7. The second key feature of the new Energy Savings Scheme is that, like the Greenhouse Gas Reduction Scheme, the new scheme will use energy savings certificates that represent energy savings to demonstrate achievement of targets. An Energy Savings Rule will define the energy savings activities recognised for certificate creation, as well as how the number of certificates is calculated.
8. The Bill allows for the creation of energy savings certificates by accredited energy savings certificate providers, who carry out recognised energy saving activities. The Bill gives liable parties the flexibility to create certificates by delivering energy efficiency upgrades directly or to purchase certificates from specialist companies accredited to conduct energy saving projects.
9. It is anticipated that the incentives will encourage the participation of many third parties in the scheme—as occurred with the Greenhouse Gas Reduction Scheme. The benefit of this approach, compared with a prescribed regulatory target on liable parties without market incentives, is that the lowest-priced and most cost-effective measures available will be adopted.
10. The Bill states that the target for the first year is 1 per cent, which is for a full calendar year. However, as the first year of the scheme commences on 1 July 2009 with a compliance period of only six months, the effective target for 2009 will actually be 0.4 per cent of total electricity sales for the full year, including exempt electricity.
11. When the targets reach their maximum level, for each 1,000 gigawatt hours of liable electricity sales a retailer or other liable party will be required to source energy savings of 50 gigawatt hours of electricity from recognised energy saving activities.
12. From 2014 to 2020 the scheme will deliver energy efficiency improvements that will save approximately 3.2 million megawatt hours each year, which is - equivalent to approximately 3.2 million tonnes of carbon dioxide each year.

## The Bill

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

**Clause 2** provides for the commencement of the proposed Act on 1 July 2009.

### **Schedule 1 Amendment of Electricity Supply Act 1995**

#### **The energy savings scheme**

The principal amendments made by the Bill are contained in **Schedule 1 [2] and [7]**.

**Schedule 1 [2]** inserts new Part 9 in the principal Act.

#### **Energy savings scheme (Division 2)**

Division 2 of new Part 9 establishes the energy savings scheme.

The persons required to participate in the scheme are retail suppliers of electricity, direct suppliers of electricity and consumers of electricity whose electricity load is classified as a market load.

Scheme participants are required to meet an individual energy savings target in each year, starting with 2009. (For the purposes of starting up the scheme, the year 2009 is taken to be the period of 6 months from 1 July 2009, but after that each year will be an ordinary calendar year.)

#### **Energy savings scheme targets (Division 3)**

Division 3 of new Part 9 establishes the general energy savings targets for the scheme, referred to as energy savings scheme targets. These targets are to be used as the basis for calculating the individual energy savings targets of scheme participants.

The Bill authorises the energy savings scheme targets to be changed, by regulation,

Electricity Supply Amendment (energy savings) bill 2009

in limited circumstances. An energy savings scheme target for a year cannot be changed after the year has started or within 12 months before the start of that year.

#### **Individual energy savings targets (Division 4)**

Division 4 of new Part 9 provides for the calculation of individual energy savings targets and penalties for failure to meet targets.

A scheme participant's individual energy savings target for a year is calculated by multiplying the total value of all liable acquisitions made by the scheme participant during that year by the energy savings scheme target for that year (that is, the target referred to in proposed Division 3). This result is then multiplied by the energy conversion factor for that year to obtain an individual energy savings target for the year.

A liable acquisition of a scheme participant is any purchase of electricity by the scheme participant (from the national electricity market operator or from any person who is not registered as a participant in the national electricity market) where the electricity is purchased for consumption by, or onsale to, end users in this State or for use in this State. Certain supplies of electricity generated by scheme participants are also treated as liable acquisitions of electricity.

A scheme participant's individual energy savings target is expressed in tonnes of carbon dioxide equivalent of greenhouse gas emissions.

A scheme participant meets its individual energy savings target if the energy savings attributable to the scheme participant during the year to which the target applies are equivalent to, or exceed, the scheme participant's individual energy savings target.

The energy savings that are attributable to a scheme participant under the scheme is the total value of all energy savings certificates that the scheme participant elects to surrender under the scheme for the purpose of meeting its individual energy savings target.

If a scheme participant fails to meet an individual energy savings target, the scheme participant will be liable for an energy savings shortfall penalty, calculated by individual energy savings target exceeds the energy savings attributable to the scheme participant).

The base penalty rates may be adjusted for movements in the consumer price index. The base penalty rates and penalty conversion factors may also be changed by regulation in other limited circumstances. Base penalty rates and penalty conversion factors cannot be changed after the year has started or within 12 months before the start of that year (apart from adjustments for movements in the consumer price index).

Scheme participants will be permitted, subject to certain limitations, to avoid an energy savings shortfall penalty by carrying forward their energy savings shortfall (or part of their energy savings shortfall) to the next year. However, the carried forward shortfall must be remedied in the next year.

#### **Exemptions (Division 5)**

Division 5 of new Part 9 permits the Minister to grant exemptions from the scheme in respect of the electricity load used by a specified person or class of persons or used in connection with a specified activity or class of activities. The Minister may grant such an exemption only if satisfied that the electricity load is used in connection with an industry or activity that is both emissions intensive and trade exposed. An exemption may be a full exemption or a partial exemption.

The effect of the exemption is that scheme participants can deduct from their liable acquisitions any electricity purchased or supplied that represents exempt electricity load.

#### **Assessment of compliance of scheme participants (Division 6)**

Division 6 of new Part 9 requires scheme participants to lodge with the Scheme

Electricity Supply Amendment (energy savings) bill 2009

Regulator an annual energy savings statement. This statement is to contain an assessment of the scheme participant's individual energy savings target for the year and details of energy savings certificates proposed to be surrendered to meet that target.

### **Creation of energy savings certificates (Division 7)**

Division 7 of new Part 9 provides for the creation of energy savings certificates. The rules made under the scheme may provide for the creation of energy savings certificates in respect of any activity that reduces the consumption of electricity in this State. Energy savings achieved in other jurisdictions may also be recognised under the scheme if there is in that other jurisdiction a corresponding energy savings scheme approved by the Minister. Activities in respect of which energy savings certificates may be created are referred to as recognised energy saving activities. Subject to certain transitional arrangements for persons accredited as certificate providers under GGAS, the energy saving activity concerned must commence on or after 1 July 2008.

An energy savings certificate may be created for each whole tonne of carbon dioxide equivalent of greenhouse gas emissions attributable to energy savings arising from a recognised energy saving activity.

To calculate the number of tonnes of carbon dioxide equivalent of greenhouse gas emissions attributable to energy savings arising from a recognised energy saving activity it is necessary to multiply the number of megawatt hours of energy savings arising from the recognised energy saving activity (which is provided for by the scheme rules) by a certificate conversion factor.

Certificate may be created after the energy saving activity occurs. There are time limits on creating certificates.

Certificates may not be created in relation to energy savings already claimed under GGAS.

It will be an offence to improperly create a certificate.

### **Accreditation of certificate providers (Division 8)**

Division 8 of new Part 9 provides for the accreditation of persons as providers of energy savings certificates. Only accredited certificate providers can create energy savings certificates. The regulations may make provision for eligibility for accreditation.

Division 8 also provides for other miscellaneous matters relating to accreditation (applications for accreditation, duration of accreditation, conditions of accreditation and transfer of accreditation).

If a person improperly creates certificates, or creates certificates in contravention of conditions of accreditation, the Scheme Administrator may require the person to surrender energy savings certificates to the Scheme Administrator. The purpose of this provision is to prevent energy savings that have not actually been achieved from being attributed to a scheme participant.

### **Registration, form and duration of energy savings certificates (Division 9)**

Division 9 of new Part 9 requires the creation of an energy savings certificate to be registered. It also provides for the form and duration of certificates.

### **Transfers and other dealings in certificates (Division 10)**

Division 10 of new Part 9 facilitates trading in energy savings certificates and provides for other matters relating to transfers of certificates.

### **Administration of scheme (Division 11)**

Division 11 of new Part 9 provides for a Scheme Regulator and Scheme Administrator, and sets out their functions. In general, the Scheme Regulator is responsible for the administration of the scheme with regard to scheme participants (including monitoring compliance with the scheme by scheme participants) and the

Electricity Supply Amendment (energy savings) bill 2009

Scheme Administrator is responsible for the administration of the scheme with regard to accreditation of certificate providers and trading in certificates (including monitoring compliance with the scheme by accredited certificate providers).

The Scheme Regulator and Scheme Administrator will have power to conduct audits and to require information. It will be an offence to obstruct the Scheme Regulator or Scheme Administrator in the exercise of their functions or to provide false and misleading information to the Scheme Regulator or Scheme Administrator.

Division 11 also makes special provision for confidential information and for the protection of Cabinet documents.

### **Registers (Division 12)**

Division 12 of new Part 9 provides for the following registers to be kept by the Scheme Administrator:

(a) a register of accredited certificate providers,

(b) a register of energy savings certificates.

It also allows the Scheme Administrator to make publicly available aggregated data compiled from the registers and provides for other matters in relation to the registers.

### **Scheme rules (Division 13)**

Division 13 of new Part 9 enables the Minister to approve rules for the purposes of the scheme. Scheme participants must comply with scheme rules.

### **Miscellaneous (Division 14)**

Division 14 of new Part 9 contains miscellaneous provisions relating to the scheme.

These provisions deal with the following:

(a) the obligation of retail suppliers to comply with the scheme as a condition of their licences,

(b) arrangements for persons who cease to be scheme participants,

(c) appeals to the Administrative Decisions Tribunal,

(d) certificate evidence,

(e) protection from personal liability for persons involved in administering the scheme,

(f) annual reports by the Scheme Regulator,

(g) five-yearly reviews of the scheme,

(h) waiver or suspension of obligations under the scheme in emergencies,

(i) early termination of the scheme (for example, if a national scheme is established).

Unless terminated earlier, the scheme will automatically terminate at the end of the year 2020.

## Issues Considered by the Committee

<p><b>13. The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</b></p>
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***The Committee makes no further comment on this Bill.***

### **3. ENERGY LEGISLATION AMENDMENT (INFRASTRUCTURE PROTECTION) BILL 2009**

Date Introduced:	13 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Ian Macdonald MLC
Portfolio:	Energy

#### **Purpose and Description**

1. This Bill amends the *Electricity Supply Act 1995* and the *Gas Supply Act 1996* to make further provision for the protection of electricity and gas infrastructure; and for other purposes.
2. This Bill contains five main amendments: new requirements on network providers and contractors; provisions for cost recovery; stronger provisions to prevent damage to networks; statutory indemnity for certain officers; and application of these changes to gas pipelines.
3. The first change is that it will amend the *Electricity Supply Act* in order to place new requirements on network operators, such as Energy Australia, Integral Energy and Country Energy, and people undertaking excavation work, such as building contractors.
4. In relation to network operators, it amends the *Electricity Supply Act* to require network operators to belong to the Dial Before You Dig Scheme. Dial Before You Dig is an industry-funded, not-for-profit organisation that was established to provide a single point of contact for those who are planning to excavate so they can locate any underground infrastructure that may be affected by the planned excavation. Network operators will be required to comply with their Dial Before You Dig membership responsibilities. These include a requirement to respond to excavators with information on the location and type of underground electricity powerlines in the vicinity of the proposed excavation work.
5. The new requirements will form part of the licence conditions of distribution network service providers. They will help to ensure that excavation workers can do their job safely and without damaging the network by making information on the location and type of underground electricity works available to contractors seeking to commence excavation works.
6. The second new requirement places obligations on people undertaking excavation work to follow correct procedures prior to commencing their work. This includes contacting Dial Before You Dig to obtain information on the location and type of underground electricity cables. This information is essential to ensure the safety of workers and the security of the electricity network.

