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Legislation Review Committee

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No 11 of 2008

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TABLE OF CONTENTS

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:
  (a) to consider any Bill introduced into Parliament, and
  (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    (i) trespasses unduly on personal rights and liberties, or
    (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    (iv) inappropriately delegates legislative powers, or
    (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

(1) The functions of the Committee with respect to regulations are:
  (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    (i) that the regulation trespasses unduly on personal rights and liberties,
    (ii) that the regulation may have an adverse impact on the business community,
    (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
    (v) that the objective of the regulation could have been achieved by alternative and more effective means,
    (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
    (vii) that the form or intention of the regulation calls for elucidation, or
    (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
  (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(2) Further functions of the Committee are:
  (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought

information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2008

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 2008

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 2008

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 2008

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. Administrative Decisions Tribunal Amendment Bill 2008

Issue: Clause 2 – Commencement by proclamation - provide the Executive with unfettered control over the commencement of various provisions of an Act.

12. The Committee has concerns about commencement by proclamation and asks Parliament to consider whether the commencement of provisions in the Bill by proclamation, rather than on assent, is an inappropriate delegation of legislative power.

2. Adoption Amendment Bill 2008

Issues: Ill-Defined and Wide Powers; Retrospectivity - Schedule 1 [30] – proposed section 140 (3) Discretion to supply adoption information:

31. The Committee notes the broad discretion that the Director-General has in deciding whether to supply or authorise an information source to supply adoption information or other information under proposed section 140 (3) to be inserted by Schedule 1 [30]. The Committee further notes that there does not appear to be any guidance or factors on what will guide such a wide discretion when deciding whether to supply (or authorise an information to supply) adoption information or other information. This may result in such discretions making rights or liberties unduly dependent on insufficiently defined administrative powers. Accordingly, the Committee refers this to Parliament.

32. The Committee is also concerned with the retrospective effect of this amendment that may impact adversely on personal rights.

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

34. The Agreement in Principle speech, however, specifically drew Parliament's attention to the issue of commencement by proclamation in order to allow for the development of appropriate guidelines and regulations to support the new access to information scheme that will be introduced by this Bill. The Committee is of the view that there are good reasons for the Bill to be commencing by proclamation rather than on assent, and that this does not appear to be an inappropriate delegation of legislative power.

3. Callan Park Trust Bill 2008*

Issue - Strict Liability:

18. Therefore, the Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with in order to facilitate the effective regulation and management of Callan Park Trust lands. The penalties for the strict liability offences are fines or penalty notices rather than imprisonment. The Committee also notes the availability of defences or safeguards for these offences. Accordingly, the Committee is of the view that the strict liability provisions in this Bill do not trespass unduly on rights and liberties.

4. Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008

Issue: Clause 2 – Commencement by proclamation

15. The Minister in his Second Reading speech advised that this provision was necessary to ensure that the amendments in the Bill come into force only when the text of the Commonwealth instrument is agreed to by New South Wales. The Committee is accordingly of the opinion that this provision does not inappropriately delegate legislative powers.

5. Mining Amendment (Improvements on Land) Bill 2008

Issue: Retrospectivity affecting rights of private property – Schedule 1[13]

11. The Committee recognises the importance of the need for certainty in the laws governing mineral exploration and mining in NSW. However this must be balanced with the common law rights of landholders to private property. The Committee therefore considers the application of the legislation to retrospective mining leases as a potential trespass on right to property and refers the matter to Parliament.

6. Ports And Maritime Administration Amendment (Port Competition And Co-ordination) Bill 2008

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

22. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

7. Public Health (Tobacco) Bill 2008

Issue: Strict Liability

12. The Committee, however, considers that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider the impact of the offence on the community, the penalty that may be imposed and the availability of any defences or safeguards.

13. Most of the strict liability provisions in the Bill are necessary in terms of securing compliance with provisions designed specifically to protect the interests of children. Australia's responsibilities under Article 3 of the Convention on the Rights of the Child 1990 place paramount importance on the best interests of the child being considered when actions and decisions concerning children are taken. The Committee considers that the current legislative proposals are consistent with those obligations.

14. The Committee also notes that no terms of imprisonment are imposed, as a penalty and that appropriate lead – in periods for offences have been included in the Bill. Accordingly, the Committee considers that the Bill does not trespass unduly on the rights and liberties of those that may be charged with certain strict liability offences.

Issue: Commencement by proclamation – Clause 2

26. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.

8. Rail Safety Bill 2008

Issue - Reverse Onus of Proof:

Proposed Part 2, Division 1 – Clause 11 Onus of proving limits of what is reasonably practicable under this Division:

23. The Committee notes that the proposed clause 11 in Part 2, Division 1, to place the onus of proof on the defendant in relation to establishing that it was not reasonably practicable to do more than was in fact done to satisfy the compliance with a duty to do something so far as is reasonably practicable, may be justified in these circumstances since such a knowledge of the facts would be in the possession of the defendant. Therefore, the Committee is of the view that this does not trespass unduly on personal rights and liberties.

Proposed Part 6, Division 1 – Clauses 113 (2) and (3) Contravention of improvement notice:

27. The Committee notes that the proposed clauses 113 (2) and (3) in Part 6, Division 1, to place the onus of proof on the defendant in relation to establishing the above defences, may be justified in these circumstances. The Committee is of the view that the knowledge of the factual circumstances of the method used (which differed from that specified in the improvement notice), to either remedy the alleged contravention or likely contravention or to remove the threat of safety within the specified period, would be in the possession of the defendant. Therefore, the Committee concludes that these clauses do not trespass unduly on personal rights and liberties.

Proposed Part 7, Division 2 – Clause 132 (4) Proceedings for offences:

30. The Committee finds that the proposed clause 132 (4) in Part 7, Division 2, to place the onus of proof on the defendant in relation to proving that the defendant had a reasonable excuse, may be justified in these circumstances. The Committee notes that such knowledge of the factual circumstances to establish a reasonable excuse would be in the possession of the defendant. Therefore, the Committee is of the view that this does not trespass unduly on personal rights and liberties.

Proposed Part 7, Division 2 – Clauses 136 (4) and (5) Offences by corporations:

35. The Committee believes that the proposed clauses 136 (4) and (5) in Part 7, Division 2, to place the onus of proof on the defendant, may be justified in these circumstances. The Committee notes that for the defendant to establish that either the defendant was not in a position to influence the conduct of the corporation in relation to the contravention of the provision, or took reasonable precautions and exercised due diligence to prevent the contravention in subclause (4); or to establish that the defendant either had no knowledge of the actual contravention or took reasonable precautions and exercised due diligence to prevent the contravention in subclause (5), would be facts possessed within the knowledge of the defendant. Accordingly, the Committee does not find these clauses to be trespassing unduly on personal rights and liberties.

Issue - Strict Liability:

39. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with in order to facilitate the effective regulation and management of rail safety. The penalties for the strict liability offences are fines rather than imprisonment and some of these offences also provide for reasonable excuses as safeguards. Therefore, the Committee does not find the strict liability offences in this Bill trespass unduly on rights and liberties.

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

41.	**Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

9. Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008

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

20.	**Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.**

10. Water (Commonwealth Powers) Bill 2008

Issue: Commencement by Proclamation

9.	**The Committee notes that certain of the proposed sections and schedules of the Act will commence on a day or day to be appointed by proclamation. This may delegate to the government the power to commence those provisions on whatever day it chooses or not at all. However, having regard to the need to co-ordinate the commencement of the particular provisions with the commencement of the proposed Commonwealth legislation the Committee considers that the provisions do not give rise to an inappropriate delegation of legislative power.**

11. Water Management Amendment Bill 2008

Issue: Strict liability

13. The Committee notes that these provisions are subject to proposed clause 60 F and clause 91M that provide a general defence though one that reverses the onus of proof. That aspect appears warranted in view of the situation that the knowledge of the factual circumstances is peculiarly in the position of the parties. Under these provisions it is a defence to a prosecution under Division 1A in relation to a Tier 1 offence if the accused person establishes that the commission of the offence was due to causes to which the person had no control and that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence. Under clauses 60F(2) and 91M(2), it is also a defence to a prosecution in relation to the taking of water from a water source if the accused person establishes that the water was taken pursuant to a basic landholder right or that a person was exempt pursuant to the Act or regulations from any requirement for an access license. The strict liability provisions of this Division obtain reasonable justification on the basis of the objective of encouraging compliance with the water reform program for the Murray Basin Area.

Issue: Excessive punishment – Clause 353F – Orders regarding monetary benefits

15. The Committee notes that the amount of the penalty to be imposed has to represent what the court, using the civil standard of proof, believes justified. The Committee considers that a maximum amount should always be set for penalties and refers the matter to Parliament.

Issue: Reverse onus of proof and deemed liability – proposed section 60E

17. The Committee notes that this provision deems the occupier liable and effectively reverses the onus of proof that requires a prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence and, in the Committee's view, constitutes a sufficient trespass on personal rights and liberties for it to be referred to Parliament for consideration of whether it trespasses unduly on personal rights and liberties.

Issue: Power of authorised officers to arrest without a warrant – proposed section 338D(3).

19. This clause represent a departure from the basic principle that no arrest should be made without a warrant from a competent court except where felony or breach of the peace is taking place or is reasonably apprehended. Adherence to such a principle is important so as to protect against the possibility of arbitrary arrest as a result of the vesting of the power of arrest in a public official. The Committee considers that the wide scope of this power has the potential to trespass on the personal rights and liberties of the person involved. The Committee accordingly refers to Parliament the question of whether this unfettered power unduly trespasses on personal rights and liberties.

Issue: Entry and search of premises by authorised officers without a search warrant – proposed section 339(1)

21. The Committee notes that this power is qualified by section 339C, which excludes entry to residential premises without the permission of the occupier or a search warrant issued under section 339C. This effectively restricts entry, without a search warrant, to premises used in connection with the works or thing being investigated. Clause 339E specifies the powers exerciseable by an authorised officer on entry to premises and these are confined substantially to the investigation of offences under the Act. The Committee accordingly does not consider that this provision trespasses unduly on personal rights and liberties.

Issue: Admissibility of information or records that might incriminate a person – proposed section 340B(4) and (5)

24. The Committee notes that the right against self-incrimination is a fundamental right and that this right should only be eroded when it is overwhelmingly in the public interest to do so. The protection afforded by section 340B(3) is of limited value because the information so obtained can, under section 340B(5), form the basis of an investigation leading to criminal proceedings. Additionally, under section 340B(4) any record furnished is admissible even though the record might incriminate the person. The Committee refers to Parliament the question of whether the removal of the right against self-incrimination by sections 340B(4) and (5) of the Bill unduly trespasses on personal rights and liberties.

Issue: Clause 2 – Commencement by Proclamation

26. However, having regard to the need to coordinate the commencement of the particular provisions with the commencement of the proposed Commonwealth legislation the Committee considers that the provisions do not give rise to an inappropriate delegation of legislative power.

PART ONE – BILLS

SECTION A: COMMENT ON BILLS

1. ADMINISTRATIVE DECISIONS TRIBUNAL AMENDMENT BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General, Minister for Justice, and Minister for industrial Relations

Purpose and Description

1. The purpose of the Bill is to amend the Administrative Decisions Tribunal Act 1997 to give effect to certain recommendations made as a consequence of a review carried out under section 147 of the *Administrative Decisions Tribunal Act 1997*. The Bill also makes a number of significant changes to the Act to enhance its operational efficiency.

2. The Bill amends of the *Anti-Discrimination Act* to increase the maximum amount that the Tribunal may award under that Act as compensatory damages from $40000-$100000. The Minister in his Second Reading speech said that this increase is intended to make sure the ADT is able to make compensation awards that reflect the seriousness of the consequences of discrimination.

3. Another significant change to that Act is the provision that will enable the President of the Anti-Discrimination Board, instead of the Minister, to grant exemptions from that Act. Currently there is no merits review of the Minister's decision. Under the changes made by the Bill the President's decision will be reviewable by the ADT.

4. The Bill amends section 67 of the Principal Act to enable the Tribunal to join a person as a party to proceedings before it if the Tribunal considers that the person ought to have been joined as a party or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings. This change arose from the submissions of a number of respondents to the statutory review, which raised concerns about the accessibility of Tribunal proceedings. The Act does not currently allow a party to proceedings to apply for the joinder of a new party.

5. The Bill amends section 88 of the Principal Act relating to the award of costs by the Tribunal. Under this section, the Tribunal currently may award costs, but only if satisfied that there are special circumstances warranting an award. The statutory review favoured the adoption of a provision as to costs based on section 109(3) of the *Civil and Administrative Tribunal Act 1998* of Victoria. Under that section the Tribunal may make an award by reference to criteria related to conduct, delay, the relative strengths of claims made, the nature and complexity of proceedings and any other matter the Tribunal considers relevant. The changes proposed to section 88 are based largely on the Victorian precedent.

6. A problem identified by the Tribunal in the course of the review was the complicated procedure for rulemaking. Under the Act the Committee must establish sub-committees for each Division of the Tribunal and must, in ordinary circumstances, undertake public consultation prior to the making of a rule. The Tribunal supported an amendment to streamline the process so as to secure procedural flexibility and informality. This proposal was adopted and is implemented by the provisions of Schedule 1[33] of the Bill.

7. In the course of the statutory review the Tribunal requested a legislative amendment to allow it to refuse to issue a summons. The Tribunal reported that it had been its experience that the language of the Act had created an expectation that the Registrar would automatically approve an application for a summons. It sought an appropriate change to the Act to dispel this expectation and to provide the Registrar with unambiguous authority to refuse a summons. The proposed change to section 84 confirms that the Registrar of the Tribunal has a discretion as to whether to issue a summons on the application of a party to proceedings.

8. Currently, under sections 74, 86 and 105 of the Principal Act the Tribunal may not exercise a power to approve a settlement unless satisfied that it is in the best interests of the person whose interests are considered by the Tribunal to be paramount. The Bill inserts a new section 86A to enable the Tribunal to take into account, when exercising a settlement power, the interests of vulnerable persons who may be directly affected by the exercise of the power. It defines a vulnerable person to be a minor, or a person who is totally or partially incapable of representing his or her interests in proceedings before the Tribunal because the person is intellectually, physically, psychologically or sensorily disabled, of advanced age, a mentally incapacitated person or otherwise disabled.

Background

9. The Administrative Decisions Tribunal began operations in 1998 to provide for the Independent, external review of ministerial decisions and to deal with other matters such as discrimination complaints and professional misconduct inquiries. The Tribunal exercises its jurisdiction across six Divisions: the General Division, the Community Services Division, the Revenue Division, the Equal Opportunity Division, the Retail Leases Division and the Legal Services Division.

10. The review was carried out by the Attorney General's Department in accordance with section 147 of the Principal Act that requires the Minister to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The review was advertised in the Daily Telegraph and the Sydney Morning Herald. The Attorney General wrote to all NSW Government Ministers inviting them to make submissions to the review. Tribunal stakeholders were specifically invited to make submissions. In total, more than 40 submissions were received. The review determined that the policy objectives of the Act remained valid and that the terms of the Act remain, in substance, appropriate to secure those objectives. The review recommended legislative and operational improvements to enable the Tribunal to continue to meet the policy objectives of the Act.

The Bill

The objects of this Bill are as follows:

(a) to amend the *Administrative Decisions Tribunal Act 1997* (the Principal Act) so as:

(i) to give effect to certain recommendations made as a consequence of a review carried out under section 147 of the Principal Act (the statutory review), and

(ii) to make other amendments in connection with the constitution, functions and procedure of the Administrative Decisions Tribunal (the Tribunal) and in the nature of statute law revision

(b) to make consequential and other amendments in the nature of law revision to the *Administrative Decisions Tribunal (General) Regulation 2004* and *Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*,

(c) to repeal the *Administrative Decisions Tribunal Legislation Further Amendment Act 1998 and Administrative Decisions Tribunal Rules (Transitional) Regulation 1998*,

(d) to amend the *Anti-Discrimination Act 1977*:

(i) to increase the maximum amount that the Tribunal may award under that Act as compensatory damages from $40,000 to $100,000, and

(ii) to enable the President of the Anti-Discrimination Board (instead of the Minister) to grant exemptions from the operation of that Act and to enable applications to be made to the Tribunal for reviews of such exemption decisions, and

(iii) to omit certain procedural provisions relating to the Tribunal that duplicate procedural provisions already contained in the Principal Act,

(e) to amend the *Building Professionals Act 2005* to remove any right to appeal certain decisions of the Tribunal to an Appeal Panel and to provide instead for such appeals to be made directly to the Supreme Court,

(f) to amend the *Anti-Discrimination Regulation 2004* and the *Explosives Act 2003* to make amendments that are consequential on the amendment of the *Anti-Discrimination Act 1977* and the Principal Act,

(g) to amend the *Supreme Court Act 1970* to assign to the Court of Appeal any appeals from decisions of an Appeal Panel of the Tribunal and the referral of questions of law by the Tribunal for the Supreme Court's opinion. The amendments made to the Principal Act by this Bill that arise from the statutory review deal with the following matters:

(a) the joinder of persons who are not parties to proceedings in the Tribunal,

(b) the continued participation of members or assessors of the Tribunal who preside over unsuccessful preliminary conferences for proceedings in the formal determination of the proceedings,

(c) the powers of the Registrar of the Tribunal with respect to the issue of a summons to attend and give evidence or produce documents or other things and the granting of access to things produced pursuant to such a summons,

(d) the expansion of the circumstances to which the Tribunal may have regard in awarding costs in proceedings before it,

(e) the simplification of the process for the making of the rules of the Tribunal by its Rule Committee.

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.
Clause 3 is a formal provision that gives effect to the amendments to the Principal Act set out in Schedule 1.
Clause 4 is a formal provision that gives effect to the amendments made to other Acts and Regulations set out in Schedule 2.
Clause 5 repeals the following legislation:

(a) the Administrative Decisions Tribunal Legislation Further Amendment Act 1998,

(b) the Administrative Decisions Tribunal Rules (Transitional) Regulation 1998.

Clause 6 provides for the repeal of the proposed Act after all the amendments and repeals effected by the proposed Act have commenced. Once these amendments and repeals have commenced, the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments or repeals made by that Act.

Schedule 1 Amendment of Administrative Decisions Tribunal Act 1997

Decisions involving conduct

Section 6 (1) (a)–(f) of the Principal Act defines the term decision to include a number of specified kinds of conduct. Section 6 (1) (g) provides that the term also includes doing or refusing to do any other act or thing.

Schedule 1 [1] amends section 8 of the Principal Act to confirm that a reviewable decision may involve an administrator engaging, or refusing to engage, in conduct if an enactment confers jurisdiction on the Tribunal to review the conduct or refusal. For example, the Tribunal currently has jurisdiction to review certain conduct of a public sector agency under section 55 of the *Privacy and Personal Information* Protection Act 1998.

Joinder of parties

Schedule 1 [18] amends section 67 of the Principal Act to enable the Tribunal to join a person as a party to proceedings before it (other than proceedings for an internal appeal) if the Tribunal considers that the person ought to have been joined as a party or is a person whose joinder is necessary to the determination of all matters in dispute in the proceedings.

Representation of parties

Schedule 1 [19] and [20] amend section 71 of the Principal Act to require an agent of a party in proceedings before the Tribunal who is not an Australian legal practitioner to obtain leave from the Tribunal to represent the party in the proceedings. An Australian legal practitioner engaged to represent a party will be entitled to appear in proceedings before the Tribunal without the need to obtain leave.

Schedule 1 [21] makes an amendment to section 71 that is consequential on the substitution of section 71 (2).

Taking into account the interests of certain vulnerable persons in approved settlements

Currently, sections 74, 86 and 105 of the Principal Act provide that the Tribunal, a member or an assessor (as the case may be) may not exercise a power under those sections to approve or give effect to a settlement (a settlement power) unless satisfied that it is in the best

interests of the person whose interests are considered by the Tribunal, member or assessor to be paramount.

Schedule 1 [32] inserts a section 86A in the Principal Act to enable (but not require) the Tribunal, member or assessor (as the case requires) to take into account, when exercising a settlement power, the interests of vulnerable persons who may be directly affected by the exercise of the power. The proposed section defines a **vulnerable person** to be:

(a) a minor, or

(b) a person who is totally or partially incapable of representing his or her interests in proceedings before the Tribunal because the person is intellectually, physically, psychologically or sensorily disabled, of advanced age, a mentally incapacitated person or otherwise disabled.

Schedule 1 [23], [29], [30], [31] and [40] make consequential amendments to sections 74, 86 and 105 in order to remove the current mandatory best interests test.

Further participation of members presiding over preliminary conferences

Schedule 1 [24] amends section 74 of the Principal Act to enable a member or assessor of the Tribunal who presides over an unsuccessful preliminary conference in respect of proceedings to continue to participate in the formal determination of the proceedings unless a party to the proceedings objects and can demonstrate that the further participation of the member or assessor is likely to prejudice the party's case. Currently, section 74 provides that a member or assessor presiding over such a preliminary conference is not eligible to be a member or assessor in the formal determination of the proceedings simply because a party has objected to his or her further participation.

References of questions of law to the Supreme Court by Tribunal at first instance

Schedule 1 [25] inserts a new section 79A in the Principal Act to enable the Tribunal at first instance to refer a question of law to the Supreme Court for its opinion if the President of the Tribunal consents to the question being referred. Currently, questions of law may be referred to the Supreme Court only by an Appeal Panel of the Tribunal hearing an internal or external appeal.

Summons to attend to give evidence or produce things

Schedule 1 [26] and [27] amend section 84 of the Principal Act to confirm that the Registrar of the Tribunal has a discretion as to whether to issue a summons, on the application of a party to proceedings, for a person to attend and give evidence or to attend and produce documents or other things.

Schedule 1 [28] amends section 84 of the Principal Act to confirm that the Registrar may give directions as to access to documents or other things produced pursuant to a summons to which no objection has been made. Costs

Schedule 1 [33] amends section 88 of the Principal Act:

(a) to confirm that parties are to bear their own costs unless the Tribunal awards costs to a particular party, and

(b) to enable the Tribunal to award costs in proceedings before it having regard to an expanded set of circumstances.

Currently, section 88 (1) provides that costs may be awarded only if the Tribunal is satisfied that there are special circumstances.

The new provisions are based largely on the provisions of section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* of Victoria.

Process for the making of rules of the Tribunal

The following amendments are made to the Principal Act in order to simplify the process by which the Rule Committee of the Tribunal may make rules of the Tribunal:

(a) the removal of the requirement that the Rule Committee may make rules relating specially to a Division of the Tribunal only on the recommendation of the Subcommittee for the Division established under section 97 (see **Schedule 1 [34**]),

(b) the removal of the exhibition and consultation procedure in section 98 so as to place the Tribunal in the same position as other tribunals with rule-making powers (see **Schedule 1 [36]).**

Rules of the Tribunal are statutory rules for the purposes of Part 6 of the *Interpretation Act 1987*. Accordingly, such rules will continue to be subject to the procedural requirements of that Part (including the tabling and disallowance provisions).

Savings and transitional provisions

Schedule 1 [57] amends clause 1 of Schedule 5 to the Principal Act to enable the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [58] inserts a new Part in Schedule 5 to the Principal Act containing provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other Acts and Regulations

Anti-Discrimination Act 1977 No 48 and Anti-Discrimination Regulation 2004

Schedule 2.3 makes the following amendments to the *Anti-Discrimination Act 1977*:

(a) section 98 (Rights of appearance and representation) of the Act is amended so as to enable section 71 of the Principal Act to apply in relation to the matter of the representation of parties,

(b) section 107 (Dismissal of proceedings) of the Act is repealed so as to enable the Tribunal to rely on its general dismissal powers under section 73 (5) of the Principal Act,

(c) section 108 (Order or other decision of Tribunal) of the Act is amended to increase the maximum amount that the Tribunal may award under that Act as compensatory damages from $40,000 to $100,000,

(d) section 110 (Costs) of the Act is substituted so as to enable the Tribunal to rely on its general power to award costs under section 88 of the Principal Act,

(e) section 126 of the Act is substituted so as to enable the President of the Anti-Discrimination Board (instead of the Minister) to grant exemptions from the operation of that Act and to enable applications to be made to the Tribunal for reviews of such exemption decisions,

(f) Schedule 1 to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments.

Building Professionals Act 2005 No 115

Schedule 2.5 makes the following amendments to the Building Professionals Act 2005:

(a) section 36 of the Act is repealed and a Part 3A is inserted so as to remove any right to appeal certain decisions of the Tribunal to an Appeal Panel and to provide instead for such appeals to be made directly to the Supreme Court,

(b) Schedule 2 to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments. The amendments to be made will place appeal rights from decisions of the Tribunal in relation to building

professionals on an equal footing with the appeal rights of other professionals such as architects and surveyors.

Supreme Court Act 1970 No 52

Schedule 2.7 makes the following amendments to the *Supreme Court Act 1970*:

(a) section 48 of the Act is amended to assign to the Court of Appeal any appeals from decisions of an Appeal Panel of the Tribunal and the referral of questions of law by the Tribunal for the Supreme Court's opinion,

(b) the Fourth Schedule to the Act is amended to make provision for matters of a savings or transitional nature consequent on these amendments.

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 various provisions of an Act.

11. Under clause 2 sections 1-3, 5(1) and 6 and Schedule 1[57] and [58] commence on the date of assent and Schedule 2.2 commences immediately before the repeal of the Administrative Decisions Tribunal Rules (Transitional) Regulation 1998. However the Committee notes that the remaining provisions of the proposed Act are to commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence those provisions of the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

12. The Committee has concerns about commencement by proclamation and asks Parliament to consider whether the commencement of provisions in the Bill by proclamation, rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

2. ADOPTION AMENDMENT BILL 2008

Date Introduced:	25 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Linda Burney MP
Portfolio:	Community Services

Purpose and Description

1. This Bill amends the *Adoption Act 2000* to make further provision with respect to the adoption of children and access to adoption information.

2. The objects are to:

   - streamline the application process for certain adoptions by removing unnecessary procedural barriers to making an application directly to the Supreme Court;
   - simplify the eligibility criteria to have greater focus on parental capacity;
   - promote open adoption practices by facilitating access to personal information for all parties to an adoption for future adoption;
   - relax publishing restrictions imposed on the parties to an adoption;
   - strengthen the involvement of Aboriginal and Torres Strait Islander agencies in the placement of Aboriginal and Torres Strait Islander children;
   - relax restrictions on changing the given name of an adopted child.

3. It also updates the objectives and principles of the Act to recognise the detrimental effect on children of undue delay in the adoption process and the legitimate parental aspirations of prospective adoptive parents.

