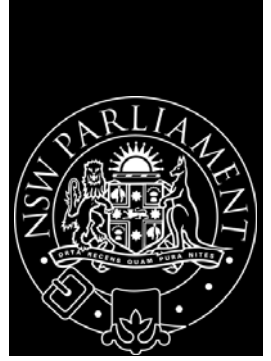


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 6 of 2006

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

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 2005

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 2005

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 2005

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 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 2005

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. Appropriation (Budget Variations) Bill 2006

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

2. Education Legislation Amendment (Staff) Bill 2006

Procedural Fairness: Schedule 1.1 [11], proposed ss.93E, 93F & 93K; Schedule 1.2 [14], proposed ss.22G, 22K & 22T; & Schedule 1.3 [5], proposed ss. 31, 32 & 32C

18. The Committee notes that the right to be heard is a fundamental rule of procedural fairness, the content of which is to be determined by what is fair in the circumstances.
19. The Committee refers to Parliament the question of whether the Bill unduly trespasses on the right to be heard by limiting that right to a right to make a submission in defence of disciplinary action.

Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).

24. The Committee notes the importance of adhering to the rules of natural justice for "protecting the individual from arbitrary government action and ensur[ing] the legitimacy and integrity of decision-making by administrators" and others. The Committee also notes that there may be circumstances in which it is appropriate to limit the extent to which the rules of natural justice are to apply.
25. The Committee notes that the equivalent provision in the *Public Sector Employment and Management Act 2002* (s. 45(1)) provides that procedural guidelines issued by the Director of Public Employment must be consistent with the rules for procedural fairness.
26. The Committee has written to the Minister for advice as to why proposed sections 93D(2) [and cognate clauses 22F(2) and 30(2)] do not include a provision equivalent to s. 45(1) of the *Public Sector Employment and Management Act 2002* expressly providing that the Director-General's procedural guidelines must be consistent with the rules for procedural fairness. The Committee has also written to the Minister for advice as to whether the Bill can be amended accordingly.

Right to property, Forfeiture of withheld salary: Schedule 1.1[11], proposed s. 93L; Schedule 1.2[14], proposed s. 22L; & Schedule 1.3[5], proposed s. 32D

32. The Committee is of the view that allowing for the forfeiture of salary of a person who is suspended pending determination of a disciplinary matter or a criminal charge is a trespass on the person's right to property.

33. The Committee notes the alternative formulation in section 49 of the *Public Sector Employment and Management Act 2002*, which makes forfeiture dependent on the outcome of the matter; either a finding of misconduct by the Director-General or a conviction of a serious offence after a criminal trial.
34. The Committee has written to the Minister for advice as to:
- (i) why the formulation under the *Public Sector Employment and Management Act 2002* was not followed in this Bill;
 - (ii) why the Bill requires the Director-General to make a decision **not** to forfeit salary rather than a decision to forfeit salary;
 - (iii) why such a decision is to be made before any final determination of the disciplinary action or criminal charge has been made;
 - (iv) whether the Bill can be amended to ensure that any salary withheld can only be forfeited to the State if the suspended person concerned is actually convicted of a criminal offence or subjected to disciplinary action;
 - (v) whether the legislation provides for restoration of forfeited salary to a person who is subsequently found not guilty of the offence with which they were charged or the charge is dropped, or where no disciplinary action is taken against the person concerned, as the case may be; and
 - (vi) whether the legislation provides for restoration of forfeited salary in the case of a person who is convicted of a serious offence but whose conviction is overturned on appeal or quashed.
35. The Committee refers to Parliament the question as to whether the trespass on property rights under these sections is undue.

Circular definition of “misconduct”: Schedule 1.1[11], proposed s 93C(1)(b); Schedule 1.2 [14], proposed s 22E(1)(b); & Schedule 1.3 [5], proposed s 29(1)(b)

40. The Committee is of the view that the definition of “*misconduct*” under the Bill should be as clear and unambiguous as possible, given the potential adverse impact on an officer that an investigation into, or finding of, misconduct can have.
41. The Committee has written to the Minister for advice as to how the definition in proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) can be amended to remove the circularity and provide clearer content.
42. The Committee refers to Parliament the question as to whether proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) make rights, liberties or obligations unduly dependent on unclear administrative powers.

Ouster clauses: Schedule 2.1 [2], proposed s 93ZA; Schedule 2.2[2], proposed s. 23ZA; & Schedule 2.3 [2], proposed s. 32R

46. The Committee notes the effect of these provisions in removing the fundamental right of a person to seek review of an adverse decision.

47. The Committee further notes that the courts will limit the scope of privative clauses in certain circumstances and thus preserve judicial review rights.
48. The Committee refers to Parliament the question as to whether proposed sections 93ZA, 223ZA & 32R make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

Regulation making power: Schedule 1.1[11], proposed s. 93W; Schedule 1.2 [14], proposed s. 22W & Schedule 1.3 [5], proposed s 32N

53. The Committee is of the view that entitlements relating to employment amount to personal property. The Committee notes that 93W(6) [and cognate clauses 22W & 32N] purport to give regulations made under the proposed sections primacy over other legislation in the field.
54. For these reasons the Committee is of the view that, to avoid an undue delegation of legislative power, such matters should be provided for in the primary legislation.
55. The Committee has written to the Minister for advice as to why such matters are not included in the primary legislation and whether the Bill can be amended to so include them.
56. The Committee refers to Parliament the question as to whether proposed subsections 93W(5), 23W(5) & 32N(5), as presently drafted are an undue delegation of legislative power.

Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).

60. The Committee notes that proposed sections 93D(2), 22F(2) & 30(2) appear to delegate the task of determining the content of natural justice to the Director-General for the purposes of the legislation, subject only to the minimum requirements set out in clause 93D(2) (and cognate clauses) and no further oversight by the legislature.
61. Given the importance of these procedural guidelines and their potential to impact on a person's right to procedural fairness, the Committee has written to the Minister for advice as to why the Director-General's procedural guidelines are not disallowable by Parliament or otherwise subject to a measure of oversight by the legislature.
62. The Committee refers to Parliament the question as to whether these provisions insufficiently subject the exercise of legislative power to parliamentary scrutiny by allowing the Director-General to determine the content of the procedural guidelines and, therefore, the scope of natural justice to be applied under the legislation, subject only to clause 93D and cognate clauses.