Energy Legislation Amendment (Infrastructure Protection) Bill 2009

7. Under proposed section 63Z of the *Electricity Supply Act*, a person must not carry out prescribed excavation work, or authorise such excavation work, unless the person has first contacted Dial Before You Dig, complied with its reasonable procedures, and waited a reasonable period for the information to be provided. Failure to comply with these requirements will be a punishable offence with a maximum penalty of a \$2,200 fine.
8. The Bill also requires that excavation workers undertake their work in accordance with the regulations. These regulations will be prepared so they are consistent with established industry guidelines, standards and procedures. The Bill allows regulations to be made that will enable network operators to monitor any excavation works being carried out near critical energy infrastructure.
9. The final of the new requirements will make it mandatory for people undertaking excavation works to notify network operators if any damage is caused to the electricity network. Under proposed section 63ZA, a person must, as soon as practicable, after becoming aware that he or she has damaged an underground powerline, notify the network operator that owns the powerline of the damage. This will allow network operators to take remedial action at an early stage and it will minimise the costs of repairing any damage and any subsequent disruptions to electricity supply to customers. It will be an offence to fail to comply with this requirement, with a maximum penalty of a \$2,200 fine.
10. The second main change proposed in this Bill will facilitate the recovery by network operators of costs and expenses associated with damage to electricity works. Under proposed section 63ZB, the court will be given the discretion to order the payment of costs incurred in preventing or mitigating damage to electricity works. A court will be able to make such an order only if the costs were incurred as the result of an offence of interfering with electricity works under section 65 of the *Electricity Supply Act*, or one of the new offences contained in proposed part 5E. The court may also award compensation for loss or damage that results from the commission of an offence under section 65 of the *Electricity Supply Act* or one of the new offences contained in proposed part 5E.
11. The third main amendment in the Bill is to strengthen the legislative powers of network operators to protect their electricity works from damage from excavation work. Proposed section 49A gives network operators the ability to serve notice on people the network operator believes are about to carry out work that will damage their assets. Under these provisions, network operators will be able to serve written notices that require proposed work to be modified or stopped, or they may apply for an injunction to prevent excavation work. This means that a network operator will be able to require excavation work to be conducted in a way that will not destroy, damage or interfere with its electricity works if the operator has reasonable cause to believe the work could damage its network.
12. A network operator may recover the costs incurred in repairing any damage to electricity works caused by a person who carried out excavation work in contravention of a written notice from the network operator under clause 49A.
13. The Bill strengthens the maximum penalties that apply under section 65 of the *Electricity Supply Act*. This is the key offence provision prohibiting conduct that interferes with electricity works. Section 65 will be amended to increase the maximum penalty for the offence of interfering with electricity works from two to five



years imprisonment. The maximum fine for individuals will increase from \$11,000 to \$22,000. For corporations the maximum penalty will increase from \$220,000 to \$440,000.

14. The fourth group of key amendments create a new statutory indemnity for the Dial Before You Dig organisation and network operators who are providing information in accordance with the new requirements. The statutory indemnity will not apply if an act or omission is done by Dial Before You Dig or network operators in bad faith or negligence. The Bill extends the statutory limits on civil liability to authorised officers of network operators. Provided these officers are acting in good faith, the personal liability of authorised officers will be removed and instead will lie against the network operator. Similar indemnities already apply in relation to the exercise of functions under the national electricity law.
15. The final key change is the inclusion in the *Gas Supply Act 1996* with similar provisions to those outlined above for the *Electricity Supply Act 1995*. These new requirements will apply to underground powerlines and gas pipelines so that both forms of vital energy infrastructure are protected. The Bill provides the same obligations on gas network operators as outlined for electricity network operators. The gas network operators must join Dial Before You Dig and comply with the membership requirements and with any regulations made under the Act concerning the information they must provide to Dial Before You Dig. The increased maximum penalties and new offences also apply to gas pipelines.

## Background

16. From the Agreement in Principle speech:

This amendment bill is a vital part of the Government's five-point plan to further improve the security of power supply to New South Wales. As members of the House would be aware, over the past few months the Sydney central business district has experienced three power interruptions. These interruptions affected Sydney businesses and households and highlighted the importance of ensuring our electricity network is adequately protected. Preliminary investigations have revealed that two of the three interruptions are likely to have been the result of damage to underground electricity cables caused by workers undertaking excavation.

In response to these events the Government announced a comprehensive five-point plan which included stronger laws to protect vital electricity supply cables, a multibillion dollar capital investment program, and a requirement for all government buildings and infrastructure to regularly test and prove backup power systems are working and sufficient. The amendments to the *Electricity Supply Act* that are currently before the House represent the first step in this plan. The bill will improve the security and reliability of the State's energy supply by reducing the risk of damage to underground powerlines and pipelines from excavation work.

## The Bill

The object of this Bill is to amend the *Electricity Supply Act 1995* and the *Gas Supply Act 1996* to make further provision for the protection of electricity and gas infrastructure. The Bill amends the *Electricity Supply Act 1995* (the **Electricity Act**) and the *Gas Supply Act 1996* (the **Gas Act**):

Energy Legislation Amendment (Infrastructure Protection) Bill 2009

- (a) to enable network operators to require persons carrying out excavation work near electricity works or gas works to modify or cease the work if the excavation work would cause damage to or interfere with the electricity or gas works, and
- (b) to enable network operators to recover compensation for damage to electricity works and gas works in certain circumstances, and
- (c) to place a condition on licences and authorisations held by network operators that they belong to a designated information provider, and
- (d) to enable regulations to be made in relation to the provision by network operators of information relating to underground electricity power lines and underground gas pipelines, and
- (e) to make it an offence for a person to carry out certain excavation work without first contacting a designated information provider to obtain information as to the location and type of underground electricity power lines or underground gas pipelines in the vicinity of the proposed work, and
- (f) to make it an offence for a person to carry out certain excavation work in contravention of the requirements of the regulations in relation to the carrying out of the excavation work, and
- (g) to make it an offence for a person to fail to notify a network operator after becoming aware that the person's actions have caused damage to the operator's underground electricity power lines or underground gas pipelines, and
- (h) to increase the penalties for the offence of unauthorised interference with electricity works or gas works.

The Bill also makes consequential amendments to the *Criminal Procedure Act 1986*.

**Schedule 1 Amendment of *Electricity Supply Act 1995 No 94***

**Schedule 1 [1]** inserts proposed section 49A into the Electricity Act to enable a network operator to require a person who is carrying out or proposing to carry out excavation work in, on or near the operator's electricity works to modify the excavation work or not carry it out. The section will only apply in circumstances where the network operator has reasonable cause to believe that the excavation work could damage or interfere with the electricity works or make them a bush fire hazard or a risk to public safety. If the network operator has made such a requirement, the operator may recover the costs in relation to the destruction of, damage to or interference with the electricity works caused by the carrying out of the excavation work. The proposed section also enables a network operator to seek an injunction to prevent the carrying out of the excavation work. Existing section 49 of the Electricity Act contains similar provisions in relation to structures or things that are in, on or near electricity works.

**Schedule 1 [2]** amends section 54 of the Electricity Act which specifies the purposes for which an authorised officer of a network operator may enter premises. The proposed amendment extends those purposes to include the monitoring of excavation work in accordance with regulations under proposed section 63Z and exercising any function under section 49 or proposed section 49A.

**Schedule 1 [3]** inserts proposed Part 5E into the Electricity Act. The proposed Part consists of the following sections:

**Proposed section 63X** defines a ***designated information provider*** for the purposes of the proposed Part. It means Dial Before You Dig NSW/ACT Incorporated or another person or body prescribed by the regulations.

**Proposed section 63Y** makes it a condition of a distribution network service provider's licence that the service provider be a member of the designated information provider and comply with the obligations imposed by that membership. The proposed section also

enables regulations to be made as to the provision of information by network operators in relation to underground electricity power lines.

**Proposed section 63Z** makes it an offence for a person to commence to carry out excavation work to which the proposed section applies or authorise such work to be commenced unless the person has contacted the designated information provider to request information as to the location and type of any underground electricity power lines in the vicinity of the proposed work, has complied with reasonable procedures of the designated information provider to enable that information to be provided and has waited a reasonable period for the information to be provided. Regulations will be able to be made prescribing what constitutes reasonable procedures and a reasonable waiting period. The proposed section also makes it an offence for a person carrying out excavation work to which the proposed section applies, or authorising it to be carried out, not to comply with the requirements of the regulations in relation to the carrying out of the work. Regulations will also be able to be made requiring notification of excavation work and enabling monitoring of excavation work by network operators. The proposed section will apply to excavation work in an area, and of a kind, prescribed by the regulations.

**Proposed section 63ZA** makes it an offence for a person to fail to notify a network operator as soon as practicable after becoming aware that the person's actions or actions authorised by the person have damaged the network operator's underground electricity power lines.

**Proposed section 63ZB** enables a court to order a person who has been convicted of an offence against the proposed Part or existing section 65 to repay costs and expenses incurred by a network operator in relation to its electricity works as a result of the commission of the offence.

**Proposed section 63ZC** provides that the designated information provider, a network operator, their officers or employees and persons acting on their behalf, do not incur any civil monetary liability for acts or omissions in connection with requests for information under proposed section 63Z and the provision of information in compliance with regulations under proposed section 63Y unless the acts or omissions were done or made in bad faith or negligently. The civil monetary liability for negligent acts or omissions is not to exceed the prescribed maximum amount. A person to whom the proposed section applies may enter into an agreement with another person varying or excluding the operation of a provision of the proposed section.

**Schedule 1 [4]** amends section 65 of the Electricity Act to increase the maximum penalty for unauthorised interference with electricity works to 4,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 5 years (or both) in any other case.

**Schedule 1 [5]** amends section 65 of the Electricity Act to provide that the offence of unauthorised interference with electricity works if committed by an individual is an indictable offence which may be dealt with summarily in accordance with Chapter 5 of the *Criminal Procedure Act 1986*.

**Schedule 1 [6]** inserts proposed section 100A into the Electricity Act to exclude authorised officers appointed by a network operator from personal liability for the exercise in good faith of their functions under that Act. Any such liability will attach instead to the network operator.

### **Schedule 2 Amendment of Gas Supply Act 1996 No 38**

**Schedule 2 [1]** inserts proposed section 50A into the Gas Act to enable a network operator to require a person who is carrying out or proposing to carry out excavation work in, on or near the operator's gas works to modify the excavation work or not carry it out. The section will only apply in circumstances where the network operator has reasonable cause to believe that the excavation work could damage or interfere with the gas works or make them a risk to public safety. If the network operator has made such a requirement, the operator may recover the costs in relation to the destruction of, damage to or interference with the

gas works caused by the carrying out of the excavation work. The proposed section also enables a network operator to

seek an injunction to prevent the carrying out of the excavation work. Existing section 50 of the Gas Act contains similar provisions in relation to structures or things that are in, on or near gas works.