4. For inter-country, step parent, relative and adult adoptions, one of the Bill's main purpose is to make it quicker and easier for prospective parents to adopt children, by removing procedural impediments to applications being made directly to the Supreme Court. The Bill amends sections 87 and 91 of the Act to cut the red tape of requiring the Department of Community Services to file reports and provide consent in adoption proceedings that do not arise out of child protection concerns. Since the step parent, adult and relative adoptions are "known" adoptions where the person to be adopted already has an established relationship with the prospective adoptive parents, and where there are no child protection concerns, the Bill dispenses with the need for the Director-General to consent to the application and file reports in such matters. It is proposed that the Supreme Court will be able to directly accept independent reports from an approved adoption service assessor or an accredited adoption service provider.

5. The Bill will facilitate a pathway for intercountry adoption applications and reports to be filed directly by the applicants with the Supreme Court, rather than the Director-

General having to make the report and file them with the court by way of affidavit. However, the Bill ensures the safety and wellbeing of adoptive children remains a Community Services priority by making provision in section 91 of the Act that the Supreme Court may request the Director-General, or Community Services may of its own accord, provide a report on an adoption application where there are child protection concerns, or serious concerns about the reliability, or independence of reports filed in the Court or other exceptional circumstances.

6. As to the circumstances that must exist before the Supreme Court would make an adoption order pertaining to step-parent, relative or foster carer adoptions, the Bill introduces changes to simplify the eligibility criteria.

7. For relative adoptions, it reduces the currently prescribed minimum length of the pre-existing child-parent relationship, from five years to two years. In step-parent adoptions, the amendment will reduce the required time for the child to be in the care of the applicant, from three years to two years. Instead of the existing five year requirement for the consent to adoption of a child over the age of 12 years, it will only require a two year relationship between the child and his or her proposed adoptive parent or parents.

8. For consistency across the Act on the length of a relationship for eligibility to adopt, the Bill amends section 28 of the Act to reduce the period a couple must be living together from three to two years before an application for adoption can be made. Two years is considered a sufficient period of time to establish an adequate commitment to the relationship that will support an adoptive parenting capacity.

9. The Bill also simplifies the circumstances for adult adoptions, by removing the requirement of a minimum five-year parent-child relationship. It clarifies that the main pre-requisite for an adult adoption is that the prospective adoptive parent has brought up the child.

10. The general eligibility and assessment criteria will be published in amendments to the *Adoption Regulation 2003*, rather than published in the *Government Gazette*.

11. This Bill makes important changes to the access to adoption information. It retains the continuation of the access entitlements applying to adoptions that have occurred in the past. It also preserves responsibility and obligations of Community Services under the Act to maintain services relating to adoption information. These services include administering the reunion and information registers, and authorising the release of information subject to any advance notice requests and in accordance with the access to information scheme or the old contact veto scheme that applied to adoptions until 1990.

12. However, a significant change is the facilitation of open adoption practises for future adoptions. The Bill aims to establish equitable and open rights to access information, such as birth certificates and birth records, by inserting a new division in the Act, so that a new scheme of general access entitlements will apply to applications for adoption made after the commencement of the division. Under this new scheme, adoptive parents, adopted children, birth parents, and siblings will more easily be able to access adoption information. The new scheme allows for adoptive parents, after the adoption orders are made, to automatically be entitled to receive adoption information. They will be able to access their adopted child's original birth certificate and other

prescribed information held by the adoption service provider or an information source such as a hospital, or the Registry of Births, Deaths and Marriages.

13. Birth parents of an adopted person over the age of 18 years and adopted persons over 18 years will have open access entitlements to information such as birth certificates, birth records and other identifying information. However, to ensure adopted children under the age of 18 years have the appropriate support when accessing information, the Bill makes provision for information to be accessed, with their adoptive parents' consent. In circumstances where the adoptive parents cannot be found or where other sufficient reasons apply, the Director-General may dispense with the adoptive parents' consent.

14. In balancing the need for equitable entitlements to information to birth parents and the need to provide protections to an adopted child under 18 years of age, the Bill gives birth parents an entitlement to information so long as the release of identifying information would not pose a risk to the safety, welfare or wellbeing of the adopted child or adoptive parents.

15. Under the new scheme, the Director-General of Community Services will be responsible for making an assessment whether supplying the information would pose a risk to the adopted child or the adoptive parents. The Director-General's discretion will be exercised in accordance with guidelines prescribed by regulation.

16. The Bill also makes provision for non-adopted and adopted birth siblings to have reciprocal rights to access information.

17. It aims to further open adoption practices by lifting the blanket restriction on the publication of identifying material of parties to adoption proceedings. The current wording of section 180 of the Act, can lead to the prevention of birth parents or adopted children from being able to speak publicly about their adoption experience or even publishing their memoirs. The intent of the restriction on the publishing of names is to protect the identity of parties while adoption proceedings are occurring, and the Bill makes it clear that the restrictions on the publication of names are to apply from the time a child is placed for adoption until an adoption order is made. However, once the court order for the adoption has been made, the amendments to section 180 of the Act will allow the publication of names of parties to an adoption where the person has given consent for the release of such information.

18. Another feature is to provide greater involvement of Aboriginal agencies in the placement of an Aboriginal child for adoption.

19. To ensure that children over 12 and under 16 years provide effective consent to their own adoption, the Bill will streamline the requirements so that they do not need to see both a counsellor and a psychologist. The functions of both professionals will be combined. Children are to be made fully aware of the implications of their decision. The same provisions will apply to young persons consenting to the adoption of their children in appropriate cases.

20. Miscellaneous amendments will remove the requirement that there must be special reasons relating to the best interests of the child before the court can approve a change of name for a child and to clarify the procedural requirements for ensuring consent by children over 12 years and under 16 years to their own adoption. Currently,

section 101 (5) of the Act limits the consideration of the best interests of the child. This section requires adoptive parents to establish special reasons to change the name of a child who is more than one year old or a non-citizen child and that the special reasons are related to the best interests of the child. The requirement for special reasons will be removed so that the court can focus on the broad consideration of the best interests of the particular child. The decision whether to change a child's name at the time the adoption order is made will be based on consideration of whether the change is in the child's best interest, taking into account the requirements of section 8, which sets out the principles that are to govern the operation of the Act. Section 8 (1) (e) states:

> The child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.

Background

21. This Bill seeks to update the *Adoption Act 2000* to ensure its policy objectives remain relevant. It gives effect to the changes arising from a review of the *Adoption Act 2000* conducted by the Department of Community Services. The review report entitled "Review of the Adoption Act 2000", was tabled in Parliament in late 2006 following public consultation and advice from a ministerial advisory committee consisting of experts in the area of child and family welfare law and practice.

22. The issue of adoption for same-sex couples was raised as part of the review process. The Government's policy is to eliminate discrimination in law for same-sex couples demonstrated in the *Same Sex Relationships Bill 2008*, recently tabled in this Parliament. The State Government is also currently working with the Commonwealth and other States on a consistent approach to surrogacy law and the issue of same-sex adoption will be considered as part of that discussion.

23. For intercountry adoptions, the legislation includes strict assessment and compliance with the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption. The Commonwealth Government manages and establishes these adoption programs with other countries and ensures compliance with the Hague Convention.

24. According to the Agreement in Principle:

> In making regulations with respect to eligibility and assessment criteria, the Government's policy is that the criteria be less prescriptive and focus more on factors that directly affect adoptive parenting capacity. For that reason, the prohibition on accepting adoption applications from those pursuing fertility treatments will be removed, in order to not exclude applicants with an overall good range of skills, qualities and support networks from being considered as prospective adoptive parents.

25. The Government also wants to make it easier for children in out-of-home care to become permanently part of their foster care family. Accordingly, the Government has made a commitment for foster carers to continue to receive the statutory care allowance for children and young people that have been in their care for a minimum of two years, following the making of an adoption order. The continuation of the statutory care allowance for foster carers who adopt children will be by Regulations under section 201 of the Act, which is a provision that enables the Director-General to provide financial assistance to adoptive parents.

26. The Agreement in Principle explained that:

> As to Aboriginal and Torres Strait participation in decision-making, it should be remembered that very few adoptions of Aboriginal children take place in New South Wales. Adoptions are not part of Aboriginal culture, which can be closely associated with practices of the stolen generation. For example, three Aboriginal children were adopted in 2003-04 and four Aboriginal children, including siblings, were adopted in 2005-06, including siblings. In the rare circumstances that an Aboriginal child is relinquished for adoption, the Act directs that the placement of the child must be in accordance with the Aboriginal child placement principles set out in sections 33 to 39 of the Act. Under these principles, the preferred option is to place the child with the birth parents' community. If that is not practicable, the next option is placement with members of another Aboriginal community and, finally, placement with non-Aboriginal adoptive parents. Aboriginal groups have recommended that in applying the Aboriginal placement principles and in considering how the child's cultural heritage will be protected, greater weight should be given to consultation with Aboriginal community organisations. The Government has responded to the concerns of Aboriginal groups by ensuring that the Bill strengthens the consultation requirements in the Act with the insertion of an additional requirement. This new requirement provides that a local, community-based and relevant Aboriginal community organisation is to be consulted on the placement of the Aboriginal child for adoption and the provisions in the adoption plan for the child are to assist the child in developing and maintaining positive links with his or her Aboriginal heritage and cultural identity.

27. The attention of the House was drawn that the Bill will commence by proclamation, in order to allow for the development of appropriate guidelines and regulations to support the new access to information scheme to be introduced.

The Bill

The object of this Bill is to amend the *Adoption Act 2000* (the ***Act***) following a statutory review of the Act:

> (a) to simplify the process for intercountry, step parent, relative and adult adoptions, and
> (b) to allow reports to the Supreme Court (the ***Court***) about adoptions to be made by assessors approved by the Director-General of the Department of Community Services, and to remove any requirement to make a report in respect of an adult adoption, and
> (c) to provide for greater access to adoption information (such as birth certificates and birth records) for adopted children, adoptive parents, birth parents and siblings (in respect of future adoptions), and
> (d) to allow the identity of parties to adoption proceedings (other than birth parents) to be published during the proceedings with the consent of the Court and of all the parties, and to allow the identity of a party to an adoption proceeding to be published after the proceedings are disposed of with consent of the party identified, and
> (e) to reduce the period that a couple must have been living together before they can adopt a child from 3 years to 2 years, and
> (f) to provide for greater involvement of Aboriginal and Torres Strait Islander organisations in the placement of, and adoption plans for, Aboriginal and Torres Strait Islander children, and
> (g) to change some of the principles to be applied by decision makers in the adoption process, and

(h) to remove certain restrictions on the Court approving a name change for a child, and
(i) to change the procedure for obtaining the consent of a child 12 years or over to his or her adoption, and
(j) to make other minor and miscellaneous changes to the Act.

Outline of provisions

Schedule 1 Amendments - Step parent, relative, adult and intercountry adoptions
The proposed Act makes various amendments which simplify the adoption process in relation to the adoption of children by a step parent or relative, in relation to the adoption of a person aged over 18, and in relation to intercountry adoptions.

Schedule 1 [17] and [18] provide that applications for these types of adoptions may be made directly to the Supreme Court without the consent of the Director-General of the Department of Community Services (the ***Director-General***).

Schedule 1 [6] and [7] reduce the length of the relationship that must be established between a child and a relative of the child or a step parent before that relative or step parent may adopt the child from 5 years and 3 years to 2 years.

Schedule 1 [8] provides that in the case of an adoption by a step parent of a child who is aged over 18, the requirement that the child and step parent have lived together for 2 years does not apply

Schedule 1 [3] removes the current requirement, for adult adoptions, that the person to be adopted must have been cared for by the applicant for at least 5 years prior to turning 18 years old. Instead, it will only be necessary to establish that the prospective adoptive parent cared for the person, as his or her child, before the person turned 18.

Schedule 1 [14] removes the requirement, in the case of a step parent or relative adoption, for the Department of Community Services to provide information (about adoption alternatives, support services, legal rights, role of the Department of Community Services, etc) to those people whose consent is required before an adoption order can be made. In such a case, it will be the responsibility of the step parent or relative to provide that information to the people whose consent is required (generally, the birth parents).
The amendment also clarifies that in the case of an adoption of a child who is under the parental responsibility of the Minister, this information does not need to be given to the Minister or his or her delegate.

Reports to the Court about adoptions

Schedule 1 [19] changes the requirements with respect to reports to the Court about adoptions. Currently, the Court may not make an adoption order for a child under 18 years of age without a written report from the Director-General or a principal officer of an accredited adoption service provider. The amendment allows these reports to also be prepared by an assessor who is approved by the Director-General in writing. It also clarifies that reports can only be required for children under 18.
In adoption applications made by someone other than the Director-General (for example, an application by a step parent, a private adoption service or an intercountry adoption), the Court may require the Director-General to provide a report only if there are concerns about the

welfare of the child or about the independence or reliability of a report made by an assessor or adoption service provider or in other exceptional circumstances.

Access to adoption information

The amendments establish a new open scheme in relation to the entitlements of adopted children, birth parents, adoptive parents and siblings to access adoption information (that is, birth certificates, birth records and other identifying information). The new scheme will only apply to future adoptions. The existing scheme will continue to apply to all other adoptions.

Under the new scheme (inserted by **Schedule 1 [23]**), an adopted person under the age of 18 will be entitled to receive his or her birth certificate, birth record and other prescribed information with the consent of his or her adoptive parents (or the Director-General in certain circumstances). The consent of the surviving birth parents will no longer be required. An adopted person who is 18 or over continues to be entitled to receive this information. However, it will no longer be necessary to obtain the consent of the Director-General to receive prescribed information.
The existing scheme provides that adoptive parents may only receive their adopted child's birth certificate and birth record if the child is over 18 and consents to the adoptive parents receiving it. Adoptive parents will now be able to access this information about their adopted child at any age and without the consent of the adopted child.
At present, a birth parent is entitled to access information about their child once the child has turned 18. This entitlement continues under the new scheme. However, it will no longer be necessary to obtain the consent of the Director-General to receive the prescribed information. Under the new scheme, if the adopted person is under 18, a birth parent will be entitled to receive adoption information about their child, unless the Director-General is of the opinion that supplying the information would pose a risk to the safety, welfare or well-being of the adopted child or adoptive parents.
The new scheme will also enable non-adopted siblings to access information about their adopted siblings (with the consent of their parents if the sibling is under 18 years of age). If the adopted sibling is under 18, the Director-General may refuse to supply the information if in the Director-General's opinion, it would pose a risk to the safety, welfare or well-being of the adopted child or adoptive parents.

Schedule 1 [24] continues the existing access arrangements for existing adoptions.

Schedule 1 [27] re-enacts an existing provision relating to the Director-General's discretion to withhold adoption information so that the provision applies to existing adoptions only. It will not apply to future adoptions under the new scheme, because the Director-General's power to withhold information under the new scheme is more limited.

Schedule 1 [30] expands the Director-General's discretion to supply adoption information to people who are not entitled under the Act to receive such information.
This will apply to existing and future adoptions. The Director-General will be able to supply such information if, in the opinion of the Director-General, it is reasonable to do so.

Schedule 1 [22] inserts a definition of ***presumptive father*** into the Act and **Schedule 1 [25] and [26]** make related amendments that clarify that a presumptive father (a man who claims to be the birth parent of an adopted person and who is shown on the original birth certificate as the father of the adopted person) has the same entitlements to access adoption information as a birth mother.

Restriction on publication of identities
Currently, the Act prohibits the publication of any material which identifies, or is reasonably likely to identify, parties to an adoption application (generally, the child, the birth parents and the adoptive parents).

Schedule 1 [32] changes the offence. It continues to be an offence to publish identifying material and the maximum penalty remains the same. However, the publication of material which identifies parties to an adoption application will now be permitted once the Court proceedings are finalised, if each person who is to be identified consents, and if the material does not identify any person who does not consent to being identified. In the case of a child who is less than 18 years, the consent of the child's adoptive parents is required.
The changes will also allow the Court to authorise publication of identifying material (other than material identifying birth parents) during proceedings if it is satisfied that all adult parties consent to the publication and it is appropriate to do so. The Court must also be satisfied that a child aged between 12 and 18 consents to the publication.
The Director-General is entitled to be heard in relation to an application for authority to publish identifying material during proceedings.

Adoption by couple
Schedule 1 [5] reduces the period that a couple must have been living together before they can adopt a child from 3 years to 2 years.

Aboriginal and Torres Strait Islander children
Schedule 1 [9] and [10] require the Director-General or a principal officer of an accredited adoption service provider to consult with a local, community-based Aboriginal or Torres Strait Islander organisation in relation to the placement of an Aboriginal or Torres Strait Islander child. **Schedule 1 [11]** requires such an organisation to be consulted in relation to provisions in an adoption plan that set out how the child's Aboriginal or Torres Strait Islander cultural identity and heritage are to be developed.

Principles for adoption decisions
Section 8 of the Act requires a person making a decision about the adoption of a child to have regard to certain principles. **Schedule 1 [2]** inserts a new principle that undue delay in making a decision about the adoption of a child is likely to prejudice the child's welfare. **Schedule 1 [1]** amends an existing principle that adoption is to be regarded as a service for a child to recognise the contribution of adoptive parents.

Changing a child's name
Currently, the Court must not approve a change in the given name of a child who is more than 1 year old or a non-citizen child unless there are special reasons, related to the best interests of the child, to do so. **Schedule 1 [20]** removes the requirement for special reasons and instead provides that the Court must not approve such a name change unless it is satisfied that the name change is in the best interests of the child.
Schedule 1 [21] inserts a note that refers to the principles that are to be applied in decisions about adoptions, including the principle that a child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.

Consent of children
Currently, a child aged 12 or over can consent to his or her own adoption if the child has been cared for by the proposed adoptive parent or parents for at least 5 years.

Schedule 1 [12] reduces that period to 2 years.
A child aged between 12 and 18 must be counselled in relation to giving consent to being adopted. **Schedule 1 [13]** removes an additional requirement for a child aged between 12 and 16 to see a registered psychologist in relation to his or her capacity to understand the effect of giving consent.

Miscellaneous
Schedule 1 [16] clarifies that in the case of an adoption of a child who is under the parental responsibility of the Minister, the requirement for a person giving consent to be counselled does not apply to the Minister or his or her delegate.

Savings and transitional provisions
Schedule 1 [33] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.
Schedule 1 [34] inserts savings and transitional provisions consequent on the amendments.

Issues Considered by the Committee

Insufficiently defined administrative powers [s 8A(1)(b)(ii) *LRA*]; and Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Issues: Ill-Defined and Wide Powers; Retrospectivity - Schedule 1 [30] – proposed section 140 (3) Discretion to supply adoption information:

28. The proposed section 140 (3) reads: The Director-General may supply (or authorise an information source to supply) adoption information or other information to any person who is not entitled under this Part to receive adoption information or other information under this Part if, in the opinion of the Director-General, it is reasonable to do so.

29. This expands the Director-General's discretion to supply adoption information or other information to people who are not entitled under the Act to receive such information.

30. This will also apply to existing and future adoptions (Schedule 1 [34]: proposed Part 4 Provisions consequent on enactment – proposed section 20), where the amendment made to section 140 by the 2008 amending Act extends to an adoption given effect to by an adoption order made before the commencement of the amendment.

31. The Committee notes the broad discretion that the Director-General has in deciding whether to supply or authorise an information source to supply adoption information or other information under proposed section 140 (3) to be inserted by Schedule 1 [30]. The Committee further notes that there does not appear to be any guidance or factors on what will guide such a wide discretion when deciding whether to supply (or authorise an information to supply) adoption information or other information. This may result in such discretions making rights or liberties unduly dependent on insufficiently defined administrative powers. Accordingly, the Committee refers this to Parliament.

32. The Committee is also concerned with the retrospective effect of this amendment that may impact adversely on personal rights.

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.

33. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. The Committee is usually concerned that commencement by proclamation may delegate to the government the power to commence the Act on whatever day it chooses or not at all, and may give rise to an inappropriate delegation of legislative power.

34. The Agreement in Principle speech, however, specifically drew Parliament's attention to the issue of commencement by proclamation in order to allow for the development of appropriate guidelines and regulations to support the new access to information scheme that will be introduced by this Bill. The Committee is of the view that there are good reasons for the Bill to be commencing by proclamation rather than on assent, and that this does not appear to be an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

3. CALLAN PARK TRUST BILL 2008*

Date Introduced:	25 September 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Sylvia Hale MLC
Portfolio:	The Greens – Non Government

Purpose and Description

1. This Bill is to constitute the Callan Park Trust and to confer on it functions relating to the care, control and management of Callan Park; and for other purposes.

2. The Callan Park Trust, will be a community-based trust to administer the site in accordance with the objects of the Callan Park Act. The objects of the Trust are to:

   (a) maintain and improve the Trust lands,
   (b) encourage the use and enjoyment of the Trust lands by the public by promoting and enhancing the rehabilitative, historical, scientific, educational, cultural and environmental value of the land,
   (c) maintain the right of the public to use the Trust lands,
   (d) define and respect the usage rights of lessees of Trust lands,
   (e) ensure the protection of the built and natural environment within the Trust lands.

3. The functions of the Trust are to:

   (a) control and manage the Trust lands, and
   (b) permit uses, and impose appropriate conditions, on any activities that are not inconsistent with the objects of the Trust, and
   (c) permit the use of the whole or any part of the Trust lands for any purpose that is consistent with the objects of the Trust and for activities of a passive and contemplative, rehabilitative, recreational, historical, scientific, educational or cultural nature, and
   (d) in connection with the Trust lands, provide, or permit the provision of, food or other refreshments and apply for, hold or dispose of any licence, permit or other authority in connection with the provision of food or other refreshments, and
   (e) ensure the protection of the built and natural environment within Trust lands, and
   (f) promote and provide exhibits, lectures, films, publications and other types of educational instruction relating to the Trust lands (including the architecture, landscaping, flora, fauna and history of the Trust lands), the history of mental health treatment and any other subject not inconsistent with the objects of the Trust, and
   (g) subject to the regulations, charge and receive fees or other amounts for or in connection with, any service provided, articles sold or permission given by the Trust in its exercise of its functions, and
   (h) enter into any contract or arrangement with any person for the purpose of promoting the objects of the Trust.

4. The Trust cannot employ any staff. It is the duty of the trust to establish an effective procedure for community consultation concerning the activities and policies. The

procedure for community consultation is to include the establishment of a Community Consultative Committee whose members are to be appointed by the trust on the recommendation of the director. The committee is to meet at least once in each quarter starting on 1 January, 1 April, 1 July and 1 October.

5. The Trust will consist of 10 trustees:
   (a) 3 trustees to be appointed by the Governor on the recommendation of the Minister and made in consultation with the Minister for Health,
   (b) 3 trustees to be appointed by the Governor on the recommendation of the relevant local council and who are residents of the council's area,
   (c) 1 trustee to be appointed by the Governor on the recommendation of the National Trust of Australia (New South Wales),
   (d) 1 trustee to be appointed by the Governor on the recommendation of the Advisory Council of the Sydney College of the Arts,
   (e) 1 trustee to be appointed by the Governor on the recommendation of a majority of the lessees of land within the Trust lands, and
   (f) 1 trustee elected in the manner prescribed by the regulations by persons employed for more than 20 hours per week on the Trust lands.

6. Each person appointed as a trustee must have expertise in at least one of the following areas:
   (a) park management,
   (b) cultural heritage management,
   (c) local community affairs,
   (d) landscape history,
   (e) finance,
   (f) planning law,
   (g) environment,
   (h) mental health.

Background

7. This Bill, in general, was modelled on the *Centennial Park and Moore Park Trust Act 1983*.

8. In the past 10 years, the group, Friends of Callan Park, has led the community campaign to save Callan Park. Callan Park covers over 60 hectares on the southern side of Iron Cove on the Parramatta River in Sydney's inner west.

9. The Second Reading speech gave the following historical background:

> In 1839 John Ryan Brenan, the Crown Solicitor, acquired the land and commissioned Mortimer Lewis, the Colonial Architect, to build a house known as Garry Owen. In 1841 Brenan bought an additional three acres to the west of his estate and the following year built Broughton Hall. In 1873 the Government acquired Callan Park, Garry Owen House, and the surrounding 104.5 acres in order to build a new lunatic asylum to be operated according to the enlightened ideas of the American doctor Thomas Kirkbride. The Kirkbride block was completed in 1885 to the designs of the then Colonial Architect James Barnet. The last psychiatric patients left this complex in 1994. It was then converted for use by the University of Sydney's Sydney College for the Arts and reopened in 1996.

> In 1915 Broughton Hall was donated by its then owners to be used as a convalescent hospital for shell-shocked soldiers returning from World War I. Subsequently it was resumed by government and in 1921 became the first psychiatric clinic in New South Wales for volunteer patients. The founder of the clinic, Dr Sydney Evan Jones, established a 25-acre garden, which his patients tended as part of their therapy. Large parts of the garden still survive. During the 1980s Broughton Hall suffered extensive fire damage and it has since been boarded up. Garry Owen House was also used for patients and later as a training school for nurses. In 1991 it was converted for use as the New South Wales Writers Centre.
>
> During the twentieth century many additional facilities and buildings were built on the Callan Park grounds as part of the hospital complex. These include a sportsground, swimming pool, wards, staff residences, and a central kitchen and laundry. In 1976 the Broughton Hall Clinic was amalgamated with the Callan Park Mental Hospital to form the Rozelle Hospital. The hospital had 250 beds and operated in various buildings scattered across the site. Callan Park incorporates archaeological, Aboriginal, historical, cultural, aesthetic and environmental heritage. Five Aboriginal heritage sites are identified at Callan Point. These are shell middens in sheltered areas close to the water's edge where groups camped or stopped for a meal. These middens contain rock oysters, cockles, mussels and Terrebralia shells, and have been dated at about 4,500 years old.

10. According to the Second Reading speech, in May 2002, NSW Health released a draft master plan for the Rozelle Hospital site at Callan Park, which proposed:

> the development of a purpose-built mental health unit at Concord Hospital, which would make the Rozelle Hospital surplus to its needs the sale of about 20 % of the 61-hectare site for development as two- to four-storey housing the creation of a 47-hectare park in which all the significant heritage buildings and gardens would be protected.

11. In response to community concerns, the New South Wales Parliament passed the *Callan Park (Special Provisions) Act 2002*, which was assented to on 24 December 2002. The objects of the Act are:

    (a) to ensure that the whole of Callan Park remains in public ownership and subject to public control, and
    (b) to ensure the preservation of the areas of open space at Callan Park that were in existence immediately before the commencement of this Act, and that extend to and include the foreshore of Iron Cove on the Parramatta River, and
    (c) to allow public access to that open space, including that foreshore, for public recreational purposes of both an active and a passive nature, and
    (d) to preserve the heritage significance of Callan Park, including its historic buildings, gardens and other landscape features, and
    (e) to impose appropriate controls on the future development of Callan Park.

