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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

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

9 Functions with respect to Regulations:

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

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

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

Part One – Bills

SECTION A: COMMENT ON BILLS

1. COMPULSORY DRUG TREATMENT CORRECTIONAL CENTRE BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Della Bosca MLC
Portfolio:	Special Minister of State

Purpose and Description

1. The object of this Bill is to amend certain Acts of Parliament to establish a scheme to provide for the compulsory treatment and rehabilitation of recidivist drug dependent offenders.

2. Under the proposed compulsory drug treatment scheme, certain eligible convicted offenders are to be referred to the Drug Court of New South Wales (***the Drug Court***) for assessment.

   To be eligible for the program an offender must:

   (a) appear to have a long-term drug dependency;

   (b) have been convicted of an offence related to the offender's drug dependency and lifestyle and been sentenced to imprisonment with an unexpired non-parole period of at least 18 months but not more than 3 years; and

   (c) have been convicted of other offences at least 3 times in the previous 5 years.

3. If it is determined by the Drug Court that an offender is eligible and suitable, the Drug Court will be empowered to order that the offender serve his or her sentence of imprisonment by way of compulsory drug treatment detention in the Compulsory Drug Treatment Correctional Centre (to be established for the purposes of this scheme) and later in the community.

4. While an offender is serving a sentence by way of compulsory drug treatment detention, the offender will be required to comply with a compulsory drug treatment personal plan prepared for the offender.

   The personal plan will contain conditions relating to:

   - conduct and good behaviour;
   - attendance for counselling or other treatment;
   - the management of the offender in the Compulsory Drug Treatment Correctional Centre;
   - periodic drug testing that the offender must undergo; and

- involvement in activities, courses, training or employment for the purpose of promoting the re-integration of the offender into the community.

5. Compulsory drug treatment detention under the proposed scheme is to consist of three stages:

   - closed detention (Stage 1), where the offender is to be kept in full-time custody at the Compulsory Drug Treatment Correctional Centre;
   - semi-open detention (Stage 2), where the offender is to be kept in the Compulsory Drug Treatment Correctional Centre with leave approved by the Drug Court to allow the offender to attend employment, training or social programs; and
   - community custody (Stage 3), where the offender may reside outside the Compulsory Drug Treatment Correctional Centre under intensive supervision at accommodation approved by the Drug Court.

6. An offender will be able to progress from one stage of detention to a higher stage after the offender has served at least 6 months in the stage, but only on the order of the Drug Court after comprehensive assessment reports relating to the offender have been prepared.

   The Drug Court will also be empowered to regress an offender to a lower stage of detention if the offender has failed to comply with his or her personal plan.

7. If an offender has progressed under the proposed scheme to semi-open detention (Stage 2) or community custody (Stage 3) and is eligible to spend time outside the Compulsory Drug Treatment Correctional Centre, the Drug Court is to impose a *community supervision order*[1] on the offender.

   A *community supervision order* may contain conditions relating to the supervision of the offender outside the Compulsory Drug Treatment Correctional Centre (for example, by way of electronic monitoring), conditions relating to drug testing that the offender must undergo and conditions relating to residence, association with other persons or attendance at specified locations.

8. The Drug Court is to supervise the offender while the offender is serving the offender's sentence by way of compulsory drug treatment detention.

   The Drug Court will be empowered to sanction and reward the offender in response to the offender's level of compliance with his or her compulsory drug treatment personal plan.

   If necessary, the Drug Court will be able to terminate a drug offender's participation in the compulsory drug treatment scheme and return the offender to full-time detention in the normal correctional centre system.

[1] The Drug Court must make a ***community supervision order*** when making a progression order that:
(a) allows the offender to be absent from the Compulsory Drug Treatment Correctional Centre, and
(b) imposes condition on the offender in relation to the periods of time when the offender is not in the Compulsory Drug Treatment Correctional Centre [proposed s 106O *Crimes (Administration of Sentences) Act 1999*].

9. The Drug Court also is to act as the parole authority in relation to drug offenders serving their sentences by way of compulsory drug treatment detention. The Drug Court will determine whether such an offender is to be released on parole and the conditions of that parole.

Background

10. According to the Minister:

> The Compulsory Drug Treatment Correctional Centre will target a hard-core group of offenders with long-term drug addiction and an associated life of crime and constant imprisonment. It is for offenders who have failed to enter or complete other voluntary or court-based treatment programs.
>
> The program sits at the end of the continuum of drug diversion programs in New South Wales aimed at breaking the drug-crime cycle. Eligible offenders to the program will be sent to a special correctional facility dedicated to abstinence-based treatment, rehabilitation and education. There will be intensive judicial case management of these offenders, in close partnership with the correctional authorities as well as health and other service providers. The compulsory drug treatment program will build on the productive justice and health system linkages already established for programs such as the Drug Court program. Offenders will be gradually reintegrated back into the community and targeted with support after completion of their program and even beyond parole. The aim is to achieve better outcomes for the State's most desperately entrenched criminal addicts by assisting them to become drug- and crime-free, to take personal responsibility, and to achieve a more productive lifestyle.[2]

11. An exposure draft of the Bill was released for public consultation earlier this year. According to the Minister this indicated general support for the Bill.[3]

12. The Minister stated that, initially, the compulsory drug treatment program will deal with one hundred adult male offenders. After two years, if successful, the program will be extended to female offenders.

> The Government has committed $6 million in funding over two years for the initial operation of the compulsory drug treatment program. The new correctional centre will be established by modifying an existing stand-alone secure wing at the Parklea Correctional Centre. Capital funding of $1.5 million has been set aside for this purpose. Offenders in the program will be kept separate from other inmates in the correctional system.[4]

The Bill

13. The three schedules of the Bill amend the *Drug Court Act 1998*, the *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* respectively to give effect to the compulsory drug treatment scheme as outlined above.

[2] The Hon John Della Bosca MLC, Special Minister of State, *Legislative Council Hansard* 12 May 2004.
[3] The Hon John Della Bosca MLC, Special Minister of State, *Legislative Council Hansard* 12 May 2004.
[4] The Hon John Della Bosca MLC, Special Minister of State, *Legislative Council Hansard* 12 May 2004.

Issues Considered by the Committee

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

Compulsory Treatment: Schedule 3

14. As soon as practicable after the making of a compulsory drug treatment order in relation to an offender, the Commissioner[5] must prepare a plan that imposes conditions on the offender regarding the offender's drug treatment and rehabilitation (the offender's ***drug treatment personal plan***) [proposed s 106F *Crimes (Administration of Sentences) Act 1999*].

15. An offender's drug treatment personal plan comes into operation when it is approved by the Drug Court [proposed s 106F(2) *Crimes (Administration of Sentences) Act 1999*].

16. The kinds of conditions that may be imposed on an offender in a compulsory drug treatment personal plan are:

    (a) conditions relating to conduct and good behaviour;

    (b) conditions relating to attendance for counselling or other treatment;

    (c) conditions relating to the management of the offender in the Compulsory Drug Treatment Correctional Centre;

    (d) conditions relating to periodic drug testing that the offender must undergo;

    (e) conditions relating to involvement in activities, courses, training or employment for the purpose of promoting the re-integration of the offender into the community;

    (f) any other kinds of conditions that may be prescribed by the regulations;

    (g) such other conditions as the Commissioner considers appropriate in the circumstances; and

    (h) such other conditions as the Drug Court considers appropriate in the circumstances [proposed s 106F(6) *Crimes (Administration of Sentences) Act 1999*].

17. The regulations under (f) above may deal with:

    (a) the form of compulsory treatment;

    (b) the provision of integrated case management services to the offender; and

    (c) the key elements of non-pharmacotherapy drug treatment programs [proposed s 106F(7) *Crimes (Administration of Sentences) Act 1999*].

18. While it is accepted that sentenced offenders may be deprived of their liberty, allowing the State to compel treatment on a person is a significant trespass on

[5] ***Commissioner*** means the Commissioner of Corrective Services [s 3 *Crimes (Administration of Sentences) Act 1999*].

personal rights and liberties and has the potential to lead to abuse and severe attacks on personal dignity.

19. However, the Bill has a number of provisions which limit the potential for abuse:

- a compulsory drug treatment order can only be given to a person who has been sentenced to full-time detention [proposed s 5A(b) *Drug Court Act 1998*] and, unless sooner revoked, expires at the end of the term of the sentence to which it relates or when the offender is released on parole [proposed s 106E *Crimes (Administration of Sentences) Act 1999*];
- an offender's compulsory drug treatment personal plan, and any changes to that plan, only come into effect when it is approved by the Drug Court [proposed ss 106F(2) & 106G(2) *Crimes (Administration of Sentences) Act 1999*];
- the sanctions for failing to comply with obligations under a compulsory treatment order are *no greater* than the sentence already imposed, in that failure to comply can result in:
  - withdrawal of privileges;
  - increased levels of management, supervision and testing;
  - an order regressing a person to a lower (ie, more restrictive) stage of detention; or
  - a revocation of the drug treatment order, resulting in the offender serving the remainder of their original sentence, with the Parole Board having regard to the circumstances of the revocation [proposed ss 106I & 106Q *Crimes (Administration of Sentences) Act 1999*].
- the Bill does not provide any additional coercive powers (apart from the above sanctions) to force offenders to meet their obligations;
- the objects of compulsory drug treatment under the Bill are:
  (a) to provide a comprehensive program of compulsory treatment and rehabilitation under judicial supervision for drug dependent persons who repeatedly resort to criminal activity to support that dependency;
  (b) to effectively treat those persons for drug dependency, eliminating their illicit drug use while in the program and reducing the likelihood of relapse on release;
  (c) to promote the re-integration of those persons into the community; and
  (d) to prevent and reduce crime by reducing those persons' need to resort to criminal activity to support their dependency [proposed s 106B *Crimes (Administration of Sentences) Act 1999*].
- the Drug Court must not make a compulsory drug treatment order unless it has referred the offender for assessment by a ***multi-disciplinary team***[6] and the Court is satisfied that, among other things:

[6] ***Multi-disciplinary team*** means a team comprised of:
(a) the Director of the Compulsory Drug Treatment Correctional Centre (or a person nominated by the Director), who is to be the team leader, and

- the offender is a suitable person to serve the sentence by way of compulsory drug treatment detention; and
- it is appropriate in all of the circumstances that the sentence be served by way of compulsory drug treatment detention [proposed s 18D(b) *Drug Court Act 1998*]

- in assessing the suitability of an offender for compulsory drug treatment, the multi-disciplinary team is to have regard to:

  (a) the offender's level of motivation and attitude to the compulsory drug treatment program;

  (b) the offender's drug treatment history;

  (c) the likelihood that the offender will commit a domestic violence offence during community custody (Stage 3); and

  (d) any other matter prescribed by the regulations.

20. The Committee notes that compelling a person to undergo treatment for drug addiction is a significant trespass to that person's rights and liberties.

21. The Committee notes, however, that:

- **the objects of the Bill are arguably for the long term benefit of the convicted person;**
- **a drug treatment order and a drug treatment personal plan can only be made by the Drug Court after multi-disciplinary assessment;**
- **a drug treatment order is an alternative to, and cannot extend beyond the term of, a sentence to full time detention; and**
- **the sanctions available for failing to comply with a drug treatment personal plan are no more severe than the imposition of the original sentence.**

22. In the circumstances, the Committee does not consider that such compulsory drug treatment unduly trespasses on personal rights and liberties.

Approval of treatment plans in the absence of the offender: Schedule 3[4]

23. A compulsory drug treatment personal plan may be approved by the Drug Court in the absence of the offender in respect of whom it is made [proposed s 106F(5) *Crimes (Administration of Sentences) Act 1999*].

24. While this provision is similar to ss 7(3A) and 8AB(7) of the *Drug Court Act*, those sections apply to making orders that the person has already accepted.

25. Procedural fairness usually requires that a person has a right to be heard and be present at a proceeding where his or rights are affected.

(b) a probation and parole officer appointed by the Commissioner of Corrective Services, and
(c) a person appointed by the Chief Executive Officer, Corrections Health Service, and
(d) such other persons as are prescribed by the regulations [cl 18A].

26. The Committee notes, however, that it may be inconvenient to require an offender subject to a compulsory drug treatment order to appear before the Drug Court and this could lead to delays and otherwise interfere with the offender's treatment program.

27. The Minister's office has also advised the Committee that the Drug Court's obligation under s 26 of the Act to ensure "proper consideration" is given to any decision to approve a plan could include holding a formal hearing if the offender has raised any significant objection to the contents of a plan.

28. In the circumstances, the Committee does not consider that proposed s 106F(5) of the *Crimes (Administration of Sentences) Act 1999* trespasses unduly on personal rights and liberties.

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

No appeal from decisions of the Drug Court: Schedules 1 [6] and 3[4]

29. No appeal lies from decisions of the Drug Court:

- to make or not make a compulsory drug treatment order [proposed s 18D(4) *Drug Court Act 1998*];
- regarding setting and varying compulsory drug treatment personal plans [proposed s 106K *Crimes (Administration of Sentences) Act 1999*];
- regarding progressing or regressing an offender between the stages of compulsory drug detention [proposed s 106M(5) *Crimes (Administration of Sentences) Act 1999*].

30. These provisions exclude review of the merits of the decisions of the Drug Court but do not appear to exclude judicial review of issues of law, such as whether the Drug Court purported to act outside its jurisdiction.