3. Electricity Supply Amendment (Protection of Electricity Works) Bill 2006

Restrictions on actions: proposed s 53(2)

15. The Committee notes that, pursuant to proposed s 53(2), no action by the owner or occupier of land lies against a network operator by reason of the operation or use of electricity works to which proposed s 53 applies.

16. The Committee notes that this constitutes a trespass on the common law right of a landowner or occupier to seek redress for the nuisance-making actions of a network operator.
17. The Committee notes that s 53(2) applies to land on which the landowner at the relevant time consented to the construction of the electricity works.
18. The Committee also notes that the retention of the right to sue for negligence in proposed s 53(3) preserves a landholder or occupier's right to sue for damage arising from the negligent acts of the network operator.
19. The Committee refers to Parliament whether this limitation on the ability to seek judicial redress for nuisance is an undue trespass on the individual rights of landowners or occupiers.

4. Judicial Officers Amendment Bill 2006

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

5. Local Government Amendment (Miscellaneous) Bill 2006

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

6. Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006

III defined and wide powers

10. The Committee notes that the Bill gives no criteria for the exercise of the Minister's power to approve or nominate persons under proposed sections 9A and 9B.
11. The Committee notes that while the bill is designed to allow Tabcorp to integrate its New South Wales and Victorian administrative operations, in the longer term it has the potential to impact on other wagering operators.
12. The Committee has written to the Minister, seeking advice as to the reasons for the Bill not including any criteria for the exercise of the powers to nominate and appoint persons under proposed sections 9A and 9B.
13. The Committee refers to parliament whether the unfettered Ministerial discretion provided under the Bill makes personal rights and liberties dependant on insufficiently defined administrative power.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. APPROPRIATION (BUDGET VARIATIONS) BILL 2006

Date Introduced:	4 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Costa MLC
Portfolio:	Treasurer

Purpose and Description

1. The Bill appropriates additional amounts from the Consolidated Fund for the years 2005-2006 and 2004-2005, for the purpose of giving effect to certain budget variations required by the exigencies of government.

Background

2. It was stated in the second reading speech that:

Throughout the year the Government becomes aware of the requirement to cater for unforeseen and urgent expenditures that were not forecast at Budget time. The bill ensures that there is a transparent process for examining this expenditure. So the practice of seeking approval for supplementary funding to cover payments not provided for in the annual Appropriation Act has now become an important part of the annual budget process. This is a process that has been endorsed by the Auditor-General as well as the Legislative Council's General Purpose Standing Committee No. 1 in its report on appropriation processes.

Parliament is aware that it is not always possible to seek Parliament's authority in advance of unforeseen and urgent expenditure, and previously established procedures to deal with such situations. These include the Treasurer's Advance and section 22 of the Public Finance and Audit Act 1983. The Treasurer's Advance is an amount made available to the Treasurer in the annual Appropriation Act to be used for unforeseen and urgent expenditure. This amount is available for both recurrent services and capital works and services. In addition, section 22 of the Public Finance and Audit Act 1983 allows the Governor to approve expenditure for the exigencies of Government from the Consolidated Fund, in anticipation of appropriation by Parliament.¹

The Bill

3. The Bill's key features were set out in the second reading speech:
 - it provides an account to Parliament on how the Treasurer's Advance has been applied for recurrent and capital expenditure;

¹ Hon Michael Costa, Treasurer, Legislative Assembly *Hansard*, 4 May 2006.

- it seeks an adjustment of the 2005-2006 advance prior to the end of the current financial year;
 - it seeks appropriations to cover expenditure approved by the Governor under s 22 of the *Public Finance and Audit Act 1983*; and
 - it seeks additional appropriation for payments which are intended to be made in the current financial year where no provision was made in the annual Appropriation Bill.²
4. The Bill appropriates the following additional amounts:
- (i) for the 2005-2006 Financial Year:
 - (a) \$206,335,000 in adjustment of the vote “Advance for Treasurer”;
 - (b) \$20,237,000 for recurrent services in accordance with s 22(1) of the *Public Finance and Audit Act 1983*;
 - (c) \$1,000,000,000 for additional recurrent services (superannuation);
 - (d) \$52,033,000 for other additional recurrent services; and
 - (ii) for the 2004-2005 Financial Year:
 - (a) \$88,447,000 in adjustment of the vote “Advance for Treasurer”; and
 - (b) \$175,064,000 for recurrent services and capital works and services in accordance with s 22(1) of the *Public Finance and Audit Act 1983*.

Issues Considered by the Committee

- | |
|--|
| <p>5. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</p> |
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The Committee makes no further comment on this Bill.

² Hon Michael Costa, Treasurer, Legislative Assembly *Hansard*, 4 May 2006.

2. EDUCATION LEGISLATION AMENDMENT (STAFF) BILL 2006

Date Introduced:	3 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Carmel Tebbutt MP
Portfolio:	Education and Training

Purpose and Description

1. The objects of this Bill are as follows:
 - (a) to create a new legislative framework for dealing with the management of conduct and performance of government school teachers and other staff employed in the public education sector that will replace the existing disciplinary scheme applying to those teachers and staff,
 - (b) to provide for automatic dismissal of government school teachers and other staff employed in the public education sector who become persons who are prohibited from being employed in child-related employment.