**Schedule 2 [2]** amends section 55 of the Gas Act which specifies the purposes for which an inspector of a network operator may enter premises. The proposed amendment extends those purposes to include the monitoring of excavation work in accordance with regulations under proposed section 64C and exercising any function under section 50 or proposed section 50A.

**Schedule 2 [3]** inserts proposed Part 4A into the Gas Act. The proposed Part consists of the following sections:

**Proposed section 64A** defines a *designated information provider* for the purposes of the proposed Part. It means Dial Before You Dig NSW/ACT Incorporated or another person or body prescribed by the regulations.

**Proposed section 64B** makes it a condition of a distributor's licence and a reticulator's authorisation that the distributor or reticulator be a member of the designated information provider and comply with the obligations imposed by that membership. The proposed section also enables regulations to be made as to the provision of information by network operators in relation to underground gas pipelines.

**Proposed section 64C** makes it an offence for a person to commence to carry out excavation work to which the proposed section applies or authorise such work to be commenced unless the person has contacted the designated information provider to request information as to the location and type of any underground gas pipelines in the vicinity of the proposed work, has complied with reasonable procedures of the designated information provider to enable that information to be provided and has waited a reasonable period for the information to be provided. Regulations will be able to be made prescribing what constitutes reasonable procedures and a reasonable waiting period. The proposed section also makes it an offence for a person carrying out excavation work to which the proposed section applies, or authorising it to be carried out, not to comply with the requirements of the regulations in relation to the carrying out of the work. Regulations will also be able to be made requiring notification of excavation work and enabling monitoring of excavation work by network operators. The proposed section will apply to excavation work in an area, and of a kind, prescribed by the regulations.

**Proposed section 64D** makes it an offence for a person to fail to notify a network operator as soon as practicable after becoming aware that the person's actions or actions authorised by the person have damaged the network operator's underground gas pipelines.

**Proposed section 64E** enables a court to order a person who has been convicted of an offence against the proposed Part or existing section 66 to repay costs and expenses incurred by a network operator in relation to its gas works as a result of the commission of the offence.

**Proposed section 64F** provides that the designated information provider, a network operator, their officers or employees and persons acting on their behalf, do not incur any civil monetary liability for acts or omissions in connection with requests for information under proposed section 64C and the provision of information in compliance with regulations under proposed section 64B unless the acts or omissions were done or made in bad faith or negligently. The civil monetary liability for negligent acts or omissions is not to exceed the prescribed maximum amount. A person to whom the proposed section applies may enter into an agreement with another person varying or excluding the operation of a provision of the proposed section.

**Schedule 2 [4]** amends section 66 of the Gas Act to increase the maximum penalty for unauthorised interference with gas works to 4,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 5 years (or both) in any other case.

**Schedule 2 [5]** amends section 66 of the Gas Act to provide that the offence of unauthorised interference with gas works if committed by an individual is an indictable offence which may be dealt with summarily in accordance with Chapter 5 of the *Criminal Procedure Act 1986*.

**Schedule 2 [6]** inserts proposed section 79A into the Gas Act to exclude inspectors appointed by a network operator from personal liability for the exercise in good faith of their functions under that Act. Any such liability will attach instead to the network operator.

### **Schedule 3 Amendment of *Criminal Procedure Act 1986* No 209**

**Schedule 3 [1]** amends section 268 of the *Criminal Procedure Act 1986* to provide the maximum penalties for offences under section 65 of the *Electricity Supply Act 1995* and section 66 of the *Gas Supply Act 1996* when dealt with summarily.

**Schedule 3 [2]** amends Table 2 in Schedule 1 to the *Criminal Procedure Act 1986* to include offences under section 65 of the *Electricity Supply Act 1995* and section 66 of the *Gas Supply Act 1996*. The effect of the amendment is that such an offence will be able to be dealt with summarily rather than on indictment unless the prosecutor elects otherwise.

## Issues Considered by the Committee

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

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

17. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Minister's office that "it is necessary to commence the proposed amendments on proclamation to permit the finalisation of new Regulations to be made under the proposed amendments. For example, proposed section 63Z of the *Electricity Supply Act 1995* requires the excavation work to which it applies to be prescribed by Regulation".

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

***The Committee makes no further comment on this Bill.***

## 4. HERITAGE AMENDMENT BILL 2009

Date Introduced:	13 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kristina Keneally MP
Portfolio:	Planning

### Purpose and Description

1. This Bill amends the *Heritage Act 1977* and the *Environmental Planning and Assessment Act 1979* with respect to the Heritage Council of New South Wales, State heritage items and other items of heritage significance; and for other purposes.
2. Changes are proposed to the heritage listing processes aimed at improving the operation and fairness of the current system at State level. The Heritage Council publishes the criteria for establishing whether an item is of State heritage significance, warranting listing on the State Heritage Register. The Heritage Council is required to notify the Minister of these criteria. This Bill amends the Act to enable the Minister to approve the criteria before the Minister causes notice of the criteria to be published in the *Government Gazette*. In considering whether to approve the listing criteria, the Minister will have regard to Australian and international best practice.
3. Currently, in order to list an item on the State Heritage Register, the Minister needs to be satisfied that the item is of State heritage significance, following a recommendation by the Heritage Council. Under the proposed changes, as well as considering whether an item is of State heritage significance, the Minister will also be required to consider a range of broader planning and economic issues. These include: a recommendation from the Heritage Council about whether the item should be listed; whether the long-term conservation of the item is necessary; whether the listing would render the item incapable of reasonable or economic use; and whether the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or the land on which the item is situated.
4. The Bill allows the Minister to make a referral or request to the panel or the commission on the Minister's own motion or after a request by an affected owner, occupier, mortgagee or lessee. This aims to address concerns raised in the panel's review about the rights of owners of items who consider that they will be affected negatively by a proposed listing.
5. It also amends the Act to allow the Minister to direct the removal of an item when the Minister has considered a recommendation by the Heritage Council and has formed the opinion that the long-term conservation of the item is not necessary and that the listing renders the item incapable of reasonable or economic use, or that the listing is causing undue financial hardship to the owner, mortgagee or lessee.
6. The Bill will reduce the membership of the Heritage Council from 15 to 11 members.

7. It will allow an owner of an item listed on the State Heritage Register to lodge a conservation management plan with the Heritage Council for its endorsement. An endorsement will allow works identified in the plan to be carried out without any further Heritage Council approval. However, the Heritage Council will only endorse a conservation management plan for minor development, identified as "exempt development" by a conservation policy or strategy contained within the plan, which does not materially affect the heritage significance of the item.
8. The Bill allows the Minister or the chair of the Heritage Council to issue a "stop work" order if it is considered that an item under an interim heritage order or listed on the State Heritage Register is being, or is about to be, harmed and where a prior approval of the Heritage Council has not been obtained.
9. The proposed stop-work order is of an interim nature. It will last for 40 days and will give the Minister or the Heritage Council time to commence other action, such as seeking a court order to restrain a breach of the Act or a court order imposing sanctions for the failure to obtain an appropriate approval under the Act. There will be no right of appeal against the stop-work order. However, neither the Minister nor the chair will be able to make more than one stop-work order in relation to the same work. This aims to prevent rolling stop-work orders being imposed and without any redress or right of appeal being available.
10. This Bill redefines what is a relic, moving from an arbitrary age-based definition to requiring that a relic be something of heritage significance before Heritage Council approval is required.
11. It aims to clarify that a council can refer an objection to a proposed heritage listing to an independent hearing and assessment panel. It will give greater consideration to the concerns of owners of items that are proposed to be listed and to facilitate more rigorous assessment of the heritage significance of an item.
12. Currently, the integrated development provisions under the *Environmental Planning and Assessment Act 1979* do not apply to development carried out by the Crown. This Bill will amend these provisions to enable them to apply to Crown development, but only where an approval is required under the Heritage Act for such development.
13. The Bill will also prevent a local council from refusing any development application on heritage grounds if an approval of the Heritage Council under the Heritage Act has been given for the same development.
14. It further amends the *Environmental Planning and Assessment Act* to allow the Minister to also vest these planning assessment panels with the functions of preparing, making and approving development control plans, and preparing and approving contributions plans that apply to land, as well as performing council's functions in relation to local environmental plans.
15. It will also ensure that members of committees constituted under section 22 of the *Environmental Planning and Assessment Act 1979* are protected from personal liability when exercising their functions in good faith. This amendment is proposed to reinstate the protections previously afforded to section 22 committee members prior to amendments to the Act in 2008.

## Background

16. The *Heritage Act 1977* established the Heritage Council of New South Wales, which provides the Minister for Planning with advice on the management of the State's heritage. The *Heritage Act* sets the State Heritage Register in place. This register consists of the State's most significant heritage places. "Listings on the register are made by the Minister for Planning on the recommendation of the Heritage Council and include approximately 1,500 places of Aboriginal, natural and historic significance ranging from the Sydney Opera House to the Aboriginal Fish Traps at Brewarrina".
17. In July 2007, the former Minister for Planning, the Hon. Frank Sartor, appointed an independent panel of experts to conduct a review of the Act. Following the review, in December 2007, the panel handed down its report, "A Review of the New South Wales *Heritage Act 1977*". The review contains 65 recommendations, which include greater fairness and rigour in the heritage listing process and retaining key elements of the current system such as local and State heritage listings and the New South Wales Heritage Council.
18. From the Agreement in Principle speech:

The bill reduces the membership of the Heritage Council from 15 to 11 members. That is based on one of the options recommended by the expert panel that the Heritage Council's size and composition be brought into line with its counterparts in other States and Territories. The Heritage Council will consist of a chairperson, three statutory members—those being the director general of the Department of Planning, the director general of the Department of Environment and Climate Change, and the New South Wales Government Architect—a representative of the National Trust of Australia, New South Wales, and six members appointed by the Minister on the basis of skills, knowledge or qualifications in one of a number of areas, including Aboriginal heritage, archaeology, architecture, conservation of environmental heritage, engineering, New South Wales or Australian history, local government, moveable heritage, natural heritage, planning, property, planning or environmental law, property economics, building, development and property industries, rural interests, and cultural landscapes...To ensure the continuity of the Heritage Council, current members appointed by the Minister on the basis of their skills, knowledge and qualifications in one of the current areas identified in the Act will be retained on the council for the remainder of their respective terms of appointment...The bill also reforms the constitution and procedures of the Heritage Council. These changes are generally consistent with the procedures of the Planning and Assessment Commission and joint regional planning panels, both established under the Environmental Planning and Assessment Amendment Act 2008. This will ensure better consistency in terms of governance.
19. In order to encourage requests for listings on the State Heritage Register, the Government has introduced the State Heritage Register Thematic Listing Program.
20. According to the Agreement in Principle speech:

Traditionally, nominations have been sourced from the community. This has been invaluable in ensuring that the heritage register reflects community values and that the community is actively involved in the listing process. One drawback to this approach is that nominations have been considered in an ad hoc fashion. As a result, some important places are yet to be listed on the State Heritage Register. The Heritage Council has recommended a more strategic approach to State Heritage



Register listings, seeking nominations in accordance with agreed themes. I have approved the first two-year program in which State listing nominations will be invited from the community according to the agreed themes. The themes include: the Governor Macquarie sites, to mark the bicentenary of Macquarie's tenure as Governor from 1810 to 1822; convict sites, to acknowledge the importance of convicts to the development of New South Wales, as well as the current Australian Convict World Heritage nomination; World War I and World War II sites, to acknowledge the ninetieth anniversary of World War I and the seventieth anniversary of World War II; and Aboriginal heritage, to ensure that this important aspect of the State's history continues to be recognised. The Heritage Council will concentrate its resources on the assessment of nominations in line with these themes. However, nominations outside the themes will continue to be accepted from the community, and sites under threat will always be a priority.