31. The Committee will always be concerned when legislation seeks to exclude review of a decision unless there is a strong public interest in doing so.

32. The Committee notes, however, the objects of the Drug Court Act[7] of reducing drug dependency and promoting re-integration of convicted drug dependent persons into the community.

[7] The objects of the Drug Court Act (with amendments proposed by the Bill in italics) are set out in s 3:

(1) The objects of this Act are:
(a) to reduce the drug dependency of eligible persons *and eligible convicted offenders*, and
(b) to promote the re-integration of such drug dependent persons into the community, and
(c) to reduce the need for such drug dependent persons to resort to criminal activity to support their drug dependencies.

(2) This Act achieves its objects *in relation to eligible persons* by establishing a scheme under which drug dependent persons who are charged with criminal offences can be diverted into programs designed to eliminate, or at least reduce, their dependency on drugs.

(2A) This Act achieves its objects in relation to eligible convicted offenders by establishing a scheme for compulsory drug treatment and rehabilitation for certain drug dependent persons.

(3) Reducing a person's dependency on drugs should reduce the person's need to resort to criminal activity to support that dependency and should also increase the person's ability to function as a law abiding citizen.

33. The Committee further notes that, consistent with those objects, s 26 *Drug Court Act 1998* provides that proceedings of the Court are to be conducted "with as little formality and technicality, and with as much expedition, as the requirements of this Act and the regulations and the proper consideration of the matters before the Court permit" and that the Court is not bound by the rules of evidence.

34. The Committee also notes that, currently under the Drug Court Act, a number of the Court's decisions are not subject to appeal.[8]

35. It appears likely to the Committee that appeal mechanisms could introduce levels of formality and lead to delays in decision making that could significantly interfere with the therapeutic objects of the Act.

36. Given the objects of the Drug Court Act, as amended by the Bill, the Committee does not consider that the restrictions on appeals from decisions of the Drug Court under Schedules 1[6] and 3[4] make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

No appeal from decisions of the Commissioner: Schedule 3[4]

37. No appeal lies from decisions of the Commissioner regarding the granting of rewards and sanctions under drug treatment personal plans [proposed s 106K *Crimes (Administration of Sentences) Act 1999*].

38. The kinds of sanctions which may be imposed by the Commissioner are:

(a) withdrawal of privileges granted to the offender under section 106J(2)(a) *Crimes (Administration of Sentences) Act 1999;*

(b) an increase in the level of the management of the offender in the Compulsory Drug Treatment Correctional Centre;

(c) an application to the Drug Court to vary any community supervision order applying to the offender to increase the level of supervision to which the offender is subject; and

(d) an application to the Drug Court to vary the offender's compulsory drug treatment personal plan to increase the frequency with which the offender must undergo periodic testing for drugs.

39. Given the objects of the Drug Court Act, as amended by the Bill, and the nature of the sanctions that may be imposed by the Commissioner, the Committee does not consider that the restrictions on appeals from decisions of the Commissioner under Schedule 3[4] make rights, liberties or obligations unduly dependent upon non-reviewable decisions.

[8] Decisions not subject to appeal under the Drug Court Act include decisions:
- not to sentence a person under the Act [ss 7(5), 8AB(9), 8AC(7)];
- to vary an offender's program (the initial program being made with consent) [s 9(2)];
- regarding an offender's non-compliance with a program [s 10(3)]; and
- to terminate an offender's program [s 11];

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

Prescribing forms of treatment: proposed 106F(7)(a) *Crimes (Administration of Sentences) Act 1999*

40. The regulations may prescribe "the form of compulsory drug treatment" which may be a condition of a compulsory drug treatment personal plan.

41. There are no apparent limits in the Act on what forms of treatment may be prescribed for these purposes.

However, the Committee understands from the Minister's office that it is not intended under the Bill to provide for any forced medical treatment.

42. Given that any regulations prescribing forms of treatment must be tabled in, and can be disallowed by, each House of Parliament, the Committee does not consider that allowing regulations to prescribe forms of treatment under the Bill comprises an inappropriate delegation of legislative power.

Commencement by proclamation: clause 2

43. The Bill is to commence on a day or days to be appointed by proclamation.

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

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

45. The Minister has indicated that the Government plans to establish the first compulsory drug correctional centre by the end of 2005.

The Committee makes no further comment on this Bill.

2. CRIMINAL PROCEDURE (SEXUAL OFFENCE EVIDENCE) BILL 2004

Date Introduced:	14 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Bob Debus MP
Portfolio:	Attorney General

Purpose and Description

1. The Bill amends the *Criminal Procedure Act 1986* [CPA] to provide for alternative arrangements for the giving of evidence by closed-circuit television and the use of screens and other means to be available to complainants giving evidence in sexual offence proceedings.

2. The Bill does this by creating a presumption that a complainant who gives evidence in sexual assault proceedings can use such alternative arrangements to give evidence unless the court orders otherwise.[9]

Background

3. The common law generally requires a witness to be physically present in the courtroom, and in the presence of the accused, when giving evidence in relation to an offence.[10]

4. According to the second reading speech:

> There is currently some discretion to allow adult complainants in sexual assault matters to give evidence by alternative means, including closed-circuit television. However, this discretion is only exercised occasionally and provides no assurance to the complainant that he or she will be in a position to rely on alternative arrangements at trial.
>
> Providing alternative facilities for giving evidence will help reduce the potential for intimidation of the complainant by shielding him or her from direct contact with the accused, reduce the level of distress complainants experience in relating the circumstances surrounding an alleged assault, and reduce the embarrassment experienced by many complainants in having to be questioned about sexual matters in a public forum. Minimising the trauma for complainants in sexual offence proceedings will also assist in ensuring that they are able to give evidence more confidently and more effectively, allowing courts to hear the best possible evidence available.[11]

5. It was also noted in the second reading speech that the proposed reforms are consistent with recommendations made by the New South Wales Law Reform

[9] The proposed provisions are similar to those available to children under s 18(1) of the *Evidence (Children) Act 1997*.
[10] *R v Dunne* (1929) 21 Cr App R 176; *R v Reynolds* [1950] 1 KB 606.
[11] Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005.

Commission in its recent report[12] as well as those of a number of previous inquiries conducted by the New South Wales Bureau of Crime Statistics and Research, the New South Wales Sexual Assault Committee, the New South Wales Legislative Council Standing Committee on Social Issues, and the Australian Law Reform Commission.[13]

The Bill

6. The Bill amends the CPA by inserting proposed s 294B.

7. The amendments to the CPA apply to evidence given in proceedings - including a new trial - in which a person stands charged with a sexual offence, whether the person stands charged with that offence alone, or together with any other offence (as an additional or alternative count), and whether or not the person is liable, on the charge, to be found guilty of any other offence [proposed s 294B(1)].

8. The Bill creates a presumption that a *complainant*[14] who gives evidence in such proceedings for a sexual offence[15] is entitled (but may chose not) to:

   (a) give that evidence from a place other than the courtroom by means of closed-circuit television (CCTV) facilities or other technology that enables communication between that place and the courtroom; or

   (b) if such technology is unavailable and the court does not adjourn the proceeding under proposed s 294(4)[16] — to give that evidence by use of alternative arrangements made to restrict contact (including visual contact) between the complainant and the accused or any other person or persons in the courtroom, including the following:

      (i) use of screens; and

[12] NSW Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101) http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r101pdf. See especially Recommendation 10 of that Report.

[13] Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005

[14] ***Complainant*** is defined, in relation to any proceedings, as the person, or any of the persons, on whom a sexual offence with which the accused stands charged in those proceedings is alleged to have been committed: proposed s 294B(11) of the *Criminal Procedure Act 1986*.

[15] ***Sexual offence*** is defined by the proposed s 294B(11) as:

(a) a prescribed sexual offence;
(b) an offence against section 67, 68, 71, 73, 78A, 78B, 80D, 91A, 91B, 91D, 91E, 91F or 91G of the *Crimes Act 1900;*
(c) an offence that, at the time it was committed, was an offence to which this section applied;
(d) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraph (a), (b) or (c); or
(e) an offence of attempting, or conspiracy or incitement, to commit and offence referred to in paragraphs (a), (b), (c) or (d).

The second reading speech notes that "a sexual offence is defined broadly in the proposed s 294B(11) to ensure that complainants in sexual offence proceedings are afforded the protections provided by the legislation wherever possible": Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005.

[16] If the Court considers it appropriate, it may adjourn the proceedings or any part of the proceedings from the courtroom to another court or place to enable evidence to be given as referred to in proposed s 294B(3): proposed s 294B(4) of the *Criminal Procedure Act 1986*.

(ii) planned seating arrangements for people who have an interest in the proceeding (including the level at which they are seated and the people in the complainant's line of vision),

and … to have a person chosen by the complainant present near the complainant while he or she is giving evidence for the purpose of providing emotional support to the complainant [proposed s 294B(3)].

9. However, a court may, on its own initiative, or on application by a party to the proceedings, order that a complainant *not* give evidence from a place other than the courtroom by means of CCTV facilities or other technology [proposed s 294B(5)].

10. The Court, however, must only make such an order if satisfied that there are *special reasons*, in *the interest of justice*, for the complainant's evidence not to be given by such means [proposed s 294B(6)].

On this point, the second reading speech noted that:

> [t]he limitation of the court's discretion will ensure that a defence argument of disadvantage to the accused will not generally be sufficient to overturn the presumption that the victim is entitled to chose to use alternative means to give evidence.[17]

11. In any proceedings to which evidence is given as provided by s 294B(3), the Judge must:

- inform the jury that it is standard procedure for complainants' evidence in such cases to be given by those means or use of those arrangements; and
- warn the jury not to draw any inference adverse to the accused[18] or give evidence any greater weight because it is given by those means or by use of those arrangements [proposed s 294B(7)].

12. Any place outside the courtroom from which a complainant gives evidence is taken to be part of the courtroom in which the proceeding is being held [proposed s 294B(8)]. The court may order that a court officer be present at such a place [proposed s 294B(9)].

13. The Bill commences on assent.

[17] Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005.

[18] ***Accused*** is defined, in relation to any proceedings, as the person who stands, or any of the persons who stand, charged in those proceedings with a sexual offence: proposed s 294B(11) of the *Criminal Procedure Act 1986*.

Issues Considered by the Committee

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

Right to a Fair Trial

14. The primary issue raised by the Bill is whether, in achieving its aim of reducing the potential distress and humiliation to complainants, the Bill impinges upon an accused's right to a fair trial.

15. Cross-examination is a basic right of an accused. It is linked to the presumption of innocence, in that an accused has a right to test the evidence upon which the Crown relies to prove his or her guilt.

    Cross-examination is particularly important in the case of sexual assault, where the only evidence may be that of the complainant.

16. The Law Reform Commission made specific reference to this issue in its Report 101, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials*:

> By its very nature, and all other things being equal, the standard adversarial trial with its reliance on cross-examination as a tool for discovering the truth provides a classic model of a fair trial for a number of reasons. The starting point of all criminal trials is that the accused is presumed innocent until proved guilty beyond reasonable doubt. The defence is given the opportunity to cross-examine prosecution witnesses in order to challenge their credibility and expose any unreliability or untruthfulness in their evidence. Although this may be difficult for certain witnesses, it is essential that their evidence be tested in an open forum.[19]

17. The right to cross-examine is recognised as a basic right in international instruments in both common law and civil law jurisdictions:

- Article 14(3)(e) of the *International Covenant on Civil and Political Rights*; and
- Article 6(3)(d) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

18. In this respect, the European Court of Human Rights has acknowledged that the prosecution of sexual offences may justify additional protections to ensure the wellbeing of complainant witnesses:

> [criminal proceedings concerning sexual offences] are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant…In the assessment of the question whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.[20]

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[19] NSW Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101), www.lawlink.nsw.gov.au/lrc.nsf/pages/r101chp3#H2

[20] *Baegen v The Netherlands* (App No 16696/90, 27 October 1995, Ser A/327-B) at 44, § 77, cited in NSW Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101), www.lawlink.nsw.gov.au/lrc.nsf/pages/r101pdf.

19. The Law Reform Commission maintained that the "first and overwhelming element of the public interest in the administration of justice is that the accused is fairly tried". However, it further noted that:

> [t]his does not mean…that the *interests* of the accused take priority over all other interests that may be affected by the proceedings…There is a substantial public interest in ensuring that witnesses are not subjected to procedures that might be oppressive or humiliating although they must answer all questions that fairly test their evidence. This is not only to ensure, as far as possible, that potential witnesses are not discouraged from coming forward and that actual witnesses are not bullied into giving untrue or inaccurate evidence, but also because such conduct must undermine public confidence in the administration of justice. Without these protections for witnesses, the court would be an instrument of injustice rather than an instrument of justice.[21]

20. The right to cross-examine is not an *absolute* right, and is subject to the court's ability to regulate its own proceedings.[22] Proposed s 294A(2) regulates the manner in which a complainant may be cross-examined, but it does not *prohibit* such cross-examination.

21. Moreover, the fairness to an accused of allowing a complainant to give evidence by the alternative means set out in the Bill, is bolstered by the requirement under proposed s 294B(7)(b) that a judge *must*:

> warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.

22. The Committee considers that the fact that a complainant may still be cross-examined under the amendments to the *Criminal Procedure Act 1986*, together with the obligatory judicial warning to the jury under s 294B(7)(b), is sufficient to ensure the fairness of the trial procedure, so that the Bill not unduly trespass on the personal rights of an accused.