Background

2. In her second reading speech, the Minister said:

The Government will amend the *Teaching Services Act 1980*, the *Technical and Further Education Commission Act 1990* and the *Education (School Administrative and Support Staff) Act 1987* to create a new framework for dealing with the conduct and performance of persons employed under the Acts and to dismiss and otherwise deal with employees who become prohibited persons.³

The Bill

3. The Bill proposes substantial amendments to three Acts:
 - *Teaching Service Act 1980*
 - *Technical and Further Education Commission Act 1990*
 - *Education (School Administrative and Support Staff) Act 1987*
4. The amendments are, for practical purposes identical, and deal with the capacity of the State, as employer, to take disciplinary proceedings against educational staff, in a context of the protection of children as a paramount concern. The provisions follow the template of the *Public Sector Employment and Management Act 2002* in large part.

³ The Hon Carmel Tebbutt MP, Minister for Education, Second reading speech, Legislative Assembly Hansard, 3 May 2006.

Management of conduct and performance

5. The provisions of the new scheme for dealing with conduct and performance apply to the following classes of persons:
 - (a) officers (including school principals) employed in the Teaching Service under the *Teaching Service Act 1980*,
 - (b) members of staff employed under Chapter 1A of the *Public Sector Employment and Management Act 2002* in the TAFE Commission Division of the Government Service,
 - (c) permanent employees employed under the *Education (School Administrative and Support Staff) Act 1987*.
6. Under the new scheme, an allegation of misconduct against a person of a class referred to above may be dealt with as a disciplinary matter. Remedial action (eg, counselling or a warning) and disciplinary action (eg, dismissal) may be taken with respect to the person. The allegation is to be dealt with in accordance with procedural guidelines made by the Director-General.
7. The new provisions also provide that a person's performance must be reviewed periodically. If the person is not performing his or her duties in a satisfactory manner, remedial action or disciplinary action (or both) may be taken against the person.
8. Remedial action and disciplinary action may be taken against a person if the person is convicted, or has been found guilty, of a serious offence. A person may be suspended from duty and his or her salary withheld and forfeited to the State while an allegation of misconduct is being dealt with or pending a decision in relation to a criminal conviction against the person.

Prohibited persons

9. The Bill provides for the automatic dismissal of a staff member who is or becomes a prohibited person and who is employed in child-related employment in the Teaching Service, in the TAFE Commission Division of the Government Service or as a permanent or temporary employee under the *Education (School Administrative and Support Staff) Act 1987*.
10. A person becomes a prohibited person if the person is convicted of a serious sex offence, the murder of a child, or a child-related personal violence offence or becomes subject to registration requirements under the *Child Protection (Offenders Registration) Act 2000*.
11. The Bill will apply to persons who are currently so employed and to future employees, as well as to persons who are currently prohibited persons. There will be an obligation on a person who is charged with any such offence or who becomes a prohibited person to notify the relevant employer authority.
12. The Bill excludes staff members who are so dismissed under the Act from any right to a hearing or the requirements for procedural fairness but does not exclude the operation of review mechanisms provided for prohibited persons under other legislation.

13. If an application is made for review of the prohibited person status of a person, the Commission for Children and Young People or the relevant tribunal to which the application is made must notify the relevant employer authority and the authority is entitled to appear and be heard in any review application.
14. If a person ceases to be a prohibited person because a conviction is overturned, or a successful review application is made (not later than 12 months after the dismissal), the person is automatically taken to be reinstated or re-employed and taken to have been on leave without pay during any intervening period. A person who is reinstated or re-employed may also be subject to disciplinary action under other provisions of the Acts being amended.
15. The Bill also excludes a person who is dismissed under the provisions from having any access to industrial or other legal remedies in relation to the dismissal and prevents the exercise of certain related protected functions by the Director-General from being open to legal challenge, including challenge on the grounds of non-compliance with the rules of procedural fairness.

Issues Considered by the Committee

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

Procedural Fairness: Schedule 1.1 [11], proposed ss.93E, 93F & 93K; Schedule 1.2 [14], proposed ss.22G, 22K & 22T; & Schedule 1.3 [5], proposed ss. 31, 32 & 32C

16. The Bill provides for the bare requirements of natural justice by providing expressly for the right to be heard in relation to disciplinary action by the Director-General in relation to an allegation of misconduct or conviction of a serious offence.⁴ However, these provisions expressly provide that, in consideration of disciplinary action, a person who is the subject of the action is not entitled to cross-examine any person, have legal representation or call witnesses. Accordingly, the Bill narrows the common law right to be heard under the rules of natural justice or procedural fairness.
17. The Committee notes that the right to be heard is a key rule of natural justice or procedural fairness. The content of the rule can vary greatly; “the requirements of the rule will be determined by what is fair in the circumstances of the case”.⁵ The Committee notes that there is no automatic right to an oral hearing, to cross-examine witnesses or to be legally represented under the rules of procedural fairness.⁶

18. The Committee notes that the right to be heard is a fundamental rule of procedural fairness, the content of which is to be determined by what is fair in the circumstances.

19. The Committee refers to Parliament the question of whether the Bill unduly trespasses on the right to be heard by limiting that right to a right to make a submission in defence of disciplinary action.

⁴ See proposed ss 93F; 22H & 32 in relation to disciplinary action arising an allegation of misconduct and proposed ss 93K, 22K & 32C in relation to disciplinary action as a result of a conviction for a serious offence punishable by imprisonment for 12 months or more.

⁵ R. Douglas, *Administrative Law*, 2nd Edition, LexisNexis Butterworths 2004, at para 11.1.2. See also *Kioa v West* (1985) 159 CLR 550.

⁶ *Ibid*, at paras 11.1.13-11.1.17.

Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).