21. At present, the Minister can refer a recommendation from the Heritage Council to list an item on the State Heritage Register to a ministerial review panel for advice or request the Planning Assessment Commission to review the matter. This Bill allows the Minister to make a referral or request to the panel or the commission on the Minister's own motion or after a request by an affected owner, occupier, mortgagee or lessee. This aims to address concerns raised in the panel's review about the rights of owners of items who consider that they will be affected negatively by a proposed listing.
22. This Bill aims to ensure that the criteria for listing mirror the criteria for delisting.
23. The Bill also requires the Heritage Council, when determining an application for approval under the Act relating to an item listed on the State Heritage Register, to take into consideration any applicable endorsed conservation management plan. This aims to improve certainty for owners and development applicants. "These amendments will also assist the Government in its negotiations with the Commonwealth to enter into bilateral agreements to reduce the duplication of State-Commonwealth approval processes for places in New South Wales that are listed on the National Heritage List".

## The Bill

24. The objects of this Bill are to amend the Heritage Act 1977 (the **Heritage Act**) and the Environmental Planning and Assessment Act 1979 (the **Planning Act**) as follows:
  - (a) to insert objects into the Heritage Act,
  - (b) to require criteria used by the Heritage Council to determine whether a place, building, work, relic, moveable object or precinct (an *item*) is of State heritage significance to be approved by the Minister for Planning (the *Minister*),
  - (c) to reduce the membership of the Heritage Council from a maximum of 15 members to a maximum of 11 members and to remove the appointment of members nominated by particular organisations (other than the National Trust of Australia (New South Wales)),
  - (d) to require the Minister, when considering the inclusion or removal of an item on or from the State Heritage Register, to consider whether the item should be conserved and other specified effects of the listing,
  - (e) to provide for the endorsement by the Heritage Council of conservation management plans for items listed on the State Heritage Register and other matters related to those plans,

- (f) to enable the Minister or Chairperson of the Heritage Council to make stop work orders to prevent an item that is subject to an interim heritage order or is listed on the State Heritage Register from being harmed,
- (g) to provide for the referral by councils of disputed proposals to list items as heritage items in local environmental plans to independent hearing and assessment panels,
- (h) to prevent a consent authority from refusing a development application for integrated development on heritage grounds if the development is the subject of a relevant approval under the Heritage Act,
- (i) to make other minor amendments and amendments of a law revision, consequential or savings and transitional nature.

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

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation, other than provisions related to certain amendments made by the *Environmental Planning and Assessment Amendment Act 2008*.

### **Schedule 1 Amendment of *Heritage Act 1977 No 136***

#### **Heritage Council**

**Schedule 1 [9]** substitutes sections 8 and 9 of the Heritage Act and repeals other provisions currently relating to the membership and procedures of the Heritage Council. The proposed sections reduce the maximum membership of the Council from 15 to 11, replace the Director of the Heritage Office with the Director-General of the Department of Planning as a statutory member of the Council and remove those members who were formerly appointed by organisations (other than the member appointed from nominations made by the National Trust of Australia (New South Wales)). The amendments retain the 3 statutory members and provide for up to 8 appointed members, while widening the qualifications, knowledge and skills such members may possess before being appointed.

**Schedule 1 [8]** gives the Heritage Council the status and privileges of the Crown by declaring it to be a NSW Government agency.

**Schedule 1 [10]** amends section 21 of the Heritage Act to update the functions of the Heritage Council to reflect changes to plan-making processes under the Planning Act.

**Schedule 1 [43]** inserts proposed Schedule 2 into the Heritage Act, containing provisions relating to the membership and procedure of the Heritage Council.

#### **State Heritage Register and items of State heritage significance**

**Schedule 1 [6]** amends section 4A of the Heritage Act to require the criteria that the Heritage Council uses to make decisions about whether an item is of State heritage significance to be approved by the Minister before the Minister publishes them in the Gazette and to require only those published criteria to be used by the Council. Currently, the criteria must merely be notified to the Minister before they are published in the Gazette.

**Schedule 1 [13]** amends section 32 of the Heritage Act to require the Minister, when determining whether to direct that an item be listed on the State Heritage Register, to consider whether the long-term conservation of the item is necessary, whether listing would render the item incapable of reasonable or economic use and whether it would cause undue financial hardship.

**Schedule 1 [14]** amends section 33 of the Heritage Act to provide that before making a recommendation for the listing of a precinct the Council must publish a notice of intention to consider listing in at least one metropolitan newspaper and one local newspaper circulating in the precinct, rather than giving written notice to each owner or occupier of land in the precinct, as is currently the case.

**Schedule 1 [16]** amends section 33 of the Heritage Act to prohibit the Heritage Council from recommending that an item be listed on the State Heritage Register unless it is satisfied that the item satisfies at least one of the criteria established under section 4A of that Act and also provides that the Council may consider whether the long-term conservation of the item is necessary, whether listing would render the item incapable of reasonable or economic use and whether listing would cause undue financial hardship.

**Schedule 1 [17]** amends section 34 of the Heritage Act to make it clear that the Minister may refer a recommendation for the listing of an item on the State Heritage Register to a review body on the Minister's own motion or at the request of an affected owner, mortgagee, lessee or occupier.

**Schedule 1 [24]** amends section 37 of the Heritage Act to require notice of the Minister's decision on a proposed State Heritage Register listing to be given in the same manner as notice of an intention to consider the listing by the Heritage Council.

**Schedule 1 [25]** amends section 38 of the Heritage Act relating to the power of the Minister to direct that an item be removed from the State Heritage Register on the recommendation of the Heritage Council. Under the amended section, the Minister may make such a direction, after considering a recommendation by the Heritage Council, if of the opinion that the item is not of State heritage significance or that the long-term conservation of the item is not necessary and if either the listing would render the item incapable of reasonable or economic use or if the listing would cause undue financial hardship to the owner, mortgagee or lessee of the item or land on which it is situated.

**Schedule 1 [27]** inserts proposed section 38A into the Heritage Act to enable the Heritage Council to endorse conservation management plans for items listed on the State Heritage Register and to enable regulations to be made for or with respect to conservation management plans.

### **Controlled activities**

**Schedule 1 [28]** amends section 57 of the Heritage Act to exempt a person from having to obtain approval to work on an item that is listed on the State Heritage Register if the work is exempted from the operation of Part 4 of that Act by a conservation management plan endorsed by the Heritage Council.

**Schedule 1 [29]** amends section 62 of the Heritage Act to require the relevant approval body to consider any applicable conservation management plan when determining whether to grant approval to carry out work on an item listed on the State Heritage Register.

**Schedule 1 [32]** inserts proposed Division 5 of Part 4 (proposed section 79C) into the Heritage Act. The proposed Division enables the Minister or the Chairperson of the Heritage Council to make a stop work order (being an order that work on an item cease for a period of 40 days) if of the opinion that an item that is subject to an interim heritage order or listed on the State Heritage Register is being or is about to be harmed. Only one stop work order may be made in relation to any work and other remedies under the Heritage Act may be pursued in relation to the work. An order may not be made if approval for the work has been given under Part 4 of the Heritage Act.

### **Other amendments**

**Schedule 1 [5]** amends section 4 of the Heritage Act to substitute the definition of *relic*, so that a relic under that Act must be of State or local heritage significance but is no longer required to be more than 50 years old.

**Schedule 1 [19]** amends section 36 of the Heritage Act to enable regulations to be made to remove or change the right of a party to legal or other representation at a review by the Planning Assessment Commission of a recommendation that an item be listed on the State Heritage Register.

**Schedule 1 [30]** amends section 72 of the Heritage Act to enable regulations to be made to remove or change the right of a party to legal or other representation at a review by the Planning Assessment Commission of an appeal against a decision by the Heritage Council about an application for approval of actions in relation to an item that is subject to an interim heritage order or listed on the State Heritage Register.

**Schedule 1 [31]** amends section 79 of the Heritage Act to enable regulations to be made to remove or change the right of a party to legal or other representation at a review by the Planning Assessment Commission of an appeal under the Planning Act or other Act that is to be determined by the Minister for Planning.

**Schedule 1 [38]** amends section 170 of the Heritage Act to require government instrumentalities to enter on their Heritage and Conservation Registers items of the environmental heritage that are required to be listed on the Registers in accordance with the regulations. Currently, items subject to interim heritage orders or listed on the State Heritage Register, or that could be subject to such an order or listing, or that are listed in environmental planning instruments, are required to be entered on the Registers.

**Schedule 1 [39]** amends section 170A of the Heritage Act to remove the requirement for government instrumentalities to include information about matters related to Heritage and Conservation Registers in their annual reports.

**Schedule 1 [40]** inserts proposed section 170B into the Heritage Act. The proposed section enables a council to refer a submission about the inclusion of an item as an item of heritage significance in a proposed local environmental plan to an independent hearing and assessment panel established under the Planning Act.

**Schedule 1 [41]** amends Schedule 1 to the Heritage Act to enable regulations containing savings and transitional provisions to be made consequent on the enactment of the proposed Act.

**Schedule 1 [42]** amends Schedule 1 to the Heritage Act to insert savings and transitional provisions consequential on the enactment of the proposed Act.

## **Schedule 2 Amendment of *Environmental Planning and Assessment Act 1979* No 203**

**Schedule 2 [1]–[3]** amend uncommenced provisions of the Planning Act as proposed to be inserted by the *Environmental Planning and Assessment Amendment Act 2008* (**the 2008 Act**).

Section 23G (2) (a) of the Planning Act (as proposed to be inserted by the 2008 Act) confers on joint regional planning panels (**regional panels**) functions as a consent authority that are conferred on it under an environmental planning instrument.

**Schedule 2 [1]** clarifies that the relevant functions as a consent authority that may be conferred on a regional panel under section 23G (2) (a) are any of the consent authority functions of a local council. This enables the council to retain certain functions as a consent authority for development applications determined by a regional panel.

**Schedule 2 [2]** resolves a technical issue concerning the entity to which a regional panel's exercise of a local council's functions as consent authority conferred on the panel under section 23G (2) (a), is to be attributed. The effect of the amendment is to deem a regional panel to be the applicable local council in the exercise of those functions, subject to the regulations. The amendment also clarifies that a regional panel is to exercise functions conferred on it under section 23G (2) (a) to the exclusion of the applicable council.

The amendment also allows proposed section 23G (5A) and (5B) to apply in relation to the functions conferred on a regional panel under an environmental planning instrument that are conferred on the Planning Assessment Commission under section 23D (1) (d) of the Planning Act (as proposed to be inserted by the 2008 Act).