Retrospectivity: Proposed s 294B(10)

23. The Bill provides that the proposed s 294B extends to evidence given in proceedings instituted *before the commencement of that section*, including a new trial that was ordered to take place before that commencement and proceedings that have been partly heard.

24. This provision therefore has a retrospective effect.

25. The second reading speech advises that the reason for retrospectivity is to:

> ensure that complainants who are currently scheduled to give evidence in a retrial will still be able to benefit from these reforms.[23]

[21] NSW Law Reform Commission, *Questioning Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101), www.lawlink.nsw.gov.au/lrc.nsf/pages/r101pdf.
[22] *Kant v DPP* (1994) 73 A Crim R 481 at 488 (Gleeson CJ)
[23] Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005

26. The Committee considers that, in general, retrospective provisions in legislation should not have a detrimental effect on the rights, liberties and obligations of members of the public.

27. The Committee notes that the Bill aims to limit the potential distress and embarrassment of complainants giving evidence in sexual offence matters, and that the fairness to the accused is protected by the obligatory judicial warning to the jury.

28. Given that the Bill effectively extends the existing discretion to allow adult complainants in sexual assault matters to give evidence by alternative means, including closed-circuit television[24], the Committee does not consider that retrospectively applying the proposed amendments unduly trespasses on the personal rights and liberties of an accused in a sexual assault trial.

The Committee makes no further comment on this Bill.

[24] Hon K A Hickey MP, *Legislative Assembly Hansard,* 14 May 2005.

3. INSTITUTE OF TEACHERS BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Dr Andrew Refshauge MP
Portfolio:	Education and Training

Purpose and Description

1. This Bill:

   (a) provides for the accreditation of school teachers, by teacher accreditation authorities, against the professional teaching standards approved by the Minister; and

   (b) constitutes the NSW Institute of Teachers as the agency responsible for providing advice to the Minister on the development, content and application of those standards and for monitoring the school-based accreditation process.

Background

2. In June 2002, the then Minister established the Interim Committee for a NSW Institute of Teachers.

   The Committee was chaired by Professor Alan Hayes, Dean of the Australian Centre for Educational Studies at Macquarie University and it reported to the Minister in July 2003. According to the Minister:

   > An Institute of Teachers will provide an objective means to articulate professional standards; support the career-long development of teachers; assure both the profession and the community of the quality of teacher education programs; accredit and recognise the high quality teaching that exists in schools; support and improve teaching; and raise the quality of student learning outcomes. [25]

3. On the work of the Interim Committee, the Minister said:

   > The cornerstone of the committee's work is the development of a framework of professional standards. A draft of these standards has been in the public domain since 2003. In the near future, the draft standards will be subject to a comprehensive validation study by the University of New England, involving 7,000 teachers from different sectors across the State. [26]

The Bill

Accreditation regime for teachers

4. The Bill establishes a regime for the accreditation of NSW teachers.

[25] The Hon Andrew Refshauge MP, Minister for Education and Training, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

[26] The Hon Andrew Refshauge MP, Minister for Education and Training, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

Teacher accreditation authorities, authorised by the Minister or Director-General, will provide accreditation.

The scheme applies to both government and non-government schools.

5. "Teacher accreditation authorities" are defined in clause 4 as:

> (a) in relation to a government school:
> (i) the Director-General, or
> (ii) such other person or body as may be approved for the time being by the Director-General, or
> (b) in relation to a non-government school:
> (i) the Minister, or
> (ii) such person or body as may be approved for the time being by the Minister.

6. There are to be five accreditation levels:

(i) provisional accreditation;

(ii) conditional accreditation;

(iii) professional competence level;

(iv) professional accomplishment level; and

(v) professional leadership level.

7. Professional teaching standards, approved by the Minister, apply to each accreditation level.

8. Among other things, these standards govern the levels of qualifications, experience, skills, and knowledge required for accreditation at each level.

9. The accreditation scheme is *mandatory* for all newly qualified teachers who wish to be employed as teachers in NSW. These teachers are called ***"new scheme teachers."***

A new scheme teacher is defined in clause 28 as a person who:

- has never been employed to teach[27] in NSW before the Bill commences;
- is (or who would be) employed as a teacher for the first time after the commencement of the Bill;
- held a tertiary or teaching qualification prescribed by the regulations immediately before commencement of the Bill;
- returns, at any time after commencement, to employment as a teacher following a period of at least 5 years during which time the person was not employed to teach; or

[27] Clause 4 defines "***teach***" for the purposes of the Act, undertaking duties in a school that include (but are not limited to):
(a) the direct delivery of courses of study that are designed to implement the curriculum (as determined by the Board of Studies) for primary or secondary schools in accordance with the *Education Act 1990*; and
(b) responsibility for assessing student participation, performance and progress in such courses.

- was employed to teach for the first time in NSW during the period of 3 months (or such other period as may be prescribed by the regulations) immediately before commencement of the Bill.

10. In addition, all ***"transition scheme teachers"*** must be accredited in order to teach in NSW.

    A "transition scheme teacher" is defined in clause 34 as a person:

    - who was, at any time before commencement of the Bill, employed to teach in a school; and
    - who was not, as at that date, the holder of:
        - a teaching qualification prescribed by the regulations; or
        - a degree in an area that is relevant to the area in which the person is employed to teach.

11. It is an offence to employ (or continue to employ) a person who is a new scheme, or transition scheme, teacher unless the person is accredited provisionally or conditionally[28] [clauses 29 and 35, respectively].

12. Accreditation under the Bill is *voluntary* for any person who is already a teacher, other than a new scheme, or transitional scheme, teacher [cl 39]. Such teachers may elect to be accredited at any level.

13. New scheme and transition scheme teachers may be accredited at professional accomplishment or professional leadership level if qualified.

    However, accreditation at these levels is not a requirement of the person's employment [cl 40].

14. A teacher accreditation authority may revoke a person's accreditation in certain circumstances, including failure to comply with any condition of accreditation [cl 24][29].

15. A person may apply to the Administrative Decisions Tribunal for a review of the following decisions:

    (a) the refusal or failure by a teacher accreditation authority to accredit the person under this Part; or
    (b) the revocation of the person's accreditation by a teacher accreditation authority [cl 26].

16. The Bill also provides that any such decision by a teacher accreditation authority is not reviewable by any other court or tribunal (including in any proceedings in the nature of disciplinary proceedings or in any proceedings for unfair dismissal).

[28] New scheme and transition scheme teachers who are conditionally accredited may only teach under supervision.

[29] Other grounds for revocation include that a teacher in a government school is punished for a breach of discipline under the *Teachers Services Act 1980,* or in the case of a non-government school, the teacher is convicted of an offence prescribed by the regulations.

NSW Institute of Teachers

17. The Bill establishes the *NSW Institute of Teachers* as an independent statutory authority. The Institute comprises a Chair, Board of Governance, Quality Teaching Council and staff (including a CEO) [Part 2].

18. The Institute will advise the Minister on a number of matters relating to the development, content and application of professional teaching standards and the accreditation, or revocation of accreditation of teacher accreditation authorities in non-government schools.[30]

    It will also advise and assist teacher accreditation authorities in accrediting persons under this Act, monitor the accreditation process across all schools and ensure that the professional teaching standards are applied fairly and consistently.

19. The Institute is required to maintain a teachers roll, consisting of two parts: an *electoral* list and the *accreditation* list [cl 16].

    Those on the *electoral* list are eligible for election to the Institute. Both lists are to contain personal information of those entered in the roll.

20. The Bill expressly provides that the functions of the Institute do not extend to industrial matters concerning teachers (such as the salaries of teachers or their conditions of employment) [cl 7(5)].

21. The Institute is subject to the direction and control of the Minister (except in relation to the preparation and content of any report or recommendation made by the Institute to the Minister) [cl 8].

22. Part 2, Divisions 2, and 3 respectively establish the office of Chairperson of the *Board of Governance* and the Board of Governance itself.

23. Part 2, Division 4 establishes the *Quality Teaching Council*, which is to compose of 10 elected teachers and 10 Ministerial appointees [cl 13]. The Council's role is to advise the Institute in respect of the Institute's functions [cl 12].

24. The Institute may enter into an arrangement with a "relevant agency" for the purposes of sharing or exchanging *any* information that is held by the Institute or the agency [cl 42].[31]

    Information that may be so shared is limited to information that assists in the exercise of the functions of the Minister or Institute under this Act or of the relevant agency concerned [cl 42(2)].

[30] The Director-General is responsible for authorising teacher accreditation authorities for government schools. See clause 4(2).

[31] "***Relevant agency***" is defined in sub-clause 42(5) as: the Board of Studies; the Department of Education and Training; any teacher accreditation agency; any university or other tertiary institution; and any other person or body prescribed by the regulations.

Issues Considered by the Committee

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

Issue: Clause 2 – Commencement by proclamation

25. The ensuing Act commences on a day or days to be appointed by proclamation.

26. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

27. The Minister's Office advised the Committee that the intention is for the Bill to be proclaimed by 1 January 2005 to capture newly graduated teachers.

28. The Minister's office also advised that, while the intention is to have the Institute fully up and running by 2005, there are a number of processes that need to be put in place before the Institute can be operational. These include the registration of all teachers (government and non-government) and setting up the ballot process for election to the Quality Teaching Council.

    The Interim Committee will continue in the meantime.

The Committee makes no further comment on this Bill.

4. LIQUOR AMENDMENT (PARLIAMENTARY PRECINCTS) BILL 2004

Date Introduced:	12 May 2005
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Grant McBride MP
Portfolio:	Gaming and Racing

Purpose and Description

1. The purpose of this Bill is to amend the *Liquor Act 1982* and the *Parliamentary Precincts Act 1997* in relation to the operation and enforcement of the *Liquor Act 1982* in the ***Parliamentary precinct***[32].

Background

2. Currently, New South Wales Parliament is exempt from the operation of the *Liquor Act 1982.*

3. The Minister's second reading speech[33] identifies that the purpose of this Bill is to remove this exemption and apply the New South Wales liquor laws to Parliament House.

4. In place of the exemption, the Bill will enable the Governor to issue a licence, commonly known as a ***Governor's licence***[34], authorising the sale of liquor within the parliamentary precincts. According to the second reading speech:

> As with all Governor's licences, the licence conditions will delineate the boundary of the licensed premises, identifying areas in which liquor may be served. The licence will also name the person, or licensee, who is the holder of the licence. These licence conditions will be formulated through discussions between government officers and parliamentary officers nominated by the Presiding Officers.
>
> This bill ensures the principle (sic) object of the Act, harm minimisation and

[32] The *Parliamentary precinct* is defined by s 6 of the *Parliamentary Precincts Act 1997* as consisting of the land described in Schedule 1 of that Act, together with all buildings, structures and works, and parts of buildings, structures and works, on, above or under that land. Schedule 1 to that Act defines the *Parliamentary Precinct* as land comprised in Lot 1823 in Deposited Plan 841390.

[33] The Hon Grant McBride MP, Minister for Gaming and Racing, *Legislative Assembly Hansard,* 12 May 2004.

[34] A *Governor's licence* is a license issued pursuant to s 19 of the *Liquor Act 1982,* which provides that the Governor may, on the recommendation of the Minister and subject to such conditions as the Minister may impose, authorise the court to issue a licence authorising the sale of liquor at, among other places, premises vested in the Crown or a public authority constituted by an Act. A Governor's licence is subject to most requirements of the *Liquor Act 1982,* including the provisions in relation to the responsible service of alcohol, ensuring the quiet and good order of the neighbourhood, underage and intoxication offences, and disciplinary action by police and the Director of Liquor and Gaming. For further information of Governor's licences, refer to the Department of Gaming and Racing's Fact Sheet 15: *Governor's Licences* available at: http://www.dgr.nsw.gov.au/IMAGES/PUBLICATIONS/Liquor%20%26%20Gaming/Fact%20Sheets/15_governor.pdf

> responsible service of alcohol requirements, will apply to Parliament House. ...The bill will make one other important amendment. It will insert a provision into the Parliamentary Precincts Act 1997 that will enable the Presiding Officers to enter into a memorandum of understanding with the Director of Liquor and Gaming.

The Bill

5. Currently, s 6(1)(a) of the *Liquor Act 1982* provides that

> Nothing in this Act applies to or in respect of the sale of liquor in Parliament House under the control of the proper authority.

6. This Bill omits s 6(1)(a) from the Act [Schedule 1[1]].

7. This Bill also provides that the Governor may, on the recommendation of the Minister and subject to such conditions as the Minister may impose, authorise the Licensing Court to issue a licence, known as a *Governor's licence*, authorising the sale of liquor in the Parliamentary precincts [Schedule 1[2]].

   Under the *Liquor Act 1982*, the Minister may not make such a recommendation, however, unless satisfied, on information supplied by the Liquor Administration Board, that practices will be in place at the licensed premises as soon as the licence is issued that ensure, as far as reasonably practicable, that:

   (a) liquor is sold, supplied and served responsibly on the premises; and

   (b) all reasonable steps are taken to prevent intoxication on the premises

   and that those practices will remain in place while the licence is in force [s 19(2A) *Liquor Act 1982*]

8. This Bill also inserts a provision into the *Parliamentary Precincts Act 1997* that will allow the Presiding Officers to enter into a memorandum of understanding with the Director of Liquor and Gaming regarding the exercise in the Parliamentary precincts of functions under the *Liquor Act 1982* by special inspectors holding office under s 109 of that Act.