20. Clause 93D(2) [and cognate clauses 22F(2) and 30(2)] provide that the Director-General may issue "procedural guidelines" dealing with allegations of misconduct against officers as a disciplinary matter and the taking of disciplinary action with respect to officers. These clauses require the guidelines to set out practical procedures to ensure that the right to be heard, the first aspect of natural justice, is available to an officer facing an allegation of misconduct.
21. However, the Bill does not require the guidelines to provide for the second aspect of natural justice, namely the rule against bias on the part of the decision maker. The Committee notes that that limb of natural justice, like the concept itself, could only be removed by express words in the statute, and the failure to specify the inclusion of the rule against bias in the guidelines would never work as a basis for excluding that portion of natural justice (*Commissioner of Police v Tanos* (1958) 98 CLR 383). Further, the Committee notes that, as author of the guidelines, the Director-General would be amenable to judicial review by way of mandamus if the guidelines did not adhere to the minimum statutory requirements set out in clause 93D(2) (and cognate clauses).
22. Clause 93D(3) states that adherence to the standard of hearing prescribed by the procedural guidelines under clause 93D(2) will satisfy the standards required for natural justice. The Committee notes that it is open to the Parliament to prescribe the standards of, or remove altogether, the common law rules of natural justice. However, in the interest of protection of personal rights, any limitations on those ought to be limited to circumstances in which there are compelling public interest reasons for doing so and should be proportional to the objective sought.
23. The Committee notes that the equivalent provision in the *Public Sector Employment and Management Act 2002* (see s. 45(1)) provides that procedural guidelines issued by the Director of Public Employment must be consistent with the rules for procedural fairness. This appears to be a clearer and more comprehensive formulation than under the Bill and therefore, in the Committee's view, a preferable approach.

24. The Committee notes the importance of adhering to the rules of natural justice for "protecting the individual from arbitrary government action and ensur[ing] the legitimacy and integrity of decision-making by administrators"⁷ and others. The Committee also notes that there may be circumstances in which it is appropriate to limit the extent to which the rules of natural justice are to apply.

25. The Committee notes that the equivalent provision in the *Public Sector Employment and Management Act 2002* (s. 45(1)) provides that procedural guidelines issued by the Director of Public Employment must be consistent with the rules for procedural fairness.

⁷ R. Douglas, *Administrative Law*, 2nd Edition, LexisNexis Butterworths 2004, at p. 175.

26. The Committee has written to the Minister for advice as to why proposed sections 93D(2) [and cognate clauses 22F(2) and 30(2)] do not include a provision equivalent to s. 45(1) of the *Public Sector Employment and Management Act 2002* expressly providing that the Director-General's procedural guidelines must be consistent with the rules for procedural fairness. The Committee has also written to the Minister for advice as to whether the Bill can be amended accordingly.

Right to property, Forfeiture of withheld salary: Schedule 1.1[11], proposed s. 93L; Schedule 1.2[14], proposed s. 22L; & Schedule 1.3[5], proposed s. 32D

27. The Bill provides that the Director-General may suspend an officer from duty pending resolution of an allegation of misconduct against the officer where that allegation is being determined as a disciplinary matter.
28. It also provides for suspension in the case of an officer being charged either with a serious offence punishable by 12 months imprisonment or more, or with an offence which would make them a "prohibited person" if convicted. In any of these cases of suspension, the Director-General may, at his or her discretion, withhold the officer's salary while they are suspended.
29. Further, these clauses provide that any salary so withheld "is forfeited to the State unless the Director-General otherwise directs" or the salary was due to the person in respect of a period before the suspension was imposed.
30. These provisions are similar to the approach taken in the *Public Sector Employment and Management Act 2002* (see s. 49). However, the Committee notes that under that Act, salary withheld may only be forfeited to the State if:
- (a) it is decided to take disciplinary action against the person for the misconduct; or
 - (b) the person is convicted of the offence with which they were charged.
31. The Committee notes that under the Bill the Director-General has the discretion to direct that the salary not be forfeited. However, the Committee is of the view that it would be an unfair incursion into a person's property rights in any case for their salary to be forfeited before a final determination is made in relation to allegations of misconduct or criminal charges against them. The Committee is of the view that the formulation under section 49 of the *Public Sector Employment and Management Act 2002* is much fairer and better protects a person's property rights.

32. The Committee is of the view that allowing for the forfeiture of salary of a person who is suspended pending determination of a disciplinary matter or a criminal charge is a trespass on the person's right to property.

33. The Committee notes the alternative formulation in section 49 of the *Public Sector Employment and Management Act 2002*, which makes forfeiture dependent on the outcome of the matter; either a finding of misconduct by the Director-General or a conviction of a serious offence after a criminal trial.

34. The Committee has written to the Minister for advice as to:

- (i) **why the formulation under the *Public Sector Employment and Management Act 2002* was not followed in this Bill;**
- (ii) **why the Bill requires the Director-General to make a decision **not** to forfeit salary rather than a decision to forfeit salary;**
- (iii) **why such a decision is to be made before any final determination of the disciplinary action or criminal charge has been made;**
- (iv) **whether the Bill can be amended to ensure that any salary withheld can only be forfeited to the State if the suspended person concerned is actually convicted of a criminal offence or subjected to disciplinary action;**
- (v) **whether the legislation provides for restoration of forfeited salary to a person who is subsequently found not guilty of the offence with which they were charged or the charge is dropped, or where no disciplinary action is taken against the person concerned, as the case may be; and**
- (vi) **whether the legislation provides for restoration of forfeited salary in the case of a person who is convicted of a serious offence but whose conviction is overturned on appeal or quashed.**

35. The Committee refers to Parliament the question as to whether the trespass on property rights under these sections is undue.

Makes rights, liberties or obligations dependent on unclear administrative powers

Circular definition of “misconduct”: Schedule 1.1[11], proposed s 93C(1)(b); Schedule 1.2 [14], proposed s 22E(1)(b); & Schedule 1.3 [5], proposed s 29(1)(b)

36. Under these proposed sections, “*misconduct*” is defined as including:
- (a) a contravention of any provision of this Act or the regulations;
 - (b) engaging in, or having engaged in, ***any conduct that justifies the taking of disciplinary action*** (emphasis added);
 - (c) taking any detrimental action (within the meaning of the *Protected Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act; and
 - (d) taking any action against a person that is substantially in reprisal for an internal disclosure made by that person.
37. Under s 93F (and 22H & 32) the Director-General may deal with allegations that “an officer may have engaged in misconduct” as a “disciplinary matter” or by way of remedial action. The effect of proposed sections 93C(1)(b) and 93F (and counterparts under the other amended Acts) is that “*misconduct*” is, in part, defined as conduct that justifies dismissal, or a fine etc. As such it is circular and conveys no content as to what actually constitutes misconduct.