**Schedule 2 [3]** specifically provides for a power to make regulations for or with respect to the functions conferred by the Planning Act on a regional panel.

**Schedule 2 [4]** amends section 90 of the Planning Act to apply the provisions of that Act relating to procedures for integrated development to development made by or on behalf of the Crown if it is development that requires an approval to carry out work under section 57 (1) of the Heritage Act (a **heritage approval**).

**Schedule 2 [5]** amends section 90A of the Planning Act to insert a definition of **heritage approval**.

**Schedule 2 [6]** inserts proposed section 92 into the Planning Act. The proposed section prohibits a consent authority from refusing development consent on heritage grounds if a heritage approval has been granted in respect of the same development.

**Schedule 2 [7]** amends section 118 of the Planning Act to enable the functions of preparing, making and approving development control plans to be conferred on panels appointed under Division 1AA of Part 6 of that Act to exercise planning functions of councils.

**Schedule 2 [8]** amends section 118 of the Planning Act to enable the functions of preparing and approving contributions plans to be conferred on panels appointed under Division 1AA of Part 6 of that Act to exercise planning functions of councils.

**Schedule 2 [9]** amends section 158 of the Planning Act to exclude committees, or members of committees, established under section 22 of that Act, from personal liability for things done or omitted to be done for the purposes of that Act. The amendment will be taken to have commenced on the same day as the removal of the previous provision relating to the liability of such committees (see proposed section 2 of the proposed Act).

## Issues Considered by the Committee

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

#### Issue: Clause 2 (2) – Schedule 1 [18]-[23] and Schedule 2 [7]-[9] - Retrospectivity:

25. Clause (2) reads: Schedule 1 [18]-[23] and Schedule 2 [7]-[9] are taken to have commenced on 3 November 2008.
26. The Committee will usually be concerned where the law is changed retrospectively in a manner that may adversely affect any person.
27. The amendments retrospectively insert the proposed sections 118 (3)(c) and 118 (3)(d) of the *Environmental Planning and Assessment Act 1979*, with respect to the appointment of planning administrator, planning assessment panel or regional panel, by conferring them with the exercise of additional functions in relation to (c), the preparation, making and approval of development control plans; and in relation to (d), the preparation and approval of contributions plans. Under the Bill, these are taken to have commenced on 3 November 2008. Currently, under section 118 (3) of the *Environmental Planning and Assessment Act 1979*, a planning assessment panel or regional panel may be appointed to exercise only all or any particular function or class of functions of the council under subsection (a) as a consent authority under Part 4, or (b) in relation to making of environmental planning instruments under Part 3 or under Division 1 of Part 2 of Chapter 6 of the *Local Government Act 1993*.
28. The amendments will also retrospectively insert under Schedule 1 [19], the new section 36 (1) into the *Heritage Act 1977*. This relates to a review by the Planning Assessment Commission of a recommendation that an item be listed on the State Heritage Register. The proposed amendment is taken to have commenced on 3 November 2008.

29. **The Committee was advised that amendments to section 118 of the *Environmental Planning and Assessment Act 1979* “relates to planning panels”. In this regard, the Committee was informed “that the retrospective commencement of the provision does not, in itself, extend the powers of any existing panels to deal with development control plans and contributions plans as this would require orders to be made which could not apply retrospectively”.**
30. **The Committee was also advised that the amendments to section 36 of the *Heritage Act 1977* in respect of “the Planning Assessment Commission are minor statute law revision arrangements required by amendments made to the *Environmental Planning and Assessment Act* in 2008. The amendments are proposed to have commenced on 3.11.08 to coincide with the establishment of the Planning Assessment Commission on that date”.**

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

**Issue: Right of Appearance – clauses which allow amendment of Act by a regulation - Schedule 1 [19] - Proposed Section 36 (1); Schedule 1 [30] – Proposed Section 72; and Schedule 1 [31] – Proposed Section 79 – Amendment of *Heritage Act 1977*:**

31. Schedule 1 [19] amends section 36 (1) of the *Heritage Act 1977* to remove the unlimited right of an Australian legal practitioner or a person’s agent to appear at an inquiry held by a Commissioner of Inquiry, “unless otherwise provided by the regulations”. This relates to a review by the Planning Assessment Commission of a recommendation that an item be listed on the State Heritage Register.
32. Schedule 1 [30] amends section 72 of the Act to remove the unlimited right of an Australian legal practitioner or a person’s agent to appear before the Planning Assessment Commission “unless otherwise provided by the regulations”, who has made representations to the Heritage Council under section 61 (3), with respect to the application for approval from the determination of which the appeal has been made. This relates to a review by the Planning Assessment Commission of an appeal against a decision by the Heritage Council about an application for approval of actions in relation to an item that is subject to an interim heritage order or listed on the State Heritage Register.
33. Schedule 1 [31] amends section 79 of the Act to remove the unlimited right of appearance by an Australian legal practitioner or a person’s agent “unless otherwise provided by the regulations”, before the making a report under section 78 by the Planning Assessment Commission. This relates to a review by the Planning Assessment Commission of an appeal under the Planning Act or other Act that is to be determined by the Minister for Planning.

- 34. The Committee observes that from the Bill’s Explanatory Note: Schedule 1 [19]; Schedule 1 [30] and Schedule 1 [31] will “enable regulations to be made to remove or change the right of a party to legal or other representation” “at a review by the Planning Assessment Commission of a recommendation that an item be listed on the State Heritage Register” [item 19]; or “at a review by the Planning Assessment Commission of an appeal against a decision by the Heritage Council about an application for approval of actions in relation to an item that is subject to an interim heritage order or listed on the State Heritage Register” [item 30]; or “at a review by the Planning Assessment Commission of an appeal under the Planning Act or other Act that is to be determined by the Minister for Planning” [item 31].**
- 35. The Committee was advised that “the proposed amendments to the Heritage Act are simply to ensure consistency with the provisions that relate to the Planning Assessment Commission under the *Environmental Planning and Assessment Act 1979*”.**
- 36. The Committee notes that the right of appearance by the affected person will not be removed by this Bill but the right of appearance by the person’s legal practitioner or their agent may be precluded or changed by regulations. The Committee refers this to Parliament and asks whether this may constitute an inappropriate delegation of legislative powers by limiting or changing the right of appearance by a legal or other representation through regulations rather than by legislation.**

**Issue: Clause 2 (1) - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.**

37. The Committee notes that except for schedule 1 [18]-[23]; schedule 2 [7]-[9]; schedule 2 [1]-[2]; and schedule 2 [3], the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all. However, the Committee accepts the advice received from the Minister’s office that “the reconstitution of the Heritage Council requires some lead in time before the amendment at Schedule 1 [9] commences. This will enable appropriate administrative and transitional arrangements to be made with respect to the proposed changes to membership. Consideration is also being given for some regulations to be made prior to the proposed Act becoming operative. In relation to the other proposed amendments, proclamations will be prepared to ensure these commence soon after assent”.

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

***The Committee makes no further comment on this Bill.***

## 5. LAND ACQUISITION (JUST TERMS COMPENSATION) AMENDMENT BILL 2009

Date Introduced:	15 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Carmel Tebbutt
Portfolio:	Commerce

### Purpose and Description

1. The object of this Bill is to amend the Land Acquisition (Just Terms Compensation) Act 1991 (the **Principal Act**) to clarify the application of sections 7A and 7B of that Act relating to the acquisition of native title rights and interests and the acquisition of land already owned by the acquiring authority.

### Background

2. According to the Agreement in Principle speech the aim of the Bill is to overcome what the government considers are the unintended consequences of the recent High Court of Australia decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* [2009] HCA 12 (2 April 2009).
3. In that decision the High Court held that acquisition of two public roads, Darcy Street and Church Street, for a new Civic Place Redevelopment was made under s7B of the *Land Acquisition (Just Terms Compensation) Act 1991* rather than under Part 1 of Chapter 8 of the *Local Government Act 1993*. Section 7A of the *Land Acquisition (Just Terms Compensation) Act 1991* empowers an authority to acquire land subject to native title if certain conditions are met, while s 7B allows an authority to acquire land from itself.
4. In its judgement the High Court concluded on p.24 that:

*A public road vested in a council, however, is not what the Local Government Act identifies in its Dictionary as "public land", and a public road is therefore not "community land". Section 186(3) has no application to either Darcy Street or Church Street. Even accepting for the purposes of argument that s186 of the Local Government Act authorises a council to acquire, from itself, what the Local Government Act identifies as community land, it does not follow that the Council's acquisition by compulsory process of public roads that are vested in it are acquisitions under Part 1 of Chapter 8 of the Local Government Act. Rather, each is an acquisition of the land comprising the relevant street under s 7B of the Land Acquisition (Just Terms Compensation) Act 1991.*
5. The Agreement in Principle speech argues that 'the policy intention of these sections (7A and 7B) is only to extend or limit-as the case may be-the rights of public authorities to acquire land where those rights are already been established under other legislation'. These sections must be read in tandem with the limitations on acquisition contained within the authority's parent legislation.



## The Bill

### Outline of provisions

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

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

### **Schedule 1 Amendment of Land Acquisition (Just Terms Compensation) Act 1991 No 22**

Section 7 of the Principal Act provides that (subject to sections 7A and 7B) the Act does not empower an authority of the State to acquire land (compulsory acquisitions of land are required to be carried out in accordance with the Act but the power to **Schedule 1 [1]** substitutes section 7 of the Principal Act. The substituted section declares that an acquisition of land by compulsory process to which section 7A or 7B applies by an authority of the State that has power under another Act to acquire land by compulsory process is made under and subject to that other Act. Accordingly, the acquisition is limited to the purposes for which land may be acquired by compulsory process under that other Act and other relevant rights and obligations in that other Act will continue to apply to the authority. In the case of the acquisition of land by councils, the applicable provisions are found in sections 186 to 190 of the *Local Government Act 1993* (those provisions will now extend to compulsory acquisitions of native title rights and interests and of roads and other land vested in the council).

**Schedule 1 [2]** amends section 7A of the Principal Act to refer to an acquisition of native title rights and interests “in accordance with” the Principal Act instead of such an acquisition “under” the Principal Act.

**Schedule 1 [4]** extends the proposed amendments to acquisitions and proposed acquisitions before the commencement of the proposed Act. However, existing court determinations (such as the High Court decision in the Parramatta Civic Place case to invalidate the council’s compulsory acquisition of certain properties) are not affected. In particular, the clause seeks to ensure that any land with native title rights and interests that may have been acquired before the amendments are made (but are not authorised by the amendments) will not extinguish or otherwise affect those native title rights and interests.

## Issues Considered by the Committee

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

#### **Issue: Schedule 1 [1] - Right to Property**

6. The Committee is always concerned about infringements on individual property rights. In considering the definition of the powers of a council to compulsorily acquire land under the *Local Government Act 1993*, the High Court observed on p 4 of its judgement “*In accordance with established principles of statutory interpretation the preferable construction is that which authorises the least interference with private property rights*”.
7. However, the effect of the Bill is to clarify that native title land and land vested in an authority must be acquired under the restrictions of the authority’s parent legislation which is more onerous than s7A and 7B of the *Land Acquisition (Just Terms Compensation) Act 1991*.
8. Further, the Bill does not extend the powers of authorities to compulsorily acquire land from private landowners other than under the restrictions that were understood

to operate prior to the High Court judgement. Further, all acquisitions are subject to compensation.