   According to the second reading speech

> The Director of Liquor and Gaming is the chief regulatory officer in the Department of Gaming and Racing. This provision is similar to existing section 27, which allows the Presiding Officers and the Commissioner of Police to enter into a memorandum of understanding regarding the exercise of police powers within and around the parliamentary precincts. The Director of Liquor and Gaming has similar functions and responsibilities to the Police Commissioner for enforcement of the liquor laws. The Government's liquor law inspectors undertake a range of compliance-related functions under the director's delegation. As part of this role, liquor law inspectors have entry powers to all licensed venues.[35]

[35] The Hon Grant McBride MP, Minister for Gaming and Racing, *Legislative Assembly Hansard,* 12 May 2004.

Issues Considered by the Committee

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

Commencement by proclamation: Clause 2

9. This Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation.

10. The Committee notes that providing for an Act to commence by proclamation delegates to the Government the power to commence an Act on whatever day it choses or not to commence the Act at all.

11. The Minister's second reading speech, however, sets out the reasons why commencement by proclamation is necessary:

> As with all Governor's licences, the licence conditions will delineate the boundary of the licensed premises, identifying areas in which liquor may be served. The licence will also name the person, or licensee, who is the holder of the licence. These licence conditions will be formulated through discussions between government officers and parliamentary officers nominated by the Presiding Officers. Some time will be required for government officers to work with parliamentary officials to finalise appropriate licence conditions. The Government expects that this process will be carried out and completed during the winter recess. This is why it is proposed that the bill commence on a day appointed by proclamation. All attempts will be made to ensure that the Governor's licence will be in place prior to the spring sitting session of the Parliament.[36]

The Committee makes no further comment on this Bill.

[36] The Hon Grant McBride MP, Minister for Gaming and Racing, *Legislative Assembly Hansard,* 12 May 2004

5. MINE HEALTH AND SAFETY BILL 2004

Date Introduced:	7 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kerry Hickey MP
Portfolio:	Mineral Resources

Purpose and Description

1. The Bill is about the health, safety and welfare of people who work at mines, ***other than coal operations*** within the meaning of the *Coal Mine Health and Safety Act 2002* [CMH&S Act].

2. The *Occupational Health and Safety Act 2000* [the OH&S Act] is the primary New South Wales Act dealing with the health, safety and welfare of people at work, and covers those working at a mine.

3. The Bill puts in place special *additional* obligations, protections and procedures necessary for the control of particular risks arising from work at a mine. The obligations, protections and procedures presently set out in the OH&S Act will continue to apply to mines.

   If a provision of the proposed Act deals with a certain matter and a provision of the OH&S Act deals with the same matter and it is impossible to comply with both provisions, then a person must comply with the OH&S Act.

4. If provisions of both Acts deal with the same matter and it is possible to comply with both provisions, then a person must comply with both Acts [cl 17].

5. However, where an act or omission constitutes an offence under both Acts, an offender is not liable to be punished twice in respect of the same offence [cl 20].

6. The Bill also contains a number of amendments to the CMH&S Act to clarify the operation of that Act and to make the CMH&S Act consistent with the provisions of the proposed Act.

7. Specifically, the Bill's objects are to:

   - assist in securing the objects of the OH&S Act at mines (including the object of securing and promoting the health, safety and welfare of persons at work at mines or related places);
   - ensure that the particular hazards associated with mines are identified and that risks arising from those hazards are assessed and eliminated or controlled;
   - ensure that effective provisions for emergencies are developed and maintained at mines; and

- ensure that managers, supervisors and employees are competent, by ensuring that appropriate health and safety competencies are defined and are implemented in the mining and quarrying industry.

Background

8. The bill is a refinement of the *Mine Health and Safety Bill 2002* [the 2002 Bill], which was introduced in December 2002, but which lapsed on the dissolution of Parliament prior to the March 2003 State election.

9. The 2002 Bill was the result of a comprehensive review of the *Mines Inspection Act 1901* [Mines Inspection Act].

10. The Minister stated in the re-introduced Bill's second reading speech that:

> [t]here was extensive consultation with mining industry parties leading up to the introduction of the 2002 bill. The intervening period has provided an extended opportunity for consultation. The bill has been amended and strengthened in the light of comments received.[37]

Contents of the Bill

11. The Bill consists of the following:

- Part 1 Preliminary
- Part 2 Application of Act
- Part 3 Objects of Act
- Part 4 Application of OH&S Act
- Part 5 Duties relating to health, safety and welfare at mines
  - Division 1 Duties of mine holders
  - Division 2 Duties of operators of mines
  - Division 3 Duties and rights of employees
  - Division 4 Duties of persons in management positions
  - Division 5 Duties of supervisors
  - Division 6 Duties of and in relation to contractors
  - Division 7 Duty to give notice
  - Division 8 General
- Part 6 Miscellaneous matters concerning mines
  - Division 1 Mine plans
  - Division 2 Hours of work
  - Division 3 Tourist and educational activities
- Part 7 Notification of incidents

[37] The Minister specifically referred to the contribution of the Australian Mines and Metals Association; the Australian Workers Union; the Construction, Forestry, Mining and Energy Union Mining, Energy Division; the then Crushed Stone and Sandstone Association, now the Cement, Concrete and Aggregates Association; the Lightning Ridge Miners Association, and the Minerals Council of New South Wales: Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.

  - Division 1 Notification of certain incidents
  - Division 2 Health and safety
  - Division 3 Inquiries

- Part 8 Stop work orders
- Part 9 Competence standards
  - Division 1 Key obligations
  - Division 2 Metalliferous Mines and Extractive Industries Competence Board
  - Division 3 Functions of Board
  - Division 4 Certificates of competence
  - Division 5 Offences
- Part 10 Oversight of mines
  - Division 1 Outline
  - Division 2 Inspections by government officials
  - Division 3 Inspections on behalf of work force
  - Division 4 Offences
- Part 11 Mining industry codes of practice
- Part 12 Regulations
- Part 13 Miscellaneous
  - Division 1 Enforcement
  - Division 2 Information
  - Division 3 Exercise and delegation of functions
  - Division 4 Service of documents
  - Division 5 Fees
  - Division 6 Liability
  - Division 7 Repeals and amendments[38]
  - Division 8 General
- Schedule 1 Amendment of *Mining Act 1992*
- Schedule 2 Amendment of OH&S Act 2000
- Schedule 3 Amendment of CMH&S Act
- Schedule 4 Amendment of other legislation
- Schedule 5 Savings, transitional and other provisions

12. Members are referred to the Bill's Explanatory note for an overview of each of the 197 clauses of the Bill.

[38] The ensuing Act repeals the following:
the *Mines Inspection Act 1901*;
the *Mines Inspection Amendment Act 1904*;
the *Mines Inspection Amendment Act 1998*;
the *Mines Inspection General Rule 2000*; and
the *Mines Inspection Regulation 1999* : cl 191 of the *Mine Health and Safety Bill 2004*.

Issues Considered by the Committee

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

Self-incrimination: Clause 96

13. Pursuant to cl 95(2), the Minister may constitute a person as a Board of Inquiry to conduct a special inquiry into an event, occurrence, practice or matter.[39]

14. A Board of Inquiry may summon a person to appear at a special inquiry conducted by the Board to give evidence, and to produce any documents that are specified in the summons [cl 96(1)].

15. A person is *not* excused from a requirement under cl 96 to answer a question on the ground that the answer might incriminate the person, or make the person liable to a penalty [cl 96(8)].

16. However, any answer given by a natural person in compliance with a requirement under cl 96 is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence under this section), if:

- the person objected at the time to answering the question on the ground that it might incriminate the person; or
- the person was not warned on that occasion that the person may object to answering the question on the ground that it might incriminate the person [cl 96(9)].

17. Clause 96(9) contains no equivalent privilege against exposing oneself to a penalty in *civil proceedings*.

18. Clause 99 provides the following maximum penalties for a contravention of Division 3 of Part 7:

- in the case of a corporation (being a previous offender) – $82,500;
- in the case of a corporation (not being a previous offender) - $55,000;
- in the case of an individual (being a previous offender) – $41,250; and
- in the case of an individual (not being a previous offender)- $27,500.

"Right to silence"

19. The common law of Australia jealously protects the privilege against self-incrimination. It applies both in the pre-trial and trial phase.

[39] Clause 95 applies if it appears to the Minister that an investigation of any of the following is necessary:
(a) any event causing death or serious injury at a mine and its causes and circumstances;
(b) any dangerous occurrence at a mine and its causes and circumstances;
(c) any practice at a mine that, in the opinion of the Minister, adversely affects or is likely to adversely affect the safety or health of persons employed at the mine; or
(d) any matter relating to the safety, health, conduct or discipline of persons at or in relation to a mine: cl 95(1) of the *Mine Health and Safety Bill 2004*.

20. The principle *nemo tenetur accusare se ipsum* (no person is bound to accuse himself or herself) originated as a means of protecting suspects from torture and oppressive interrogation, but is now recognised as a basic human right protecting personal freedom and human dignity.[40]

21. Article 14(3)(g) of the *International Covenant of Civil and Political Rights* (ICCPR) states that a person has the right "[n]ot to be compelled to testify against himself or to confess guilt". Outside the criminal context, the privilege is an attribute of the wider right to a fair trial protected by Art 14(1) of the ICCPR.

22. The privilege against self-incrimination provides that a person is not under a duty to answer questions or otherwise cooperate with public officials engaged in the investigation or prosecution.

23. This is often called the *right to silence*. This right has been described by the High Court as:

> an entitlement to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of participants and the roles that they played.[41]

24. It is clear that an Board of Inquiry constituted under cl 95 of the Bill is acting as a "person in authority", and that the exercise of the Board's powers poses a threat to the privilege against self-incrimination.

25. Thus, the privilege against self-incrimination is restricted to criminal proceedings where the person had made a prior statement that they may have been about to incriminate themselves, or had not been advised of the right to make such a statement [cl 96(9)].

26. In *Pavic and Swaffield*,[42] the High Court emphasised that the right to silence was a fundamental rule of law (not restricted to formal interviews) and that this could be infringed even by covert questioning by police or informers.

27. In that case, the rationale for exclusion of a confession was that the confession was unfairly elicited in derogation of the free choice to speak or be silent.

28. The approach favoured by the Bill actually places the accused under an *obligation* to speak, in order to assert the entitlement once he or she has been advised of the issue of self-incrimination.

29. The Supreme Court of Canada has rejected this approach, observing that:

> [i]t would be absurd to impose on the accused an obligation to speak in order to activate the right to silence.[43]

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[40] The historical origins and modern rationale of the privilege are explored in *EPA v Caltex* (1993) 178 CLR 447.

[41] Adverse inferences cannot be drawn from the failure to answer in these circumstances: *R v Petty* (1991) 173 CLR 95 at 95.

[42] (1998) 192 CLR 159.

[43] *R v Liew* [1999] 3 SCR 227at paragraph 44.

30. The scope of the protection afforded by cl 96(9) is further restricted.

31. Clause 96(10) provides that *further information* obtained as a result of an answer given under cl 96 is not inadmissible on the ground that the answer had to be given or that the answer might incriminate.

32. Thus, information obtained that would otherwise be inadmissible due to the operation of cl 96(9) may nonetheless provide the basis for further procedures, such as the issue of a search warrant, or questioning of third parties, during which further independent incriminating material of the person may be found.

33. In this indirect way, information that was otherwise inadmissible on the ground that it violated the privilege against self-incrimination may be used to incriminate that person.

34. The Committee notes that the right against self-incrimination (or "right to silence") is a fundamental right. This right should only be eroded when it is overwhelmingly in the public interest to do so.[44] The Committee also considers that, as a rule, when a person is compelled to answer incriminating questions, that information should not be capable of being used against the person.

35. The Committee notes that, under the terms of cl 96 of the Bill, information can only be used against a person in criminal proceedings if, after being advised of the consequences of not doing so, the person does not make a statement that the information they are about to give might tend to incriminate them.

36. The Committee further notes that such protection against the consequences of self-incrimination is of limited value if the information so obtained can form the basis of investigations leading to criminal proceedings.[45]

37. The Committee also notes that cl 96 contains no privilege whatsoever against exposing oneself to a civil penalty.

38. The Committee also notes the public benefit of obtaining information regarding the safety of mine operations.

39. The Committee refers to Parliament the question of whether the removal of the right against self-incrimination in the Bill unduly trespasses on personal rights.

[44] Thus, legislative abrogation of the right to silence in the United Kingdom has been held to infringe the right to a fair trial contained in Article 6 of the European Convention on Human Rights: *Condron v United Kingdom* [2001] 31 EHRR 1.

[45] The Senate Standing Committee for the Scrutiny of Bills "generally holds to the view that the interest of having government properly informed can more easily prevail where the loss of a person's right to silence is balance by a prohibition against both the direct and indirect use of the forced disclosure. The Committee is concerned to limit exceptions to the prohibition against such use. In principle, a forced disclosure should be available for use in criminal proceedings only when they are proceedings for giving false or misleading information in the statement which the person has been compelled to make." (emphasis in original) Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament, November 1998 – October 2001.*

Part 10 Oversight of mines – Powers of government officials

Powers of entry at any time: Clause 135

40. Clause 135 provides that, despite Part 5 of the OH&S Act, a government official may enter any place to which this Act applies *at any time*.[46]

41. Pursuant to s 53(1) of the OH&S Act, entry under a power conferred by Division 2 Part 5 of that Act may only be made at a reasonable time in the daytime or at any hour when work is carried on or is usually carried on at the premises.