38. The Committee is of the view that it would not be appropriate to attempt to define every form of conduct that might amount to misconduct. The Committee is further of the view that even if this were possible, it would be too rigid and limiting.
39. However, the Committee is of the view that the definition of “misconduct” ought to be as clear and unambiguous as possible because of the fact that the content of “misconduct” is central to the scheme established under the Bill. Also, an investigation into an allegation of misconduct, and a determination of misconduct can have significant adverse consequences for the person concerned. Without a clear and unambiguous definition, officers will not know what conduct might constitute misconduct for the purposes of the Act.

40. **The Committee is of the view that the definition of “*misconduct*” under the Bill should be as clear and unambiguous as possible, given the potential adverse impact on an officer that an investigation into, or finding of, misconduct can have.**
41. **The Committee has written to the Minister for advice as to how the definition in proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) can be amended to remove the circularity and provide clearer content.**
42. **The Committee refers to Parliament the question as to whether proposed sections 93C(1)(b), 22E(1)(b) & 29(1)(b) make rights, liberties or obligations unduly dependent on unclear administrative powers.**

Makes rights, liberties or obligations dependent upon non-reviewable decisions

Ouster clauses: Schedule 2.1 [2], proposed s 93ZA; Schedule 2.2[2], proposed s. 23ZA; & Schedule 2.3 [2], proposed s. 32R

43. These proposed sections purport to prohibit review by a court or administrative review tribunal of the exercise of a function by the Director-General in connection with the termination of employment of a person classed as a “prohibited person”, or the reinstatement or re-employment of a person who has ceased to be so classed.
44. The Committee notes that such clauses are referred to as “privative clauses” and that there are limits on the extent to which courts will be prepared to accept exclusion of their review jurisdiction under such clauses.
45. For example, the NSW Court of Appeal made clear in *Mitchforce v Industrial Relations Commission* [2003] NSWCA 151 that there had to be reasonable limits to the effectiveness of attempts to exclude the supervision of the courts. Chief Justice Spigelman said in that case (at para 68):

The most recent authoritative [relevant] statement ... is the decision of the High Court in *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454. The judgments in that case affirm a number of propositions applicable where an issue arises as to the interaction between a jurisdictional limit and a privative provision in the legislation of a State Parliament:

...

A privative provision on its proper construction will not protect a “manifest” defect, in the sense that a decision is not a bona fide attempt to exercise the

power; that it does not relate to the subject matter of the legislation and that it is not reasonably capable of reference to the power given to the decision-maker ([13], [18], [56], [57]).

- 46. The Committee notes the effect of these provisions in removing the fundamental right of a person to seek review of an adverse decision.**
- 47. The Committee further notes that the courts will limit the scope of privative clauses in certain circumstances and thus preserve judicial review rights.**
- 48. The Committee refers to Parliament the question as to whether proposed sections 93ZA, 223ZA & 32R make rights, liberties or obligations unduly dependent upon non-reviewable decisions.**

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

Regulation making power: Schedule 1.1[11], proposed s. 93W; Schedule 1.2 [14], proposed s. 22W & Schedule 1.3 [5], proposed s 32N

49. Proposed s. 93T (and cognate clauses 22T & 32K) provide for the termination of employment of persons classed as “prohibited persons”. Proposed section 93W [and cognate clauses 22W and 32N] applies to a person who ceases to be classed as a “prohibited person”⁸ and provides for the person’s possible reinstatement to, or reemployment in, the Teaching Service.
50. Subsection 93W(5) provides for regulations to be made with respect to the entitlements (which will substantially have a financial value) of those persons who are so reinstated or reemployed, where such persons have already received payments in respect of leave and superannuation, for example, upon termination.
51. Subsection 93W(6) provides that:
- Any regulation made under subsection (5) has effect despite any other Act or law.
52. The Committee is of the view that, as such matters involve what amount to personal property rights, it may be appropriate to make provision for such matters in the principal legislation, not in regulations. This is made all the more apparent in the light of 93W(6) as it purports to give regulations made under 93W(5) supremacy over any other legislation in the field. It may be that there are other general statutes dealing with leave and superannuation, for example, which should not be excluded by subordinate legislation under these Acts as amended by the Bill.

- 53. The Committee is of the view that entitlements relating to employment amount to personal property. The Committee notes that 93W(6) [and cognate clauses 22W & 32N] purport to give regulations made under the proposed sections primacy over other legislation in the field.**

⁸ The Note to proposed section 93W(1) (and cognate clauses 22W & 32N) provides:
A person ceases to be a prohibited person in relation to an offence if an order is made under the *Commission for Children and Young People Act 1998* that the relevant provisions of that Act do not apply in respect of the offence or if the relevant conviction is overturned on appeal.

- 54. For these reasons the Committee is of the view that, to avoid an undue delegation of legislative power, such matters should be provided for in the primary legislation.**
- 55. The Committee has written to the Minister for advice as to why such matters are not included in the primary legislation and whether the Bill can be amended to so include them.**
- 56. The Committee refers to Parliament the question as to whether proposed subsections 93W(5), 23W(5) & 32N(5), as presently drafted are an undue delegation of legislative power.**

Parliamentary scrutiny of legislative power [s 8A(1)(b)(v) *LRA*]

Procedural fairness: Director-General's Procedural Guidelines: Schedule 1.1[11], proposed s. 93D(2); Schedule 1.2 [14], proposed s. 22F (2) & Schedule 1.3 [5], proposed s 30(2).