12. In June 2007, the Government was in discussions with the University of Sydney to sign a memorandum of understanding to expand the university's presence on the site when the Rozelle Psychiatric Hospital was closed. In April 2008, the Government closed down the Rozelle Psychiatric Hospital.

13. Callan Park is currently administered by the Sydney Harbour Foreshore Authority. The foreshore authority is in the process of developing and implementing a land use plan for the site. This Bill aims to establish a community trust to manage Callan Park.

The Bill

14. The objects of this Bill are:

(a) to constitute the Callan Park Trust and define its objects, functions and powers, and
(b) to vest in the Trust the land known as Callan Park, and
(c) to make ancillary and other provisions with respect to the Trust and the land vested in the Trust.

Outline of provisions

Part 1 Preliminary
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 3 months after the date of assent, unless commenced sooner by proclamation.
Clause 3 defines certain words and expressions used in the proposed Act.

Part 2 The Callan Park Trust
Clause 4 constitutes the Trust as a corporation. The Trust is to be subject to the control and direction of the Minister and be a statutory body representing the Crown.
Clause 5 provides that the Trust is to consist of 10 trustees appointed or elected in the manner prescribed by the proposed section. Other provisions relating to the trustees and the procedure of the Trust are set out in Schedule 1 to the proposed Act.
Clause 6 specifies the objects of the Trust. The objects are as follows:

(a) to maintain and improve the Trust lands,
(b) to encourage the use and enjoyment of the Trust lands by the public by promoting and enhancing the rehabilitative, historical, scientific, educational, cultural and environmental value of the land,
(c) to maintain the right of the public to use the Trust lands,
(d) to define and respect the usage rights of lessees of Trust lands,
(e) to ensure the protection of the built and natural environment within the Trust lands,
(f) to protect and guarantee public access to the existing open space on Trust lands.

Clause 7 specifies the general functions of the Trust. These include:

(a) making use of the Trust lands for various relevant activities, and
(b) entering into arrangements to provide food or other refreshments on the Trust lands, and
(c) such other functions as may be reasonably necessary for the attainment of the Trust's objects.

Clause 8 empowers the Trust to establish committees to enable it to carry out its functions and to establish, control and manage branches or departments with respect to the Trust lands or any part of those lands.
Clause 9 deals with reports and recommendations by the Trust to the Minister.
Clause 10 provides that it is the duty of the Trust to engage in effective community consultation concerning the activities and policies pursued by the Trust. The procedure for community consultation is to include the establishment of a Community Consultative Committee.

Part 3 Property of the Trust

Clause 11 vests Callan Park (being the land described in Schedule 1 to the proposed Act) in the Trust. That land is not to be appropriated or resumed except by an Act of Parliament.
Clause 12 prevents the Trust from selling, mortgaging or otherwise disposing of principal Trust lands and provides that any compulsory acquisition of trust lands may occur only by way of an Act of Parliament.
Clause 13 provides that the Trust may, when acquiring property, agree to any condition not inconsistent with the objects of the Trust. The proposed section further provides that any duties payable under the *Duties Act 1997* are not to be charged to the Trust in respect of any gift, devise or bequest made to the Trust.
Clause 14 provides that the Minister may approve of the disposal of property of the Trust despite any condition of acquisition to which the property may be subject.
Clause 15 empowers the Trust (with the approval of the Minister) to grant leases, easements and licences in relation to the Trust lands. Except for specified leases to Rozelle Hospital and the Sydney College of the Arts, leases are not to have a term that, together with the term of any further leases granted pursuant to an option, exceeds 10 years.

Part 4 Plan of management
Clause 16 requires the Trust to prepare an initial plan of management for the Trust lands and the buildings on the Trust lands. The Minister may adopt, with or without alteration, such a plan or may refer the plan back to the Trust for further consideration.
Clause 17 provides that the Minister is not to adopt a plan of management unless the local council for the area in which the Trust lands are situated has given its consent to the plan.
Clause 18 provides that the Trust is to give effect to the plan of management as adopted by the Minister.
Clause 19 requires the Minister to ensure that all of the Trust lands are the subject of a plan of management.

Part 5 Administration
Clause 20 provides that the Director is, subject to the control and direction of the Trust, responsible for the administration and management of the Trust lands and associated services.
Clause 21 provides that the Trust may delegate any of its functions to the Director, trustee or member of staff of the Trust.
Clause 22 provides that an annual endowment of such amount as Parliament approves, out of money provided by Parliament, is to be paid to the Trust by the Treasurer for the purpose of providing for the remuneration, if any, of trustees, the remuneration of persons employed under the proposed Act, and for the general operating expenses, including those related to the maintenance of the Trust lands or other property, of the Trust.

Part 6 Miscellaneous
Clause 23 provides for the annual report of the Trust (as required under the *Annual Reports (Statutory Bodies) Act 1982*) to specify the uses to which the Trust lands have been put during each reporting year.
Clause 24 enables an authorised officer to require persons to state their full name and residential address, or provide their driver's licence, in certain circumstances. Failing to comply with an authorised officers request is an offence punishable by a penalty not exceeding 10 penalty units.
Clause 25 provides that when a person who is not the owner of a vehicle is alleged to have committed an offence, the owner of that vehicle must, when required to do so by an authorised officer, provide a written statement detailing the name and residential address of

the driver. If required to do so by an authorised officer any other person must provide any information that may lead to the identification of the driver.

Clause 26 provides that if a parking offence occurs on Trust lands' the owner of the vehicle is taken to have committed the offence unless they can establish that at the time of the offence the vehicle was being driven by another person. This may be achieved by establishing that the vehicle was stolen or being used illegally. A statutory declaration of the driver may be used to establish that the owner was not, at the relevant time, driving the vehicle.

Clause 27 enables penalty notices to be issued for certain offences prescribed under the regulations. A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person may pay, within the time and to the person specified in the notice, the penalty prescribed by the regulations for the offence if dealt with under the proposed section.

Clause 28 provides that, in the absence of evidence to the contrary, proof of certain matters is not required in any legal proceedings. These matters are listed in the proposed section.

Clause 29 provides that proceedings for offences under the Act or regulations under the proposed Act are to be disposed of summarily before the Local Court. Such proceedings must be commenced within 12 months of the date on which the offence is alleged to have been committed.

Clause 30 provides that when a corporation commits an offence under the Act or regulations the directors and other persons involved in the management of the company are taken to have committed the offence if they knew or authorised the act or omission constituting the offence.

Clause 31 provides that where the Trust suffers loss as a result of an offence under the Act or regulations the Trust may seek compensation from the person convicted of the offence.

Clause 32 enables the Trust to recover through a court of competent jurisdiction any money owing to it as a recoverable debt.

Clause 33 enables the Governor to make regulations under the proposed Act. In particular, the regulations may make provision for or with respect to the use and enjoyment of the Trust lands, the care, control and management of the Trust lands, the determination and payment of fees for the use of certain parts of the Trust lands and for services as the Trust may provide. The regulations may create offences punishable by a penalty not exceeding 10 penalty units.

Clause 34 is a formal provision giving effect to the amendments to the Acts and Regulations specified in Schedule 4.

Issues Considered by the Committee

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

Issue - Strict Liability:

15. The Bill contains some strict liability provisions[1]. Strict liability will in some cases cause concern as it displaces the common law requirement that the authority prove beyond reasonable doubt that the offender intended to commit the offence, and is contrary to the fundamental right of presumption of innocence.

[1] Part 6: proposed clause 24 (3) - Requirement to state name and address; proposed cl 25 (1) - Requirement for owner of vehicle and others to give information; proposed cl 26 (1) - Liability of vehicle owner for parking offences.

16. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

17. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance. These proposed provisions[2] also provide for defences or safeguards, and carry only fines of 10 penalty units or penalty notices.

18. Therefore, the Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with in order to facilitate the effective regulation and management of Callan Park Trust lands. The penalties for the strict liability offences are fines or penalty notices rather than imprisonment. The Committee also notes the availability of defences or safeguards for these offences. Accordingly, the Committee is of the view that the strict liability provisions in this Bill do not trespass unduly on rights and liberties.

The Committee makes no further comment on this Bill.

[2] Part 6: proposed clause 24 (3) - Requirement to state name and address, but subclause (4) provides a safeguard that a person is not guilty of an offence unless it is established that the authorised officer warned the person that a failure to comply with the requirement is an offence; proposed cl 25 (1) - Requirement for owner of vehicle and others to give information, but subclause (2) provides a defence if the defendant satisfies the court that the defendant did not know and could not with reasonable diligence have ascertained the driver's name or residential address; proposed cl 26 (1) - Liability of vehicle owner for parking offences, but subclause (3) provides for safeguards such as within 21 days of a notice, supplies by statutory declaration to an authorised officer or the informant described in the notice the name and address of the person who was in charge of the vehicle at all relevant times relating to the offence, or satisfies the authorised officer or the court that the person did not know and could not with reasonable diligence have ascertained that name and address.

4. CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT AMENDMENT (ADVERTISING) BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon John Hatzistergos MP
Portfolio:	Attorney General, Minister for Justice, and Minister for Industrial Relations

Purpose and Description

1. The purpose of the Bill is to amend the *Classification (Publications, Films and Computer Games) Enforcement Act 199*5 as a consequence of the enactment of the *Classification (Publications, Films and Computer Games) Amendment (Assessments and Advertising) Act 2008* of the Commonwealth (the Commonwealth Amending Act).

2. The Bill provides for the enforcement of a proposed Commonwealth scheme relating to the advertising of unclassified films or unclassified computer games, or both, to be determined by a legislative instrument made under Division 2 of Part 3 of the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth (the Commonwealth Act).

3. In his Second Reading speech the Minister advises that currently State and Territory enforcement legislation makes it an offence to advertise an unclassified film or computer game. Due to increasing concerns about piracy, and rapid advances in technology, films and computer games are now often available for classification only very close to their release date. The Minister states that in this situation current classification laws place significant regulatory limitations on marketing these films and computer games prior to their release date.

4. To overcome this concern, while ensuring that advertising continues to be done appropriately, Commonwealth, State and Territory Ministers agreed in April 2007 to implement a new way of regulating the advertisement of films and computer games which have yet to be classified. This new advertising scheme was developed following nationwide public consultation in late 2006.

5. "Advertising scheme" is defined in the Bill in Schedule 1(1) and means a scheme determined from time to time under section 31 of the Commonwealth Act. That section of the Commonwealth act authorised the Minister, by legislative instrument, to determine a scheme for the advertising of unclassified films and unclassified computer games. The Bill makes it an offence to publicly exhibit an advertisement for an unclassified film that does not comply with the advertising scheme. It will also be an offence to sell or publicly demonstrate a classified computer game with an advertisement for an unclassified computer game or unclassified film if the sale or

public demonstration with the advertisement does not comply with the advertising scheme. In summary then, the Bill makes amendments that will provide an enforcement mechanism for a scheme under the Commonwealth Act that would make provision for the advertising of unclassified films and unclassified computer games.

Background

6. The Bill together with amendments to the Commonwealth Act and a new Commonwealth instrument will remove the prohibition on advertising unclassified films and computer games and replace it with a new scheme that will allow advertising subject to conditions. The Bill enables the introduction of an industry based authorised assessor scheme for the advertising of unclassified films and computer games. Safeguards will be included in the scheme so that consumers can continue to obtain reliable classification information and minors continue to be protected from inappropriate material.

7. It is proposed that the Commonwealth Act will come into force on or before 1 July 2009, and it will allow the Commonwealth Minister for Home Affairs to make a statutory instrument that sets conditions for the advertising of films and computer games before they are classified. The Minister in his Second Reading speech advised that all State and Territory classification Ministers had already agreed on the conditions which will be imposed by the statutory instrument with the final text of the Commonwealth instrument to be developed in consultation with States and Territories.

8. In order to apply the agreed conditions the Commonwealth instrument will establish an assessment scheme under which the classification of the product can be determined either by the Classification Board or by an approved assessor who has undertaken appropriate training. The Bill makes amendments to remove the offence of advertising an unclassified film or computer game and replaces this with an offence of advertising an unclassified film or computer game otherwise than in accordance with the new advertising scheme.

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 a day to be appointed by proclamation.
Clause 3 is a formal provision that gives effect to the amendments to the Classification (Publications, Films and Computer Games) Enforcement Act 1995 set out in Schedule 1.
Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.
Schedule 1 Amendments

Schedule 1 makes amendments that will provide an enforcement mechanism for a scheme under the Commonwealth Act that would make provision for the advertising of unclassified films and unclassified computer games.
Schedule 1 [1] amends section 4 to insert a definition of Advertising Scheme.

Schedule 1 [2] and [3] amend section 39 to provide that a person must not publish an advertisement for an unclassified film or computer game otherwise than in accordance with the Advertising Scheme.
Schedule 1 [4] amends section 40 to make it an offence to publicly exhibit an advertisement for an unclassified film during a film program, or to sell a classified film with an advertisement for an unclassified film or unclassified computer game, if the exhibition or sale with the advertisement does not comply with the Advertising Scheme.
Schedule 1 [5] amends section 41 to make it an offence to sell or publicly demonstrate a classified computer game with an advertisement for an unclassified computer game or unclassified film if the sale or public demonstration with the advertisement does not comply with the Advertising Scheme.
Schedule 1 [6] amends Schedule 1 to enable the making of regulations of a savings and transitional nature.
Schedule 1 [7] amends Schedule 1 so that it will not be an offence to publish an advertisement for an unclassified film otherwise than in accordance with the Advertising Scheme under section 39 as to be amended by Schedule 1 [3] if the advertisement is published in accordance with a transitional regulation made under the Commonwealth amending Act.

Issues Considered by the Committee

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

Issue: Strict Liability – Schedules 1[3], 1[4] and 1[5]

9. Several provisions in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the authority is not required to prove that the person intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. The relevant provisions are contained in Schedules 1[3], 1[4] and 1[5].

10. Schedule 1[3] amends section 39 to provide that a person must not publish an advertisement for an unclassified film or computer game otherwise than in accordance with the Advertising Scheme.

11. Schedule 1[4] amends section 40 to make it an offence to publicly exhibit an advertisement for an unclassified film during a film program, or to sell a classified film with an advertisement for an unclassified film or unclassified computer game, if the exhibition or sale with the advertisement does not comply with the Advertising Scheme.

12. Schedule 1[5] amends section 41 to make it an offence to sell or publicly demonstrate a classified computer game with an advertisement for an unclassified computer game or unclassified film if the sale or public demonstration with the advertisement does not comply with the Advertising Scheme.

13. These provisions do not appear to unduly trespass on personal rights and liberties as they have the object of ensuring reliable classification information and protecting minors from inappropriate material. The penalties are not inequitable.

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

Issue: Clause 2 – Commencement by proclamation

14. The Committee notes that the proposed Act is to commence on a day 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.

15. The Minister in his Second Reading speech advised that this provision was necessary to ensure that the amendments in the Bill come into force only when the text of the Commonwealth instrument is agreed to by New South Wales. The Committee is accordingly of the opinion that this provision does not inappropriately delegate legislative powers.

The Committee makes no further comment on this Bill.

5. MINING AMENDMENT (IMPROVEMENTS ON LAND) BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Ian MacDonald
Portfolio:	Minister for Primary Industries, Minister for Energy, Minister for Mineral Resources, and Minister for State Development

Purpose and Description

1. The purpose of this Bill is to amend the *Mining Act 1992* to clarify the circumstances in which consent is required under section 62 of the Act to a mining lease over land on which an improvement is situated. As a result of the proposed Act, the consent of the owner of an improvement will only be required if the improvement is one that is taken to be an improvement in accordance with the existing notification and claims procedures set out in Part 2 of Schedule 1 to the Act. The Bill also makes a number of minor and consequential amendments, including transitional provisions that deal with pending applications for mining leases and that validate existing mining leases granted on the basis that the consent of the owner of an improvement was given because he only did not make a claim.

2. The Minister in his Second Reading speech advised that the need for this Bill follows a Court of Appeal judgment given on 8 August 2008 in the case of *Ulan Coal Mines v Mineral Resources and Anor [2008] NSWCA 174*. In that case, the NSW Court of Appeal held that the claim process is optional for landholders and the fact that a claim is not made within the required 28 day period after the landholder is notified is not determinative as to whether the owner of the improvement has consented to the granting of the mining lease.

3. The central provision of this Bill is contained in new Part 11, which validates mining leases that would otherwise be invalid because of the Court of Appeal's decision. This is achieved by validating any mining lease where the 28-day period for lodging a claim regarding an improvement expired before the Court of Appeal's decision, that is, the claim period expired on or before 7 August 2008. The absence of such a claim is taken to constitute the landholder's consent for the purposes of issuing a mining lease under section 62 of the Act. This means all existing leases are deemed to have been granted in compliance with section 62 of the Act and their validity cannot be challenged on this basis.

4. The Minister in his Second Reading speech states that the benefits that the mining industry provides to New South Wales are placed at risk because of uncertainty about the validity of mining leases issued under the *Mining Act.* He says the Bill restores certainty to existing leases and does not create any new arrangements or procedures in addition to those that were followed by the Department of Primary Industries, miners and landholders before the Court of Appeal decision. The Bill also protects certain

mining lease applications. In the case of applications that were pending where the claim period was completed before the Ulan decision, then these can be determined on the same basis, that is, the absence of a claim is taken to constitute the owner's consent to the granting of a lease over the land. In the case of pending applications where the 28 day period falls on or between 8 August 2008 and the commencement of the amendments then the full 28 day time period will start again when the Act amendments commence. The Minister says that restarting the claim period in this way avoids unfairly penalising any landholder who elected in good faith, not to lodge any claim based on the Court of Appeal's decision.

5. The Bill now defines "significant improvement" in the Dictionary to the Act using the existing wording of section 62(1) of the Mining Act. Such an improvement means any substantial building, dam, reservoir, contour bank, graded bank, levee, water disposal area, soil conservation work or other valuable work or structure. Under this definition structures must be both substantial and valuable to qualify as an improvement that can prevent mining.

Background

6. In 2005 Moolarben Coal Mines Pty Ltd lodged a mining lease application over land owned by Ulan Coal Mines. Ulan claimed protection under section 62 of the Mining Act for certain improvement, which included dams, fences and other works.

7. Section 62(1) of the *Mining Act 1992* provides that a mining lease may not be granted over the surface of any land on which any improvement is situated (other than an improvement constructed or used for mining purposes and for no other purposes) except with the written consent of the owner. Schedule 1 of the *Mining Act* provides a mechanism for a landholder whose land is the subject of an application for a mining lease to make a claim to the Minister that on the land is situated a valuable work or structure. This mechanism is triggered by the service on the landholder of a notice by the mining lease applicant. The notice is required to state that claims with respect to valuable works or structures on the land must be made to the Minister within 28 days after service of the notice. In the event of a claim being made and the applicant for the mining lease objecting to the claim, then the Director-General of the Department is to refer the objection to a Mining Warden for inquiry and report. Anything identified in the claim is taken to be a valuable work or structure unless, as a result of the Warden's inquiry, it is declared not to be.

8. Ulan's claim was lodged outside the 28-day period and was refused by the Department of Primary Industries. The court action arose out of this refusal.

The Bill

The object of this Bill is to amend *the Mining Act 1992* to clarify the circumstances in which consent is required under section 62 of the Act to a mining lease over land on which an improvement is situated. As a result of the proposed Act, the consent of the owner of an improvement will only be required if the improvement is one that is taken to be an improvement in accordance with the existing notification and claims procedures set out in Part 2 of Schedule 1 to the Act.

The Bill also makes a number of minor and consequential amendments, including transitional provisions that deal with pending applications for mining leases and that validate existing

mining leases granted on the basis that the consent of the owner of an improvement was given because the owner did not make a claim.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.
Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
Clause 3 is a formal provision that gives effect to the amendments to the Mining Act 1992 set out in Schedule 1.
Clause 4 amends the *Mining Amendment Act 2008* to repeal an uncommenced amendment to section 62 of the *Mining Act 1992*. The amendment is to be re-inserted in a modified form as a consequence of the amendments made by the proposed Act (see Schedule 1 [5]).
Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendments

Schedule 1 [4] and [6] amend section 62 of the Act so that the consent of the owner of an improvement on land to a mining lease being granted over the land will only be required if the improvement has been identified by the landholder in a claim made in accordance with the existing notification and claims procedures. If the improvement is declared not to be an improvement for the purposes of section 62 by a mining warden as the result of an objection by the applicant for the mining lease, the consent of the owner will not be required.
Schedule 1 [5] replicates an uncommenced amendment in the *Mining Amendment Act 2008* which makes it clear that an applicant for a mining lease (or a related corporation of the applicant) who is the owner of a dwelling-house, garden or improvement situated on land over which the lease is sought is not required to consent to the lease. The amendment also confers on the Warden's Court, rather than a warden and the Minister, jurisdiction relating to disputes under section 62 of the Act, but only in relation to matters concerning the consent of owners of dwelling-houses or gardens. Disputes relating to improvements on land will be dealt with in accordance with the existing notification and claims procedures which enable the applicant for the mining lease to object to the landholder's claim that something on the land is a significant improvement.
Schedule 1 [14] inserts a new definition of significant improvement in the Dictionary to the Act. The definition uses essentially the same wording that is currently used in various provisions of the Act (including section 62) to define those things that are improvements on land for the purposes of the Act. The amendments made by Schedule 1 [1]–[3] and [7]–[11] are consequential on the consolidation of these various provisions into the new definition.
Schedule 1 [12] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.
Schedule 1 [13] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act. The amendments made by the proposed Act will extend to applications for mining leases lodged, but not determined, before the commencement of the proposed Act. Special provision is also made in the case of any application lodged before the commencement of the proposed Act where the 28-day period in which the owner was entitled to make a claim ended on or before 7 August 2008 (the day before the decision in Ulan). Regardless of whether the mining lease has been granted, the owner's consent will be taken to have been given to the lease if a claim was not made within the 28-day period. Any existing mining lease granted on this basis (including any lease that was the subject of the decision in

Ulan) is validated by the proposed Act. In the case of other pending applications, the 28-day period in which the owner can make a claim will run from the commencement of the proposed Act.

Issues Considered by the Committee

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

Issue: Retrospectivity affecting rights of private property – Schedule 1[13]

9. The Committee has in the past put the position that retrospective legislation that affects the rights of any person is generally undesirable. If retrospective legislation has any adverse affect on a person, whether the affect amounts to trespass on a right or not, the legislation trespasses on the rule of law. The Court of Appeal in the *Ulan Case* accepted Ulan Coal Mines' argument that the public interest in the encouragement of mining enterprises is balanced in Section 62 by the protection afforded to rights of private property. The rights involved here are the common law rights of landholders to the exclusive use and enjoyment of their land.

10. Under the new provisions of Part 11, inserted in the Principal Act by Schedule 1[13], all mining leases that would otherwise be invalid because of the Court of Appeal decision are validated. This specifically includes the lease the subject of the Court of Appeal decision. The amendments made by the proposed Act will also extend to applications for mining leases lodged but not determined, before the commencement of the proposed Act. Regardless of whether the mining lease has been granted, the owner's consent will be taken to have been given to the lease if a claim was not made within the 28–day period. This prevents any future challenge to the leases on that basis.

11. The Committee recognises the importance of the need for certainty in the laws governing mineral exploration and mining in NSW. However this must be balanced with the common law rights of landholders to private property. The Committee therefore considers the application of the legislation to retrospective mining leases as a potential trespass on right to property and refers the matter to Parliament.

The Committee makes no further comment on this Bill.

6. PORTS AND MARITIME ADMINISTRATION AMENDMENT (PORT COMPETITION AND CO-ORDINATION) BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Joseph Tripodi MP
Portfolio:	Ports and Waterways

Purpose and Description

1. This Bill amends the *Ports and Maritime Administration Act 1995* to make further provision for the objects and functions of Port Corporations, the powers of the Minister and the making of regulations with respect to port facilities and services and the port-related supply chain.

2. It amends the statutory objectives of the port corporations. Port Corporations will be provided with additional objectives to promote and facilitate a competitive commercial environment in port operations; and to improve productivity and efficiency of the port-related supply chain. These objectives will have equal status with the existing statutory objectives so that no one objective is more important than another.

3. In leasing reforms, the CIRA review (for Council of Australian Governments [COAG] Competition and Infrastructure Reform Agreement [CIRA]), found current stevedore leases maximise rents but fail to encourage competitive commercial behaviour. The new objectives will provide the ability and the responsibility for the board to give equal consideration to the impact of the lease on investment and efficiency.

4. The Bill makes provisions to enable the Minister to provide direction to a port corporation if tension arises between the new policy objectives and the existing commercial objectives in making a decision. Directions could then be made at the request of the port corporations or on the Minister's initiative. In the case of major leases, the Minister will be able to direct the port corporations to adopt certain leasing practices to foster competition, investment and productivity. This could include directions for Port Corporations to include shorter terms of duration; productivity and performance targets; enforceable capital expenditure schedules; incentives and penalties for meeting targets; and end-of-term handover provisions.

5. The Bill provides a system of reviews, checks and balances in relation to issuing a ministerial direction. The port corporations' shareholders must be informed of any ministerial directions and the Treasurer's approval must be received for any direction affecting a port corporation's approved financial outcomes. The direction-giving power will not extend to directions to rail agencies, authorities or operators beyond their interface with supply chain facilities.

6. It also provides a definition of the port-related supply chain to include cargo transport, handling and storage operations—and coordination of those operations—in connection

with a port. Supply chain facilities are defined as providing storage, handling and distribution of cargo in connection with a port. This can also include moving from one mode of transport to another. These are important links where bulk goods, containerised commodities, or empty containers are staged, stored temporarily and/or transferred.

7. Port corporations will be provided with a new statutory function to facilitate and coordinate improvements in the efficiency of the port-related supply chain. The ports' broadened functions will enable them to provide impartial oversight of initiatives to meet performance standards and to enhance competition. This aims to enable industry to lead the required efficiency improvements, with the ports providing coordination and independent facilitation where it is needed.

8. If voluntary action and facilitation prove insufficient to improve supply chain performance, this Bill provides powers to initiate regulatory actions to enhance supply chain performance. This approach is consistent with the recommendations of the Independent Pricing and Regulatory Tribunal [IPART] report. IPART recommended that improvements be led by industry, with Government stepping in only if industry efforts failed to deliver the desired results. As recommended by IPART, Sydney Ports Corporation will take a lead role in facilitating and coordinating the industry-led response in the first phase of implementation. However, if industry initiatives fall short of improving transparency and performance, the Government will then progress to phase two and may step in to mandate measures to deliver the required improvements.