9. **The Committee is always concerned about infringements on individual property rights. However, the Committee is satisfied that the Bill is necessary to clarify that native title land and land vested in an authority must be acquired under the restrictions of the authority's parent legislation which is more onerous than s7A and 7B of the *Land Acquisition (Just Terms Compensation) Act 1991*.**
10. **The Committee also does not consider that, in clarifying that land subject to native title and land vested in councils falls within Part 1 of Chapter 8 of the *Local Government Act 1993*, the powers of councils to compulsorily acquire land from private landowners has been unduly extended.**

**Issue: Schedule 1 [4] - Retrospectivity**

11. Any past acquisitions of a public authority's own land or native title interests will also be taken to be acquisitions under the parent legislation, not the *Lands Acquisition (Just Terms Compensation) Act*. The argument is made that this is necessary to ensure certainty of land tenure not only for public authorities, but also for any third parties who might subsequently have bought or leased land that would have been affected by the High Court's decision.
12. The retrospective application of the bill does not extend to any acquisition of native title interests that might have occurred contrary to any general mandatory requirements regarding land acquisition in the parent legislation.
13. Further existing court determinations such as the High Court's decision in *R & R Fazzolari Pty Ltd v Parramatta City Council*; *Mac's Pty Ltd v Parramatta City Council [2009]* are not affected.

14. **The Committee accepts that the retrospective application of the Bill is necessary to ensure certainty of land tenure and, as it does not affect previous court determinations, the Committee considers that it does not unduly trespass on personal rights and liberties.**

***The Committee makes no further comment on this Bill.***

## 6. MINING AMENDMENT (SAFEGUARDING LAND AND WATER) BILL 2009\*

Date Introduced:	14 May 2009
House Introduced:	Legislative Council
Minister Responsible:	Ms Lee Rhiannon MLC
Portfolio:	The Greens

### Purpose and Description

1. This Bill amends the *Mining Act 1992* to make provision for protecting agricultural land and water from mining.
2. It amends the Mining Act to protect from mining operations and mining exploration prime agricultural land and water sources that feed prime agricultural land. It aims to insert a new section 11B into the Mining Act. Under the proposed new section, an exploration licence, assessment lease or mining lease cannot be granted over prime agricultural land.
3. Proposed new subsections (3) and (4) provide that an authority cannot be granted over protected land and that planning approval cannot be granted for a mining operation over or beneath the surface of protected land. "Protected land" is defined as prime agricultural land and land on which, or within one kilometre of which, is situated a river or aquifer that feeds prime agricultural land.
4. A dispute mechanism is contained in new section 11B. Any party, either a landholder or a mining company, to a dispute may apply to the Land and Environment Court for a determination of the matter, including whether the land is defined as class 1 or class 2.
5. New Section 11B (6) provides that approvals under the *Environmental Planning and Assessment Act 1979*, including approvals under part 3A, cannot override the protections granted in this Bill.
6. The proposed new section 11B (7) states that the Director General of the Department of Primary Industries must maintain an inventory of protected land, including maps, to enable protected land to be identified. This section also states that the information should be publicly available on a government website.
7. The Bill does not apply retrospectively.

### Background

8. According to the Second Reading speech:

Farmers like Wendy Bowman, whose family has farmed the Hunter Valley for generations, tell the story behind this bill. Coalmines have encroached on her family's properties and she has been successively moved on. Her crops have failed because

Mining Amendment (Safeguarding Land and Water) Bill 2009\*

of high salinity levels in nearby creeks and pollution from mine subsidence. When open-cut mining increased, her property Ashton became bathed in dust. The cows refused to eat and Ashton went from being one of the best-watered properties in the Hunter to having its milk rejected by the dairy company because it was contaminated with mine dust.

9. The conflict between agriculture and mining is also referred to around the Liverpool Plains, where the local community has a blockade for almost a year to stop BHP Billiton from entering local farms to exercise its coal exploration licence, including the local farmer Tim Duddy, whose property is located at the centre of the blockade. Other examples include the Caroon Coal Action Group and Watermark coal exploration zones. Similar concerns are raised by the Gloucester Valley, where the local community is fighting against coal expansion. Gloucester has similar alluvial flats and soil profile to the productive lands in the Liverpool Plains. Gloucester Residents In Partnership (GRIP) has organised a meeting where 950 residents voted to support the Gloucester Shire Council's decision not to renew the current exploration permits.
10. The Bill applies to all mining operations regulated by the Mining Act, which includes most minerals that are mined, including coal, gold, base metals and gemstones, except petroleum and uranium.
11. It extends to exploration licences. An application to explore leads to an application to mine. The exploration process "often involves drilling multiple holes and wells". At present, compensation does not include long-term damage to agriculture, and the right to object also does not apply to exploration licences.
12. The Bill aims to protect prime agricultural lands as well as protection to the rivers and aquifers that feed that land.
13. The definitions in the Bill are set out in the proposed new section 11B (1). It defines prime agricultural land in accordance with the land classification system used by the New South Wales Department of Primary Industries. From the Second Reading speech:

This system ranks land on its suitability for agricultural production, with class 1 being the most fertile and class 5 being land unsuitable for agriculture. I understand that when classifying land, the Department of Primary Industries takes into account biophysical factors such as topography, soil chemistry and climate, as well as social and economic factors...This definitions section of the bill defines prime agricultural land as class 1 and class 2 land. Class 1 is arable land suitable for intensive cultivation where constraints for sustained high levels of agricultural production are minor or absent. According to the Department of Primary Industries, they are "elite, of limited extent and considered to be of significance to the State". Class 1 is arable land suitable for regular cultivation for crops, but not suited to continuous cultivation. According to the Department of Primary Industries they are "also of superior quality and of limited extent". It has a moderate to high suitability for agriculture but soil factors or environmental constraints reduce the overall level of production and may limit the cropping phase to a rotation with sown pastures. I refer members to the Department of Primary Industries document Agfact AC 2.5 Agricultural Land Classification, which sets out the characteristics of class 1 and class 2 land in more detail.
14. The Second Reading speech explained that:

In New South Wales, the Australian Bureau of Statistics New South Wales agricultural profile for 2006-07 states that only 8 per cent of New South Wales, or 6.7 million

Mining Amendment (Safeguarding Land and Water) Bill 2009\*

hectares, was used for cropping in 2006-07...At the international level, only 11 per cent of land is available for agriculture; the figure drops to 8 per cent in New South Wales. A much smaller fraction of this 8 per cent would be situated on top of viable mineral deposits. Clearly this bill does not cover a large amount of land.

15. The Bill aims to target only the most fertile, highly productive food-producing land in New South Wales. According to the Second Reading speech, "it does not seek a blanket ban and it does not signal an end to mining in New South Wales".

## The Bill

16. The object of this Bill is to amend the *Mining Act 1992* to protect prime agricultural land (and water sources that feed prime agricultural land) from mining operations. As a result of the proposed section to be inserted in the *Mining Act 1992*, an exploration licence, assessment lease or mining lease cannot be granted under that Act in relation to any such protected land and planning approvals under the *Environmental Planning and Assessment Act 1979* (such as development consents or Part 3A project approvals) cannot be given for the purposes of mining operations on that land. **Prime agricultural land** is defined in the proposed section as land that is identified as Class 1 or 2 land in accordance with the agricultural land classification by the Department of Primary Industries. The Director-General of that Department will be required to identify (by way of maps) land that is protected land for the purposes of the proposed section and to make that information publicly available.

### 17. Outline of provisions

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

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

**Schedule 1** contains the amendment to the *Mining Act 1992* described in the overview above.

## Issues Considered by the Committee

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| <p>18. <b>The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</b></p> |
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***The Committee makes no further comment on this Bill.***

## 7. MOTOR ACCIDENTS (LIFETIME CARE AND SUPPORT) AMENDMENT BILL 2009

Date Introduced:	13 May 2009
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Joe Tripodi MP
Portfolio:	Finance

### Purpose and Description

1. This Bill amends the *Motor Accidents (Lifetime Care and Support) Act 2006* to enable certain people who were injured before the commencement of the Lifetime Care and Support Scheme to buy into the Scheme and to extend the period of interim participation in the Scheme in the case of young children; and for other purposes.
2. This Bill introduces two main amendments to the existing Lifetime Care and Support Scheme. The first is to enable a person who sustained severe injuries from a motor vehicle accident prior to the commencement of the scheme to participate in the scheme by using part of his or her lump sum award to buy in to the scheme. The second is to extend the interim participation period for children who are less than three years old at the time of the motor vehicle accident.
3. It amends the *Motor Accidents (Lifetime Care and Support) Act 2006* to provide that people who sustained severe injuries in a motor vehicle accident prior to the commencement of the Lifetime Care and Support Scheme will have the option of buying in to the scheme. Injured persons may be accepted as a lifetime participant in the Lifetime Care and Support Scheme under this buy-in arrangement so long as their injury would have made them eligible to participate in the scheme had the motor vehicle accident occurred after the scheme commenced. The Lifetime Care and Support Authority will determine the buy-in amount to be paid by an injured person wishing to participate in the scheme. The buy-in payment is to be the amount required to fund the person's treatment and care needs resulting from the motor accident injury for his or her lifetime participation in the scheme.
4. The Bill also amends the *Motor Accidents (Lifetime Care and Support) Act* to extend the interim participation period for young children who are less than three years old at the time of the motor vehicle accident. The effect of this change will be to make sure that children who are less than three years old at the time they were severely injured will not have a final assessment for lifetime participation in the scheme until they have reached the age of five years.

### Background

5. The Lifetime Care and Support Scheme looks after all people who are severely injured in motor vehicle accidents in New South Wales. Participants in the scheme receive the medical treatment, care and support services they need throughout their lives, regardless of who may have been responsible for causing the road accident in

Motor Accidents (Lifetime Care and Support) Amendment Bill 2009

which they were injured. The Lifetime Care and Support Scheme commenced for children on 1 October 2006 and it was extended to include adults from 1 October 2007. The Lifetime Care and Support Authority administers the scheme. Eligibility for the Lifetime Care and Support Scheme is determined on the basis of medical assessment and depends on the severity of a person's injuries.