42. The Bill proposes to amend s 47A of the OH&S Act to provide that a person appointed as a government official under the Bill is taken to have been appointed as an inspector for the purposes of the OH&S Act and has the powers of an inspector under that Act in relation to mining workplaces.

43. Reading together proposed s 47A and s 59 of the OH&S Act, a government official who enters premises under the Bill may do any, or all, of the following:

- make searches, inspections, examinations and tests (and take photographs and make video and audio recordings);
- take for analysis a sample of any substance or thing which in the inspector's opinion may be, or may contain or be contaminated by, a substance (or a degradation product of a substance) that is a risk to health;
- in the case of an inspector who is a medical practitioner, carry out medical examinations with the consent of the person proposed to be examined;
- carry out biological tests in such manner and in such circumstances as may be prescribed by the regulations;
- require any person in or about those premises to answer questions or otherwise furnish information;
- require the occupier of those premises to provide the inspector with such assistance and facilities as is or are reasonably necessary to enable the inspector to exercise the inspector's functions;
- require the production of and inspect any documents in or about those premises;
- take copies of or extracts from any such documents; and
- exercise all other functions that are conferred by, or are reasonably necessary for the purposes of, the OH&S Act or Regulations.

44. Section 60 of the OH&S Act provides further powers for such officials regarding dismantling and removing plant.

45. The second reading speech made specific reference to the fact that the power of entry at any time contained in the Bill is *in addition* to the existing powers of inspectors

[46] Clause 6 of the *Mine Health and Safety Bill 2004* sets out an extensive list of sites and places to which the ensuing Act applies.

under the OH&S Act, while noting that these powers are already available to inspectors and mine safety officers under the Mines Inspection Act.[47]

46. The Minister also noted that:

> [i]t is also important to recognise that a government official under the Mine Health and Safety Act will have powers which are only exercisable in relation to mining workplaces or to investigate matters occurring at mining workplaces…decisions taken under the Mine Health and Safety Act will be made reviewable by the Administrative Decisions Tribunal by way of regulation…As a protection for this process, the Mine Health and Safety Act will require that such regulations cannot be made without the concurrence of the Minister administering the Administrative Decisions Tribunal Act 1997.[48]

47. The Committee notes that the wide scope of the powers to enter contained in the Bill have the potential to trespass on the rights and liberties of persons involved in mining.

48. The Committee also notes that cl 135 in effect combines the existing powers of inspectors under the *Occupational Health and Safety Act 2000* and under the *Mines Inspection Act 1901*.

49. The Committee refers to Parliament the question of whether the powers of entry in the Bill unduly trespass on personal rights.

Powers to cross land: Clause 136 & clause 153

50. A government official or a site check inspector may enter any land - including any land that includes residential premises - at any time, if entering that land is the only way that the government official can gain entry to a place of work to which the ensuing Act applies for the purpose of exercising functions under the Act or the OH&S Act [cl 136(1) & cl 153(1) respectively].

51. Such entry may be made by a government official or site check inspector only by any means or route approved by the occupier of the land and all due care must be exercised in entering, being on and leaving the land [cl 136(2) & cl 153(2) respectively].

52. However, the limits to access set out in cl 136(2) and cl 153(2) do *not* apply:

(a) in the case of an emergency;

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[47] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004. Section 36 of the *Mines Inspection Act 1901* currently provides that an inspector or mine safety officer may do all or any of the following things, namely:

(a) make such inspection, examination, and inquiry as may be necessary to ascertain whether in respect of any mine the provisions of this Act and the general rules and special rules (if any) in force therein relating to matters above or below ground are complied with;

(b) *at all times by day and night* enter any mine and inspect the same and examine and inquire respecting the state and condition and ventilation of the mine or any part thereof, and the state and condition of the machinery, and the sufficiency of the special rules (if any) in force therein, and all matters and things connected with or relating to the safety of the persons employed in or about the mine or any mine contiguous thereto, or the care and treatment of the horses and other animals used in the mine;

(a) (bi) enter on any private land or workplace in the performance of the inspector's functions; and

(b) exercise such other powers as may be necessary for carrying this Act into effect. Emphasis added.

[48] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.

(b) where the government official has made reasonable efforts to locate the occupier of the land and has been unable to do so;

(c) if the occupier of the land unreasonably fails to approve a means or route to cross the land; or

(d) if the occupier of the land approves an unreasonable means or route to cross the land [cl 136(3) & cl 153(3)].

53. On this issue, the Minister noted that:

> [i]t has also been recognised that it may be necessary to cross land owned by others to reach a land-locked mine site. That has been dealt with by giving government officials and work force representatives a power to cross such land, including land containing residential premises, but not to enter those premises.[49]

54. The Committee notes that the power to enter land to which the Act does not apply trespasses on personal rights to property and privacy of the owners and occupiers of that land.

55. However, having regard to the fact that such land may only be entered if it is the only means of entering a place of work under the Act, and that it generally requires the consent of the owner of the land, the Committee considers that such access is so clearly in the public interest as to not constitute an undue trespass on those personal rights.

Offences by corporations: Clause 174

56. Clause 174 provides that if a corporation contravenes a provision of the proposed Act, or regulations, whether by act or omission, each director or other person who is concerned in the management of the corporation is taken to have contravened the same provision.

57. The onus of proof regarding a director's or manager's participation in a proven offence is effectively reversed, in that a director or manager will be liable under the clause unless the court is satisfied that:

- the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
- the person, if in such a position, used all due diligence to prevent the contravention by the corporation.

58. Pursuant to cl 174(2), a director or manager may be proceeded against and convicted under this clause *whether or not* the corporation has been proceeded against or been convicted under cl 174.

59. The Committee notes that the Bill reverses the onus of proof regarding responsibility for a proven offence for certain persons concerned with the management of a corporation in relation to mining work.

[49] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.

60. Given the Bill's object of facilitating mine health and safety, the need for directors and managers to comply with the ensuing Act, and the need of the prosecution to prove the other elements of an offences beyond reasonable doubt before a director or manger can be deemed responsible, the Committee does not consider that this provision unduly trespasses on personal rights.

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

Stop work orders: Clause 100

61. Part 8 of the Bill deals with stop work orders. Clause 100 provides as follows:

> (1) If the Minister is of the opinion that any action is being, or is about to be, carried out by any person at a place of work to which this Act applies that involves, or is likely to result in, a serious breach of a provision of:
>
> (a) this Act or the regulations, or
>
> (b) the *Occupational Health and Safety Act 2000* or the regulations under that Act,
>
> the Minister may order that the person is to cease or is not to carry out the action and that no action, other than any action that may be specified in the order, is to be carried out in or in the vicinity of the place, or a specified part of the place, within a period not exceeding 28 days after the day of the order.

62. The inclusion of a breach of Regulations made under the ensuing Act makes the scope of a stop work order extremely wide, having regard to the regulation-making power contained in cl 166 [see below].

63. The Minister may extend a stop work order for any further period or periods, of no more than 28 days each, *that the Minister thinks fit* [cl 102].

64. Clause 101 specifically provides that the Minister is *not required*, before making a stop work order, to notify any person who may be affected by the order.

65. Failure to comply with a stop work order is an offence, with penalties ranging from $3,300 for a first time offending employee to $165,000 for a corporation which is a previous offender [cl 106].

66. It appears from both the breadth of the order, and the procedure surrounding it, that the current provision in the Bill for stop work orders has the potential to make personal rights and obligations dependent upon insufficiently defined administrative powers.

67. However, it was suggested in the second reading speech that this power would be used sparingly:

> A broad power is given to the Minister administering the Mine Health and Safety Act to issue stop work orders. This power is considered warranted for an industry such as mining, and particularly underground mining, where imminent danger may require strong and urgent action. It is envisaged that the power would be only rarely used but, nonetheless, it is seen as providing a necessary avenue for high-level intervention

where other steps have failed. With the power vested in the Minister, accountability to the Parliament is assured.[50]

68. The Committee notes that the scope for issuing a stop work order is extremely wide, and that the procedure and penalties relating to stop work orders are severe.

69. However, the Committee also notes that the stop work order process is aimed at responding quickly to situations which place persons in situations of danger relating to workplace activity at mines.

70. The Committee further notes that responsibility for such orders rests with the Minister, who is accountable to Parliament for his or her actions.

71. The Committee considers that in the circumstances, the lack of narrow definition of the power and the flexibility of the procedure surrounding the issue of a stop work order, do not make personal rights, liberties and obligations unduly dependent on an insufficiently defined administrative power.

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

No appeal from exercise of functions by Boards of Inquiry: Clause 98

72. Subsequent to conducting an inquiry under proposed Part 7 Division 3, a Board of Inquiry must, within the period required by the Minister, prepare a report as to:

(a) the causes of the event or dangerous occurrence, if the special inquiry concerns an event or dangerous occurrence; or

(b) its findings in relation to the practice or matter, if the inquiry concerns a practice at a mine or a matter relating to the safety, health, conduct or discipline of persons in a mine [cl 97(1)].[51]

73. The procedure in relation to reports by a Board of Inquiry impinge upon two associated rights, namely:

- the *right to review* of a decision of the Board of inquiry and
- the *right to be heard* on matters which may be the subject of adverse findings.

Right to review

74. The Bill provides that no appeal lies from any decision or determination of a Board of Inquiry on a special inquiry [cl 98].[52]

75. This prohibition appears insufficient, however, to preclude *judicial review*, as it has been held that a legislative intention to effectively preclude judicial review of a particular class of decisions should be expressed sufficiently clearly.[53]

[50] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.
[51] Clause 97(2) of the *Mine Health and Safety Bill 2004* provides that the Minister may, if the Minister thinks fit, publish the report at the time and in the manner determined by the Minister.
[52] Clause 98 replicates s 47P of the *Mines Inspection Act 1901*.
[53] *Darling Casinos Ltd v NSW Casino Control Authority* (1997) 143 ALR 55.

76. A fundamental issue in the appropriateness of allowing judicial review is whether a court may simply apply legal principles and standards to the facts, rather than weigh up competing policy issues.[54]

77. Arguably, judicial review in this instance would consist of a court considering whether, in the processes of a Board of Inquiry, *rules of natural justice* had been observed. It would therefore be an application of legal principles and standards to the facts.

78. The Committee has previously noted that the right to have a decision reviewed must be balanced against the policy consideration of ensuring an expeditious decision making process, and the reasonable allocation of public resources to fund any review.[55]

79. In this case, the balancing process is between ensuring mine safety on the one hand; and protecting the rights of individuals who have been obliged to answer questions and have no means of having adverse findings reviewed, on the other.

Right to be heard

80. The balancing act is made more complicated in that the Minister may publish any report prepared by the Board of Inquiry, thereby making any adverse findings part of the public record.

81. The High Court has held that a person has a common law right to be heard in opposition to any potential adverse finding in relation to themselves, unless by express terms or necessary implication an Act excludes this right to be heard.[56]

82. Specifically, the Court has noted that the common law rules of natural justice apply to public inquiries - such as those provided for in the Bill - whose findings *of their own force* could not affect a person's legal rights or obligations. In other words, it is not necessary that the Board of Inquiry itself may adversely affect a person's rights, simply that decisions made by it in the course of its proceedings under the Bill may ultimately form the basis for action by the Minister which may have such an adverse effect.

83. The High Court has delineated this right in the following manner:

> It needs to be stressed that, although [persons] are entitled to make submissions concerning matters which are identified as a possible source of adverse findings concerning their interests, they have no right to make submissions on the general subject matter of the inquest. Their legal entitlement is confined to making submissions in respect of matters which may be the subject of adverse findings against them personally...This does not mean that their submissions must be perfunctory or limited to assertions or denials. In opposing the making of any adverse

[54] See, eg, Bowen CJ in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*, (1987) 75 ALR 218 (Full Fed Ct) at 224-225.

[55] See, eg, review of the *Environmental Planning and Assessment Amendment (Development Consents) Bill 2003*, Digest No. 4, 27 October 2003.

[56] Annetts v McCann (1990) 170 CLR 596. See also Mahon v Air New Zealand (1984) AC 808, at p 820; and National Companies and Securities Commission v News Corporation Ltd. (1984) 156 CLR 296, at 315-316, 325-326, 326.

> finding, [persons] are entitled to put every rational argument open on the evidence and, where necessary, to refer to and analyse the evidence to support that argument.[57]

84. A Board of Inquiry is not bound to act in a formal manner, nor is it bound by the rules of evidence, so that it may inform itself on any matter in any way that it considers appropriate [cl 96(4)].

85. If the Board of Inquiry agrees, an agent - including a legal practitioner - may represent a person or body at the special inquiry [cl 96(5)].

86. The Bill, however, is silent as to whether, in the course of an Inquiry, a person who is obliged to answer questions which may result in adverse findings against him or her, is able to make submissions in respect of those matters.

87. The Committee considers that, in general, all decisions of an administrative nature should be subject to review. This is particularly the case where findings of an adverse nature may be published.

88. The Committee recognises the importance of having mine safety matters fully investigated.

89. The Committee also recognises that, in some instances, policy considerations will dictate that an appeal is neither necessary nor practical.

90. The Committee has written to the Minister seeking clarification of the right to make submissions in the course of an Inquiry.