9. The Bill provides for the making of regulations including:

   (a) the power to require provision of information to monitor performance and investment in port facilities and the supply chain;

   (b) to set mandatory standards for the operation or provision of supply chain facilities and services;

   (c) to require supply chain facilities and providers to keep records and provide information for monitoring compliance with mandatory standards;

   (d) to provide independent audits and inspections to ensure compliance with mandatory standards;

   (e) to provide penalties for non-compliance with mandatory standards with incentives for meeting standards; and

   (f) to determine charges and the mechanism to set charges for supply chain facilities and services.

10. It provides the power to put in place fixed charges or auction mechanisms for the allocation and pricing of charges along the supply chain. This supports the off peak incentive scheme endorsed in the Government's response to the IPART report or the IPART report's recommendation for a Dutch auction system for pricing access to the stevedore terminals.

11. Regulatory powers will require supply chain participants to record and provide information to check compliance with the mandatory standards and to allow for

enforcement. Information regarding port and supply chain performance may also be published to provide greater transparency. This aims to introduce public accountability. The Bill also provides for audit powers to verify the accuracy and completeness of this information.

12. To ensure the regulations are appropriate, the Bill does not allow regulations to be made with respect to the operation of any railway outside a port or supply chain facility or on the seaside interface of the stevedore terminals. The Treasurer will need to be consulted in relation to the scope of specific regulatory proposals.

Background

13. According to the Agreement in Principle:

> As trade continues to grow, substantial pressure is being placed on New South Wales ports and the supply chains servicing them. The 2003 New South Wales ports growth plan outlined the strategy for increasing port and trade capacity in New South Wales. Projects under the ports growth plan include a new container terminal at Port Botany bringing port capacity to 3.2m 20-foot equivalent units [TEU] per annum; new container and coal terminals at Newcastle; and relocating the car import trade to Port Kembla with three times the storage capacity. However, increasing port capacity is only one part of the solution. Just as important is enhancing the efficiency of port operations and the supply chains that transport goods to and from the ports.

14. The reforms are guided by two major public reviews conducted into the regulation and operation of New South Wales ports. A review of port competition and regulation in New South Wales was conducted by PricewaterhouseCoopers on behalf of the New South Wales Government. This review was conducted to fulfil a commitment under the Council of Australian Governments [COAG] Competition and Infrastructure Reform Agreement [CIRA]. The CIRA review made a number of recommendations in relation to improving port services, price oversight, and lease and access arrangements. It recommended that port corporations should work with stakeholders to identify capacity constraints and facilitate the improvement of landside infrastructure; port charges to balance cost recovery and facilitate trade; and long-term lease conditions be subject to greater transparency and be reviewed to ensure they reflect current Government policy.

15. The other recent review was of Port Botany's links with inland transport conducted by the Independent Pricing and Regulatory Tribunal [IPART]. This highlighted the need to reform the landside interface at Port Botany and for Sydney Ports Corporation to lead and facilitate the reform. Key themes from the IPART's review included the need for greater transparency in performance reporting and access arrangements; performance standards and systems to drive improvements; and measures to drive 24-hour-seven-day-a-week operation at the port to reduce peak-hour congestion.

16. In response to these reviews, this Bill aims to ensure port corporations' decisions balance commercial and policy objectives; enhance the role of the port corporations in facilitating improvements in the port-related supply chain; as well as provide regulatory powers for the government to act should voluntary industry action fail to improve the efficiency of the port logistics systems.

17. Each port is connected to producers and consumers through complex supply chains that include many port users and service providers. For example, the port-related

supply chain at Port Botany is comprised of two (soon to be three) - stevedoring terminals; two rail track owners; over 200 different road carriers; four rail operators; six metropolitan intermodal terminals; and thousands of warehouses, importers and exporters. The Hunter Valley coal supply chain that transports coal from the mines to the Port of Newcastle, is made up of two rail track owners; two train operators with 26 trains; 16 coal producers; over 20 load points or coal intermodals; five dump stations; and two coal terminals supplying approximately 1,000 vessels per year.

18. Port Kembla's leading steel export port is also the second largest for grain. The recent dismantling of the single desk for wheat grain exports will increase the complexity of the supply chain by increasing the number of New South Wales exporters. As car imports are transferred to Port Kembla from Sydney in late 2008, the complexity of that supply chain will continue to grow.

19. From the Agreement in Principle:

> Mandatory standards for performance would allow the setting of standards for maximum truck turnaround times, and for the punctual arrival of trucks for their slots. The IPART report proposed a system of matched penalties and compensation for non-compliance with these performance standards where the party that failed to meet the standard compensates the other party. This would result in payments from stevedores to truck operators for failing to meet a truck-turnaround standard or a payment from the truck operator to the stevedore for being late to a booking time. These types of penalties are expected to deliver significant alignment between the actions of supply chain participants and the economic consequences.

The Bill

20. The object of this Bill is to amend the *Ports and Maritime Administration Act 1995*:

(a) to broaden the principal objectives of Port Corporations to include promoting and facilitating a competitive commercial environment in port operations and improving productivity and efficiency in ports and the port-related supply chain, and

(b) to broaden the principal functions of Port Corporations to include facilitating and co-ordinating improvements in the efficiency of the port-related supply chain, and

(c) to authorise the Minister to give directions to a Port Corporation in relation to the exercise of any of its functions in connection with its proposed new principal objectives, and

(d) to authorise the making of regulations to promote productivity and competition at the ports of Port Corporations and in the port-related supply chain, including regulations relating to information sharing, mandatory performance standards and port-related supply chain service charges.

Outline of provisions

New principal objectives

Schedule 1 [2] extends the principal objectives of a Port Corporation to include the following 2 new principal objectives:

(a) to promote and facilitate a competitive commercial environment in port operations,

(b) to improving productivity and efficiency in its ports and the port-related supply chain.

New principal function
Schedule 1 [3] extends the principal functions of a Port Corporation to include the principal function of facilitating and co-ordinating improvements in the efficiency of the port-related supply chain.

Ministerial direction to port corporation
Schedule 1 [4] (proposed section 10A) authorises the Minister to give a Port Corporation directions in relation to the exercise of any of the Corporation's functions in connection with its proposed new principal objectives. The section establishes a procedure for the review of such a direction if the Port Corporation considers that complying with the direction may cause a significant variation in its approved financial outcomes.

Regulations to promote competition and productivity
Schedule 1 [4] (proposed section 10B) confers a broad power to make regulations in connection with the operation and provision of land-based port facilities and services and the facilities and services of the port-related supply chain for the ports of Sydney Harbour, Botany Bay, Newcastle and Port Kembla. The section authorises the regulations to create offences with a penalty of up to 500 penalty units.
Schedule 1 [6] provides for the matters in respect of which regulations can be made, which include the following:

(a) requiring a person who operates or provides facilities or services to provide information relating to their operation or provision, for the purpose of facilitating the monitoring of efficiency, performance and investment,
(b) setting mandatory standards in connection with the operation or provision of facilities and services,
(c) requiring the operator or provider of facilities or services to keep records and provide information to facilitate the monitoring of compliance with mandatory standards,
(d) verifying and auditing compliance with mandatory standards,
(e) providing incentives to encourage compliance with mandatory standards and imposing penalties for a failure to comply with mandatory standards, including by requiring the payment of financial penalties by participants in the port-related supply chain to other participants in connection with a failure to comply with mandatory standards,
(f) regulating the charges that may be imposed for or in connection with the provision and operation of facilities and services in the port-related supply chain.

Miscellaneous amendments
Schedule 1 [1] inserts definitions of ***port-related supply chain*** and ***supply chain facility***.
Schedule 1 [5] substitutes the provision dealing with proceedings for offences to enable proceedings for an offence to be taken before the Supreme Court in its summary jurisdiction (as an alternative to a Local Court) and to prevent the imposition by a Local Court of a penalty exceeding 100 penalty units. This amendment is consequential on the amendment that will allow the regulations to create offences with a penalty of up to 500 penalty units.

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.

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

22. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

7. PUBLIC HEALTH (TOBACCO) BILL 2008

Date Introduced:	25 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Tony Stewart MP
Portfolio:	Minister for Small Business, Minister for Science and will Medical Research, and Minister Assisting the Minister for Health (Cancer)

Purpose and Description

1. The Bill repeals and re-enacts (with amendments), as a separate Act provisions currently contained in Part 6 of the Public Health Act 1991 relating to the sale, advertising and packaging of tobacco products and non-tobacco smoking products. The central object of the Act is to reduce the incidence of smoking and other consumption of tobacco products and non tobacco smoking products, particularly by young people, in recognition of the fact that the consumption of those products adversely impact on the health of the people in New South Wales and places a substantial burden on the State's health and financial resources.

2. The Bill's stated aim to achieve this object is by regulating the packaging, advertising and display of tobacco products and non-tobacco smoking products, and prohibiting the supply of those products to children, and reducing exposure of children to environmental tobacco smoke. Under the Bill non-tobacco smoking product means any product (other than a tobacco product) that is intended to be smoked, and includes any product known or described as herbal cigarettes.

3. The packaging and sale of tobacco without a health warning is prohibited. Another key provision of the Bill makes it an offence to display tobacco products, non-tobacco smoking products and smoking accessories in shops. This offence is punishable with a fine of up to $11,000 for individuals and up to $55,000 for corporations. This prohibition does not apply to the display of tobacco or non-tobacco smoking products to a customer of the business at his or her request.

4. Further controls include the requirement in clause 10 that the occupier of premises on which tobacco or non tobacco smoking products are sold must ensure that those products are sold from only one point of sale on the premises. Clause 12 of the Bill permits tobacco vending machines to be placed only in bar areas and gaming machine areas of hotels, clubs and casinos.

5. Under clause 15 of the Bill, if the owner of a tobacco vending machine contravenes a provision of the Act relating to vending machines the occupier of the premises on which the vending machine is situated is taken to have contravened the same provision unless the occupier can prove that the vending machine was placed on the premises in compliance with the Act and the occupier could not by the exercise of due diligence prevent the contravention, or the vending machine was placed and retained on the premises without the occupier's knowledge or consent.

6. The provisions of the Bill relating to juvenile smoking include the prohibition, in clause 22, of the sale of a tobacco product to a person under the age of 18 years. It is also an offence for a person to purchase a tobacco product on behalf of a person under the age of 18 years. These offences carry a maximum penalty, in the case of an individual, of 100 penalty units for a first offence or 500 penalty units for a second or subsequent offence or, in the case of the corporation, 500 penalty units for a first offence or 1000 penalty units for a second or subsequent offence.

7. Other measures for the protection of juveniles include a prohibition under clause 30 against smoking in a motor vehicle if there is a person under the age of 16 years present in the vehicle. This offence carries a maximum penalty of 10 penalty units. The driver of the motor vehicle in which the person is smoking in contravention of this provision is guilty of an offence. The driver may be proceeded against and convicted of an offence whether or not the person who was smoking has been proceeded against or convicted of an offence under this provision. It is a defence to a prosecution under this provision if the court is satisfied that, when the defendant was smoking, the defendant believed on reasonable grounds that no person in the vehicle was under the age of 16 years.

8. Further provisions of the Bill include prohibiting a person from engaging in tobacco retailing for specified periods when they have been guilty of repeat offences. Overall, the Bill substantially increases penalties for most existing tobacco offences and places the key tobacco control provisions in one piece of legislation.

Background

9. The Minister in his Agreement in Principle speech states that the Bill has been introduced to enact a range of new provisions designed specifically to prevent exposure of children to tobacco. He states that NSW Health spends more than $250 million a year treating tobacco related illnesses. Government policy has been formulated against the background that the use of tobacco products lead to addiction, disease and premature death. Accordingly, the policy is to control the sale, advertising and display of these products. The Minister states that 90% of the costs to the health care system of hospitalisation of people for environmental tobacco smoke relate to children's exposure to other people's smoke. The Bill is said to represent a decisive shift in the way tobacco may be presented by the retail sector.

10. The Bill has been developed out of a comprehensive community consultation process. The Government received approximately 12,000 submissions following the release of a paper entitled *Protecting Children from Tobacco – The Next Steps to Reduce Tobacco - Related Harm*. That paper was prepared so as to assist community members to make a submission as part of the public consultation process. The paper presented a number of reforms that might be effective in reducing the prevalence and uptake of smoking in young people in NSW. In May 2009 a public consultation forum on the paper took place at the NSW Parliament House. This forum provided an opportunity for stakeholders to express their views about the options proposed in the paper.

The Bill

The object of this Bill is to repeal and re-enact (with amendments) as a separate Act provisions currently contained in Part 6 of the Public Health Act 1991 relating to the sale, advertising and packaging of tobacco products and non-tobacco smoking products. In particular, the Bill makes provision for the following new matters:

(a) prohibiting the display of tobacco products, non-tobacco smoking products and smoking accessories in shops,
(b) requiring tobacco products and non-tobacco smoking products to be sold from only one point of sale on premises,
(c) limiting the number of tobacco vending machines permitted on premises to one vending machine and removing the provision that currently allows vending machines to be situated in staff amenities areas,
(d) making it an offence to smoke in a motor vehicle while a child under the age of 16 years is present and making the driver liable if a passenger smokes in those circumstances,
(e) establishing a scheme whereby a person who engages in tobacco retailing is automatically prohibited from continuing to engage in tobacco retailing for specified periods for repeat offences against the proposed Act or the regulations,
(f) requiring notification to be given to the Director-General of the Department of Health before a person commences to engage in tobacco retailing,
(g) increasing penalties for most existing tobacco offences. The Bill also makes consequential amendments to various Acts.

Outline of provisions

Part 1 Preliminary

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 sets out the object of the proposed Act.

Clause 4 defines certain words and expressions used in the proposed Act.

Part 2 Tobacco and other smoking products and sales

Division 1 Tobacco packaging

Clause 5 defines health warning for the purposes of the proposed Part.

Clause 6 prohibits a person from selling a tobacco product that is not in the manufacturer's package and from selling cigarettes individually or in packages of less than 20. The clause does not apply to the sale of single cigars. (See section 54 of the *Public Health Act 1991*.)

Clause 7 prohibits a person from packaging a tobacco product for sale without a health warning or selling a tobacco product in a package without a health warning. The clause does not apply to the sale of single cigars. (See sections 55 and 56 of the *Public Health Act 1991*.)

Clause 8 prohibits the use of certain words on a package in which tobacco is packed or sold. (See section 57 of the *Public Health Act 1991*.)

Division 2 Sale and display of tobacco and other smoking products

Clause 9 requires the occupier of premises on which tobacco products or non-tobacco smoking products are sold to ensure that the products, and any smoking accessories, cannot be seen by the public from inside or outside the premises.

Clause 10 requires the occupier of premises on which tobacco products or non-tobacco smoking products are sold to ensure that the products, and any smoking accessories, are

sold only from one point of sale on the premises. A point of sale will include a cash register but not a tobacco vending machine.

Clause 11 creates the following offences (see section 57A of the *Public Health Act 1991*):

(a) an offence of a vendor carrying tobacco products on his or her person in a public place for the purpose of selling the products by retail,

(b) an offence for a person to employ or pay the vendor to undertake such an activity and for a person who has control of premises to cause or permit such an activity on the premises,

(c) an offence for a person to sell tobacco products by retail from mobile or temporary premises,

(d) an offence for a person who has control of premises, and for a person organising a concert or other event on premises, to cause or permit such sales on the premises.

Division 3 Tobacco vending machines

Clause 12 permits tobacco vending machines to be placed only in bar areas and gaming machine areas of hotels, clubs and casinos. Currently, section 61F of the *Public Health Act 1991* also enables tobacco vending machines to be placed in premises set aside by employers as staff amenities areas.

Clause 13 prevents a person from placing a tobacco vending machine on premises for the purposes of the sale of tobacco products or non-tobacco smoking products unless it can only be activated by a member of staff of the premises or the products can only be obtained from the machine by a token that is only available from a member of staff of the premises.

Clause 14 requires the owner or lessee of a tobacco vending machine located on premises for the purposes of the sale of tobacco products or non-tobacco smoking products to ensure that the vending machine displays a statement prescribed by the regulations (see section 61F of the *Public Health Act 1991*) and that the products in the machine, and certain information and representations, are not in view of members of the public.

Clause 15 makes the occupier of premises on which a tobacco vending machine is located for the purposes of the sale of tobacco products or non-tobacco smoking products liable for contraventions of the proposed Division in relation to the machine in certain circumstances.

Part 3 Advertising and promotion of tobacco products

Clause 16 prohibits certain forms of tobacco advertising. (See section 61B of the *Public Health Act 1991*.)

Clause 17 prohibits the promotion of tobacco products by means of prizes, gifts and other benefits or tickets, coupons or the like. (See section 61C of the *Public Health Act 1991*.)

Clause 18 prohibits a person from implementing or conducting a shopper loyalty program that extends to the purchase of tobacco products or non-tobacco smoking products or the giving of such products as gifts.

Clause 19 prohibits a person from giving out free samples of tobacco products. (See section 61D of the *Public Health Act 1991*.)

Clause 20 prohibits a person from promoting or publicising tobacco products or related information under a sponsorship arrangement. (See section 61E of the *Public Health Act 1991*.)

Clause 21 prohibits a person from manufacturing or selling a tobacco product designed for consumption otherwise than by smoking and from selling food, toys or other products that resemble tobacco products. (See section 61G of *the Public Health Act 1991*.)

Part 4 Protection of juveniles

Division 1 Juvenile smoking
Clause 22 prohibits a person from selling a tobacco product or non-tobacco smoking product to a person under the age of 18 years. (See section 59 of the *Public Health Act 1991*.)
Clause 23 prohibits a person from purchasing a tobacco product or non-tobacco smoking product on behalf of a person under the age of 18 years. (See section 58A of the *Public Health Act 1991*.)
Clause 24 prohibits a manager or member of staff of premises on which a tobacco vending machine is situated from supplying a tobacco vending machine token to a person under the age of 18 years or activating a tobacco vending machine on behalf of a person under the age of 18 years.
Clause 25 prohibits a person from obtaining a tobacco vending machine token on behalf of a person under the age of 18 years.
Clause 26 enables a police officer to seize tobacco products or non-tobacco smoking products from persons in public places reasonably suspected of being under the age of 18 years. (See section 58 of the *Public Health Act 1991*.)
Clause 27 provides that evidence of age documents constitute documentary evidence of a person's age for the purpose of defences to offences under the proposed Division.
Clause 28 makes an employer liable for offences committed by employees under clauses 22 and 24. (See section 59A of the *Public Health Act 1991*.)

Division 2 Other measures for the protection of juveniles
Clause 29 enables the Minister to make a declaration in the Gazette that certain tobacco products are prohibited. It is an offence to sell a prohibited tobacco product. (See section 54A of the *Public Health Act 1991*.)
Clause 30 makes it an offence for a person to smoke in a motor vehicle when a person under the age of 16 years is present in the vehicle. The driver of the vehicle is also guilty of an offence if a passenger smokes in those circumstances.

Part 5 Restrictions on tobacco retailing
Division 1 Preliminary
Clause 31 defines the term "engaging in tobacco retailing" for the purposes of the proposed Part.
Clause 32 defines "conviction" for the purposes of the proposed Part as including being found guilty of an offence even though an order is made not to proceed to conviction.

Division 2 Prohibition against tobacco retailing
Clause 33 provides that a person who has been found guilty of 2 offences against the same provision of the proposed Act or the regulations on the same premises in a 3-year period is prohibited from engaging in tobacco retailing for 3 months. The clause also provides that a person who has been found guilty of 3 offences against the same provision of the proposed Act or the regulations on the same premises in a 3-year period is prohibited from engaging in tobacco retailing for 12 months.
Clause 34 provides that the prohibition from engaging in tobacco retailing only operates at the premises where the relevant offences occurred or other premises within 5 kilometres of those premises (unless those other premises were already being used by the person for tobacco retailing before the last of the relevant offences was committed).
Clause 35 makes it an offence for a person who is prohibited from engaging in tobacco retailing to do so on the premises to which the prohibition applies during the prohibition period provided in clause 33.
Clause 36 requires a person who is prohibited from engaging in tobacco retailing to ensure that tobacco products, non-tobacco smoking products and smoking accessories, and related

information, are not displayed on any business premises operated by the person during the prohibition period provided in clause 33.
Clause 37 provides for the effect of appeals against convictions on the operation of the provisions of the proposed Part.
Clause 38 provides for the way in which offences are to be taken into account for the purposes of clause 33.

Division 3 Notification by tobacco retailers
Clause 39 requires a person to notify the Director-General of the Department of Health before commencing to engage in tobacco retailing. Existing businesses have 3 months after the commencement of the clause to make the notification. Division 4 Seizure and forfeiture of tobacco products
Clause 40 gives an inspector power to seize tobacco products in a person's possession, custody or control in the course of committing, or for the purposes of committing, an offence under proposed Division 2.
Clause 41 provides for the forfeiture of seized tobacco products by order of the court that convicts a person for an offence under proposed Division 2.
Clause 42 provides for the destruction of forfeited tobacco and the recovery of the costs of destruction from the convicted person.
Clause 43 provides for the return of seized tobacco in certain circumstances.

Part 6 Enforcement
Clause 44 enables inspectors to enter premises and to carry out inspections for the purposes of the proposed Act.
Clause 45 enables an inspector to require certain information from the occupier or person in charge of premises in connection with a suspected offence against the proposed Act or the regulations.
Clause 46 makes it an offence to fail to comply with a requirement or direction of a police officer or an inspector made under the proposed Act or to give false information in relation to such a requirement.
Clause 47 makes it an offence to obstruct a police officer or inspector in the exercise of the police officer's or inspector's functions under the proposed Act or to impersonate an inspector.
Clause 48 enables an inspector to apply for a search warrant to enter premises if satisfied that there are reasonable grounds for believing that the proposed Act or the regulations have been contravened on the premises.
Clause 49 enables a Local Court to make certain orders in relation to the removal of tobacco advertisements displayed in contravention of the proposed Act or the regulations. Clause 50 enables a police officer or an inspector to issue a penalty notice in relation to offences against the proposed Act or the regulations that are prescribed as penalty notice offences.

Part 7 Proceedings for offences
Clause 51 prevents certain civil proceedings being brought against a person for complying with provisions of the proposed Act or the regulations.
Clause 52 provides for penalties for continuing offences against certain provisions of the proposed Act.
Clause 53 provides for directors and persons concerned in the management of a corporation to be liable for offences committed against the proposed Act or the regulations by the corporation in certain circumstances.

Clause 54 provides that an offence under the proposed Act or the regulations may be dealt with summarily by a Local Court or the Supreme Court and places limitations on the penalty that may be imposed in proceedings brought in a Local Court.

Part 8 Miscellaneous
Clause 55 provides that the Act binds the Crown.
Clause 56 excludes the Director-General of the Department of Health and inspectors from personal liability for certain acts done in good faith for the purpose of executing the proposed Act or the regulations.
Clause 57 makes provision for the service of documents under the proposed Act.
Clause 58 enables the Governor to make regulations for the purposes of the proposed Act.
Clause 59 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.
Clause 60 is a formal provision that gives effect to the amendments to the Acts set out in Schedule 2.
Clause 61 provides for the review of the proposed Act in 5 years from the date of assent to the proposed Act.

Schedule 1 Savings, transitional and other provisions
Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular, the proposed Schedule provides for lead-in times for certain new offences against the proposed Act.

Schedule 2 Amendment of Acts
Schedule 2 amends the Acts specified in the Schedule as a consequence of the enactment of the proposed Act.

Issues Considered by the Committee

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

Issue: Strict Liability

11. Numerous clauses in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the authority is not required to prove that the person intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. These include clauses such as those in Part 2 of the Bill relating to tobacco packaging, sale and display (clauses 6 – 11); those relating to tobacco vending machines (clauses 12 – 15); and those in Part 4 relating to the protection of juveniles (clauses 22 – 30).

12. The Committee, however, considers that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider the impact of the offence on the community, the penalty that may be imposed and the availability of any defences or safeguards.

13. Most of the strict liability provisions in the Bill are necessary in terms of securing compliance with provisions designed specifically to protect the interests of children. Australia's responsibilities under Article 3 of the Convention on the Rights of the Child 1990 place paramount importance on the best interests of the child being considered when actions and decisions concerning children are taken. The Committee considers that the current legislative proposals are consistent with those obligations.

14. The Committee also notes that no terms of imprisonment are imposed, as a penalty and that appropriate lead – in periods for offences have been included in the Bill. Accordingly, the Committee considers that the Bill does not trespass unduly on the rights and liberties of those that may be charged with certain strict liability offences.

Issue: Reverse Onus of Proof – Clause 15 of Part 2; Clause 28 and 30(4) and (5) of Part 4

15. Under clause 15 if the owner or lessee of a tobacco vending machine contravenes a provision in relation to tobacco vending machines the occupier of the premises on which the vending machine was situated is taken to have contravened the same provision, unless the occupier could not by the exercise of due diligence have prevented the contravention or the vending machine was placed on the premises without the occupier's knowledge or consent.

16. Under clause 28 if an employee contravenes section 22 or 24 relating to the sale of tobacco to minors the employer is taken to have contravened that section, whether or not the employee contravened the provision contrary to the employer's instructions. It is a defence to a prosecution under this provision if it is established that the employer had no prior knowledge of the contravention and that the employer could not by the exercise of due diligence have prevented the contravention.

17. Under clause for 30(1) a person must not smoke in a motor vehicle that is on a road if there is a person under the age of 16 years present in the vehicle. Clause 30(4) states it is a defence to a prosecution for an offence under this clause if the court is satisfied that when the defendant was smoking, the defendant believed on reasonable grounds that no person in the vehicle was under the age of 16 years.

18. Under clause 30(5) the driver of a motor vehicle in which a person is smoking, in contravention of subsection (1) is guilty of an offence. Clause 30(5) states it is a defence to prosecution for an offence under subsection (2) if the court is satisfied that the defendant believed on reasonable grounds that no person in the vehicle was under the age of 16 years.

19. The Committee notes that these provisions effectively reverse the onus of proof that requires a prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence. However the Committee considers that knowledge of the factual circumstances is peculiarly in the possession of the particular parties and that reversing the onus of proof in these circumstances has some justification. The Committee accordingly considers that these provisions do not trespass unduly on rights and liberties.

Issue: Deemed liability and reverse onus of proof – Clauses 16(5) and (6)

20. These subclauses relate to proceedings for offences concerning the advertising and promotion of tobacco products. Under the clause, a person must not, in New South Wales and for any direct or indirect benefit, display a tobacco advertisement in, or so that it can be seen or heard from, a public place or a place prescribed by the regulations.