57. The Committee refers to its discussion above in relation to these proposed sections, which allow the Director-General to issue procedural guidelines.
58. The Committee notes that proposed s 93D(2) and cognate clauses provide that the procedural guidelines are to ensure that an officer is notified of and given an opportunity to respond to, an allegation of misconduct and is able to make a submission in relation to any proposed disciplinary action.
59. However, the Committee also notes that, subject to this limitation only, the Bill delegates the task of actually determining the content of natural justice to the Director-General with no Parliamentary oversight.

- 60. The Committee notes that proposed sections 93D(2), 22F(2) & 30(2) appear to delegate the task of determining the content of natural justice to the Director-General for the purposes of the legislation, subject only to the minimum requirements set out in clause 93D(2) (and cognate clauses) and no further oversight by the legislature.**
- 61. Given the importance of these procedural guidelines and their potential to impact on a person's right to procedural fairness, the Committee has written to the Minister for advice as to why the Director-General's procedural guidelines are not disallowable by Parliament or otherwise subject to a measure of oversight by the legislature.**
- 62. The Committee refers to Parliament the question as to whether these provisions insufficiently subject the exercise of legislative power to parliamentary scrutiny by allowing the Director-General to determine the content of the procedural guidelines and, therefore, the scope of natural justice to be applied under the legislation, subject only to clause 93D and cognate clauses.**

The Committee makes no further comment on this Bill.

3. ELECTRICITY SUPPLY AMENDMENT (PROTECTION OF ELECTRICITY WORKS) BILL 2006

Date Introduced:	2 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Joseph Tripodi MP
Portfolio:	Energy

Purpose and Description

1. The Bill amends the *Electricity Supply Act 1995* (the Act) so as to:
 - protect the presence, operation and use of certain electricity works;
 - clarify the powers of a network operator with respect to the removal of dangerous structures or things from land on which certain electricity works are situated; and
 - specify circumstances in which the costs of removing any dangerous structure or thing are payable by the relevant network operator, and in which the relevant network operator is liable for loss or damage suffered by the owner of any structure or thing as a result of its removal.

Background

2. The following background was provided in the second reading speech:

Around 44 per cent of the electricity network in New South Wales was built decades ago on land over which network operators now do not have a formal easement or ownership. During this time electricity distribution was undertaken by county councils, under local government control. Under the local government laws in place at the time, these councils had the power to undertake works on private land with the consent of the owner without having an easement or other interest over the property.

... Owner consent to the presence, operation and use of electricity works on private land does not, however, legally bind subsequent purchasers of the property, despite the fact that they have paid a reduced price for the property.

... Other States in Australia have passed legislation in the past 10 years to protect electricity works on land over which network operators hold no formal interest. It is appropriate that New South Wales does the same.

... Electricity infrastructure requires the benefit of solid legal protection to ensure that power can be practically and affordably provided to homes and businesses across New South Wales...The long-term use of these works, combined with the statutory rights and responsibilities of network operators to operate, maintain and repair essential electricity infrastructure, may provide a defence to any legal action. This, however, is by no means certain.⁹

⁹ The Hon J G Tripodi MP, Minister for Energy, Legislative Assembly *Hansard*, 3 May 2006.

The Bill

3. The Bill prevents legal action from being taken against a network operator by reason of the presence, operation or use of electricity works, and states that, as between the owner of the land and the network operator, such presence, operation and use is taken to be lawful [proposed new s 53(2)].
4. However, any civil liability for negligence that may arise from the operation, use, maintenance, repair, replacement, modification, upgrade or removal of any such works is maintained [proposed s 53(3)]. Network operators will be required to obtain formal easements and compensate landholders in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* if they wish to protect future electricity works constructed on private land.¹⁰
5. Currently, s 49 enables a network operator to take action to remove structures and things which endanger its electricity works. The bill allows such action to be taken even if the works concerned are situated on land owned or occupied by the person having control of the structure or thing concerned [proposed s 49(7)].
6. Section 49(5) currently enables a network operator to recover the cost of such removal from the person having control of it. Pursuant to the Bill, this will not apply - in relation to certain classes of structure or thing - where the person having control of the structure or thing owns or occupies the land on which the works are situated [proposed s 49(8)].
7. Where proposed s 49(8) applies, the network operator must bear the costs of removing the structure or thing, and is liable to the owner of the structure or thing for any loss or damage suffered by the owner as a consequence of its removal [proposed s 49(9)].
8. Amended s 49 will apply where a network operator has reasonable cause to believe that any structure or thing situated in, on or near its electricity works:
 - could destroy, damage or interfere with those works; or
 - could make those works become a potential cause of bushfire or a potential risk to public safety [proposed new s 49(1)].

Issues Considered by the Committee

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

Restrictions on actions: proposed s 53(2)

9. Proposed s 53(2) provides that no action by the owner or occupier of the land lies against the network operator by reason of:
 - the presence in, on or over the land of electricity works to which s 53 applies; or

¹⁰ The Hon J G Tripodi MP, Minister for Energy, Legislative Assembly *Hansard*, 3 May 2006.

- the operation or use of electricity works to which s 53 applies that are present in, on or over the land.
10. As noted above, this does not extend to litigation resulting from negligence.¹¹ However, proposed s 53(2) does operate to protect a network operator from litigation arising from nuisance suffered by the landowner.

Nuisance

11. Nuisance is an unreasonable interference with the use and enjoyment of land: an “invasion of the common law rights of an owner or occupier of land”.¹² It denotes the *result* of a person’s conduct, or the state of affairs created by the conduct, and bringing about the result.¹³ Although the relevant state of affairs is often brought about by negligence, it is not a necessary component of the tort of nuisance.¹⁴
12. Generally a person creates a nuisance - for example, noxious smells or loud noise - on his or her own land, which then causes an interference with the rights of an adjoining landowner or occupier. However such an interference may be constituted by the activities of another on land actually owned by the person so affected, provided that the wrongdoer has permission to be there.¹⁵
13. Given the breadth of “operation or use” of electricity works, these may ultimately result in a nuisance to the landowner, for which the network operator would, but for proposed s 53(2), be liable under the common law.
14. However, the Committee notes that if any damage to the rights of an owner or occupier to use and enjoy the land resulted from the negligence of the network operator, action could be taken against the network operator.