91. The Committee refers to Parliament the question whether this Bill unduly trespasses on personal rights and liberties by denying a right to review of the findings contained in a report made by a Board of Inquiry.

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

Commencement: Clause 2

92. Clause 2 of the Bill provides that the ensuing Act will commence "on a day or days to be appointed by proclamation".

93. In the second reading speech the Minister noted that the proposed Act covers a difficult industry demographic, ranging from large mines employing hundreds, to single-person operations [see below].[58]

94. The Committee has been advised by the Minister's office that the delayed commencement is due to the need to develop extensive regulations in consultation with a wide range of industry stakeholders in order to give effect to the aims of the Bill.

[57] *Annetts v McCann* (1990) 170 CLR 596.
[58] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.

95. The Committee notes that providing the Act to commence on proclamation delegates to the Government the power to commence an Act on whatever day it chooses after assent or not to commence the Act at all.

96. The Committee considers that the development of the necessary regulations is an appropriate reason to delay the commencement.

Henry VIII clause: Clause 72

97. Part 5 of the Bill [clauses 22-74] deals with duties of mine holders, operators, employees, etc., relating to health, safety and welfare at mines.

98. Clause 72 covers the relationship between duties under Part 5 and any regulations subsequently made under the ensuing Act.

99. Clause 72 provides as follows:

> (1) Compliance with the regulations is not in itself a defence in any proceedings for an offence against this Part.
>
> (2) However, a relevant contravention of the regulations is admissible in evidence in any proceedings for an offence against this Part.
>
> (3) This section is subject to any regulations under section 168 or 169.

100. Proposed s 168 provides that the regulations may adapt the provisions of Part 5 to meet the circumstances of *any specified class of case*.

101. Proposed s 169 provides as follows:

> (1) The regulations may specify contractors or classes of contractors:
>
> (a) in relation to whom some or all of Subdivision 4 of Division 2 of Part 5 does not create any duties or creates duties subject to conditions, or
>
> (b) to whom some or all of Division 6 of Part 5 does not apply or applies subject to conditions.
>
> (2) Any regulation made under this section applies only to contractors who do not undertake mining activities as part of the work that they undertake in connection with a mine.

Thus, a regulation could simply exempt an entire class of operations or persons from the duties imposed by Part 5 of the proposed Act.

102. Providing for a regulation to amend an Act in this way significantly reduces parliamentary oversight of the legislative process.

103. Such provisions have come to be referred to as *Henry VIII clauses*. Because such provisions derogate from the legislative authority of the Parliament, the Committee considers that they should be used as sparingly as possible. The Committee acknowledges, however, that there *are* circumstances where the use of such provisions is appropriate.

104. The Queensland Scrutiny of Legislation Committee, in a report examining Henry VIII clauses, considered that enabling an Act to be amended by subordinate legislation may be appropriate when:

- facilitating the effective application of innovative legislation;
- facilitating transitional arrangements;
- facilitating the application of national schemes of legislation; and
- circumstances warrant immediate Executive action.[59]

105. On this issue, the Minister stated the following:

> The legislation contains powers that will enable regulations to modify application of the Act. This is necessary for two reasons. First, the legislation covers a difficult industry demographic in that the mining industry ranges from large mines employing hundreds to single-person operations. While the underlying principles of the legislation are universally applicable, it would be unreasonable to expect very small mines with virtually no resources to meet all requirements.
>
> The example of the management structure required by the legislation and its unreasonableness or total impracticality for very small mines has already been given. Secondly, the regulation-making powers in the bill will provide flexible transitional arrangements from the old to the new legislation. Again, as indicated earlier, many of the arrangements required under the new Act have substantively been put in place as a result of the Mines Inspection General Rule 2000. The regulations will allow many of those arrangements to remain in place while the finetuning required to conform to the new Act is undertaken.[60]

106. It is arguable that both the nature of the legislation – ie, its inter-relationship with the OH&S Act and the fact that it replaces a number of Acts and Regulations – and its scope, as referred to by the Minister, require a flexibility in the short term which would be provided by enabling the ensuing Act to be amended by subordinate legislation. This would therefore be a permissible use of a Henry VIII clause.

107. However, the Committee notes the extraordinary scope of the regulation-making powers already included in cl 166(a) – (bx) of the Bill.

108. Moreover, pursuant to cl 170, a Regulation made under the ensuing Act may apply, adopt or incorporate any publication in force at a particular time or from time to time.

109. This allows changes to the law without any recourse to Parliament, as any amendment of an incorporated document *cannot be disallowed*. The Minister noted that:

> [w]hile the bill provides that regulations may incorporate documents such as Australian Standards as amended from time to time, it is intended that any reference to non-statutory material will be severely limited in the regulations.[61]

110. The Committee notes the broad legislative power that the Bill delegates to modify or negate the application of Part 5 of the proposed Act by regulation. The Committee considers that such power to effectively amend the Act should only be allowed by regulation in exceptional circumstances. Further, that when such power is delegated, it should be as specific as possible rather than have general effect.

[59] Legislative Assembly of Queensland, Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, Brisbane, January 1997 at 38-55.
[60] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.
[61] Hon K A Hickey MP, *Legislative Assembly Hansard*, 7 May 2004.

111. The Committee also notes that the Bill delegates legislative powers beyond the scrutiny of Parliament by providing that Regulations may incorporate extrinsic documents as amended from time to time.

112. The Committee refers to Parliament the question of whether providing for the application of Part 5 of the Act to be amended by Regulation is an inappropriate delegation of legislative power.

The Committee makes no further comment on this Bill.

6. PASSENGER TRANSPORT AMENDMENT (BUS REFORM) BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Michael Costa MLC
Portfolio:	Transport Services

Purpose and Description

1. The Bill's objects are to:

(a) to amend the *Passenger Transport Act 1990* [the Act] to:

(i) enact new provisions dealing with service contracts[62] for regular bus services (including transitway services);

(ii) enable the Director-General of the Ministry of Transport [the Director-General] to declare bus service contract regions and strategic transport corridors;

(iii) enable the Director-General to fix fees for applications for certain accreditations and authorities under the Act and for the renewal of such accreditations and authorities;

(iv) limit the provisions of Division 2 of Part 3 (which currently apply to service contracts for regular passenger services other than transitway services) to service contracts for ferry services;

(v) enable the Independent Pricing and Regulatory Tribunal [IPART] to determine maximum fares for certain regular bus services (whether provided by public or private bus operators);

(vi) facilitate the making of accreditation standards that take into account different kinds of public passenger services and operators; and

(vii) enact certain transitional provisions to enable the variation or termination of certain existing bus service contracts in order to facilitate the introduction of the new provisions relating to regular bus services;

(b) amend the *Independent Pricing and Regulatory Tribunal Act 1992* [IPART Act] to exclude certain bus services provided by the State Transit Authority [STA] under the Act from the standing reference of IPART to determine pricing policy for the STA;

[62] Currently, Division 2 of Part 3 of the *Passenger Transport Act 1990* distinguishes between commercial and noncommercial service contracts. A *commercial contract* enables an operator to charge passengers of the operator's regular passenger service a fare while a *noncommercial contract* provides for the operator to be remunerated by the Crown for the provision of the regular passenger service. A commercial contract is to be for a period of 5 years, although the operator may be entitled to a renewal for a further period of 5 years if the operator meets certain performance standards. A non-commercial contract may (subject to the regulations in relation to school bus services) be for any term specified by the contract.

(c) amend the *Transport Administration Act 1988* [the TAA] to make it clear that Government subsidised travel need not be limited to the provision of concessions;

(d) amend the *Passenger Transport (General) Regulation 2000* [PTG Regulation] to enable the Director-General in certain circumstances to:

(i) exempt the holder of an authority under the Act to drive a particular kind of public passenger vehicle from any separate requirement under any provision of the Act to hold an authority to drive another kind of vehicle; and

(ii) exempt the holder of an accreditation under the Act to carry on a particular kind of public passenger service from any separate requirement under any provision of the Act to be accredited to carry on another kind of public passenger service; and

(e) make consequential amendments to the *Passenger Transport (Bus Services) Regulation 2000* and the PTG Regulation.

Background

2. On 17 March 2004, the Minister for Transport Services released the Final Report of the Hon Barrie Unsworth's Review of Bus Services in NSW [the Unsworth Review].

3. The Unsworth Review considered submissions from over 500 organisations and individuals on the options outlined in the Review's Interim Report, as well as consulting with a broad range of stakeholders. These included representatives from industry groups, community organisations and state and local government.[63]

4. The Foreword to the Final Report noted that:

> [t]he principal objective of the Review, to create a bus transport system with common standards of fares and service levels, has been widely accepted as an achievable outcome of the implementation of the recommendations outlined in the Interim Report.[64]

5. The Unsworth Review concluded that the existing inequities in the provision of bus transport services can only be eliminated by way of structural changes and reforms, especially the manner in which the Government authorises bus operators to provide services in franchise areas.[65]

6. In summary, the 48 recommendations of the Unsworth Review aim to introduce:

> a network of strategic bus corridors supported by an expanded bus priority program, common standards with service levels tailored to each community, the pensioner excursion ticket to all buses across the metropolitan area, performance standards, community consultation, and staff training as key requirements of the new contracts.[66]

[63] See Ministry of Transport, http://www.transport.nsw.gov.au/busreview/
[64] www.transport.nsw.gov.au/busreview/final-recommendations.html
[65] www.transport.nsw.gov.au/busreview/final-recommendations.html
[66] Mr J G Tripodi MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 12 May 2004. The Government's point-by-point response is to be found at www.transport.nsw.gov.au/busreview/ government-response.html

The Bill

7. According to the second reading speech, the Bill:

> introduces a more contestable regime of performance-based contracts to replace perpetual contracts with few measurable performance standards and gives the parties the flexibility to determine the terms and conditions of service by shifting the detail from the legislation to the contracts. It allows changes to be negotiated on the expiry of a contract term so that services meet changing needs and facilitates the introduction of more transparent and accountable funding arrangements, including the payment of School Student Transport Scheme [SSTS] subsidies based on actual travel undertaken. It provides an independent process for setting the maximum fares that private or Government-owned bus operators may charge and allows for existing commercial service contracts to be varied or terminated, if that becomes necessary to move to the new system.[67]

8. The Bill consists of the following:

- Schedule 1 – Amendment of the Act:
  - Definitions;
  - Accreditation standards;
  - Fees for accreditations and authorities under Part 2 of the Act;
  - Service contracts for regular bus services;
  - Creation and variation of bus service contract regions, strategic transport corridors and transitway and emergency routes; and
  - Compensation for determination or variation of transitway routes
- Schedule 2 - Amendment of other Acts and Regulations, ie, the:
  - *Independent Pricing and Regulatory Tribunal Act 1992*;
  - *Passenger Transport (Bus Services) Regulation 2000*;
  - *Passenger Transport (General) Regulation 2000*; and
  - *Transport Administration Act 1988*.

Issues Considered by the Committee

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

Compensation for operation of Part 7 and the amending Act: Schedule 1 [25]

9. On or after the Bill's commencement day, the Director-General may, by written notice, terminate an existing commercial bus service on and from the date specified in the notice [proposed s 29].

10. Similarly, the creation of new bus service contract regions, strategic transport corridors and/or transitway routes and emergency routes under the Bill extinguishes

[67] Mr J G Tripodi MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 12 May 2004.

existing rights of bus service operators to the extent of those changes [proposed s 29, s 30 and s 31].

11. Accordingly, the Bill's exclusion of any claims for compensation as a result of the exercise of these powers by the Director-General affects the rights to compensation of bus service operators for such termination or extinguishment.

12. Proposed Sch 3[36] to the Act provides as follows:

> No compensation is payable to any person by or on behalf of the Crown for loss or damage arising directly or indirectly from:
>
> (a) the entry of parties, under and in accordance with Part 3 of this Act, into a service contract for a regular bus service on or after the commencement day, or
>
> (b) the declaration or variation, under and in accordance with this Part and Division 3 of Part 3 of this Act, of a bus service contract region or strategic transport corridor on or after the commencement day, or
>
> (c) the termination of an existing commercial bus service contract by operation of this Part, or
>
> (d) the variation of a region or route, or the extinguishment or compromise of a right or expectation, by the operation of this Part,
>
> and no proceedings for damages or other relief, whether grounded on the provisions of any contract or otherwise arising at law or in equity, for the purpose of restraining any action referred to in paragraphs (a)–(d), or of obtaining compensation in respect of any such loss or damage, may be instituted or maintained.[68]

13. In the second reading speech, the Parliamentary Secretary stated that:

> [t]he savings and transitional provisions…make it clear that the Crown will not be liable to pay compensation for damages, if any, arising from these reforms. This provision is based on section 65 of the current Act. It recognises that existing commercial contracts were not awarded through any kind of open competitive tender process, but that the 1990 Act handed them to existing bus operators, with contract areas reflecting traditional service "territories". It recognises that the viability of these businesses hinges on a large injection of taxpayer funds through SSTS payments and concession reimbursements: more than $260 million in 2002-03. And it recognises that the Government is giving existing operators every opportunity to remain in the industry, under new performance-based contracts.[69]

Right to Compensation

14. The High Court has treated the denial of compensation rights as akin to the acquisition of property, holding that "acquisition" in s 51(xxxi)[70] of the Commonwealth Constitution extends to the:

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[68] No compensation is payable by or on behalf of the Crown for the introduction of new regular bus services, which includes compensation because of the enactment or operation of the amendments made to the *Passenger Transport Act 1990* by the Bill, or for any consequence of that enactment or operation; and compensation because of any statement or conduct relating to a matter referred to in relation to the amendments, or to any aspect of regular bus services: cl 36(2) & (3) of the *Passenger Transport Amendment (Bus Reform) Bill 2004*.