21. The clause also prohibits the distribution to the public of any unsolicited object that constitutes or contains a tobacco advertisement or the sale or hire for any direct or indirect benefit of any object to any person if the object constitutes a tobacco advertisement.

22. Clause 16(5) states that in any proceeding for an offence under the provision, if there is present in the relevant tobacco advertisement the name of a person who manufactures a tobacco product or a trademark or brand name of a tobacco product, it is to be presumed until the contrary is proved, that the person displayed the tobacco advertisement, or distributed, sold or supplied the object, for a direct or indirect benefit.

23. Similarly, clause 16(6) states that in any proceedings for an offence under this section, if the thing that is alleged to constitute a tobacco advertisement contains the trademark or the brand name of a tobacco product it is to be presumed, until the contrary is proved, to be designed to promote or publicise the tobacco product to which it relates.

24. Clause 16 (5) and (6) contain provisions that not only deem liability but reverse the onus of proof. In these instances, the Committee always considers these serious enough to refer the matter to Parliament. Accordingly, the Committee asks Parliament to consider whether these provisions trespass unduly on the rights and liberties of those persons who may be charged with an offence under the particular provisions.

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

Issue: Commencement by proclamation – Clause 2

25. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate the power to the Government to commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

26. Although there may be good reasons why such discretion is required, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

8. RAIL SAFETY BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon David Campbell MP
Portfolio:	Transport

Purpose and Description

1. This Bill makes provision with respect to rail safety; to repeal the *Rail Safety Act 2002*; and for other purposes.

2. The main changes relate to channelling the requirements of accreditation to rail infrastructure managers and rolling stock operators, who are defined as rail transport operators, and introducing general duties to ensure public safety in relation to railway operations. The rationale for limiting accreditation to infrastructure managers and rolling stock operators is to provide accountabilities and responsibilities for safety back to the accredited party. This is consistent with the principle that safety cannot be contracted out. This will mean that infrastructure managers and rolling stock operators need to be able to demonstrate that their contractors' practices fit with their safety management systems. It will be an offence for a contractor not to comply with the safety management system of the rail transport operator.

3. This Bill provides new criteria under which applications for accreditation will be considered. An application for accreditation will not be granted unless, among other requirements, the ITSRR (Independent Transport Safety and Reliability Regulator) is satisfied that the applicant has the competence and capacity to manage risks to safety associated with the railway operations and has the competency and capacity to implement the safety management system. Accreditation may be granted subject to conditions or restrictions imposed by the ITSRR, and other conditions and restrictions may be imposed by regulations. The ITSRR may also revoke or suspend accreditation with reason.

4. This Bill provides a mechanism to achieve nationally consistent outcomes in decisions on applications for accreditation and related processes, where the applicant operates, or is applying to operate, in two or more jurisdictions. The rail safety regulators in each jurisdiction must consult with each other before determining the application, with the aim of coordinating decision making between jurisdictions. Rail safety regulators must also take into account guidelines issued for the purposes of this provision. These guidelines are intended to facilitate nationally consistent outcomes in decisions, and to improve the transparency and timeliness of decision making. The rail safety regulator must also provide reasons to the applicant if the regulator does not act consistently with the guidelines.

5. The introduction of general duties in the rail industry, similar to general duties provided in the Occupational Health and Safety Act, will provide a positive duty on those carrying out railway operations to ensure, so far as is reasonably practicable, the safety of rail operations. It will be an offence for failing to discharge that duty. The

extension of general duties to cover the providers of rail infrastructure and rolling stock, such as those who design, commission, manufacturer, supply, install or erect rail infrastructure or rolling stock, will ensure powers and safeguards to regulate all parties in the supply chain. Duties of care will also apply to rail safety workers when carrying out rail safety work. The inclusion of general duties will also clarify the function of the system of accreditation in the rail industry by making it clear that gaining accreditation is a threshold requirement only, and not a certification of safety.

6. It will mean the ITSRR will be able to enforce the general duty to ensure safety in relation to railway operations, and not just the obligations to develop and implement safety and risk management systems. General duties will further provide for the ITSRR in relation to other persons who carry out railway operations, such as those who may not otherwise be required to be accredited. To ensure national consistency, the Bill will introduce complementary duties of safety in relation to railway operations based on the national model rail safety legislation. The general duties of safety in the Bill will have the element of "reasonable practicability" in the general duty offence.

7. Aiming to be consistent with the national model rail safety law, clause 6 of this Bill will include guidance on what is required by a duty holder to ensure safety so far as is reasonably practicable. Under this Bill, on the civil standard, it will be for the defendant to prove that they did everything reasonably practicable in eliminating or minimising risks to the safety of their railway operations. The New South Wales Occupational Health and Safety law will continue to apply to New South Wales rail operators, including their duties around workplace safety. However, if there is any overlap or conflict between the Occupational Health and Safety provisions and the Rail Safety provisions, the Occupational Health and Safety legislation will apply.

8. There are requirements for rail transport operators to have and review safety management systems. In implementing a safety management system, rail transport operators will need to comply with requirements to be prescribed in regulations, to identify and assess risks to safety arising from railway operations, and to specify controls and monitor procedures relating to those risks.

9. The safety management system is to include other important matters, including interface agreements to manage risks to safety between two or more rail transport operators and between rail infrastructure managers and roads authorities; a security plan; an emergency plan; a health and fitness management program; a drug and alcohol program and a fatigue management program.

10. The Bill provides for new obligations on rail infrastructure managers and roads authorities to jointly manage risks arising from rail or road crossings, such as level crossings, road over rail bridges and rail over road bridges. This obligation extends the current obligation on railway operators to enter into interface agreements for managing risks to safety with other railway operators. A transitional period will apply to these requirements.

11. Before establishing, reviewing or varying a safety management system, a rail transport operator is required to consult with persons likely to be affected by the safety management system, including trade unions, or other employee organisations. A rail transport operator is also required to ensure that each rail safety worker who carries out rail safety work has the competence to do it and to keep records of competence. The Bill sets out procedures for assessing the competence of rail safety workers. Rail

transport operators will be required to provide rail safety workers with a form of identification sufficient to enable the worker's competence and training to be checked by a rail safety officer. It will be an offence for a worker, without reasonable excuse, not to produce the form of identification on request by a rail safety officer.

12. The Bill will exempt rail infrastructure managers of private sidings from accreditation, from the requirements of a safety management system (unless required to comply by regulation), and from certain notification requirements. However, managers of private sidings will be required to register the private siding with the ITSRR and to comply with any conditions imposed by ITSRR, as well as to have systems and processes to meet the general safety duty. There is currently no requirement in New South Wales to register private sidings, it is intended to provide a two-year transitional period in which to manage the implementation of this provision.

13. It builds on the range of compliance and enforcement powers currently in place, such as the power to issue improvement and prohibition notices or to bring prosecutions for contraventions of the Act. The proposed sections 141 and 142 set out a scheme whereby ITSRR may accept an undertaking from the alleged offender as an alternative to prosecution. Such undertakings, if not complied with, are enforceable by the court. The Bill includes additional court-based sanctions. For instance, it will be possible for a court to make a commercial benefit order requiring the person to pay an amount not exceeding three times the gross commercial benefit that the person received from the commission of the offence.

14. For systematic or persistent offenders, a court will be able to make a supervisory intervention order requiring the person to take specified actions for a specified period not exceeding one year. The specified actions a court may ask a person to undertake include actions to improve compliance with rail safety laws, to carry out specified practices and to appoint persons with specific compliance responsibilities. If a supervisory intervention order is not appropriate, the Bill provides that a court may make an exclusion order prohibiting a systematic or persistent offender from carrying out particular or all railway operations, or from being involved in the management of a corporation involved in managing rail infrastructure or operating rolling stock. It will be an offence for contravening such orders.

15. Proceedings for offences are to be brought in a Local Court constituted by an industrial magistrate and the Industrial Relations Commission in Court Session. This court currently has jurisdiction to hear matters arising under the Occupational Health and Safety Act. The referral of proceedings to this jurisdiction will ensure consistent judicial treatment of safety matters in the railway context. The Bill will provide for appeals against ITSRR's decision to review an improvement notice or prohibition notice to be made to a local court constituted by an industrial magistrate.

16. The current provisions of the Rail Safety Act relating to the functions of the chief investigator of the Office of Transport Safety Investigation, including provisions directed at investigations and rail safety inquiries, will be retained.

Background

17. This Bill aims to implement the national model rail safety legislation developed from an intergovernmental agreement for regulatory and operational reform in road, rail and intermodal transport. The intergovernmental agreement tasked the National Transport

Commission with developing reforms to improve and strengthen the co-regulatory system for rail safety across Australia. This Bill also builds on rail safety reforms introduced in New South Wales since 2002 in response to the special commissions of inquiry into the Glenbrook and Waterfall rail accidents. The Council of Australian Governments has also committed to harmonise rail safety regulation to achieve a nationally consistent approach to interstate rail safety regulation. The New South Wales Government has committed to do this by 31 December 2008.

18. The New South Wales Independent Transport Safety and Reliability Regulator [ITSRR] has taken part in the national reform process, consistent with Recommendation 120 of the Waterfall inquiry. There has been consultation with the Rail, Tram and Bus Union (RBTU) and Unions NSW.

19. To address concerns raised by councils during consultation, the Bill clarifies that the protection for roads authorities provided by the *Civil Liability Act 2002* will remain. However, unlike the National Model Rail Safety Legislation, New South Wales intends to maintain regulations providing for the random drugs and alcohol testing of a person who is carrying out rail safety work. New South Wales also intends to maintain existing fatigue management provisions prescribing the outer hours of work for train drivers in a schedule to the Act.

20. The National Model Rail Safety Regulations have been developed. The model regulations address a range of matters, including the accreditation requirements and the requirements for a safety management system. This means that all existing regulations will need to be remade consistent with the national model regulations. The Government has already commenced the task by releasing late last year the draft New South Wales Rail Safety Regulations for public consultation.

The Bill

The objects of this Bill are:

(a) to establish general duties to ensure safety in relation to railway operations, and
(b) to implement in New South Wales a nationally consistent scheme for other rail safety requirements and accreditation of rail transport operators, and
(c) to repeal the *Rail Safety Act 2002* and to re-enact certain provisions of that Act relating to offences, and
(d) to make consequential amendments to other Acts.

Outline of provisions

Part 1 Preliminary
The proposed Part (proposed sections 1–7) contains provisions relating to the citation and commencement of the proposed Act, as well as a provision setting out the objects of the proposed Act and provisions defining words and expressions used in the proposed Act. Words and expressions defined include ***rail infrastructure***, ***rolling stock***, ***rail transport operator***, ***rail infrastructure manager***, ***notifiable occurrence***, ***rolling stock operator***, ***rail safety worker***, ***railway*** and ***railway operations***. The proposed Part defines the components of a duty under the proposed Act to ensure, so far as is reasonably practicable, safety. The proposed Part also sets out the railways that the proposed Act does not apply to, including slipways and aerial cable operated systems, and describes the classes of work that are ***rail safety work*** for the purposes of the proposed Act.

Part 2 General rail safety

Division 1 Duties to ensure public safety of railway operations

The proposed Division (proposed sections 8–11) imposes on rail transport operators and other persons duties relating to rail safety and makes it an offence to fail to carry out those duties. The duties include the following:

(a) a requirement that a rail transport operator or person carrying out railway operations must ensure, so far as is reasonably practicable, the safety of the railway operations, with a failure to do particular things being a contravention of the duty. Those things include developing or implementing, so far as is reasonably practicable, safety systems for railway operations, ensuring the competence, health and fitness of rail safety workers and that they are not affected by alcohol or drugs or fatigue, providing adequate facilities for the safety of persons at railway premises and providing information. In the case of rail infrastructure managers they also include ensuring that the design, construction, commissioning and other matters relating to rail infrastructure are done in a way that ensures, so far as is reasonably practicable, the safety of railway operations and that systems and procedures for scheduling, controlling and monitoring railway operations also ensure safety. Rolling stock operators must do similar things,

(b) a requirement that persons who design, commission, manufacture, supply, install or erect a thing, and who know or ought reasonably to know that the thing is to be used as or in connection with rail infrastructure or rolling stock, ensure, so far as is reasonably practicable, that it is safe when properly used. The duty extends to testing and examination and providing adequate information about its safe use,

(c) a requirement that a person who decommissions rail infrastructure or rolling stock must ensure, so far as is reasonably practicable, that the decommission is carried out safely and must carry out testing and examination necessary to comply with the duty,

(d) requirements imposed on rail safety workers, when carrying out rail safety work, to take reasonable care for their own safety, the safety of people who may be affected by the workers' acts or omissions and to co-operate with the rail transport operator with respect to any action taken to comply with the proposed Act or regulations under the proposed Act.

The proposed Division also imposes on a defendant, in proceedings for an offence concerning the general duties set out in proposed Division 1 of Part 2, the onus to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty.

Division 2 Safety management of railway operations

The proposed Division (proposed sections 12–24) sets out specific requirements for rail transport operators to have and to review safety management systems and makes it an offence not to comply with those requirements. That obligation also extends to contractors (not being employees) who do rail safety work on behalf of a rail transport operator. It will also be an offence not to implement, and to fail to comply with, the safety management system. The safety management system is to comply with requirements to be prescribed by regulations, to identify and assess risks to safety arising from railway operations and specify controls and monitoring procedures relating to those risks. It is to include the following:

(a) measures to manage risks to safety arising to the railway operations of the rail transport operator from operations of other rail transport operators or road and rail crossings,

(b) a security management plan,
(c) an emergency management plan that complies with requirements to be prescribed by regulations,
(d) a health and fitness management program that complies with requirements to be prescribed by regulations,
(e) a drug and alcohol management program that complies with requirements to be prescribed by regulations,
(f) a fatigue management program that complies with requirements to be prescribed by regulations.

Safety performance reports are to be submitted by rail transport operators to the Independent Transport Safety and Reliability Regulator (the ***ITSRR***) annually, or within such other periods as are agreed between the operators and the ITSRR. In addition, the ITSRR may arrange with a rail transport operator for the random testing of a person who is on duty for the purpose of carrying out rail safety work for the presence of alcohol or drugs. Regulations may be made with respect to testing procedures and offences of failing to comply with test procedure requirements (proposed Schedule 1).

A rail transport operator is required to ensure that each rail safety worker who carries out rail safety work has the competence to do so and to keep records of competence.

Procedures for assessing competence are also set out.

The proposed Division also requires rail safety workers to be provided by the rail transport operator with a form of identification sufficient to enable the worker's competence and training to be checked by a rail safety officer and makes it an offence for a worker, without a reasonable excuse, not to produce the form of identification on request by a rail safety officer.

The ITSRR may direct a rail transport operator to amend its safety management system.

Division 3 Interface co-ordination

The proposed Division (proposed sections 25–33) imposes the following obligations on rail transport operators, rail infrastructure managers and roads authorities in relation to risks to safety arising from their operations and railway operations of other rail transport operators or from rail or road crossings:

(a) a rail transport operator must assess risks to safety arising from railway operations of other rail transport operators, determine measures to manage the risks and seek to enter interface agreements for managing those risks with the other operators,
(b) a rail infrastructure manager must assess risks to safety arising from rail or road crossings, consider or determine (in the case of public roads) measures to manage the risks and must (in the case of public roads) or may (in the case of other roads) seek to enter into interface agreements for managing those risks with the roads authority for the road concerned,
(c) a roads authority must assess risks to safety arising from rail or road crossings wholly or partly because of railway operations, determine measures to manage the risks and seek to enter interface agreements for managing those risks with the roads authority for the road concerned if it is a public road or any other road (if a rail infrastructure manager has notified the authority that the risks should be managed jointly).

If the relevant agreements are not entered into, the ITSRR may appoint a person to give directions as to the interface arrangements that are to apply and it will be an offence not to comply with a direction. The proposed Division also requires rail transport operators and roads authorities to maintain registers of applicable interface agreements and arrangements determined under the proposed Division.

Part 3 Accreditation of rail transport operators
Division 1 Requirement for accreditation

The proposed Division (proposed sections 34–37) makes it an offence for a person to carry out railway operations unless the person is a rail transport operator who is accredited under proposed Part 3, carries out the operations on behalf of an accredited person or an exempt person or is exempt from the requirement for accreditation. A person may be accredited to carry out railway operations for specified railways or parts of railways, for a particular service or aspect of railway operations or for specified railway operations such as to permit construction and repair work. It will also be an offence to fail to comply with a condition or restriction of an accreditation or to carry out a railway operation not authorised by an accreditation or in a manner not so authorised, or to cause or permit another person to do so.

Division 2 Applications for accreditation

The proposed Division (proposed sections 38–45) sets out requirements for applications to the ITSRR for accreditation. Accreditation may not be granted unless, among other requirements, the ITSRR is satisfied that the applicant has the competence and capacity to manage risks to safety associated with the railway operations and has the competence and capacity to implement the proposed safety management system. Accreditation may be granted subject to conditions or restrictions imposed by the ITSRR and other conditions or restrictions may be imposed by regulations. One or more applicants for accreditation may be directed by the ITSRR to co-ordinate their applications if the ITSRR thinks it necessary to ensure the applicants' railway operations are carried out safely. An accreditation cannot be transferred or assigned but the ITSRR may waive requirements of the proposed Division for a transferee of railway operations.

Division 3 Accreditation fees and inspection of documents

The proposed Division (proposed sections 46–51) enables the regulations to prescribe annual accreditation fees and contains other related provisions, including provisions that confer powers on the ITSRR to accept fees by instalments and to waive fees. Rail transport operators are also required to make current notices of accreditation or exemption available for public inspection. Private siding operators must also make registration notices available for public inspection.

Division 4 Surrender, revocation and variation of accreditation

The proposed Division (proposed sections 52–59) enables an accredited person to surrender his or her accreditation and enables the ITSRR to suspend or revoke an accreditation or to impose conditions or restrictions on, or vary the conditions on or restrictions of, an accreditation. Such action may be taken if a person is not able to demonstrate the requirements for accreditation, is not able to comply with the conditions or restrictions of accreditation, has not managed the accredited railway operations for at least 12 months or contravenes the proposed Act or regulations.

Notice of any such action is to be given and a person the subject of action may make submissions to the ITSRR. The ITSRR may immediately suspend an accreditation if it considers there is, or would be (without suspension), an immediate and serious risk to safety. The proposed Division also provides for applications by accredited persons to vary accreditations or the conditions or restrictions of accreditations and applies the requirements for the granting of an accreditation to such applications. The proposed Division also makes it clear that any accreditation that is varied is subject to any conditions or restrictions prescribed by the regulations and that are applicable to the varied accreditation.

Division 5 Private sidings

The proposed Division (proposed section 60) exempts the rail infrastructure manager of a private siding from accreditation, safety management system and certain notification requirements of the proposed Act but requires the manager to register the siding with the ITSRR and comply with any conditions imposed by the ITSRR with respect to the siding. The manager may also be required, by the regulations, to
comply with the safety management system requirements of the proposed Act or the notification requirements.

Part 4 Safety reports and investigations
Division 1 Safety reports
The proposed Division (proposed sections 61–64) enables the ITSRR, by notice in writing, to require a rail transport operator to provide the ITSRR with information about measures taken to promote rail safety or relating to the operator's financial capacity and insurance arrangements. It also enables regulations to be made requiring the provision of information to the ITSRR. It will be an offence to fail to comply with any such requirement. The ITSRR is to make an industry safety report to the Minister for Transport in each year on the carrying out of railway operations of accredited persons, including reporting on rail safety and improvements and changes in rail safety, as well as on any other matters prescribed by the regulations.
Notifiable occurrences (which include accidents or incidents that have, or could have, resulted in significant property damage, serious injury or death) must be reported by a rail safety operator to the ITSRR or another authority specified by the ITSRR. The ITSRR may also require other specified occurrences that endanger or could endanger rail safety to be reported. It will be an offence not to comply with these obligations.
The proposed Division also re-enacts the provision of the *Rail Safety Act 2002* that provides for the Chief Investigator of the Office of Transport Safety Investigations (the ***Chief Investigator***) to establish a system for the voluntary reporting by rail safety workers of matters that may affect the safety of railway operations.

Division 2 Investigations of accidents and incidents
The proposed Division (proposed sections 65–74) provides for the following investigations and inquiries:

(a) investigations, at the request of the Chief Investigator, by rail transport operators of notifiable occurrences and railway accidents or incidents that may endanger the safety of railway operations or other matters prescribed by regulations,
(b) investigations by the Chief Investigator of, and reports to the Minister for Transport on, railway accidents or incidents that may endanger the safety of railway operations, either at the discretion of the Chief Investigator or on the Minister's request,
(c) rail safety inquiries by Boards of Inquiry constituted by the Minister into a railway accident or incident or any other event that may affect the safety of railway operations.

The proposed Division prohibits information obtained by the Chief Investigator from a report by a rail transport operator under proposed section 65 from being used (unless a court otherwise directs) in criminal or civil proceedings against the operator. It also sets out the powers of the Chief Investigator and a Board of Inquiry to require persons to answer questions and produce evidence for the purposes of an investigation or a rail safety inquiry. The Chief Investigator may request that a rail safety inquiry be held and assessors may be appointed to sit with and advise a Board of Inquiry. The report of a rail safety inquiry is to be given to the Minister for Transport and tabled in Parliament.

Division 3 Disclosure of train safety records
The proposed Division (proposed sections 75–83) re-enacts sections 71–78 of the *Rail Safety Act 2002* relating to the disclosure of train safety records to persons and in proceedings in courts.

Division 4 Audit by ITSRR
The proposed Division (proposed section 84) enables the ITSRR to audit the railway operations of rail transport operators and to conduct an annual audit program for the railway operations of rail transport operators.

Part 5 Investigation powers
Division 1 Powers of entry

The proposed Division (proposed sections 85–87) confers on rail safety officers powers to enter places (including railway premises) for compliance and investigative purposes or in an emergency. A residence may not be entered without a search warrant or the occupier's consent. Reasonable notice must be given of an intention to enter railway premises.

Division 2 General enforcement powers of rail safety officers
The proposed Division (proposed sections 88–93) sets out the powers of rail safety officers who enter a place under the proposed Part, including search and seizure powers and the power to require a person to answer questions or otherwise give information.
Other powers that the proposed Division confers are:

(a) powers relating to relevant documents found in a place, and
(b) powers to use assistants, and
(c) powers to operate electronic equipment to access information, and
(d) powers to use equipment on a place or vehicle to examine or process things found on the vehicle or place, and
(e) a power to secure a site for investigative, compliance or safety offences.

It will be an offence to enter a secured site without the permission of a rail safety officer.

Division 3 Search warrants
The proposed Division (proposed section 94) enables a rail safety officer to apply for a search warrant to enter and search a place if the rail safety officer believes on reasonable grounds that the provisions of the proposed Act or regulations or the terms of an accreditation have been or are being contravened in or on a place or something connected with such a contravention is in or on a place.
Division 4 Powers to support seizure
The proposed Division (proposed sections 95–98) confers on rail safety officers the following powers and obligations related to seizure of things under the proposed Part:

(a) power to direct things to be taken to specified places or remain under the control of a person at a specified place,
(b) an obligation to give a receipt for any thing seized (or to leave a receipt in a conspicuous place) and to enable the owner to have access to the thing,
(c) a power to issue an embargo notice prohibiting certain actions (such as moving, sale, deletion of information) from being taken in relation to a thing that cannot, or cannot readily, be seized or moved.

It will be an offence to do any thing forbidden by an embargo notice or to instruct or request another person to do so or to fail to take reasonable steps to prevent another person from doing something forbidden by an embargo notice.

Division 5 Dealings with seized items

The proposed Division (proposed sections 99–102) sets out procedures for dealing with things seized under the proposed Part. A rail safety officer must return any such thing to the owner if it is not required as evidence or is not forfeited or the officer is otherwise authorised to retain, destroy or dispose of it. Conditions may be imposed
on the return of an item so as to eliminate or reduce risks to safety. A thing that is seized may be forfeited to the Crown if the rail safety officer involved in its seizure considers it is necessary to retain it to prevent an offence or if, after making reasonable efforts or inquiries, the thing cannot be returned to its owner or the owner cannot be found. The ITSRR may deal with a forfeited thing in any way it thinks fit.
Provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* that are applicable to property in the custody of police officers are applied to property in the custody of a rail safety officer.

Division 6 Directions
The proposed Division (proposed sections 103–107) confers on rail safety officers the following powers and obligations relating to directions:

(a) power to direct a rail transport operator or rail safety worker to give the rail safety officer reasonable assistance to exercise a function under the proposed Part,
(b) power to direct a person to state the person's name and address if the person is committing an offence against rail safety law, is found in circumstances that lead to a reasonable suspicion that the person has committed such an offence or is a person carrying out railway operations who is found at railway premises and the rail safety officer reasonably considers the information is necessary for the purposes of the proposed Act or regulations,
(c) an obligation to warn a person that it is an offence to fail to comply with a direction under paragraph (a) or (b) unless the person has a reasonable excuse,
(d) power, if the rail safety officer has reasonable grounds to believe that a person is capable of giving information, producing documents or giving evidence in relation to a possible contravention of a rail safety law or for the purposes of an audit, investigation, rail safety inquiry or other inquiry, by notice in writing, to require the person to give information, produce documents or appear before a rail safety officer to give such evidence and produce such documents,
(e) a power to inspect, take copies of or take possession of documents produced in response to the notice.

It will be an offence for a person who is given a notice referred to in the proposed Division to fail to comply with the notice unless the person has a reasonable excuse.

Division 7 Miscellaneous
The proposed Division (proposed sections 108–111) makes it clear that a rail safety officer may give more than one direction under the proposed Part on the same occasion under different provisions and may give further directions. It also empowers a person authorised by the ITSRR to close temporarily, or regulate, a railway crossing and requires notice to be given of such actions.
The proposed Division also imposes an obligation on a rail safety officer to take reasonable steps to return any rail infrastructure, rolling stock, railway premises or motor vehicle that is damaged by the use of unreasonable or unauthorised force to the condition in which it was before the action was taken. The ITSRR must also pay compensation for damage caused by the exercise of a power of entry by a rail safety officer except where an inspection reveals a

breach of a law. It prohibits the use of any more force than is reasonably necessary to effect an entry or to exercise a power.