- 15. The Committee notes that, pursuant to proposed s 53(2), no action by the owner or occupier of land can be taken against a network operator by reason of the operation or use of electricity works to which proposed s 53 applies.**
- 16. The Committee notes that this constitutes a trespass on the common law right of a landowner or occupier to seek redress for the nuisance-making actions of a network operator.**
- 17. The Committee notes that s 53(2) applies to land on which the landowner at the relevant time consented to the construction of the electricity works.**
- 18. The Committee also notes that the retention of the right to sue for negligence in proposed s 53(3) preserves a landholder or occupier’s right to sue for damage arising from the negligent acts of the network operator.**

¹¹ See also the Hon J G Tripodi MP, Minister for Energy, Legislative Assembly *Hansard*, 3 May 2006.

¹² *Hargrave v Goldman* (1963) 110 CLR 40 at 60 per Windeyer J.

¹³ See Dixon J in *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657.

¹⁴ See *Read v J Lyons & Co* [1947] AC 156 at 183 per Lord Simonds: “...if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it”.

¹⁵ See, eg, *Hooper v Rogers* [1975] 1 Ch 43.

19. The Committee refers to Parliament whether this limitation on the ability to seek judicial redress for nuisance is an undue trespass on the individual rights of landowners or occupiers.

The Committee makes no further comment on this Bill.

4. JUDICIAL OFFICERS AMENDMENT BILL 2006

Date Introduced: 2 May 2006
House Introduced: Legislative Assembly
Minister Responsible: The Hon Bob Debus MP
Portfolio: Attorney General

Purpose and Description

1. The Bill amends the *Judicial Officers Act 1986* to make further provision for the handling of complaints against judicial officers and the investigation of judicial officers suspected to be suffering from impairment. It also amends the *Judges' Pensions Act 1953* to exclude leave without pay from a judicial officer's pensionable service.

Background

2. In the second reading speech, Mr Tony Stewart MP stated:

Last year the Minister announced a review of the *Judicial Officers Act 1986* in the lead-up to the twentieth anniversary of the introduction of the legislation. The ... Bill introduces changes arising out of the review of the Act. The proposed reforms have been developed in consultation between the heads of jurisdiction and the Director-General of the Attorney General's Department. Submissions to the review from members of the public, the legal community and other interested parties were considered as part of the consultative process.¹⁶

The Bill

3. Amongst other things, the Bill amends the *Judicial Officers Act 1986* in relation to the handling of complaints against judicial officers and the investigation of judicial officers who have suspected impairments. It also addresses the powers of the Judicial Commission to enter into certain kinds of contractual arrangements and includes within the Act persons who are acting in judicial office as judicial officers.
4. The Bill also amends the *Judges' Pensions Act 1953* to ensure that any leave without pay that is taken by a judge is not counted towards the judge's period of service for the purpose of calculating the judge's pension entitlements.

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

¹⁶ Mr Tony Stewart MP, Parliamentary Secretary, Second reading speech, Legislative Assembly Hansard, 2 May 2006.

5. LOCAL GOVERNMENT AMENDMENT (MISCELLANEOUS) BILL 2006

Date Introduced:	2 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kerry Hickey MP
Portfolio:	Local Government

Purpose and Description

1. The Bill makes a series of operational amendments to the *Local Government Act 1993* [the Act].
2. This Bill also amends the *Local Government (General) Regulation 2005* in relation to a councillor's responsibilities in relation to leave of absence, and in relation to a general manager's responsibilities with respect to the information to be made available to councillors [proposed new cl 235A].

Background

3. The following background was provided in the second reading speech:

The amendments in this bill address issues highlighted by State Government agencies and peak industry bodies, including the Local Government and Shires Associations of New South Wales. The bill proposes changes that have arisen out of issues with the day-to-day operation of the Act and that require legislative amendment to improve the way the sections apply.¹⁷

The Bill

4. The Bill amends the Act so as to:
 - clarify that informal votes are not to be taken into account for the purpose of determining whether a question at a council poll or constitutional referendum has been carried [proposed amended s 20];
 - provide that if the holder of a civic office to whom leave of absence has been granted attends a council meeting, the leave of absence is taken to have been rescinded as regards any future council meeting [proposed amended s 234];
 - provide that a by-election need not be held in relation to a vacancy that arises in a civic office in the last 12 months before a scheduled council election (extended from 6 months) [proposed amended s 294];
 - ensure that a council's power to grant leave of absence to the holder of a civic office is non-delegable [proposed amended s 377]; and
 - enable a council to serve notices by way of electronic mail if the person to be served has requested that notices be so served [proposed amended s 710(2)].

¹⁷ Hon K A Hickey MP, Minister for Local Government, Legislative Assembly *Hansard*, 2 May 2006.

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

The Committee makes no further comment on this Bill.

6. TOTALIZATOR LEGISLATION AMENDMENT (INTER-JURISDICTIONAL PROCESSING OF BETS) BILL 2006

Date Introduced:	2 May 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Purpose and Description

1. The object of this Bill is to permit bets placed with licensees under the *Totalizator Act 1997* to be processed in other jurisdictions, and to permit bets placed with certain persons in other jurisdictions to be processed in New South Wales by those licensees (or by means of their technology).

Background

2. The second reading speech states:

The Totalizator Legislation Amendment (Inter-Jurisdictional Processing of Bets) Bill amends the Totalizator Act 1997 and the Unlawful Gambling Act 1998 to allow Tabcorp to integrate its New South Wales and Victorian wagering operations.

Tabcorp's technical integration – that is, its back-of-office integration – will create a common wagering system operating platform for both the New South Wales and Victorian TAB,.. so that all bets received by Tabcorp can be processed in both New South Wales and Victoria, and allow Tabcorp to process bets through its computers located in New South Wales...