[69] Mr J G Tripodi MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 12 May 2004.

[70] Section 51(xxxi) provides that the Commonwealth may make laws for "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

> extinguishment of a vested cause of action, at least where the extinguishment results in a direct benefit or financial gain (which, of course, includes liability being brought to an end without payment or other satisfaction).[71]

15. It has been argued that Parliament's power to legislate to deprive a contracting party of rights under a contract entered into with the Executive should be used sparingly and set out unambiguously:

> the use of legislation to strip a specific individual of a legal right to compensation for breach of [contract] is a harsh and extraordinary use of governmental authority which, because it should not be done lightly, requires specific and unambiguous language.[72]

16. Whether the extinguishment of compensation rights comprises an *undue* trespass to personal rights depends on striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[73]

17. In striking such a balance, two issues for consideration include any need to extinguish compensation rights in order to promote the general interests of the community and the appropriateness of any right to compensation in the circumstances.

18. *Some* of the issues that go towards such considerations include the findings of the Unsworth review and the history of the bus service contracts.

19. The Committee notes that the Bill's amendments preclude any claims for compensation for changes to bus service operation, thereby trespassing on the personal rights of bus service operators.

20. The Committee also notes that given the power to terminate contracts under the Bill, the denial of compensation rights is particularly significant.

21. The Committee further notes that proposed Sch 3 [36] mirrors the existing restrictions on claims for compensation under the *Passenger Transport Act 1990*.

22. The Committee refers to Parliament the question as to whether the exclusion of claims for compensation constitutes an undue trespass on the rights of bus service operators.

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

Protection for exercise of functions by Director-General: proposed Sch 3 Cl 35

23. Both the Unsworth Report and the Government's response stressed the need for flexibility in establishing a new contractual basis for the provision of bus services.

[71] *Georgiadis v Australian and Overseas Telecommunications Corporation*, per Mason CJ, Deane & Gaudron JJ (1994) 179 CLR 297 at 205.

[72] Professor P W Hogg, cited in *Politics and the Rule of Law: Where Does the Forest Service's Duty Lie?* www.for.gov.bc.ca/hen/publications/rule_of_law/rule_of_law_chapter05.html

[73] This is the test used by the European Court of Human Rights when applying Article 1 of Protocol 1 to the *European Convention on Human Rights*, which permits a State to deprive a person of possessions, as long as it is done "in the public interest and subject to the conditions provided for by law and by the general principles of international law": *Sporrong and Lönnroth v Sweden* (1982) EHRR 35 at paragraph 69.

24. As a result, Sch 1 [25] inserts a new Part 7 into Schedule 3 to the Act.

Proposed Part 7 deals with the effect that the Bill's amendments to the Act have upon existing contracts.

25. Under proposed Sch 3 cl 35, any function of the Director-General which has been exercised under proposed s 28EA, s 28EB, or proposed part 7, concerning the termination of an existing commercial bus service contract[74], or the declaration or variation of a bus service contract region or strategic transport corridor before the transitional period expiry day, may not be:

(a) challenged, reviewed, quashed or called into question before any court of law or administrative review body in any proceedings;[75] or

(b) restrained, removed or otherwise affected by any proceedings [cl 25(2)].

Moreover, the rules of natural justice, so far as they apply to the exercise[76] of such functions, do not place on the Director-General any obligation enforceable in a court of law or administrative review body [cl 35(3)].[77]

Accordingly, no court of law or administrative review body has jurisdiction or power to consider any question involving compliance or non-compliance by the Director-General [cl 35(4)].

Finally, cl 35 has effect despite any provision of the Act, any other Act or any other law.

Privative or ouster clauses

26. Clause 35 is intended to operate as a *privative* or *ouster* clause, ie, one which "ousts" the jurisdiction of any court from reviewing the operation of the decision-making process under the amendments to the Act.

27. The right to judicial review of administrative action has been argued to be so fundamental to the functioning of a democratic system as to be part of the rule of law:

> Judicial review is neither more nor less than the enforcement of the rule of law over Executive action; it is the means by which Executive action is prevented from exceeding the powers and functions assigned to the Executive by law and the interests of the individual are protected accordingly.[78]

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[74] The declaration, etc., of a bus service contract region, or a strategic transport corridor, under the Bill does not affect the continued operation of a service contract for a regular passenger service entered into *on or after the commencement of the relevant sections*, unless the service contract so provides: proposed s 28EA(5) and s 28EB(5) of the *Passenger Transport Act 1990* respectively

[75] "Proceedings" includes proceedings for an order in the nature of prohibition, certiorari or mandamus or for a declaration or injunction or for any other relief: cl 35(7) of the *Passenger Transport Amendment (Bus Reform) Bill 1990*.

[76] "Exercise of functions" includes the purported exercise of functions and the non-exercise or improper exercise of functions: cl 35(7) of the *Passenger Transport Amendment (Bus Reform) Bill 1990*.

[77] This is despite the fact that in *Annetts v McCann* Brennan J stated that "the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice": (1990) 170 CLR 596.

[78] Brennan J in *Church of Scientology v Woodward* (1982) 154 CLR 25 at 71.

28. Given that an ouster clause necessarily conflicts with its constitutionally-entrenched review powers, the High Court has:

> read such provisions as not so much attacking the jurisdiction of the courts, as expanding the decision-making authority of the relevant officer, so that what may appear to be breaches of the law are not in fact breaches at all.[79]

29. Nonetheless, the High Court has held that in certain instances a legislative intention may effectively preclude judicial review of a particular class of decisions when expressed sufficiently clearly.[80]

30. Thus, an ouster clause may be effective (at least in relation to Commonwealth powers) where the relevant decision:

- is a bona fide attempt to exercise the decision-maker's power;
- relates to the subject matter of the legislation; and
- is reasonably capable of reference to the power given to the body.[81]

31. These are known as the "*Hickman* provisos".

32. However, although there is no general rule as to the meaning or effect of ouster clauses,[82] an ouster clause will *not* be upheld to protect against failure to "comply with imperative duties and inviolable conditions or limitations on power discerned on a full reading of the statute".[83]

Thus, in practice, an ouster clause cannot subvert the overall aim of an Act.

Ouster clauses under State law

33. Three fundamental differences have been proposed to differentiate the effect of ouster clauses at State and Commonwealth levels.[84] These are:

- there is no State equivalent to s 75(iii) and (v) of the Constitution endowing the High Court with original jurisdiction in matters brought requiring Commonwealth officers to act within the law[85]; and
- unlike the Commonwealth, the powers of a State legislature are not confined to enumerated heads of power[86]; and

[79] J Basten QC, "*S157* and the Protection of Human Rights", *Australian Human Rights Centre Working Paper 2003/2*, www.ahrcentre.org/Publications/basten_s157.htm.
[80] *Darling Casinos Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.
[81] *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 614-615 per Dixon J.
[82] *Plaintiff S157/2002 v Commonwealth* (2003) ALR 24 at paragraph 60, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
[83] Comment on the *Hickman* provisos in *Plaintiff S157/2002*, S Evans, "Privative clauses and time limits in the High Court", *Constitutional Law and Policy Review*, Vol, 5, No.4, June 2003 at 62. See also Mason ACJ and Brennan J in *R v Coldham ex parte Australian Workers Union* (1983) 153 CLR 415 at 419.
[84] M Sexton and J Quilter, "Privative clauses and State constitutions", *Constitutional Law and Policy Review*, Vol, 5, No.4, June 2003 at 69.
[85] See, eg, *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 618.
[86] See, eg, *R v Coldham ex parte Australian Workers Union* (1983) 153 CLR 415 at 421, per Murphy J and *Darling Casinos Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 631, per Gaudron and Gummow JJ.

- a State legislature is not fettered by a doctrine of separation of powers which precludes the conferral on a non-judicial body of the power to determine conclusively its own jurisdiction.[87]

34. Thus, Justices Gaudron and Gummow have noted that:

> [p]rovided the intention is clear, a privative clause in a valid State enactment may preclude review for errors *of any kind*. And it if does, the decision in question is entirely beyond review so long as it satisfies the *Hickman* principle.[88]

35. Accordingly, it would appear that there is nothing to prevent the effective operation of an ouster clause in State legislation, although it has been argued that their Honours suggest that the *Hickman* provisos are:

> an irreducible minimum level of review, beyond which even a State Parliament cannot go.[89]

The Bill's ouster clause

36. The second reading speech noted that:

> the power to end existing commercial contracts is necessary...if negotiated agreements cannot be reached. The bill also contains a clause protecting decisions to vary or terminate existing commercial contracts from judicial review. This clause is justified on public interest grounds because it aims to prevent unnecessary costs and delays, as well as to promote efficiency and provide finality. Ongoing uncertainty is not good for the industry or for the public, especially bus users.[90]

37. Sir Anthony Mason has described the determination to restrict access to the courts as a "contagion", which could spread so as to undermine the rule of law:

> No encouragement should be given to attempts to restrict access to the courts for the determination of rights by converting provisions restricting access into provisions having substantive validity. If the legislature intends to treat noncompliance with its prescribed requirements as not resulting in invalidity, it should be encouraged to say so without achieving that result indirectly through the operation of an ouster clause.[91]

38. The Committee notes that proposed Sch 3 cl 35 purports to exclude from judicial review any decisions of the Director-General under proposed Part 7 of Schedule 3 to the *Passenger Transport Act 1990*.

39. The Committee also notes that the rights of bus operators may be dependent upon such decisions concerning the termination of an existing commercial bus service contract, or the declaration or variation of a bus service contract region or strategic transport corridor before the transitional period expiry day.

[87] *Plaintiff S157/2002 v Commonwealth* (2003) ALR 24 at paragraph 73.
[88] *Darling Casinos Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 634, per Gaudron and Gummow JJ.
[89] M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd Ed, Sydney 2000), 696.
[90] Mr J G Tripodi MP, Parliamentary Secretary, *Legislative Assembly Hansard*, 12 May 2004.
[91] Sir A Mason, "The Foundations and the Limitations of Judicial Review", *AIAL National Lecture Series on Administrative Law*, www.law.anu.edu.au/aial/Publications/webdocuments/Forums/Forum 31.pdf

40. The Committee has written to the Minister seeking an explanation as to the need for the ouster clause, rather than an adequate definition of the breadth of the Minister's power under the Act.

41. The Committee refers to Parliament whether Sch 3 cl 35 to the *Passenger Transport Act 1990* operates to make personal rights unduly dependent upon non-reviewable decisions.

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

Issue: Clause – Commencement by proclamation

42. The Bill is to commence on a day or days to be appointed by proclamation.

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

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

44. The Committee is advised by the Minister's office that the delay in commencing the Bill is due to the ongoing consultation process with the bus transport industry, with the aim of allowing for a reasonable transition period between assent and the Bill's provisions coming into effect. It is also to ensure that all new contracts may be introduced at the same time.

45. The Minister's office further advises that it is expected that draft contracts and funding models will be completed by the end of May 2004, and that the reformed system will be operative from 1 January 2005. [92]

The Committee makes no further comment on this Bill.

[92] On this point, the Unsworth Review recommended that, "[t]o provide certainty, the introduction of new contracting arrangements should be progressed expeditiously, with the aim of being in place across the Sydney metropolitan area by 2005. The first 2 years should be viewed as a transition period, to enable the collection of relevant information and data, and the review and refinement of arrangements as necessary": Recommendation 46, www.transport.nsw.gov.au/busreview/final-recommendations.html

7. STATE WATER CORPORATION BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Michael Egan MLC
	The Hon Frank Sartor MP
Portfolio:	Treasurer
	Energy, Utilities & Sustainability

Purpose and Description

1. This Bill:

   (a) establishes the State Water Corporation as a State owned corporation under the *State Owned Corporations Act 1989* and sets out its principal objectives and functions;
   (b) provides the Independent Pricing and Regulatory Tribunal with certain functions in relation to the Corporation, including regulatory and auditing functions;
   (c) makes consequential amendments to other Acts; and
   (d) enacts consequential savings and transitional provisions.

Background

2. In his second reading speech, the Minister said that State Water is currently a business unit within the Department of Energy, Utilities and Sustainability that delivers bulk water in country NSW.

   State Water is not a legal entity in its own right.[93] The Minister also said:

> In April 2003, State Water was transferred from the former Department of Land and Water Conservation to the Department of Energy, Utilities and Sustainability. This was the first step in removing the inherent conflict of interest of having a water delivery business located within the same department that regulates natural resource management.
>
> Corporatisation will complete the separation of the Government's water delivery functions from its policy and regulatory functions, and pave the way for State Water to become an efficient business operating on commercial principles.
>
> Changing State Water to a [State Owned Corporation] will expose it to similar corporate governance structures, disciplines and incentives that apply in the private sector, including an independent and commercial board of directors, a capital structure, agreed performance targets with its shareholders and clear, arm's-length relationships with government regulators.

[93] The Hon Frank Sartor MP, Minister for Energy, Utilities & Sustainability, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

The Bill

Commencement

3. The Bill commences on a day or days to be appointed by proclamation.

State Water Corporation

4. The State Water Corporation (SWC) is to be established as a statutory State Owned Corporation [cl 4].

5. The principal objectives of the SWC are to be to capture, store and release water in an efficient, effective, safe and financially responsible manner [cl 5(1)].