Part 6 Improvement and prohibition notices
Division 1 Improvement notices

The proposed Division (proposed sections 112–116) sets out a scheme for the issuing, enforcement and withdrawal and amendment of improvement notices to require remedial rail safety work to be undertaken, a contravention or likely contravention of a rail safety law to be remedied or railway operations or operations in relation to a rail or road crossing to be carried out safely, within a specified period (of at least 7 days). An improvement notice may be issued if a rail safety officer believes on reasonable grounds that a person is contravening a rail safety law, has contravened and is likely to continue to contravene a rail safety law or is carrying out or has carried out railway operations that threaten safety. It will be an offence to fail to comply with a notice unless the person has a reasonable excuse and it will be a defence in proceedings for an offence if a contravention or threat to safety is remedied by a method other than one specified in a notice. The issue of or any other action relating to an improvement notice does not affect any proceedings in relation to any connected matter. The ITSRR may arrange for rail safety work to be carried out to remedy a matter that is the subject of an improvement notice that is not complied with and may recover its costs from the person to whom the notice is issued.

Division 2 Prohibition notices

The proposed Division (proposed sections 117–121) sets out a scheme for the issuing, enforcement and withdrawal and amendment of prohibition notices to prohibit the carrying on of an activity either wholly or in a specified way. A prohibition notice may be issued if a rail safety officer believes on reasonable grounds that an activity that involves or will involve an immediate risk to safety is occurring, or may occur, in relation to railway operations or railway premises or may occur at, on, or in the immediate vicinity of, rail infrastructure or rolling stock. An oral direction prohibiting an activity may be made if it is not possible or reasonable to immediately serve a notice. An oral direction ceases to have effect if a prohibition notice is not issued within 5 days of the giving of the direction. It will be an offence to fail to comply with a notice or oral direction unless the person has a reasonable excuse. The issue of or any other action relating to a prohibition notice does not affect any proceedings in relation to any connected matter.

Division 3 General provisions relating to notices

The proposed Division (proposed sections 122–125) enables a person given an improvement notice or a prohibition notice to apply to the ITSRR for a review of the notice and then, if not satisfied with the result of the review, to the Local Court constituted by an Industrial Magistrate. The effect of an application for a review is to stay an improvement notice but a prohibition notice may only be stayed by the Local Court constituted by an Industrial Magistrate. The proposed Division also makes it clear that the revocation or withdrawal of an improvement notice or a prohibition notice does not prevent the issue of another notice.

Part 7 Offences, penalties and other sanctions

Division 1 Offences

The proposed Division (proposed sections 126–131) provides for the following offences:

(a) intentionally obstructing or hindering the ITSRR or a rail safety officer or a person assisting them or intentionally concealing the location or existence of, or failing to comply with a request to produce, a record, document or other thing,

(b) impersonating or falsely representing to be a rail safety officer,
(c) attempting to obtain, or obtaining, by false statement or misrepresentation, an accreditation,
(d) forging or fraudulently altering or using or purporting to use an accreditation or fraudulently allowing an accreditation to be used by any other person,
(e) failing to give a notice of the commencement, discontinuation or completion of activities prescribed by the regulations that may adversely affect the safety of rail infrastructure or rolling stock,
(f) tampering or disabling emergency or safety equipment of a railway or a unit or units of rolling stock or the interlocking system of a railway.

The proposed Division re-enacts, with minor changes, a provision of the *Rail Safety Act 2002* enabling the regulations to make provision for offences relating to fare evasion, trespass and other matters relating to passenger conduct and the regulation and control of trains, drivers and railways.

Division 2 Proceedings for offences

The proposed Division (proposed sections 132–139) confers jurisdiction on the Local Court and the Industrial Court of New South Wales to deal with offences under the proposed Act and contains other matters relating to proceedings, including limiting the Local Court to imposing maximum penalties of 500 penalty units or 12 months imprisonment, or both. Offences under the regulations relating to conduct on railway premises are to be dealt with by the Local Court. The proposed Division sets out the period within which proceedings for offences under the proposed Act or regulations may be commenced, enables proceedings for such offences to be taken by the ITSRR or a person authorised by the ITSRR and makes a director or person concerned in the management of a corporation liable for such offences unless they show they were not in a position to influence the conduct of the corporation or, if in such a position, used all due diligence to prevent the offence.

The proposed Division also makes it clear that persons may be proceeded against for multiple offences against the proposed Act or regulations in relation to different parts of the same rail infrastructure, railway premises or rolling stock and provides for continuing offences.

The proposed Division also applies provisions of the *Occupational Health and Safety Act 2000* relating to the prosecution of Crown and State agencies to offences under the proposed Act and regulations made under the proposed Act.

Penalty notices will be able to be issued for offences prescribed by the regulations as penalty notice offences.

Division 3 Enforceable voluntary undertakings

The proposed Division (proposed sections 140 and 141) sets out a scheme whereby the ITSRR may accept voluntary undertakings by persons in relation to a contravention or alleged contravention of the proposed Act or regulations but may not bring proceedings related to the offence while the undertaking is in force. An undertaking may be enforced by the Local Court constituted by an Industrial Magistrate.

Division 4 Court-based sanctions

The proposed Division (proposed sections 142–146) provides for the following remedies, at the discretion of a court, if the court finds a person guilty of an offence under the proposed Act or regulations:

(a) a commercial benefits order requiring the person to pay, as a fine, an amount not exceeding 3 times the gross commercial benefit (as estimated by the court) that the person or an associate (such as a close relative or related body corporate) received or was likely to receive from the commission of the offence,

(b) if the court considers the person to be a systematic or persistent offender against rail safety laws, a supervisory intervention order requiring the person to take specified actions for a specified period not exceeding one year, including actions to improve compliance with rail safety laws, to carry out specified practices and appointing persons with specific compliance responsibilities,

(c) if the court considers the person to be a systematic or persistent offender against rail safety laws and that a supervisory intervention order is not appropriate, an exclusion order prohibiting the person, for a specified period, from carrying out specified or any railway operations or from being involved in the management of a corporation involved in managing rail infrastructure or operating rolling stock or from being involved in managing rail infrastructure or operating rolling stock.

It will be an offence to contravene a supervisory intervention order or an exclusion order.

Part 8 Administration

The proposed Part (proposed sections 147–154) enables the Minister to delegate any of the Minister's functions under the proposed Act to any member of staff of the ITSRR.

The proposed Part also enables the ITSRR to appoint rail safety officers and requires rail safety officers to be issued with identification cards, not to exercise functions as an officer unless issued with an identification card, to display the identification card or wear an approved uniform when exercising functions and to produce the identification card if requested to do so by a person in relation to whom a function is being or is to be exercised. The ITSRR may also exercise any function conferred on a rail safety officer. Under an agreement with another State or Territory, rail safety officers may exercise functions in the other State or Territory and rail safety officers from the other State or Territory may exercise functions in this State.

Part 9 Miscellaneous

The proposed Part (proposed sections 155–179) contains the following miscellaneous provisions relating to enforcement, liability, regulations and other matters:

(a) a provision providing for the proposed Act to bind the Crown in right of New South Wales and, in so far as the legislative power of the Parliament permits, the Crown in all its other capacities,

(b) a provision enabling the ITSRR to enter into information sharing arrangements with WorkCover, the Chief Investigator and other prescribed persons or bodies concerning information relating to possible breaches of the proposed Act or regulations, the safe carrying out of railway operations and other prescribed information,

(c) provisions establishing a scheme for the review of specified decisions by the ITSRR under the proposed Act, consisting of an initial review of the decision by the ITSRR and a further right to seek a review from the Administrative Decisions Tribunal,

(d) a provision providing for protection from self-incrimination for persons required under the investigation provisions of the proposed Act to make statements, give or furnish information or answer questions or produce documents, so that any such statement, information or document may not be used in criminal proceedings (other than those relating to the giving of false or misleading information or similar offences), if the person objected on the ground of self-incrimination or the person was not warned that providing the statement, information or document might incriminate the person,

(e) provisions requiring the ITSRR to keep records of the granting, refusal and variation of accreditations and the granting of improvement and prohibition notices and enabling the ITSRR to issue evidentiary certificates based on such records and providing for such certificates to be admissible in proceedings,

(f) a provision making it an offence for persons who are or have been engaged in the administration of the proposed Act to disclose or communicate information obtained in that administration except in certain specified circumstances,

(g) a provision making it clear that the provisions establishing rail safety duties under the proposed Act do not confer a right of action in civil proceedings or a defence in civil proceedings,

(h) a provision excluding the Minister, the ITSRR, the Chief Investigator, a member of, or an assessor for, a Board of Inquiry, an officer of the ITSRR, a rail safety officer or a person acting under the direction of any such person from personal liability for things done or omitted in good faith for the purposes of the proposed Act or any other Act,

(i) a provision excluding the State or an authority of the State from civil liability for any act or omission of the Minister, the ITSRR, the Chief Investigator, a member of, or an assessor for, a Board of Inquiry, a rail safety officer or an officer of the ITSRR in exercising functions under the proposed Act,

(j) a provision conferring immunity from action on a person who, in good faith, reports to the ITSRR or a rail transport operator or an employee or contractor of the ITSRR or a rail transport operator that a person is unfit to carry out rail safety work or that it may be dangerous to allow the person to carry out rail safety work,

(k) provisions establishing a scheme for the approval by order of the Minister of compliance codes (which may be disallowed in the same way as regulations) and for the approval by order of the ITSRR of guidelines. A code and evidence of a failure to observe a code may be admissible as evidence in criminal proceedings. A person is not liable to any civil or criminal proceedings by reason only of a failure to observe a compliance code,

(l) a provision enabling the ITSRR to recover the costs of entry and inspection of rail infrastructure, rolling stock or railway premises,

(m) a provision enabling money payable to the ITSRR under the proposed Act or regulations to be recovered by the ITSRR as a debt in a court of competent jurisdiction,

(n) a provision prohibiting contracting out of any or all of the provisions of the proposed Act,

(o) a provision setting out how documents required to be served under the proposed Act may be served,

(p) a provision setting out additional matters for which regulations may be made under the proposed Act and enabling the making of regulations,

(q) a provision about the relationship between the proposed Act and the occupational health and safety legislation,

(r) a provision repealing the *Rail Safety Act 2002*,

(s) formal provisions giving effect to Schedule 3 (which contains savings and transitional provisions) and Schedule 4 (which contains amendments to other Acts),

(t) a provision providing for the review of the proposed Act as soon as possible after the period of 5 years after the proposed Act is assented to.

Schedule 1 Rail safety workers—alcohol or other drugs

Schedule 1 contains regulation-making powers enabling regulations to be made to establish a system for the testing of rail safety workers for the presence of alcohol or other drugs, including regulations as to the conduct of testing, devices for testing and offences relating to the carrying out by rail safety workers of rail safety work while under the influence of alcohol or any other drug or while having the prescribed concentration of alcohol in the worker's breath or blood. Regulations may also be made creating offences relating to refusals or failures to undergo tests and conferring protection against personal liability on persons administering tests.

Schedule 2 Fatigue management

Schedule 2 re-enacts, with some changes, the provisions of the *Rail Safety Act 2002* which established rules for the working periods, and breaks between working periods, of train drivers. Regulations may be made amending the proposed Schedule.

Schedule 3 Savings, transitional and other provisions

Schedule 3 enables regulations containing savings and transitional provisions to be made as a consequence of the enactment of the proposed Act and contains savings and transitional provisions consequent on that enactment.

Schedule 4 Amendment of other Acts

Schedule 4 contains amendments to other Acts consequent on the enactment of the proposed Act and the repeal of the *Rail Safety Act 2002*.

Issues Considered by the Committee

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

Issue - Reverse Onus of Proof:

Proposed Part 2, Division 1 – Clause 11 Onus of proving limits of what is reasonably practicable under this Division:

21. Proposed clause 11 reads: In any proceedings for an offence against a provision of this Division consisting of a failure to comply with a duty to do something so far as is reasonably practicable, it is for the defendant to prove that it was not reasonably practicable to do more than was in fact done to satisfy the duty.

22. This effectively reverses the onus of proof that requires the authority to prove all elements of an offence. This is inconsistent with a presumption of innocence. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is in the possession of one party.

23. The Committee notes that the proposed clause 11 in Part 2, Division 1, to place the onus of proof on the defendant in relation to establishing that it was not reasonably practicable to do more than was in fact done to satisfy the compliance with a duty to do something so far as is reasonably practicable, may be justified in these circumstances since such a knowledge of the facts would be in the possession of the defendant. Therefore, the Committee is of the view that this does not trespass unduly on personal rights and liberties.

Proposed Part 6, Division 1 – Clauses 113 (2) and (3) Contravention of improvement notice:

24. A person on whom an improvement notice has been served must comply with the notice unless the person has a reasonable excuse. Clause 113 (2) reads: In proceedings against a person for an offence of engaging in conduct that results in a contravention of a requirement of an improvement notice served on a ground stated in section 112 (1) (a) or (b), it is a defence if the defendant establishes that: (a) the alleged contravention or likely contravention, or (b) the matters or activities occasioning the alleged contravention or likely contravention, were remedied within the period specified in the notice, though by a method different from that specified in the improvement notice.

25. Clause 113 (3) reads: In proceedings against a person for an offence of engaging in conduct that results in a contravention of a requirement of an improvement notice on the ground stated in section 112 (1) (c) or (d), it is a defence if the defendant establishes that the threat to safety was removed within the period specified in the notice, though by a method different from that specified in the improvement notice.

26. These effectively reversed the onus of proof that required the authority to prove all elements of an offence. This is inconsistent with a presumption of innocence. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is in the possession of one party.

27. The Committee notes that the proposed clauses 113 (2) and (3) in Part 6, Division 1, to place the onus of proof on the defendant in relation to establishing the above defences, may be justified in these circumstances. The Committee is of the view that the knowledge of the factual circumstances of the method used (which differed from that specified in the improvement notice), to either remedy the alleged contravention or likely contravention or to remove the threat of safety within the specified period, would be in the possession of the defendant. Therefore, the Committee concludes that these clauses do not trespass unduly on personal rights and liberties.

Proposed Part 7, Division 2 – Clause 132 (4) Proceedings for offences:

28. Proposed clause 132 (4) reads: In any proceedings for an offence under this Act, the onus of proving that a person had a reasonable excuse is on the defendant.

29. This reverses the onus of proof that requires the authority to prove all elements of an offence. This is inconsistent with a presumption of innocence. However, reversing the onus of proof may be justified in particular circumstances such as where knowledge of the factual circumstances is in the possession of one party.

30. The Committee finds that the proposed clause 132 (4) in Part 7, Division 2, to place the onus of proof on the defendant in relation to proving that the defendant had a reasonable excuse, may be justified in these circumstances. The Committee notes that such knowledge of the factual circumstances to establish a reasonable excuse would be in the possession of the defendant. Therefore, the Committee is of the view that this does not trespass unduly on personal rights and liberties.

Proposed Part 7, Division 2 – Clauses 136 (4) and (5) Offences by corporations:

31. Proposed clause 136 (1) covers the contravention of any provision of the Act or the regulations by a corporation (whether by act or omission) where each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the same provision. The same applies if an employee contravenes (whether by act or omission), any provision of the Act or the regulations, where the employer is taken to have contravened the same provision (clause 136 (2)).

32. Proposed clause 136 (4) reads: It is a defence to an offence arising under subsection (1) if the defendant establishes that the defendant: (a) was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or (b) being in such a position, took reasonable precautions and exercised due diligence to prevent the contravention.

33. Proposed clause 136 (5) reads: It is a defence to an offence arising under subsection (2) if the defendant establishes that the defendant: (a) had no knowledge of the actual contravention, or (b) being in such a position, took reasonable precautions and exercised due diligence to prevent the contravention.

34. These reversed the onus of proof that required the authority to prove all elements of an offence. This is inconsistent with a presumption of innocence. Reversing the onus of proof, however, may be justified in certain circumstances such as where knowledge of the facts is in the peculiar possession of one party.

35. The Committee believes that the proposed clauses 136 (4) and (5) in Part 7, Division 2, to place the onus of proof on the defendant, may be justified in these circumstances. The Committee notes that for the defendant to establish that either the defendant was not in a position to influence the conduct of the corporation in relation to the contravention of the provision, or took reasonable precautions and exercised due diligence to prevent the contravention in subclause (4); or to establish that the defendant either had no knowledge of the actual contravention or took reasonable precautions and exercised due diligence to prevent the contravention in subclause (5), would be facts possessed within the knowledge of the defendant. Accordingly, the Committee does not find these clauses to be trespassing unduly on personal rights and liberties.

Issue - Strict Liability:

36. Numerous clauses[3] throughout the Bill impose strict liability in relation to various offences. Strict liability will in some cases cause concern as it effectively displaces the

[3] Some of the clauses include the following: Part 2, Division 2: proposed clause 15 (3) Safety performance reports; proposed cl 17 (2) and (3) Emergency management plan; proposed cl 21 (5) Competence of rail safety workers; proposed cl 22 (1) and (2) Identification for rail safety workers; proposed cl 23 Other persons to comply with safety management system; Part 2, Division 3: proposed cl 32 (8) Interface arrangements may be directed to be made; proposed cl 33 (1) and (2) Register of interface agreements; Part 3, Division 3: proposed cl 51 Keeping and making available documents for public inspection; Part 4, Division 1: proposed cl 61 (2) and (3) Rail transport operators to provide information; proposed cl 63 (1) and (4) Notifiable occurrences; Part 4, Division 2: proposed cl 65 (3), (4) and (5) Investigation into railway accidents and incidents by rail transport operators; Part 4, Division 3: proposed cl 77 (1) Disclosure of train safety records (other than train safety recordings) to a court or person; proposed cl 78 Disclosure of train safety recordings; Part 5, Division 2: proposed cl 93 (2) Securing a site; part 5, Division 5: proposed cl 99 (3) Return of seized things; Part 7, Division 1: proposed cl 129 Notice to

common law requirement that the authority prove beyond reasonable doubt that the offender intended to commit the offence, and is contrary to the fundamental right of presumption of innocence.

37. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is usually considered inappropriate), and the availability of any defences or safeguards.

38. Most of the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance.

39. The Committee notes that there is a public interest in ensuring that the provisions of the Bill are complied with in order to facilitate the effective regulation and management of rail safety. The penalties for the strict liability offences are fines rather than imprisonment and some of these offences[4] also provide for reasonable excuses as safeguards. Therefore, the Committee does not find the strict liability offences in this Bill trespass unduly on rights and liberties.

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

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

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

41. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

be given of certain matters; Part 7, Division 4: proposed cl 144 Contravention of supervisory intervention order; proposed cl 146 Contravention of exclusion order; Part 8: proposed cl 153 Return of identification cards; Part 9: proposed cl 162 (2) Disclosure of information.

[4] Some of the clauses that provide reasonable excuse as a safeguard include the following: Part 2, Division 2: proposed clause 24 (3) ITSRR may direct amendment of a safety management system; Part 4, Division 2: proposed cl 68 (3) Chief Investigator and transport safety investigator's functions; proposed cl 72 (4) Witnesses and evidence at rail safety inquiries; Part 5, Division 4: proposed cl 95 (5) Directions relating to seizure; Part 5, Division 6: proposed cl 103 (2) and (3) Rail safety officers may direct certain persons to give assistance; proposed cl 105 Failure to give name or address; proposed cl 107 Failure to comply with notice; Part 6, Division 1: proposed cl 113 (1), (2) and (3) Contravention of improvement notice; Part 6, Division 2: proposed cl 118 Contravention of prohibition notice; proposed cl 119 (2) Oral direction before prohibition notice served.

9. ROAD TRANSPORT (DRIVER LICENSING) AMENDMENT (DEMERIT POINTS SYSTEM) BILL 2008

Date Introduced:	24 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Daley MP
Portfolio:	Roads

Purpose and Description

1. This Bill amends the *Road Transport (Driver Licensing) Act 1998* and various regulations with respect to the demerit points system applying to New South Wales drivers.

2. It introduces a demerit point scheme for learners similar to that currently applied to New South Wales provisional P1 licence holders. The following main provisions will be introduced. A learner licence will be suspended for a period of three months if four or more demerit points are incurred by the holder of that licence. The three-month suspension is considered to be an appropriate period of time because it allows the novice driver to re-enter the licensing system quickly so that their driving skills can be maintained. It is also consistent with the period of time provided to P-platers who are suspended.

3. The Bill includes a power to refuse to renew a learner or provisional licence if the holder has reached or exceeded his or her demerit point threshold and action has not been taken to suspend the licence. This provision is currently applied to unrestricted licence holders. Learner licence holders, like the provisional licence holders, will have the right of appeal if they are suspended or refused for demerit points.

4. The offences that will carry four or more demerit points are any speeding offences committed by a learner driver, driving with one or more unrestrained passengers, and riding a motorbike with a power/capacity in excess of the allowed limit.

5. Learners will receive demerit points for offences that they have committed from the commencement of this legislation. Therefore, demerit points will not be applied retrospectively to learners.

6. This Bill ensures a greater consistency of practices and principles across all New South Wales licence types. It also ensures that New South Wales is aligned with other Australian jurisdictions that have already adopted demerit point schemes for their respective learner drivers.

7. The Bill includes additional amendments to road transport law to provide greater clarity in applying licence sanctions when the licence holder holds different licence classes. For example, a driver who holds a licence to drive a car and is subject to a pending suspension action should not be given the opportunity to obtain a learner rider licence.

The law currently allows for licences to be held in any combination of an unrestricted, provisional or learner type. The current provisions are unclear as to whether there is a requirement to apply a licence suspension under different sections of the Road Transport (Driver Licensing) Act. This Bill aims to give clarity by introducing the new concept of primary and subordinate classes for the purposes of demerit point suspensions.

8. The effect of the proposed measures is that where a person holds both an unrestricted and provisional class and reaches or exceeds 12 or more demerit points, this Bill will clarify that both classes can be suspended under the demerit point scheme that applies to the unrestricted or primary class. The same concept will apply where a provisional class is held in combination with a learner class. In this case, both licence classes will be suspended when the demerit point threshold is reached or exceeded for the provisional class, being the primary class in this case.

9. It also clarifies that the subordinate class can be suspended only if the demerit point threshold is reached or exceeded on that licence class only.

Background

10. The Bill's primary purpose is to introduce a demerit points scheme for learner licence holders. The measures will encourage compliance with the driving laws from the very first stage of the licensing system. They will ensure the timely application of licence sanctions for poor driving behaviour. They will also ensure that New South Wales is aligned with other Australian jurisdictions that have already adopted demerit points schemes for their learner drivers.

11. According to the Agreement in Principle:

> Most importantly, the changes will build on the Government's initiatives to help to further reduce the road toll and better equip young and novice drivers on our roads. The provisions within the bill have undergone extensive community consultation. In November 2004 the New South Wales Government released the discussion paper "Improving Safety for Young Drivers" in an effort to identify workable solutions to the overrepresentation of young people in road fatalities. The paper detailed 11 road safety initiatives, which included an initiative to modify the demerit point structure of the New South Wales Graduated Licensing Scheme to further encourage safer driving by young people. The consultation process identified community support for tougher penalties on novice drivers who do not comply with their licence conditions and the road rules.

12. Measures had been introduced in July last year to address the sudden increase in road deaths of young drivers. One of those measures was the zero tolerance to speed where a provisional P1 driver will lose their licence for at least three months for any speeding offence. Evidence based on crash data for 2007 has already shown that this measure is delivering road safety benefits. Advice from the Roads and Traffic Authority is that preliminary data of fatal crash involvements of P1 drivers in 2007 has decreased by 35 per cent compared with 2006. This Bill builds on the earlier initiatives. It aims to extend the zero tolerance to speed initiative with provisional P1 drivers to include learner drivers through the adoption of the learner demerit point scheme.

13. The demerit point scheme involves the allocation of penalty points for certain driving offences. When the allowable number of points has been reached or exceeded, the driver's licence is suspended.

14. Unlike provisional drivers, New South Wales learner licence holders currently are managed under a discretionary enforcement scheme. The Roads and Traffic Authority currently monitors the number of offences committed by each individual learner and then cancelling the learner's licence if four or more offences are committed within a 12-month period. However, there are limitations with the current administrative arrangements for learner licence holders. The current process lacks immediacy. There may be some time between the date when the first offence is committed and the date cancellation action is applied. There is also concern that some drivers who have committed fewer than four offences, but dangerous offences, are not deterred from re-offending and may even continue this poor driving behaviour into the provisional licence stage.

15. Therefore, this Bill introduces a demerit point scheme for learners to address these issues. It ensures the timely application of licence sanctions for irresponsible driving behaviour.

16. The four-demerit-point threshold for learner drivers aims to strike a balance between the appropriate leniency extended to learners while still requiring a high standard of driver competency.

17. The majority of fundamental driving offences carry from one to three demerit points. This means that a minor transgression of the law may not automatically lead to suspension. However, serious offences committed by learners will lead to licence suspension, such as speeding, certain safety-related offences committed in operating school zones, and double demerit point periods.

18. This Bill will also ensure the practice which has sound road safety principles where a person who exceeds their demerit point limit on the most superior licence type does not have the opportunity to avoid a demerit point licence sanction by continuing to drive or ride on the subordinate licence type. Alternatively, reaching or exceeding the demerit point threshold on the subordinate licence type does not necessarily deny the licence holder the opportunity to continue to drive on the superior licence type.

The Bill

The objects of this Bill are:

(a) to amend the *Road Transport (Driver Licensing) Act 1998* (the ***Principal Act***):

(i) to provide for a demerit points system for learner drivers, and to provide more comprehensively for a demerit points system for provisional drivers, and

(ii) to clarify the effect of a notice of licence suspension or licence ineligibility issued for incurring demerit points, where the driver holds licences for more than one class of vehicle, and

(b) to amend the *Road Transport (Driver Licensing) Regulation 2008*:

(i) to clarify the point at which a person who is issued a notice of licence suspension for incurring a threshold number of demerit points becomes ineligible to apply for a driver licence, and

(ii) to make certain speeding offences demerit point offences for learner drivers, and

(c) to amend the *Road Transport (General) Regulation 2005* to provide learner and provisional drivers with a right of appeal to the Local Court against a decision of the RTA to issue a notice of licence suspension or licence ineligibility.

Outline of provisions

Schedule 1 Amendment of *Road Transport (Driver Licensing) Act 1998*

Demerit points system for provisional and learner drivers
Currently, **section 17** of the Principal Act enables the Roads and Traffic Authority (***the RTA***) to suspend or cancel a provisional licence if the holder of the licence incurs 4 or more demerit points. The Principal Act does not apply the demerit points system to learner drivers.

Schedule 1 [19] inserts a new **Subdivision (Subdivision 3)** into **Division 2 of Part 2** of the Principal Act (proposed **sections 17–17C**) which provides more comprehensively for the demerit points system in its application to provisional drivers (including providing for the issue of notices of licence ineligibility) and which applies the system to learner drivers.