6. Most people who are eligible to enter the scheme will have a spinal cord injury or a severe brain injury. Some people who have suffered burns or amputations will also be eligible to join the scheme. Currently, there are 227 seriously injured people participating in the scheme, including 199 adults and 28 children. According to the Agreement in Principle speech, “these proposed reforms will enhance the operation of the Lifetime Care and Support Scheme and provide improved options for people injured in motor vehicle accidents who have significant future medical and care needs. These initiatives will not impact on the green slip levy paid by motorists that funds the operating costs of the Lifetime Care and Support Scheme”.
7. The Agreement in Principle speech explained that the “Lifetime Care and Support Guidelines may make provision as to how a person's contribution for participation in the scheme is to be determined. This initiative will be cost neutral for the scheme and will not compromise the scheme or the provision of services to existing and future participants”.
8. The effect of the proposed change to ensure that children who are less than three years old at the time they were severely injured will not have a final assessment for lifetime participation in the scheme until they have reached the age of five years. The Government bases this on a recommendation made by the Standing Committee on Law and Justice in its first review of the new scheme. Currently, severely injured people are initially accepted into the Lifetime Care and Support Scheme as interim participants for a period of two years. During this period, the Lifetime Care and Support Scheme pays for the injured person's treatment, rehabilitation and care expenses. The interim participation period exists because recovery and ongoing improvements in the injured person's condition may occur during this post-accident period. Prior to the expiration of the two-year interim participation period, interim participants are assessed to determine whether they are eligible for lifetime participation in the scheme.
9. According to the Agreement in Principle speech:

As noted by the standing committee, it is not always possible to make a full and final assessment of the long-term care needs of very young children at the end of the current two-year interim participation period, especially in cases involving brain injuries. This extended period of interim scheme participation for children who are less than three years old at the time of the motor vehicle accident will ensure that their injuries fully stabilise before significant decisions are made about their projected lifetime care needs. This change will also extend to young children who are currently interim participants in the scheme, so that those children will be able to continue their interim participation until they reach five years of age.

## **The Bill**

10. The objects of this Bill are:

Motor Accidents (Lifetime Care and Support) Amendment Bill 2009

- (a) to enable a person who was injured in a motor accident before the commencement of the Lifetime Care and Support Scheme (*the Scheme*) to participate in the Scheme by buying in, and
- (b) to provide that a child under 3 years of age who is accepted as an interim participant in the Scheme remains a participant until the child is 5 years of age rather than for 2 years as is currently the case.

## 11. Outline of provisions

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

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act except for specified provisions that commence on a day or days to be appointed by proclamation.

### **Schedule 1 Amendment of *Motor Accidents (Lifetime Care and Support) Act 2006* No 16**

**Schedule 1 [3]** inserts proposed section 7A into the *Motor Accidents (Lifetime Care and Support) Act 2006* (the *Principal Act*). The proposed section enables a person who was injured in a motor accident occurring before the relevant Scheme commencement date to be accepted as a lifetime participant in the Scheme if the person pays to the Lifetime Care and Support Authority (the *Authority*), for payment into the Lifetime Care and Support Authority Fund, an amount that the Authority determines as the amount required to fund the treatment and care needs of the person as a lifetime participant in the Scheme in respect of the injury. Such a person is eligible to participate in the Scheme only if the person would have been eligible to participate in the Scheme had the motor accident occurred immediately after the relevant Scheme commencement date and had no damages been awarded to the person in respect of the injury.

An application for participation in such a case cannot be made by an insurer and is to be made by or on behalf of the person.

Proposed section 7A also provides that guidelines issued under section 58 of the Principal Act may make provision for or with respect to how a person's contribution for participation in the Scheme under the proposed section is to be determined.

**Schedule 1 [1]** inserts a proposed definition of *relevant Scheme commencement date*, being 1 October 2006 in the case of a person who was under 16 years of age when injured in a motor accident and 1 October 2007 in any other case.

**Schedule 1 [5]** amends section 54 of the Principal Act to provide that the Authority is not permitted to recover damages under that section in respect of injuries to a participant in the Scheme if the participant paid an amount to the Authority under proposed section 7A in respect of those injuries. **Schedule 1 [2]** makes a consequential amendment.

**Schedule 1 [4]** provides that a child under 3 years of age who is accepted as an interim participant in the Scheme remains an interim participant until the child is 5 years of age. Currently such a child would only remain an interim participant for 2 years.

**Schedule 1 [7]** omits a redundant Schedule, provides for regulations of a savings and transitional nature to be made consequential on the enactment of the proposed Act and provides for the amendment proposed to be made by Schedule 1 [4] to extend to children who are interim participants in the Scheme on the commencement of that amendment and who were under 3 years of age when they became interim participants. This means any such child will now continue to be an interim participant until he or she is 5 years of age.

**Schedule 1 [6]** omits a redundant provision.



## Issues Considered by the Committee

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

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

12. The Committee notes that the proposed Act is to commence on the date of assent except for Schedule 1 [1]-[3] and [5], which will commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the core amendments on whatever day it chooses or not at all. However, the Committee accepts the advice received from the office of the Motor Accidents Authority and the office of the Lifetime Care and Support Authority, that “the commencement provisions of the Motor Accidents (Lifetime Care and Support) Amendment Bill 2009 have been drafted so as to ensure that those provisions which can become operational immediately will commence on assent. Schedule 1 [1]-[3] and [5] – the buy-in option – will commence on a day or days to be appointed by proclamation, to enable the necessary administrative processes to be put in place, in particular, the changes to the statutory LTCS Guidelines (refer Schedule 1 [3], cl. 7A(5), prior to those provisions becoming operational”.

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| <p>13. <b>The Committee accepts the advice received above and has not identified any issues identified under s 8A(1)(b)(iv) of the <i>Legislation Review Act 1987</i>.</b></p> |
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***The Committee makes no further comment on this Bill.***

## SECTION B: MINISTERIAL CORRESPONDENCE

# 1. CORRESPONDENCE ON EXPLANATORY MATERIALS AND EXPLANATORY MEMORANDA ACCOMPANYING BILLS

Date of letter received: 20 May 2009  
Minister Responsible: Hon Nathan Rees MP  
Portfolio: Premier

### Background

1. The Committee resolved at its meeting on 24 November 2008 to write to the Premier regarding the potential for practice adoption in respect of Explanatory Materials and Explanatory Memoranda accompanying Bills. The attached letter to the Premier was written on 24 November 2008. It referred to recurring matters of concern that have been reported in the Committee's Digest reports, such as, commencement by proclamation, strict liability and retrospectivity. The Committee noted the practice of the Senate Standing Committee on the Scrutiny of Bills. This aims to encourage helpful information and explanation in the Explanatory Note for provisions that may warrant the attention of Parliament as an approach that could be usefully adopted in respect of our own legislation.
2. By way of background information, the Committee's correspondence also included an attachment with a summary of the relevant Practice Note No 1 of 17 October 2005 adopted by the Victorian Scrutiny of Acts and Regulations Committee. The Committee also referred to relevant comments from a report of the Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills* and the *Odger's Australian Senate Practice*, 12<sup>th</sup> edition at page 269.
3. The Committee wrote to the Premier to seek his consideration to adopt a similar practice for Ministers in New South Wales when future Bills are introduced.

### The Premier's Reply

4. The Premier wrote his reply in a letter received on 20 May 2009 (see attached).
5. In response to the Explanatory Materials for Bills, the Premier wrote:

I note that Ministers already endeavour to highlight in Agreement in Principle speeches, or during Parliamentary debate, the rationale for certain provisions which also may be of concern to the Committee. For example, a Minister introducing a Bill which has some retrospective operation will often explain the reasons for the relevant provisions and their intended operation in the Agreement in Principle speech.

I understand that in other jurisdictions where guidance has been issued, your counterpart Committees have been the bodies responsible for issuing that guidance

material. I understand it is open to your Committee to issue similar guidelines, if the Committee considers it appropriate to do so. I am sure that Ministers will take into account any guidelines your Committee issues, although it will remain a matter for Ministers to determine how best to inform Parliament of matters relevant to a Bill.

I am advised that there are some differences in drafting practices in New South Wales which should be considered by the Committee if it does decide to issue guidelines.

Unlike in other jurisdictions, Explanatory Notes for Bills in New South Wales are prepared by the Parliamentary Counsel's Office and not by agencies. Any additional matters which Ministers choose to raise would therefore be raised through means other than the Explanatory Notes.

6. In relation to the issue of commencement by proclamation, the Premier advised the following in his letter:

The Government has been increasingly vigilant to ensure that provisions that provide for commencement by proclamation are only used when necessary. Since 2004 there has been a steady increase in the number of Acts which have commenced on Assent. In 2004, only 26 per cent of Acts commenced on Assent, whereas, in 2008, 42 per cent of Acts were drafted to commence on Assent.

For the remaining Acts, some period of time is necessary to undertake the further regulatory and administrative actions which are required before commencing an Act. Importantly, this flexibility ensures that all parties, particularly stakeholders, are prepared before an Act commences.

In these circumstances, I do not support the view that provisions that allow for a commencement date to be appointed by proclamation amount to an inappropriate delegation of legislative power.

It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate. Ministers have on many occasions addressed the need for such commencement provisions in Agreement in Principle or have provided specific advice to your Committee to assist it in advising Parliament as to whether such a power is appropriate.

As you would be aware, Parliamentary Counsel prepares a report every 90 days that identifies uncommenced legislation. This report is tabled in Parliament. Members have the opportunity to raise concerns if they consider that particular legislation should have commenced sooner.

7. The Premier thanked the Committee for bringing these concerns to his attention. The Premier also informed at the outset of his letter:

I note that the digests published by your committee provide a useful summary for Members of your Committee's concerns in relation to Bills. While the Government may not always agree with the issues raised, there is no doubt Members are, as a result of the digests, in a better position to understand the Committee's concerns and can make an informed decision whether to raise those concerns during debate.

## **Committee's Response**

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| <p>8. <b>The Committee thanks the Premier for his reply.</b></p> |
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PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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24 November 2008

Our Ref: LRC2984

The Hon Nathan Rees MP  
Premier,  
GPO Box 5341,  
SYDNEY NSW 2001

Dear Premier,

Re: **Potential for Practice Adoption in respect of Explanatory Materials and Explanatory Memoranda Accompanying Bills**

As you are aware, pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee reports on any Bill with issues of concern in its *Legislation Review Digest*.

It is apparent that issues such as commencement by proclamation (which may give rise to an inappropriate delegation of legislative power), strict liability and retrospectivity are recurring matters of concern, which have been frequently reported in the Committee's Digest reports.

The Committee notes the practice of the Senate Standing Committee on the Scrutiny of Bills is to encourage helpful information and explanation in the Explanatory Note for provisions that may warrant the special attention of Parliament. Such an approach could usefully be adopted in respect of our own legislation.

By way of background information, the Committee notes that the Scrutiny of Acts and Regulations Committee in Victoria has adopted the following Practice Note No 1 on 17 October 2005, to advise legal and legislation officers of their Committee's expectations in respect of information that should be provided to the Parliament concerning provisions in Bills that test or invoke their Committee's terms of reference:

"...To avoid needless Ministerial correspondence the Committee strongly prefers that explanatory material be provided at the time a Bill is introduced in Parliament in either the Second Reading Speech and/or the explanatory memorandum. Provisions frequently of concern to the Committee include –

- 1.1 Unexplained retrospective provisions
- 1.2 Unexplained wide delegation of powers and functions provisions

1.3 Unexplained commencement by proclamation: or delayed commencement in excess of 12 months

1.4 Insufficient or unhelpful explanatory material.\*

For more details of the Practice Note No 1 of the Victorian Scrutiny of Acts and Regulations Committee, please refer to the attachment.

We would also like to refer to the comments from a report of the Senate Standing Committee for the Scrutiny of Bills, *The Quality of Explanatory Memoranda Accompanying Bills*, 24 March 2004:

The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justification for this.