While TAB Limited holds licences to conduct totalizator betting in New South Wales, its parent company Tabcorp does not. Accordingly, there is a need to amend the legislation to facilitate Tabcorp's wagering integration proposals.¹⁸

3. The second reading speech provides the following background in relation to Tabcorp and its totalizator licence:

By way of background, in 1998 the New South Wales TAB was privatised, with licences for the conduct of both on-course and off-course totalizator betting in New South Wales issued to TAB Limited. The totalizator licence is for a 99 year term. Tabcorp Ltd's off-course licence includes an exclusivity period of 15 years.

In July 2004 TAB Limited was acquired by the Victorian based company Tabcorp Holdings Limited and is now a wholly owned subsidiary of that company....

Under its Victorian licence, Tabcorp operates a merged totalizator pool, known as SuperTAB, which combines investments for the TABs in Victoria, Western Australia, Tasmania and the Australian Capital Territory.¹⁹

The Bill

4. Under Schedule 1 of the bill:

¹⁸ The Hon Grant McBride, Minister for Gaming and Racing, *Hansard*, Legislative Assembly, 2 May 2006.

¹⁹ The Hon Grant McBride, Minister for Gaming and Racing, *Hansard*, Legislative Assembly, 2 May 2006.

- A New South Wales licensee can process bets on behalf of a wagering operator from another jurisdiction, providing the Minister for Gaming and Racing has given appropriate approval. The approval process involves publication of a notice in the *Gazette* [proposed s 9A (1)-(2)].
 - A wagering operator from another jurisdiction can process bets on behalf of a New South Wales licensee, providing they have been nominated by the Minister. The nomination process involves publication of a notice in the *Gazette* [proposed s 9B (1)-(2)].
 - The Minister may revoke authorisation at any time by a gazettal notice [proposed ss 9A (4) and 9B (4)].
 - Bets processed by New South Wales licensee's on behalf of wagering operators in other jurisdictions do not constitute, or involve, the conduct of a totalizer or other betting activity in New South Wales [proposed s 9A (3)].
 - Similarly, where a wagering operator from another jurisdiction processes bets on behalf of a New South Wales wagering operator they are taken to be conducting a betting activity in New South Wales [proposed Schedule 1, Section 2 – 9B (3)].
5. Schedule 2 of the Bill amends the
- Unlawful Gambling Act 1998 so as to make it clear that the processing of bets in accordance to the new arrangements is exempt from the prohibitions of that Act.²⁰

Issues Considered by the Committee

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

Ill defined and wide powers

6. The Bill allows the Minister unfettered discretion in deciding whether to approve or nominate a wagering operator. Also, the Minister may revoke authorisation at any time by notice in the *Gazette*.
7. The Bill does not specify criteria to which the Minister is to have regard in exercising this discretion. There is also no provision for review of the Minister's decision.
8. While it was stated in the second reading speech that the bill is designed to allow Tabcorp to integrate its New South Wales and Victorian wagering operations, the bill has the potential to affect other wagering operators.
9. Under the *Totalizator Act 1997*, TAB Ltd's off-course and on-course licence includes an 'exclusivity period' of 15 years after a date declared by the Minister by order published in the *Gazette* (ie. 22 June 1998).²¹ Once this exclusivity period has ended, a new wagering operator could apply to the Minister for approval to process bets on behalf of a wagering operator from another jurisdiction.

²⁰ The Hon Grant McBride, Minister for Gaming and Racing, *Hansard*, Legislative Assembly, 2 May 2006.

²¹ *Totalizator Act 1997*, Sections 11, 14(1)-(2), 15(1)-(3).

- 10. The Committee notes that the Bill gives no criteria for the exercise of the Minister's power to approve or nominate persons under proposed sections 9A and 9B.**
- 11. The Committee notes that while the bill is designed to allow Tabcorp to integrate its New South Wales and Victorian administrative operations, in the longer term it has the potential to impact on other wagering operators.**
- 12. The Committee has written to the Minister, seeking advice as to the reasons for the Bill not including any criteria for the exercise of the powers to nominate and appoint persons under proposed sections 9A and 9B.**
- 13. The Committee refers to parliament whether the unfettered Ministerial discretion provided under the Bill makes personal rights and liberties dependant on insufficiently defined administrative power.**

The Committee makes no further comment on this Bill.

Part Two – Regulations

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

Regulation	Gazette reference		Information sought	Response Received
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Motor Accidents Compensation Regulation 2005	26/08/05	5609	28/04/06	
Photo Card Regulation 2005	09/12/05	10042	28/04/06	

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Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Smoke-free Environment Amendment (Removal of Exemptions) Bill 2006*	4
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	6
Water Management Amendment (Water Property Rights Compensation) Bill 2006	5
Workers Compensation Legislation Amendment Bill 2006	4
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1

Appendix 2: Index of Ministerial Correspondence on Bills for 2006

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05		15	
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05		1
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	11	1
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	6	5
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06			5
Education Legislation Amendment (Staff) Bill 2006	Minister for Education and Training	09/05/06			6
Motor Accidents Compensation Amendment Bill 2006 and Motor Accidents (Lifetime Care and Support) Bill 2006	Minister for Commerce	24/03/06	26/04/06		3,5
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06		2
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05		15	
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	Minister for Gaming and Racing	09/05/06			6
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	15	5
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05		15	

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Crimes (Sentencing Procedure) Amendment Bill 2006	R				
Crimes (Serious Sex Offenders) Bill 2006	R, C				
Education Legislation Amendment (Staff) Bill 2006	R, C	R, C	R, C	R, C	R, C
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	R				
Environmental Planning and Assessment Amendment Bill 2006	R				
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Jury Amendment (Verdicts) Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		
Motor Vehicles Repairs (Anti-steering) Bill 2006	R				
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006		R, C			

Key

R Issue referred to Parliament
C Correspondence with Minister/Member

N Issue Noted

Appendix 4: Index of correspondence on regulations reported on in 2006

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1