Proposed **section 17** defines the expression ***threshold number of demerit points*** for the purposes of the new Subdivision, being 4 demerit points for the holder of a learner or provisional P1 licence and 7 demerit points for the holder of a provisional P2 licence.

Proposed **section 17A** sets out the actions the RTA may take if the holder of a learner licence or a provisional licence incurs the threshold number of demerit points within the 3 year period ending on the day on which the person last committed an offence for which demerit points have been recorded against the person. In these circumstances, the Authority may issue a notice of licence suspension or cancellation or, if the person subsequently applies for a driver licence, either refuse the application and issue a notice of licence ineligibility, or (if the driver licence applied for is a learner or provisional licence) grant the licence and issue a notice of licence suspension or cancellation.

Proposed **section 17B** enables the RTA to give a notice of licence suspension or cancellation to the holder of a learner or provisional licence who incurs the threshold number of demerit points within the 3 year period ending on the day on which the person last committed an offence for which demerit points have been recorded against the person.
If a person is served with a notice of licence suspension under the proposed section, all driver licences held by the person in relation to which the threshold number of demerit points is the same or lower than the number of demerit points taken into account for the purposes of the notice, are suspended on and from the date, and for the period, specified in the notice.
Proposed **section 17B** also enables regulations to be made with respect to various matters concerning notices of cancellation.

Proposed **section 17C** enables the RTA to give a notice of licence ineligibility to the applicant for a licence (including a provisional licence or learner licence) who incurs the threshold number of demerit points within the 3 year period ending on the day on which the person last committed an offence for which demerit points have been recorded against the person.

However, the RTA may not give a person both a notice of licence ineligibility and a notice of licence suspension or cancellation under section 17B in respect of the same 3 year period.
A person who has been served with a notice of licence ineligibility under the proposed section is not entitled to be issued with or apply for any driver licence for the ineligibility period specified in the notice other than a renewal of a driver licence of a class different from that the subject of the application in relation to which the notice is given or a higher grade of that class of licence. (Classes of licence are established in the regulations under the Principal Act. The reference to a grade of driver licence is a reference to a learner, provisional P1, provisional P2 or an unrestricted licence, ordered from lowest to highest.)

Schedule 1 [22] amends **section 18 (1)** of the Principal Act to extend that provision (which provides that periods of licence suspension under section 16 of the Principal Act are in addition to any periods of suspension imposed under other laws of this State) to periods of licence suspension under proposed section 17B.

Effect of notices issued under section 16 or 16A on combined licence holders
Schedule 1 [9] amends **section 16 (6)** of the Principal Act to make it clear that where a person holds combined driver licences (for example, a motorcycle licence and a car licence), all driver licences held by the person (rather than the person's driver licence, as is currently the case) are suspended if the person is served with a notice of licence suspension for incurring 12 or more demerit points and does not opt for a period of good behaviour.
Similarly, **Schedule 1 [11], [15] and [16]** amend sections 16 (9) and 16A (8) (a) and (b) of the Principal Act to make it clear that all driver licences held by a person (rather than the person's driver licence) are suspended if the person is served with a notice of licence suspension for incurring 2 or more demerit points during a period of good behaviour taken under those sections.

Determining demerit point thresholds where combined licences
Schedule 1 [20] inserts a new section 17D into the Principal Act to clarify how demerit points incurred by the holder of combined driver licences (for example, a learner motorcycle licence and an unrestricted car licence) are to be counted towards the demerit point thresholds applying to those licences.

Effect of expiry of driver licence during suspension period
Schedule 1 [24] extends section 33A of the Principal Act to suspensions under proposed section 17B so that, if a person's licence expires during a suspension period imposed under the proposed section, the person will not be able to obtain another licence until the period expires and will be guilty of an offence of driving during a suspension period if he or she drives during the balance of the unexpired suspension period. (The regulations currently contain a similar provision relating to suspensions of provisional licences under existing section 17 of the Principal Act.)

Commencement day for periods of suspension or licence ineligibility under sections 16 and 16A
Schedule 1 [9], [10] and [16] amend sections 16 (6) and (8) and 16A (5), (7) and (8) of the Principal Act to resolve an inconsistency between the commencement day for a period of suspension or licence ineligibility that is required by the Principal Act to be specified in a notice of suspension or licence ineligibility, and the day on which the Principal Act provides that the suspension is to take effect, by providing that a period of suspension or licence ineligibility under those sections is to start on and from (rather than from, as is currently the case) the suspension date, or the ineligibility date, specified in the relevant notice.

Similarly, **Schedule 1 [10]** amends sections 16 and 16A to provide that a period of good behaviour under those sections is to start on and from (rather than from) the day on which the licence would otherwise be suspended or on which the licence ineligibility would otherwise have effect.

Purposes for which demerit points incurred in certain intervening periods may be taken into account

Presently, demerit points incurred by a person after he or she is served with a notice of licence suspension under section 16 of the Principal Act but before the suspension (or good behaviour period, if that option is taken) begins are to be taken into account from the end of the suspension (or good behaviour period) only for the purpose of issuing a further notice of suspension under that section.

Similarly, demerit points incurred by a person after he or she is served with a notice of licence ineligibility under section 16A of the Principal Act but before the licence ineligibility takes effect (or good behaviour period begins, if that option is taken) are to be taken into account from the end of the licence ineligibility (or good behaviour period) only for the purpose of issuing a further notice of licence ineligibility under that section.

Schedule 1 [12] and [17] amend sections 16 (11) and 16A (10) of the Principal Act to provide that demerit points incurred by a person in these intervening periods may be taken into account from the end of the suspension or licence ineligibility (or good behaviour period) for the purpose of issuing either a further notice of suspension under section 16 or a notice of licence ineligibility under section 16A.

Schedule 1 [17] also substitutes section 16A (10) to correct the formatting of some of the text of that provision.

Schedule 2 Amendment of *Road Transport (Driver Licensing) Regulation 2008*

Schedule 2 [1] and [2] omit provisions that are no longer necessary given the power of the RTA to issue notices of licence ineligibility under proposed section 17C. Currently, under clause 42 of the *Road Transport (Driver Licensing) Regulation 2008)* (***the Regulation***), a person whose driver licence has been suspended is ineligible to apply for a driver licence for the duration of the suspension.

Schedule 2 [3] qualifies clause 42 in relation to suspensions under Division 2 of Part 2 of the Act (that is, suspensions for incurring demerit points) by providing that a person who is issued with a notice of licence suspension under that Division is ineligible to apply for any driver licence from the date the notice is issued until the end of the licence suspension (or, if the notice is issued under section 16 and the person elects to be of good behaviour, until the person so elects).

Schedule 2 [4] omits clause 42 (5) of the Regulation consequential on the amendment made by Schedule 1 [24] and makes another consequential amendment.

Schedule 2 [5] amends clause 54 of the Regulation consequential on the amendments made by Schedule 1 [19].

Schedule 2 [6]–[11] amend Schedules 1 and 2 to the Regulation to make specified speeding offences demerit point offences for learner drivers, and to make consequential amendments.

Schedule 3 Amendment of *Road Transport (General) Regulation 2005*

Schedule 3 provides for appeals to the Local Court against a decision of the RTA to issue a notice of licence suspension under proposed section 17B (1) or a notice of licence ineligibility under proposed section 17C (1).

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.

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

20. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

10. WATER (COMMONWEALTH POWERS) BILL 2008

Date Introduced:	23 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Phillip Costa MP
Portfolio:	Minister for Water, Minister for Rural Affairs and Minister for Regional Development

Purpose and Description

1. The purpose of this Bill is to refer certain matters relating to the Murray-Darling Basin to the Commonwealth Parliament so as to enable the Commonwealth Parliament to make laws about those matters. This referral Bill fulfils New South Wales obligations under an Intergovernmental Agreement on the Murray-Darling Basin dated 3 July 2008, which is referred to as the July IGA. The Bill is necessary under section 51(xxxvii) of the Constitution to enable the Commonwealth to legislate on the referred matters.

2. The referred matters are limited to powers, functions and duties of Commonwealth agencies that relate to Basin water resources and are conferred by or under the Murray-Darling Basin Agreement. Referred matters include the management of Basin water resources to meet critical human water needs, water charging in relation to Basin water resources, the transformation of entitlements to water from a Basin water resource to enable trading in those water entitlements and the transfer of assets, rights and liabilities of the Murray- Darling Basin Commission to the Murray- Darling Basin Authority established by the Commonwealth Water Act and other transitional matters relating to the replacement of that Commission.

3. The referral Bill makes it possible to extend the application of water market rules and water charge rules to cover all irrigation infrastructure operators and all bodies within the Basin that charge regulated water charges. The intent is that the Australian Competition and Consumer Commission will be responsible for all water charge rules within the Basin. As with the water charge rules, the IGA proposes that market rules be set by the ACCC within the Basin.

4. Under Part 7 of the July IGA the States have agreed to refer powers to enable planning for critical human water needs within the River Murray system to occur through the Commonwealth Water Act. These references can be terminated by the making of a proclamation under clause 5 of the Bill. That proclamation can be revoked if necessary by a further proclamation. The text of the proposed Commonwealth legislation subject to the referral is defined in clause 3 by reference to the text tabled in the House of Assembly of South Australia in conjunction with the introduction of the referral legislation in that State, since it is anticipated that South Australia will be the first state to introduce its referral legislation.

Background

5. At the 3 July 2008 meeting of the Council of Australian Governments (COAG), the Prime Minister, Premiers of New South Wales, Victoria, South Australia and Queensland and the Chief Minister of the Australian Capital Territory signed an Intergovernmental Agreement on Murray - Darling Basin reform. The purpose of the Agreement is to provide for the establishment of a co-operative planning and management arrangement for the Basin's water and other natural resources that will enable the social, environmental and economic values of the Murray- Darling Basin to be protected into the future.

6. The reforms will bring the Murray- Darling Authority and the Murray-Darling Basin Commission together as a single institution to be known as the Murray- Darling Basin Authority. The authority will have two roles. One will be to prepare, implement, monitor and enforce the Basin plan. The other will be the responsibility for implementing the decisions made by the Ministerial Council and the Basin Officials Committee.

7. The Agreement establishes Commonwealth- State management partnerships and strengthens the role of the Australian Competition and Consumer Commission in regulating water rules and water charging within the Basin. The Agreement will enable the making of a Basin Plan to provide arrangements for critical human water needs. A central feature of the new arrangements is to improve planning and management by addressing the Basin's water and other natural resources as a whole in the context of a Federal- State partnership.

8. The Intergovernmental Agreement represents an undertaking by Governments to implement the reforms necessary to meet the current needs of the Basin and in the long term to protect and enhance its social, environmental and economic values. The object of the Bill is to implement that undertaking.

The Bill

The object of this Bill is to refer certain matters relating to the Murray-Darling Basin and other water management matters to the Commonwealth Parliament so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxxvii) of the Commonwealth Constitution, which enables State Parliaments to refer matters to the Commonwealth Parliament.
The Bill operates by reference to the text of Schedule 1 to the proposed Commonwealth Water Amendment Bill 2008 so as to enable the enactment and future amendment of provisions set out in that Schedule that are to be included in the Commonwealth Water Act 2007.
The Bill also makes consequential and related amendments to the Water Management Act 2000 and other Acts, and repeals the Murray–Darling Basin Act 1992.

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. The referral provisions commence on the date of assent to the proposed Act. The consequential amendments and repeal of existing legislation are to be commenced on the commencement of the proposed Commonwealth legislation.
Clause 3 defines certain words and expressions used in the proposed Act. The text of the proposed Commonwealth legislation subject to the referral is defined by reference to the text

tabled in the House of Assembly of South Australia in conjunction with the introduction of the referral legislation in that State (since it is anticipated that South Australia will be the first State to introduce its referral legislation). A copy of the text is also to be tabled for information in the Legislative Assembly of New South Wales in conjunction with the introduction of this Bill.

Clause 4 deals with the references to the Commonwealth Parliament. Clause 4 (1) (a) ("the initial reference") refers in effect the matter of the Commonwealth including in the Commonwealth Water Act 2007 provisions in the terms, or substantially in the terms, set out in Schedule 1 of the tabled text. The expression "substantially in the terms" of the tabled text will enable minor adjustments to be made to the tabled text. Clause 4 (1) (b) ("the amendment reference") refers in effect the matter of the Commonwealth amending in future the provisions enacted in reliance on the initial reference. The referred subject-matters are limited to the following:

(a) the powers, functions and duties of Commonwealth agencies that:
    (i) relate to Basin water resources, and
    (ii) are conferred by or under the Murray-Darling Basin Agreement, (b) the management of Basin water resources to meet critical human water needs,
(b) water charging in relation to Basin water resources (other than for urban water supply after the removal of the water from a Basin water resource),
(c) the transformation of entitlements to water from a Basin water resource to enable trading in those water entitlements,
(d) the application, in relation to water resources that are not Basin water resources, of provisions of the Commonwealth Water Act dealing with the subject-matters specified in paragraphs (c) and (d) (being an application of a kind that is authorised by the law of this State),
(e) the transfer of assets, rights and liabilities of the Murray-Darling Basin Commission to the Murray-Darling Basin Authority established by the Commonwealth Water Act, and other transitional matters relating to the replacement of that Commission.

Clause 5 deals with the termination of the period of the references specified under clause 4 (namely, the period ending on a day fixed by the Governor by proclamation).

The clause enables the period of both references to be terminated or only the period of the amendment reference.

Clause 6 makes it clear that the separate termination of the period of the amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.

Clause 7 provides for the accuracy of a copy of the tabled text to be certified by the Clerk of the House of Assembly of South Australia. Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.

Clause 8 is a formal provision that gives effect to the amendments to the Water Management Act 2000 set out in Schedule 1.

Clause 9 is a formal provision that gives effect to consequential amendments to other Acts set out in Schedule 2.

Clause 10 repeals the Murray–Darling Basin Act 1992.

Clause 11 deems the existing *River Murray Traffic Regulation 2005* made under the Murray–Darling Basin Act 1992 to be made under the replacement provisions inserted by Schedule 1 into the *Water Management Act 2000*.

Schedule 1 Amendment of Water Management Act 2000

Schedule 1 [1]–[8] and [10] contain consequential amendments, including to the compensation arrangements under the Act in relation to reductions in water allocations to bring them into line with the National Water Initiative.

Schedule 1 [9] inserts proposed Part 3A into Chapter 8 of the Act so as:

(a) to make provision for the appointment of the NSW representative on the proposed Basin Officials Committee, and

(b) to confer on State agencies (such as the State Water Corporation and the Water Administration Ministerial Corporation) the relevant functions and powers that the Murray-Darling Basin Agreement confers on the States who are parties to the Agreement.

Schedule 2 Consequential amendment of other Acts

Schedule 2 makes consequential amendments to the *Snowy Hydro Corporatisation Act 1997*, the *State Authorities Superannuation Act 1987* and the *Superannuation Act 1916.*

Issues Considered by the Committee

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

Issue: Commencement by Proclamation

9. The Committee notes that certain of the proposed sections and schedules of the Act will commence on a day or day to be appointed by proclamation. This may delegate to the government the power to commence those provisions on whatever day it chooses or not at all. However, having regard to the need to co-ordinate the commencement of the particular provisions with the commencement of the proposed Commonwealth legislation the Committee considers that the provisions do not give rise to an inappropriate delegation of legislative power.

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

11. WATER MANAGEMENT AMENDMENT BILL 2008

Date Introduced:	23 September 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Phillip Costa MP
Portfolio:	Minister for Water, Minister for Rural Affairs and Minister for Regional Development

Purpose and Description

1. The *Water Management Amendment Bill 2008* is a Bill that is cognate with the Wat*er (Commonwealth Powers) Bill 2008* known as the Referral Bill.

2. The Referral Bill fulfils NSW obligations under the Agreement on Murray-Darling Basin Reform dated 3 July 2008 (known as the July IGA) to refer certain powers to the Commonwealth. This involves the transfer of powers from institutions created by the 1992 Murray Darling Basin Agreement to those created by the July IGA. These include powers in relation to water market rules and water charge rules and critical human water needs. The transfer of these powers under section 51(xxvii) of the Constitution is necessary to enable the Commonwealth to legislate on these matters, because they are not mentioned in section 51 of the Constitution.

3. The *Water Management Amendment Bill* is cognate with the Referral Bill because they both have the purpose of safeguarding the State's rivers and river communities. The Amending Bill restates offences under the *Water Management Act 2000* and increased penalties under those provisions. The stated aim of the Bill is to improve compliance with the Water Management Act 2000.

4. Important provisions in this regard are those relating to the powers of the Minister to give directions relating to the conservation of water. The Minister is given power to impose temporary restrictions on the taking of water under an access licence. The Minister can do this if satisfied that it is necessary in the public interest to cope with a water shortage or threat to public health or safety. The Minister can also, by order in writing, direct that within a specified area, and for a specified period that the taking of water from an aquifer is prohibited. The Minister can also give directions to landholders requiring water to be taken in accordance with mandatory guidelines under section 336B. Ministerial directions are subject to appeal to the Land and Environment Court.

5. The Bill increases penalties. The justification given is that compliance with the Principal Act is essential in a time of extreme drought so as to reduce water theft and to indicate that water theft is regarded as a serious crime against property and against the environment. Penalties are set out in section 363B and are divided into three Tiers. A Tier 1 penalty corresponds to a maximum penalty, in the case of a corporation, of 20,000 penalty units and, in the case of a continuing offence, a further penalty of 2400

penalty units for each day the offence continues. In any other case a Tier 1 penalty corresponds to a maximum penalty of imprisonment for two years or 10,000 penalty units, or both, and, in the case of a continuing offence, a further penalty of 1200 penalty units for each day the offence continues.

6. A Tier 2 penalty corresponds to a maximum penalty of, in the case of a corporation, 10,000 penalty units, and, in the case of a continuing offence, a further penalty of 12,000 penalty units for each day the offence continues. In any other case a Tier 2 penalty corresponds to a maximum penalty of 2250 penalty units and, in the case of a continuing offence, a further penalty of 600 penalty units for each day the offence continues.

7. A Tier 3 penalty corresponds to a maximum penalty of 100 penalty units.

8. The Bill contains new sentencing provisions, which set out the matters courts are required to take into account when imposing penalties for breaches of the Act. This is intended to assist the courts to determine an appropriate penalty. Relevant considerations include the impact of the offence on other person's rights under the Act, the market value of any water that has been lost, misused or unlawfully taken, the extent of the harm caused or likely to be caused to the environment by the commission of the offence and the practical measures that may be taken to prevent, control or abate that harm. Other matters to be considered in imposing a penalty include the extent to which the person could reasonably have foreseen the harm caused by the commission of the offence and the extent to which the person had control over the causes that gave rise to the offence.

Background

9. Both the Government and Opposition agree with the need for serious water reform. There is agreement on the need for a unified approach to manage the Murray-Darling Basin, which extends across five States. Although NSW is transferring certain powers to the Commonwealth the States will retain much of the responsibility for regulatory compliance. The cognate Bills are intended to eliminate duplication and confusion about the roles of the new Murray – Darling Basin Authority and the old Murray-Basin Commission by transferring much of the Commission's powers to the Authority and having uniform water charge and water market rules. The Referral Bill allows NSW to suspend its referral powers at any time if necessary.

10. In the Agreement in Principle Speech the Minister said that the *Water Management Act 2000* remains the pivotal legislative mechanism for the protection and sustainable management of New South Wales water resources. To improve compliance the amending Bill has substantially increased the penalties for offences and has introduced new alternatives for sentencing. These provisions are supported by revised powers for authorised officers to investigate potential breaches of provisions of the Act. They are stated to be analogous to those in the *Protection of the Environment Operations Act 1997*. River operations and maintenance functions will continue to be undertaken in NSW by State Water unless NSW agrees otherwise.

The Bill

Outline of provisions

The object of the Bill is to amend the *Water Management Act 2000* (the Principal Act) so as:

(a) to restate the offences under that Act, and to increase the penalties that may be imposed in respect of them, and
(b) to restate, and broaden, the directions that the Minister may give under that Act with respect to the protection of the State's water resources, and
(c) to restate the powers that may be exercised under that Act with respect to compelling the production of information and entering and searching premises, and
(d) to enable a court that finds a person guilty of an offence against that Act to make certain orders (such as orders for the prevention or mitigation of harm to the environment) against that person, and
(e) to establish the liabilities of the co-holders of an access licence or approval that is held by more than one person, and (f) to prescribe the matters that a court must take into consideration when imposing a penalty for an offence against that Act, and
(f) to facilitate the use in legal proceedings under that Act of evidentiary certificates issued by the Minister and by authorised analysts, and
(g) to prescribe certain states of affairs that, in legal proceedings under that Act, give rise to rebuttable presumptions of fact, and
(h) to clarify the operation of certain provisions of that Act in relation to access licences, and
(i) to standardise the provisions of that Act with respect to the publication of certain orders and notices, and
(j) to make other amendments of a minor, consequential or ancillary nature. The Bill also makes consequential amendments to the *Dividing Fences Act 1991*, the *Law Enforcement (Powers and Responsibilities) Act 2002* and the Water Act 1912.

Issues Considered by the Committee

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

Issue: Strict liability

11. Numerous clauses in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. The Committee, however, notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards. The Committee took these matters into account when it considered the following provisions

12. Schedule 1(1) inserts proposed new Division 1A into Part 2 of Chapter 3 of the Act. This new Division introduces a series of strict liability offences in relation to access licenses. These provisions include an offence of taking water without an access license (proposed section 60A); an offence of contravening the terms and conditions of an access license (proposed section 60B); an offence of taking water under an access license without having sufficient water credited to an access license (proposed section 60C); an offence of taking water otherwise from a nominated water supply work (proposed section 60D); a provision that deems the occupier of premises from which water is unlawfully taken as having committed the relevant offence in relation to the

taking of that water (proposed section 60E); and a provision that empowers the Minister, if satisfied on the balance of probabilities that water has been unlawfully taken, to charge the offender with an amount of up to 5 times the value of the water taken.

13. The Committee notes that these provisions are subject to proposed clause 60 F and clause 91M that provide a general defence though one that reverses the onus of proof. That aspect appears warranted in view of the situation that the knowledge of the factual circumstances is peculiarly in the position of the parties. Under these provisions it is a defence to a prosecution under Division 1A in relation to a Tier 1 offence if the accused person establishes that the commission of the offence was due to causes to which the person had no control and that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence. Under clauses 60F(2) and 91M(2), it is also a defence to a prosecution in relation to the taking of water from a water source if the accused person establishes that the water was taken pursuant to a basic landholder right or that a person was exempt pursuant to the Act or regulations from any requirement for an access license. The strict liability provisions of this Division obtain reasonable justification on the basis of the objective of encouraging compliance with the water reform program for the Murray Basin Area.

Issue: Excessive punishment – Clause 353F – Orders regarding monetary benefits

14. Clause 353F of the Bill appears open to the imposition of an excessive punishment of an offender. It permits the Land and Environment Court to order an offender to pay, as part of the penalty for committing an offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence. The additional penalty that can be imposed is not subject to any maximum amount.

15. The Committee notes that the amount of the penalty to be imposed has to represent what the court, using the civil standard of proof, believes justified. The Committee considers that a maximum amount should always be set for penalties and refers the matter to Parliament.

Issue: Reverse onus of proof and deemed liability – proposed section 60E

16. Proposed section 60E deems the occupier of premises from which water is unlawfully taken as having committed the relevant offence in relation to the taking of that water. This provision also reverses the onus of proof.

17. The Committee notes that this provision deems the occupier liable and effectively reverses the onus of proof that requires a prosecution to prove all elements of an offence. This is inconsistent with a presumption of innocence and, in the Committee's view, constitutes a sufficient trespass on personal rights and liberties for it to be referred to Parliament for consideration of whether it trespasses unduly on personal rights and liberties.

Issue: Power of authorised officers to arrest without a warrant – proposed section 338D(3).

18. The Committee notes that proposed section 338D(3) allows for the arrest, without a warrant, of a person who fails to provide their full name and address to an authorised officer.

19. This clause represents a departure from the basic principle that no arrest should be made without a warrant from a competent court except where felony or breach of the peace is taking place or is reasonably apprehended. Adherence to such a principle is important so as to protect against the possibility of arbitrary arrest as a result of the vesting of the power of arrest in a public official. The Committee considers that the wide scope of this power has the potential to trespass on the personal rights and liberties of the person involved. The Committee accordingly refers this to Parliament and writes to the Minister to seek clarification on the question of whether this unfettered power unduly trespasses on personal rights and liberties.

Issue: Entry and search of premises by authorised officers without a search warrant – proposed section 339(1)

20. Section 339(1) gives an authorised officer the power to enter any premises at any reasonable time without a search warrant. This raises the issue of whether the provision trespassers unduly on personal rights and liberties.

21. The Committee notes that this power is qualified by section 339C, which excludes entry to residential premises without the permission of the occupier or a search warrant issued under section 339C. This effectively restricts entry, without a search warrant, to premises used in connection with the works or thing being investigated. Clause 339E specifies the powers exerciseable by an authorised officer on entry to premises and these are confined substantially to the investigation of offences under the Act. The Committee accordingly does not consider that this provision trespasses unduly on personal rights and liberties.

Issue: Admissibility of information or records that might incriminate a person – proposed section 340B(4) and (5)

22. The Committee notes that under section 340B(3) any information furnished or answer given in compliance with the requirements of Part 2 is not admissible in evidence against the person in criminal proceedings if the person objected at the time to doing so on the ground that it might incriminate the person.

23. However under the proposed section 338A(2) authorised officers have the power to require a person to furnish to the officer information or records as he or she may require. Proposed section 340B(4) states that such records are not inadmissible in evidence against the person in criminal proceedings on the ground that the record might incriminate the person. Similarly, under section 340B(5) any further information obtained as a result of a record or information furnished or of an answer given is not inadmissible on the ground that the record or information had to be furnished or the

answer had to be given, or that the record or information furnished or the answer given might incriminate the person.

24. The Committee notes that the right against self-incrimination is a fundamental right and that this right should only be eroded when it is overwhelmingly in the public interest to do so. The protection afforded by section 340B(3) is of limited value because the information so obtained can, under section 340B(5), form the basis of an investigation leading to criminal proceedings. Additionally, under section 340B(4) any record furnished is admissible even though the record might incriminate the person. The Committee refers to Parliament the question of whether the removal of the right against self-incrimination by sections 340B(4) and (5) of the Bill unduly trespasses on personal rights and liberties.