The Committee would like to draw attention also to the *Odger's Australian Senate Practice*, 12<sup>th</sup> edition, at page 269, which remarked that:

In response to the criticism of the misuse of the power to proclaim legislation, the government also adopted a type of commencement provision in bills whereby, if a statute whose commencement is to be specified by proclamation has not commenced within 6 or 12 months after assent, it commences automatically. Provisions allowing proclamation to be made at any time after assent are now not included in bills unless there is some special reason for doing so.

The Committee is therefore, writing to seek your consideration to adopt a similar practice for our Ministers when future Bills are to be introduced.

Of course, the Committee would welcome a senior member of staff from the Department of Premier and Cabinet to attend a meeting if you should consider it beneficial to further elaborate on this proposal.

The Committee would like to thank you in advance.

If you need further information, please contact Ms Catherine Watson, Committee Manager, on 9230 2036 or by email: [Catherine.Watson@parliament.nsw.gov.au](mailto:Catherine.Watson@parliament.nsw.gov.au)

Yours sincerely



Allan Shearan MP  
Chair

**Attachment:**

**Scrutiny of Acts and Regulations Committee, Victoria: Summary of Practice Note No 1 - 17 October 2005:**

1.1 Unexplained retrospective provisions: Where a Bill contains a provision that has retrospective operation (deeming, validating or backdated to the time of an announcement or 'press release') the Committee would expect that the Parliament will be provided with an explanation why it is desirable or necessary for the provision to be retrospective. The explanation should include the reason why a specific retrospective date is chosen, and provide sufficient information whether the retrospectivity may detrimentally affect any person. Where there is insufficient information provided to the Parliament, the grounds for an initial adverse report by the Committee will be that such a provision may constitute an undue trespass to rights and freedoms within the meaning of the Act.

1.2 Unexplained wide delegation of powers and functions provisions: Where a Bill provides for a delegation of powers or functions in wide or unlimited terms, such as a delegation to 'any person', the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a wide or unlimited delegation of powers. Where there is insufficient information provided to the Parliament the grounds for an initial adverse report by the Committee will be that such a provision may make rights, freedoms or obligations dependent upon insufficiently defined administrative powers within the meaning of the Act.

1.3 Unexplained commencement by proclamation or delayed commencement in excess of 12 months: Where a Bill provides for the commencement of an Act by proclamation and no forced commencement provision is provided OR where the commencement is more than 12 months from Royal Assent the Committee expects that Parliament will be informed as to the reasons why it is desirable or necessary to employ such a commencement provision. Where there is insufficient information provided to the Parliament the grounds for any initial adverse report by the Committee will be that such a provision may constitute an inappropriate delegation of legislative powers within the meaning of the Act.

1.4 Insufficient or unhelpful explanatory material: "The Committee will write to Ministers where, in the Committee's opinion, explanatory material (clause notes and/or the Second Reading Speech) are unhelpful in describing the purpose or effect of a key provision... In particular the Committee will comment on deficient or inaccurate explanatory material provided in respect to the following types of legislative provisions –

- Powers of arrest, detention and deprivation of liberty
- Search and seizure powers without judicial warrant
- Creation of strict or absolute liability offences
- Reversal of onus of proof in criminal (or civil penalty) offences
- Abridgment of the right to silence or the privilege against self-incrimination
- Freedom of communication, assembly, movement, association, religion or conscience
- Infringement of the right to vote
- Denial of or failure to advise of, judicial or merits review of administrative decisions
- Denial or abridgment of the principle of 'fair trial' or the principles of natural justice
- Acquisition of property without adequate compensation
- Privacy of information and health records
- Inappropriately delegates legislative power. Examples: allow regulations to alter the provisions of an Act, or allow regulations to establish a tax (as distinct from a fee for service or penalty).

The grounds for an adverse report where an explanatory memorandum is plainly deficient or inadequate is that such a provision may test or invoke one or more of the Committee's terms of reference."



Premier of New South Wales  
Australia

Mr Alan Shearan MP  
Chair  
Legislation Review Committee  
Parliament House  
Macquarie Street  
Sydney NSW 2000

RECEIVED

3 MAY 2009

20 MAY 2009

LEGISLATION REVIEW  
COMMITTEE

Dear Mr Shearan *Alan*,

I refer to your letter concerning the adoption of a practice of explaining issues of concern to your Committee in explanatory material for Bills.

At the outset, I note that the digests published by your committee provide a useful summary for Members of your Committee's concerns in relation to Bills. While the Government may not always agree with the issues raised, there is no doubt Members are, as a result of the digests, in a better position to understand the Committee's concerns and can make an informed decision whether to raise those concerns during debate.

I note that Ministers already endeavour to highlight in Agreement in Principle speeches, or during Parliamentary debate, the rationale for certain provisions which also may be of concern to the Committee. For example, a Minister introducing a Bill which has some retrospective operation will often explain the reasons for the relevant provisions and their intended operation in the Agreement in Principle speech.

I understand that in other jurisdictions where guidance has been issued, your counterpart Committees have been the bodies responsible for issuing that guidance material. I understand it is open to your Committee to issue similar guidelines, if the Committee considers it appropriate to do so.

I am sure that Ministers will take into account any guidelines your Committee issues, although it will remain a matter for Ministers to determine how best to inform Parliament of matters relevant to a Bill.

I am advised that there are some differences in drafting practices in New South Wales which should be considered by the Committee if it does decide to issue guidelines.

Unlike in other jurisdictions, Explanatory Notes for Bills in New South Wales are prepared by the Parliamentary Counsel's Office and not by agencies. Any additional matters which Ministers choose to raise would therefore be raised through means other than the Explanatory Notes.

- 2 -

I also note your comments in relation to commencement by proclamation.

The Government has been increasingly vigilant to ensure that provisions that provide for commencement by proclamation are only used where necessary. Since 2004 there has been a steady increase in the number of Acts which have commenced on Assent. In 2004, only 26 per cent of Acts commenced on Assent, whereas, in 2008, 42 per cent of Acts were drafted to commence on Assent.

For the remaining Acts, some period of time is necessary to undertake the further regulatory and administrative actions which are required before commencing an Act. Importantly, this flexibility ensures that all parties, particularly stakeholders, are prepared before an Act commences.

In these circumstances, I do not support the view that provisions that allow for a commencement date to be appointed by proclamation amount to an inappropriate delegation of legislative power.

It remains a matter for Parliament to determine whether a power to commence an Act by proclamation is appropriate. Ministers have on many occasions addressed the need for such commencement provisions in Agreement in Principle or have provided specific advice to your Committee to assist it in advising Parliament as to whether such a power is appropriate.

As you would be aware, Parliamentary Counsel prepares a report every 90 days that identifies uncommenced legislation. This report is tabled in Parliament. Members have the opportunity to raise concerns if they consider that particular legislation should have commenced sooner.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely



**Nathan Rees MP**  
Premier



# Appendix 1: Index of Bills Reported on in 2009

	Digest Number
Appropriation (Budget Variations) Bill 2009	4
Associations Incorporation Bill 2009	2
Barangaroo Delivery Authority Bill 2009	2
Biofuel (Ethanol Content) Amendment Bill 2009	3
Children and Young Persons (Care and Protection) Amendment Bill 2009	6
Children and Young Persons (Care and Protection) Amendment (Children's Employment) Bill 2009	2
Children Legislation Amendment (Wood Inquiry Recommendations) Bill 2009	2
Civil Procedure Amendment (Transfer of Proceedings) Bill 2009	6
Crimes (Administration of Sentences) Amendment (Private Contractors) Bill 2009	2
Crimes (Appeal and Review) Amendment Bill 2009	2
Crimes (Criminal Organisations Control) Bill 2009	5
Crimes (Forensic Procedures) Amendment Bill 2009	7
Crimes (Sentencing Procedure) Amendment (Council Law Enforcement Officers) Bill 2009	5
Criminal Legislation Amendment Bill 2009	6
Criminal Organisations Legislation Amendment Bill 2009	6
Education Amendment Bill 2009	3
Education Amendment (Educational Support For Children With Significant Learning Difficulties) Bill 2008*	1
Electricity Supply Amendment (Energy Savings) Bill 2009	7
Energy Legislation Amendment (Infrastructure Protection) Bill 2009	7
Food Amendment (Meat Grading) Bill 2008*	1
Garling Inquiry (Clinician and Community Council) Bill 2009*	5
Gas Supply Amendment (Ombudsman Scheme) Bill 2009	5

	Digest Number
GreyHound Racing Bill 2009	5
Harness Racing Bill 2009	5
Hawkesbury-Nepean River Bill 2009	4
Health Legislation Amendment Bill 2009	4
Heritage Amendment Bill 2009	7
Home Building Amendment (Insurance) Bill 2009	6
Hurlstone Agricultural High School Site Bill 2009	3, 6
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009	4
Land Acquisition (Just Terms Compensation) Amendment Bill 2009	7
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	2
Liquor Amendment (Special License) Conditions Bill 2008	1
Mining Amendment (Safeguarding Land And Water) Bill 2009*	7
Motor Accidents Compensation Amendment Bill 2009	6
Motor Accidents (Lifetime Care And Support) Amendment Bill 2009	7
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	2
Parking Space Levy Bill 2009	3
Racing Legislation Amendment Bill 2009	5
Real Property and Conveyancing Legislation Amendment Bill 2009	4
Surveillance Devices Amendment (Validation) Bill 2009	4
Succession Amendment (Intestacy) Bill 2009	5
Telecommunications (Interception and Access) (New South Wales) Amendment Bill 2008	1
Transport Administration Amendment (CountryLink Pensioner Booking Fee Abolition) Bill 2009	3
Western Lands Amendment Bill 2008	1

## Appendix 2: Index of Ministerial Correspondence on Bills

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

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2009

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Associations Incorporation Bill 2009		N, R			N, R
Barangaroo Delivery Authority Bill 2009	N				
Biofuel (Ethanol Content) Amendment Bill 2009	N			N	N, R
Crimes (Criminal Organisations Control) Bill 2009	R, N		R		
Crimes (Forensic Procedures) Amendment Bill 2009	N				
Criminal Legislation Amendment Bill 2009		N			
Criminal Organisations Legislation	R, N			N	
Gas Supply Amendment (Ombudsman Scheme) Bill 2009				N	
Greyhound Racing Bill 2009				N	
Harness Racing Bill 2009				N	
Hawkesbury-Nepean River Bill 2009				N	
Health Legislation Amendment Bill 2009	N				
Heritage Amendment Bill 2009	N			N, R	
Home Building Amendment (Insurance) Bill 2009	N				
Industrial Relations Amendment (Jurisdiction of Industrial Relations Commission) Bill 2009				N	
Land Acquisition (Just Terms Compensation) Amendment Bill 2009	N				
Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Bill 2009	N, R, C	R			
Liquor Amendment (Special Licence) Conditions Bill 2008				N, R	
Motor Accidents Compensation Amendment Bill 2009				N	
Nation Building and Jobs Plan (State Infrastructure Delivery) Bill 2009	N		N	N	
Parking Space Levy Bill 2009				N	N, C

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Racing Legislation Amendment Bill 2009				N	
Real Property and Conveyancing Legislation Amendment Bill 2009	N, R				
Succession Amendment (Intestacy) Bill 2009	N			N	
Surveillance Devices Amendment (Validation) Bill 2009	N, R				
Western Lands Amendment Bill 2008				R	

## Key

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

## Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12	
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10	