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

Issue: Clause 2 – Commencement by Proclamation

25. The Committee notes that Schedules 1-4 and 7.2 and 7.3 of the proposed Act will commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence those provisions on whatever day it chooses or not at all.

26. However, having regard to the need to coordinate the commencement of the particular provisions with the commencement of the proposed Commonwealth legislation the Committee considers that the provisions do not give rise to an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

PART TWO – REGULATIONS

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

Outline of the Regulation/Issues

Criminal Procedure Amendment (Briefs of Evidence) Regulation 2008

Recommendation

That the Committee, for the purposes of s 9(1)(b)(i) of the *Legislation Review Act 1987*, resolved to report that:

i) the Committee still holds genuine concerns that this Regulation trespasses unduly on individual rights and liberties, especially for defendants in the extension of the initial 12 months of trial to 30 June 2009, without adequate protection in respect of procedural fairness, and refers this Regulation to Parliament.

Grounds for comment

Personal rights/liberties	The Committee still holds genuine concerns that this regulation may trespass unduly on individual rights and liberties such as principles on fair trials and procedural fairness.
Business impact	
Objects/spirit of Act	The object of this Regulation is to extend, until 30 June 2009, the operation of the trial scheme under clause 24 of the Criminal Procedure Regulation 2005 (which lists the kind of proceedings for which prosecutors are not required to serve briefs of evidence) and clause 24A of that Regulation (which allows prosecutors to give short briefs of evidence to defendants in certain circumstances). The aim is to save police time and increase the number of early guilty pleas.
Alternatives/effectiveness	The Regulation may not be effective with respect to its objective, instead, it may lead to: - Increase in the number of defended hearings in the Local Court - Increase in court time set aside for defended hearings.

	- Need for police and witnesses to attend court to give evidence. - Increase in the number of guilty pleas on the hearing date.
Duplicates/overlaps/conflicts	
Needs elucidation	The Agreement in Principle speech for the related Bill (which enabled regulations such as this one), noted that the brief of evidence may be replaced by a comprehensive facts sheet with copies of police evidence to be attached. However, the legislation did not provide for this. There is the potential for the requirement of the brief of evidence to be removed and not be replaced by a detailed facts sheet.
SLA, ss 4,5,6, Sched 1, 2	
Other	

Persons contacted	

Explanatory Note

The object of this Regulation is to extend, until 30 June 2009, the operation of the trial scheme under clause 24 of the *Criminal Procedure Regulation 2005* (which lists the kind of proceedings for which prosecutors are not required to serve briefs of evidence) and clause 24A of that Regulation (which allows prosecutors to give short briefs of evidence to defendants in certain circumstances).

An amendment made by the *Criminal Procedure Amendment (Local Court Process Reforms) Act 2007* enabled the regulations to make other provision for the content of briefs of evidence required under section 183 of the *Criminal Procedure Act 1986*.

The object of the *Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007* was to amend the *Criminal Procedure Regulation 2005* to prescribe an initial 12-month trial scheme allowing prosecutors to give short briefs of evidence to defendants. The trial scheme applied to proceedings for summary offences and for indictable offences specified in Table 2 in Schedule 1 to the *Criminal Procedure Act 1986* that are dealt with summarily, but only in cases where a brief of evidence is required to be served. This 2008 Regulation aims to extend the operation of the trial scheme until 30 June 2009.

This Regulation is made under the *Criminal Procedure Act 1986*, including section 4 (the general regulation-making power) and sections 183 and 187.

Comment

1. At the time of the 2007 Regulation (the Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007), the Committee had expressed its concerns and referred it to Parliament in its Digest Report Number 8 of 4 December 2007.

2. Clause 24A of Schedule 1 introduced short briefs of evidence in certain circumstances to reduce the time spent by police officers in producing statements for inclusion in certain briefs of evidence. This applies only to proceedings for summary offences, including for indictable offences in Table 2 of Schedule 1 of the Criminal Procedure Act 1986, that are dealt with summarily at the Local Court for which brief of evidence is required to be served on the accused person if there is no guilty plea.

3. Table 2 list of offences is broad and includes various offences against the person (eg common assault and other forms of assault); stalking and intimidation; larceny and certain other property offences which do not exceed $5,000; offences relating to drugs where the amount is not more than the applicable small quantity; possession of implement of housebreaking; other property offences; false instruments where the value does not exceed $5,000; offences relating to participation in criminal groups; offences relating to firearms and dangerous weapons; certain firearms offences; offences relating to fires; publishing of child pornography; attempts to commit any offence mentioned in Table 2 offences; accessories before or after the fact to any offence mentioned in Table 2 offences; abettors of any offence mentioned (other than Part 3) of Table 2 offences if the offence is a minor indictable one; conspiracies to commit any offence in Table 2 offences; and various other offences.

4. Clause 24A (3) provides the definition of 'prescribed statement' of a non-material witness, in relation to a brief of evidence required to be served under section 183 of the Criminal Procedure Act 1986. This includes:

5. a police officer who provides evidence that the preconditions of the exercise of a power have been satisfied or establishes that the evidence on which the prosecutor relies was obtained in accordance with the law (for example, the custody manager has cautioned the accused under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002);

6. a police officer who was responsible for the movement of, or recording the movement of, a thing connected with the offence or the investigation of the offence (for example, a police officer who conveys DNA or a drug sample to the Division of Analytical Laboratories);

7. a police officer who operated a device that produced or caused the production of a document, photograph, video or any other thing relied on by the prosecutor to prove the prosecution's case;

8. any other police officer who provides evidence that merely corroborates evidence of another officer whose statement relates to a process or procedure and is included in the brief of evidence (for example, a police officer, other than the investigating officer, who was present when the accused person was interviewed);

9. a person who is a medical practitioner, nurse, paramedic or other health care professional if all the notes of the person (for example, doctor's treatment notes or ambulance officer's checklists) have been included in the brief of evidence.

10. Clause 24A (4) provides that the above documents are no longer required to be included in the brief of evidence to be served to the accused person, so long as the brief includes a summary list of what such statement would have included.

11. The Committee still holds the same concerns as previously reported in its Digest Report No 8 of 4 December 2007, that the regulation may trespass unduly on individual rights and liberties such as principles on fair trials and procedural fairness. The rationale for the Committee's concerns include:

(a) The invisibility of the pre-trial process or procedure over the conduct, admissibility and regulation of evidence of confessions or admissions during police interrogation and investigation.

(b) Difficulties in challenging confessional evidence or damaging admissions relate to the lack of independent source of verification apart from the defendant and the interviewing officer.

(c) The Wood NSW Royal Commission into the Police in 1995 found various practices (including threatening suspects; unlawful interrogations; false evidence) revealed in evidence by police witnesses.

(d) As recommended at 29 in the 1990 NSW Law Reform Commission's Report on *Police Powers of Detention and Investigation After Arrest*, there should be a system aimed at increasing confidence in the integrity of police investigative methods and the evidence subsequently produced; regularising the treatment of persons in custody and the safeguards to persons in custody of police; and reducing the delays and costs by reducing the time spent on challenges to the admissibility of Crown evidence.

(e) The Government then introduced the *Crimes Amendment (Detention After Arrest) Act 1997*, which addressed some of the issues from the NSW Law Reform Commission's Report. The Act provides for a custody manager to inform the person that they have a right to communicate with a friend, relative, guardian or independent person or lawyer unless the custody manager believes on reasonable grounds not to do so for certain reasons. Obligations are placed on custody manager to provide medical assistance if required and custody records are to be maintained.

(f) The courts and the High Court of Australia have dealt with issues of police powers and the admissibility of evidence obtained in contravention of fairness principles, including the question of the admissibility of alleged confessional evidence: *Driscoll v The Queen* (1977) 15 ALR 47; *R v Carter* [1984] 3 NSWLR 635; *Stephens v R* (1985) 58 ALR 753; *Carr v R* (1988) 81 ALR 236; *Duke v R* (1988) 83 ALR 650; and *McKinney v R* (1991) 171 CLR 468. The development in these cases, has been from the argument that the unsigned confessional evidence should have been excluded (*Driscoll*) to the need for judicial warnings on the difficulties facing an accused to dispute alleged confessional evidence in situations where other means of corroboration are not available to the accused (*McKinney*).

(g) The *Evidence Act 1995* also contains provisions on circumstances in which admissions made by the defendant are not to be admitted at trial including exclusion of improperly or illegally obtained evidence and the need to caution accused persons. The lack of inclusion of documents in briefs of evidence may make it harder for defendants to dispute any alleged illegally obtained evidence during police investigation or questioning, as well as delay the proceedings with

applications to the court for ordering the service of such documentation previously not included.

(h) The need for good practice to increase the confidence in the integrity of police investigative methods and police procedures, as well as the evidence subsequently produced through the evidence in briefs to show that the preconditions of the exercise of a power have been satisfied or that the evidence on which the prosecutor relies upon was lawfully obtained.

(i) The inclusion of the above contents in the briefs of evidence may support the promotion of a greater focus on the relevant issues, the minimisation of any applications by the accused to the courts for orders on the service of documents not previously included in the brief of evidence, the promotion of guilty pleas in appropriate cases, and reduction of time and delays for all parties.

12. Clause 24A operated for a trial period on accused persons who were charged with the relevant offences on or after 12 November 2007 and before 12 November 2008. This Regulation aims to extend the trial scheme until 30 June 2009.

13. As outlined in paragraph 6 above, the Committee remains concerned that the rights and liberties of defendants may be affected without adequate protection during the trial scheme and now, the extended trial period.

14. At the time when the Criminal Procedure Amendment (Local Court Process Reforms) Bill 2007 was introduced, the Legislation Review Committee commented on it in its Digest Report No 2 of 24 September 2007. The amendment legislation enabled regulations (such as this one and the 2007 Regulation), to make other provision for the contents of briefs of evidence required under sections 183 and 187 of the Act. The Committee has already raised concerns with the amendment legislation as unduly trespassing the rights and liberties of the defendant and interfering with procedural fairness.

15. The Law Society of NSW raised concerns regarding the amendment legislation at the time. They considered that it would be inappropriate for a lawyer to advise a defendant to plead guilty without seeing the relevant evidence. The Law Society argued that the legislation (and similarly, this regulation) may have the effect of increasing the number of not guilty pleas rather than achieving the legislative objective of reducing the administrative workload of police.

16. The Law Society in its Journal article of August 2007 (page 7), commented that the reality for the criminal system is that the service of briefs results in a plea or a shorter hearing as well as it leads to better police practice. It suggested that the amendments will not lead to savings for police, rather, there would be an increase in court time set aside for defended hearings as well as an increase in the number of defended hearings in the Local Court and an increase in the need for police and witnesses to give evidence in court.

17. In its submission to the NSW Attorney General with regard to the then proposed amendment to clause 24 of the Criminal Procedure Regulation 2005, the Law Society wrote:

> The summary offences in which a brief will no longer have to be served, such as offensive conduct, can involve complex matters of fact and law. The service of a brief saves court time and resources by ensuring that all parties know in advance of the hearing what the relevant issues are, how many witnesses are required, how long the hearing is likely to last and whether the matter is still to be defended at all.
>
> The [Law Society's] Committee is concerned that these reforms signal a move towards abolishing the service of briefs in summary matters altogether. In the Agreement in Principle speech, the Minister for Police commented that the evaluation of the 12-month trial will also consider " whether there should be further reforms to increase efficiency" and that "[t]he trial as proposed by the Attorney will extend the scheme to other specific summary matters".

18. The background context was since 1997, when the NSW Government introduced the Justices Amendment (Briefs of Evidence) Bill 1997 to provide for the service of copies of briefs of evidence in proceedings for offences dealt with summarily in the Local Court, the Government stated then that it was unfair to the defendant that the defendant be advised only of the offence that is charged and the alleged facts that constitute the offence. That bill was passed to ensure fairer hearings as defendants could be prepared in advance of the prosecution case. The former Attorney General summarised the benefits of the reforms back in 1997:

- Summary hearings would become more focused on relevant issues and be disposed of more quickly
- Shorter more focused hearings would save time and money for all parties
- Provisions of a brief would assist defendants in providing instruction to their lawyers
- Police officers would spend less time at court waiting to give evidence
- It would likely increase guilty pleas.

19. The Committee has previously noted in its Digest Report Number 8 of 4 December 2007, that the Law Society in its submission to the Attorney General, argued that the same rationale behind the introduction of the 1997 reforms still remains valid today. The Law Society suggested that the amendments will lose the benefits of the 1997 reforms as summarised above. The amendments may instead lead to:

- Increase in the number of defended hearings in the Local Court
- Increase in court time set aside for defended hearings
- Need for police and witnesses to attend court to give evidence
- Increase in the number of guilty pleas on the hearing date.

20. That the Committee, for the purposes of s 9(1)(b)(i) of the *Legislation Review Act 1987*, resolved to report that:

    (i) the Committee still holds genuine concerns that this Regulation trespasses unduly on individual rights and liberties, especially for defendants in the extension of the initial 12 months of trial to 30 June

2009, without adequate protection in respect of procedural fairness, and refers this Regulation to Parliament.

SECTION B: REGULATIONS FOR WHICH NO FURTHER ACTION IS REQUIRED UNDER S 9(1)(A) OF THE *LEGISLATION REVIEW ACT 1987*

Outline of the Regulation/Issues

Charitable Fundraising Regulation 2008

Recommendation

That the Committee:

1) for the purposes of s 9 (1)(a) of the *Legislation Review Act 1987*, resolve that no further action is required with regard to this Regulation.

Grounds for comment

Personal rights/liberties	**Strict liability provisions**: the Regulation contains a number of strict liability provisions. Such provisions are always a concern to the Committee, because they may be seen as contrary to the right to the presumption of innocence. However, the Committee notes that those provisions are expressed as maximum penalties and are in the low range of 5 to 20 penalty units. Clause 11 places an obligation on face-to-face collectors to prominently display an identification badge or card. The object is to enable members of the public to be more confident as to the bona fides of the appeal. Clause 12 is a disclosure provision relating to the fund-raising conducted by mail or by telephone. Clause 14 requires authorised fundraisers to advise the Minister regarding changes to basic particulars such as name and address, details of branches and traders. The purpose is to maintain the integrity of the Department's records. The Committee considers that these provisions do not involve excessive penalties and that the reasons for the provisions are in the public interest. The Committee therefore concludes these strict liability provisions do not trespass unduly on personal rights and liberties.

Business impact	
Objects/spirit of Act	
Alternatives/effectiveness	
Duplicates/overlaps/conflicts	
Needs elucidation	
SLA, ss 4,5,6, Sched 1, 2	**RIS**: This Regulation is a principal statutory rule, which means that a Regulatory Impact Statement (RIS) for it was required under the *Subordinate Legislation Act 1989* prior to the making of the rule. The RIS examined 6 alternative options to implement the regulatory proposal. It favoured the option that involved the making of a regulation with fewer controls than at present. The RIS states this option gives effect to all the necessary requirements for the proper administration of the Act. It said this option was supported by Government policy, which was to minimise the number and complexity of regulations and reduce red tape. The RIS concluded that the favoured option provided the most net benefit to the community.
Other	

Persons contacted	Mr Simon Hughes, Project Officer, Charities Branch Ph: 9995-0630

Explanatory Note

The object of this Regulation is to remake, with some changes, the provisions of the Charitable Fundraising Regulation 2003, which is repealed on 1 September 2008 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation makes some changes to the standard conditions that apply to an authority that is taken to be granted under section 16 (6) of the *Charitable Fundraising Act 1991* (the Act) and provides for an exemption from the requirement for a face-to-face collector to wear an identification card or badge in certain circumstances where the collector is at a fundraising event or function. This Regulation also provides that a request for, or receipt of, certain benefits from a registered club does not constitute a fundraising appeal for the purposes of the Act if the request or receipt is in relation to a community support and expenditure scheme.

This Regulation also makes provision with respect to the following:

(a) the activities and appeals that do not constitute a fundraising appeal for the purposes of the Act,
(b) the religious organisations that are exempt from the Act,
(c) the manner of determining what constitutes a lawful and proper expense in connection with a fundraising appeal,
(d) the particulars that are to be shown in the records of income and expenditure that a person or organisation conducting a fundraising appeal must keep,
(e) the identification and obligations of participants in fundraising appeals,
(f) the financial and organisational information that must be provided to the public on

(g) request, and the fees payable for that information,
(h) the changes in particulars that an authorised fundraiser must furnish to the Minister,
(i) the standard conditions to apply to authorities to conduct fundraising appeals that are taken to have been granted under the Act when applications have not been dealt with in time,
(j) savings and formal matters.

This Regulation is made under the *Charitable Fundraising Act 1991*, including sections5 (3) (f), 7 (1) (b), 9 (3) (a), 16 (6), 20 (3), 22 (2) (b), 47 (1) and (3), 49 (3) and 55 (the general regulation-making power).

Comment

2. The simplification of the Regulation gave rise to concern by the Office of the NSW Privacy Commissioner regarding the direct marketing provision of Clause 12 of the Regulation, which, it said, had the effect of removing the previous requirement to comply with the Australian Direct Marketing Code of Practice. The Department's response was that Clause 12 of the Regulation contained the salient features of that Code and also required compliance with the Commonwealth Telecommunications Standard. It said these requirements provide sufficient protection to members of the public.

3. The NSW Office of Fair Trading referred to the need for greater harmonisation in charitable fundraising regulations between Victoria and New South Wales. The Office said that the development of a new, national generic consumer law, as recommended by the Productivity Commission and endorsed by the Council of Australian Governments and the Ministerial Council on Consumer Affairs is intended to address such inconsistencies. It said, however, that detailed work on the new law had only just begun and the date for implementation of the national consumer policy framework has yet to be determined. The Department said that it would continue to identify and act upon appropriate opportunities to harmonise in the future.

4. The Fundraising Institute of Australia (FIA), in their submission, argued that because of the exemptions under the Charitable Fundraising Act 1991 and Regulation that only approximate 20% of fundraising is captured by the Act and Regulation. It said this results in discrimination against those that are required to have an authority. The Department's response was that the rationale for having exemptions from holding an authority are generally based on the recognition that appropriate oversight of fundraising and internal controls are already in place. It also said that traditionally religious activities of recognised religious bodies were exempt from charity laws.

5. FIA said that allowances should be made smaller and newer organisations, as these were likely to have higher costs of fundraising than established organisations. The Department said that allowances have been made for small organisations, for example, raising the trigger amount to $100,000 for section 23 reports for unincorporated associations and for notes to the financial accounts. This reduced red tape and the regulatory burden for smaller fundraisers.

Appendix 1: Index of Bills Reported on in 2008

	Digest Number
Administrative Decisions Tribunal Amendment Bill 2008	11
Adoption Amendment Bill 2008	11
Appropriation Bill 2008	8
Appropriation (Budget Variations) Bill 2008	6
Appropriation (Parliament) Bill 2008	8
Appropriation (Special Offices) Bill 2008	8
Auditor-General (Supplementary Powers) Bill 2008	9
Australian Jockey Club Bill 2008	7
Board of Adult and Community Education Repeal Bill 2008	5
Building Professionals Amendment Bill 2008	7
Callan Park Trust Bill 2008*	11
Child Protection (Offenders Registration) Amendment Bill 2008	10
Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008	7
Children (Criminal Proceedings) Amendment Bill 2008	8
Children (Detention Centres) Amendment Bill 2008	8
Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008	11
Clean Coal Administration Bill 2008	5
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008	8
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	5
Contaminated Land Management Amendment Bill 2008	10
Conveyancing Amendment (Mortgages) Bill 2007*	1
Courts and Crimes Legislation Amendment Bill 2008	8
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008	10

	Digest Number
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes Amendment (Rock Throwing) Bill 2008	6
Crimes (Administration of Sentences) Legislation Amendment Bill 2008	5
Crimes (Forensic Procedures) Amendment Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008	10
Criminal Case Conferencing Trial Bill 2008	4
Dangerous Goods (Road and Rail Transport) Bill 2008	10
Dividing Fences and Other Legislation Amendment Bill 2008	5
Education Amendment Bill 2008	4
Election Funding Amendment (Political Donations and Expenditure) Bill 2008	9
Electricity Industry Restructuring Bill 2008	8
Electricity Industry Restructuring Bill 2008 (No 2)	10
Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008	10
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Environmental Planning and Assessment Amendment Bill 2008	7
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	4
Exotic Diseases of Animals Amendment Bill 2008	8
Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*	5
Filming Related Legislation Amendment Bill 2008	8
Fines Amendment Bill 2008	4
Firearms Amendment Bill 2008*	8
First State Superannuation Amendment Bill 2008	7
Food Amendment (Public Information on Offences) Bill 2008	2

	Digest Number
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Gas Supply Amendment Bill 2008	4
Growth Centres (Development Corporations) Amendment Bill 2008	4
Health Services Amendment (Mandatory Background Checks of Medical Practitioners) Bill 2008*	9
Hemp Industry Bill 2008	6
Higher Education Amendment Bill 2008	5
Home Building Amendment Bill 2008	10
Housing Amendment (Tenant Fraud) Bill 2008	4
Human Tissue Amendment (Children in Care of State) Bill 2008	7
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008*	8
Jury Amendment Bill 2008	7
Justices of the Peace Amendment Bill 2008	5
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property Bill) 2008	10
Local Government Amendment (Election Date) Bill 2008	2
Local Government Amendment (Elections) Bill 2008	4
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008	9
Marine Parks Amendment Bill 2007	1
Marine Safety Amendment Bill 2008	8
Medical Practice Amendment Bill 2008	6
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	10
Mining Amendment Bill 2008	3
Mining Amendment (Improvements on Land) Bill 2008	11
Miscellaneous Acts Amendment Bill 2008	6
National Gas (New South Wales) Bill 2008	5

	Digest Number
National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008*	3
Peak Oil Response Plan Bill 2008*	6
Police Integrity Commission Amendment (Crime Commission) Bill 2008	9
Port Macquarie-Hastings Council Election Bill 2008*	5
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008	11
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008*	8
Public Health (Tobacco) Bill 2008	11
Public Sector Employment Management Amendment Bill 2008	4
Rail Safety Bill 2008	11
Retirement Villages Amendment Bill 2008	10
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008	11
Road Transport Legislation Amendment Bill 2008	9
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
Shop Trading Bill 2008	8
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	3
Snowy Mountains Cloud Seeding Trial Amendment (Extension) Bill 2008	6
Sporting Venues Authorities Bill 2008	6
State Arms, Symbols and Emblems Amendment (Black Opal) Bill 2008	5
State Emergency and Rescue Management Amendment (Botany Emergency Works) Bill 2008	5
State Revenue Legislation Amendment Bill 2008	4
State Revenue and Other Legislation Amendment (Budget) Bill 2008	8
Statute Law (Miscellaneous Provisions) Bill 2008	8
Strata Management Legislation Amendment Bill 2008	7

	Digest Number
Succession Amendment (Family Provision) Bill 2008	10
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	6
Superannuation Administration Amendment Bill 2008	4
TAFE (Freezing of Fees) Bill 2007*	1
Thoroughbred Racing Amendment Bill 2008	9
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	9
Totalizator Amendment Bill 2008	2
Tow Truck Industry Amendment Bill 2008	10
Vexatious Proceedings Bill 2008	10
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	5
Water (Commonwealth Powers) Bill 2008	11
Water Management Amendment Bill 2008	11
Western and Crown Lands Amendment (Special Purpose Leases) Bill 2008	8
Workers Compensation Amendment Bill 2008	5
Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008	8

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08			10
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08			9
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
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				8
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
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	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2008

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Administrative Decisions Tribunal Amendment Bill 2008				N, R	
Adoption Amendment Bill 2008	N, R	N, R		N	
Board of Adult and Community Education Repeal Bill 2008	N, R				
Building Professionals Amendment Bill 2008	N, R			N, R	
Callan Park Trust Bill 2008	N				
Child Protection (Offenders Registration) Amendment Bill 2008	N				
Children (Criminal Proceedings) Amendment Bill 2008	N			N, R	
Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008				N	
Coal and Oil Shale Workers (Superannuation) Amendment Bill 2008	N				
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	N, R			N	
Contaminated Land Management Amendment Bill 2008	N, R			N, R	
Courts and Crimes Legislation Amendment Bill 2008	N				
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008				R	
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Crimes Amendment (Rock Throwing) Bill 2008	N, R			N, R	
Crimes (Administration of Sentences) Legislation Amendment Bill 2008			N		
Crimes (Forensic Procedures) Amendment Bill 2008	N, C				
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	N, R		N, R		
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008				R	
Criminal Case Conferencing Trial Bill 2008	N, R				
Dangerous Goods (Road and Rail Transport) Bill 2008	N			R	

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Election Funding Amendment (Political Donations and Expenditure) Bill 2008				N, R	
Electricity Industry Restructuring Bill 2008	N, R	N, R		N, R	
Electricity Industry Restructuring Bill 2008 (No 2)	N, R	N, R		R	
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Filming Related Legislation Amendment Bill 2008				N, R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Hemp Industry Bill 2008	N, R		N, R	N, R	
Home Building Amendment Bill 2008	N		N, R		
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008	N				
Jury Amendment Bill 2008	N				
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Bill 2008				R	
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008				N, R	
Marine Safety Amendment Bill 2008				N, R	
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	N			R	
Medical Practice Amendment Bill 2008	N, R			N, R	
Mining Amendment Bill 2008	N				
Mining Amendment (Improvements on Land) Bill 2008	N, R				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Police Integrity Commission Amendment (Crime Commission) Bill 2008	N		N		
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008				N, R	
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008		N, R		N, R	
Public Health (Tobacco) Bill 2008	N			N, R	
Public Sector Employment and Management Amendment Bill 2008	R				
Rail Safety Bill 2008	N			N, R	
Retirement Villages Amendment Bill 2008	N			R	
Road Transport Legislation Amendment Bill 2008	N			N, R	
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008				N, R	
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Statute Law (Miscellaneous Provisions) Bill 2008	N			N, R	
Strata Management Legislation Amendment Bill 2008				N, R	
Succession Amendment (Family Provision) Bill 2008				R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Thoroughbred Racing Amendment Bill 2008			N, R	N, R	
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Tow Truck Industry Amendment Bill 2008	N			R	
Vexatious Proceedings Bill 2008	N			R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Water (Commonwealth Powers) Bill 2008	N				
Water Management Amendment Bill 2008	N, R			N, R	
Western Crown Lands Amendment (Special Purpose Leases) Bill 2008		N, R			
Workers Compensation Amendment Bill 2008	N, R				

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

Appendix 4: Index of correspondence on regulations reported on in 2007

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2007
Road Transport (Safety and Traffic Management) (Road Rules) Amendment (Mobility Parking Scheme) Regulation 2007	Minister for Roads	04/12/07	25/03/08	3