6. Under the Bill, the SWC's functions include:
    - capturing, storing and releasing water:
        - to persons entitled to take the water;
        - for the purposes of flood management; and
        - for any other lawful purpose, including for environmental protection purposes; and
    - constructing, maintaining and operating water management works [cl 6].

7. The SWC may also provide facilities or services that are necessary for, ancillary or incidental to, these functions and conduct any business or activity that it considers will further its objectives [cl 6].

8. For the purposes of exercising its functions, the SWC may also:
    - own works it installs or that are transferred to it [cl 21];
    - acquire land [cl22];
    - enter onto land [cl 23];
    - break up roads [cl 24];
    - alter the position of conduits, provided that the alteration would not permanently damage the conduit or adversely affect its operation [cl 25];
    - authorise devices for generating electricity from water released in the exercise of its functions [cl 26];
    - demolish or remove a structure or other thing that obstructs or interferes with the SWC's water management work [cl 27];
    - find sources of pollution of water supply, including digging up ground and recovering associated expenses from any person responsible for the pollution [cl 28]; and
    - impose fees and charges.

9. The Independent Pricing and Regulatory Tribunal will set the prices that the Corporation may charge for its services.[94]

10. The SWC is to operate under an operating licence, which must include conditions and terms requiring the SWC to to provide, construct, operate, manage and maintain efficient, co-ordinated and commercially viable systems and services to capture, store and release water, and to ensure that the systems and services meet the performance standards specified in the operating licence [cl 12(1)].

11. The Governor, on the recommendation of the Minister, can amend or substitute the operating licence or impose, amend or revoke conditions of the operating licence [cl 13].

12. If the SWC contravenes its operating licence, the Governor may impose a monetary penalty [cl 16].

    In addition, the Independent Pricing and Regulatory Tribunal may impose a monetary penalty for contravention of the licence [cl 17]. The monetary penalty imposed by IPART must not exceed $10,000 for the first day on which the contravention occurs and a further $1,000 for each subsequent day (not exceeding 30 days) on which the contravention continues [cl 17(6)].

    The Tribunal may also require the SWC to take such action as the Tribunal considers appropriate (eg, the publication of notices in newspapers) [cl 17].

13. The SWC may apply to the Administrative Decisions Tribunal for review of a decision of the Tribunal [cl 18].

14. All State Water staff will be transferred to the new SWC and their existing accrued entitlements and conditions of employment will be preserved.[95]

Independent Pricing and Regulatory Tribunal

15. The Bill provides the Independent Pricing and Regulatory Tribunal with regulatory and auditing functions [clauses 30 and 31].

16. In particular, the Tribunal's functions include:

    - making recommendations to the Minister for or with respect to:
        - the granting, amendment or cancellation of the operating licence;
        - the imposition, amendment or cancellation of conditions in relation to the operating licence;
        - action to be taken, and sanctions to be applied, in respect of a contravention of the operating licence; and
        - remedial action that may be warranted as a result of a contravention of the operating licence.

[94] The Hon Frank Sartor MP, Minister for Energy, Utilities & Sustainability, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

[95] The Hon Frank Sartor MP, Minister for Energy, Utilities & Sustainability, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004. See also schedule 2.

- monitoring and reporting to the Minister on compliance by the Corporation with the operating licence;
- determining the operating licence fee (if any); and
- imposing monetary penalties or requiring other action to be taken under section 17.

17. The Tribunal is also to prepare operational audits of the SWC at the times directed, and on the matters specified, by the portfolio Minister.

    The Tribunal is to ensure that each operational audit of the Corporation is prepared in accordance with the operating licence.

Issues Considered by the Committee

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

Issue: Clause 2- Commencement by proclamation

18. The ensuing Act is to commence on a day, or days, to be appointed by proclamation.

    The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act at all.

19. The Minister's office advised the Committee that the Bill is expected to commence on 1 July 2004.

The Committee makes no further comment on this Bill.

8. WATER MANAGEMENT AMENDMENT BILL 2004

Date Introduced:	12 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Craig Knowles MP
Portfolio:	Natural Resources

Purpose and Description

1. The Bill amends the *Water Management Act 2000* to facilitate the commencement of that Act and published water sharing plans and to deal with aspects of the National Water Initiative.

2. According to the second reading speech:

> The key objectives of the new legislation are: to establish secure water access entitlements to drive investment in sustainable agriculture, to give clear legal status to environmental water and the capacity of catchment management authorities to administer environmental water as an integral part of total catchment management, to provide a transparent water planning process where any future changes to access share entitlements are based on an independent assessment of catchment outcomes and socioeconomic impacts and to create streamlined and robust administrative arrangements to facilitate trade in water to generate greater economic returns and assist industry adjustment. [96]

Background

Historical overview of NSW water management

3. Current water management law in NSW cannot be understood except by reference to its historical development, including not only the law as it appears in the statute books but its implementation.

4. Following the substantial rejection at the end of the nineteenth century of the "doctrine of riparianism", which confined rights to take water to holders of land adjoining rivers, each of the Australian states adopted an administrative system for allocating water. This was based on the assumption of a right of primary access by the State, with water allocated for consumptive uses through a system of licences and other authorisations granted for specified periods. This led to significant over-commitment of available water resources.

5. A key feature of the administrative system as it evolved in Australia was its failure to guarantee security of supply to irrigators. The Australian system did not guarantee priority of access to water based on order of historical usage. If there was not enough water to go round, all users suffered. There was no provision for junior appropriators to give way to senior appropriators.

[96] The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

As new licences were granted, the security of supply of existing licence holders was inevitably reduced: existing licence holders had no priority. Today, the threat to security of supply stems not from the grant of more licences to extractive users, because embargoes have now been put in place, but from demands that water should be left in stream to ensure long-term sustainability of the resource.

6. NSW legislation required licences to be renewed periodically, but this was done by the water management agency as a matter of course. Although the agency had legislative powers to modify licences without payment of compensation (to provide for in stream environmental flows, for example) in practice this was not done.

   If water users were to be encouraged to invest by installing expensive infrastructure, there had to be an implicit understanding with the regulatory agency that licences would have some degree of permanency.

   Licences themselves came to be regarded by water users as de facto "property rights". This perception was reinforced when, from the early 1980s, temporary transfers of water allocations were allowed. Statutory provision for transfers was made in the *Water (Amendment) Act* 1986.

7. This Bill continues the process of reforming water resource management in NSW. As indicated in the second reading speech, this has in part been driven by a Commonwealth agenda because water resource management frequently raises inter-State issues.[97]

Water entitlements under the Water Management Act 2000

8. The *Water Management Act 2000* set up a system of water resource management underpinned by forward planning through water management plans.

   Among other things, these plans determine the conditions (volume, timing, etc) under which water can be extracted from watercourses while maintaining environmental flows.

   Water made available for extractive use is then apportioned among users through access licences and its use on land regulated through water use approvals.

9. The Act introduced a notion of water entitlement based on the entitlement holder's *share* of the water available for extraction. This is now referred to as a "perpetual access share".

   > A perpetual access share entitlement gives the entitlement holder a perpetual share of the available pool of water for extraction. It is important to emphasise that last point because what the water user gets is a perpetual share of the available water, not a guaranteed volume of water.[98]

   The volume of water comprising that share is dependent upon both:

[97] The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

[98] The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

- the total amount of water within the system, which is dependent on environmental conditions; and
- the amount of the total water available which is allocated to extractive use in the bulk access regime under the water management plan,[99] which has a life of 10 years and may be subject to amendment.

10. According to the Minister:

> the Act created the platform for a more certain investment climate and a fully functioning water market through three things: water sharing plans to set the rules for the allocation of water between environment and water users for the next 10 years; clearly defined access share entitlements in available water which are separate from land ownership; and a register to record all water entitlements, the ownership of these entitlements, and third party interests.
>
> ...
>
> Water-sharing plans apply to individual water sources or systems. They set clear rules for providing water to the environment and for sharing the water available for use between different categories of water user—towns, industry and irrigation—for the next 10 years. The water-sharing plans also set rules for water trading. The water-sharing plans ... are a principal determinant of access to the resource.[100]

11. Under s 20 of the Act:

> (1) The water sharing provisions of a management plan for a water management area or water source must deal with the following matters:
>
> (a) the establishment of environmental water rules for the area or water source in relation to each of the classes of environmental water referred to in section 8 (1);
>
> (b) the identification of requirements for water within the area, or from the water source, to satisfy basic landholder rights;
>
> (c) the identification of requirements for water for extraction under access licences;
>
> (d) the establishment of access licence dealing rules for the area or water source; and
>
> (e) the establishment of a bulk access regime for the extraction of water under access licences, having regard to the rules referred to in paragraphs (a) and (d) and the requirements referred to in paragraphs (b) and (c).

The Bill

12. The amendments in the Bill fall into three main areas:

> The first is water planning processes and water access share entitlements... The second is integrated management of water for environmental outcomes... The third is

[99] Water management plans are to include, but are not limited to:
(i) water sharing; and
(ii) water source protection;
(iii) drainage management; and
(iv) floodplain management [s 15(1)(a) *Water Management Act 2000*].

[100] The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

implementation of the water-sharing plans, necessary in part, to ensure that they operate from 1 July 2004 in the manner intended.[101]

13. Schedule 1 to the Bill contains amendments to the Act relating to water management plans and other related matters:

(a) to provide that the Minister for the Environment must concur in the making and amendment of plans by the Minister for Natural Resources;
(b) to enable the Minister to extend water sharing plans on the recommendation of the Natural Resources Commission;
(c) to give catchment management authorities a role in water management and to provide a link with catchment action plans;
(d) to ensure that plans are not subject to challenge before or after a judicial review period of 3 months; and
(e) to clarify the operation of Minister's plans.

14. Schedule 2 to the Bill contains amendments to the Principal Act relating to domestic and stock rights and water usage. The amendments limit those rights so as to protect existing such rights and other water rights, and environmental water.

15. Schedule 3 to the Bill contains amendments to the Act:

(a) to provide for the keeping of a Water Access Licence Register (the ***Access Register***) in which is to be recorded the grant of water access licences and specified dealings and matters affecting the licences in an analogous way to the recording of various dealings and matters in relation to land in the Register kept under the *Real Property Act 1900;*
(b) to categorise the dealings that may be carried out in respect of access licences and to set out the way in which they take effect;
(c) to provide for the creation of security interests over water access licences and holdings in access licences by registration of such interests in the Access Register and to confer various rights on the holders of such security interests;
(d) to enable caveats to be lodged with respect to the recording of certain matters in the Access Register in an analogous way to the lodging of caveats in relation to various dealings in relation to land in the Register kept under the *Real Property Act 1900;* and
(e) to enable the holder of an access licence to transfer the water entitlements conferred by the licence to another person for a specified period of not less than 6 months.

16. Schedule 4 to the Bill contains amendments to the Act:

(a) to make further provision in relation to the types of access licence;
(b) to modify the procedures relating to the granting, surrender, suspension and cancellation of access licences and the recovery of outstanding amounts in relation to access licences;
(c) to modify the procedures relating to the keeping of water allocation accounts for access licences and the crediting and debiting of water in relation to those accounts;

[101] The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

(d) to change the period for which approvals are granted under the Act and to enable extensions of approvals to be granted;
(e) to modify the procedures relating to the granting, amendment, suspension and cancellation of approvals;
(f) to make further provision in relation to interstate agreements in respect of access licences and water allocations; and
(g) to make other miscellaneous amendments in relation to access licences and approvals.

17. Schedule 6 to the Bill contains amendments to the Principal Act:

(a) to make provision with respect to the conversion of former entitlements to access licences and approvals under the Principal Act; and
(b) to make further provisions of a savings or transitional nature.

18. Schedule 7 makes consequential and other amendments to various Acts and an instrument. In particular, Schedule 7.1 amends the *Catchment Management Authorities Act 2003* to provide for:

(a) the establishment and operation of Environmental Water Trust Funds by catchment management authorities in connection with their environmental water functions; and
(b) non-regulatory water management provisions to be included in catchment action plans.

Issues Considered by the Committee

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

Procedural fairness; the right to be heard: Proposed section 50(2A)

19. The *Water Management Act 2000* created two *alternative* procedures for water management plan-making:

- water management committees develop draft plans which are then put on exhibition for public comment. The Minister has a broad discretion to vary the provisions of the draft plan before making a final plan [sections 35-44];
- the Minister may develop a plan (a Minister's plan), without any requirement for consultation with the relevant water management committee [s 50]. A Minister's plan must, however, be put on exhibition for public comment [s 15(4)].

The Minister cannot make a plan in relation to an area over which a management plan is already "in force" *except* in relation to matters not dealt with by the management plan [s 50(1)].

20. All but one (Coxs River) of the water management plans that have been made so far have been made as Minister's plans, although in practice drafts were developed by water management committees and placed on exhibition for public comment.

21. The effect of proposed section 50(2A) is to remove the existing mandatory requirement for exhibition of Minister's plans for public comment and leave this to the Minister's discretion.

22. The provisions of a water management plan have a direct relationship with conditions in licences [proposed s 66(1)(a)]. Therefore, they have the potential to interfere with the personal rights of licence holders.

    Conditions required by a management plan are mandatory, and are not subject to appeal. Given this, providing for public consultation and comment on draft plans is an important safeguard and gives those who may be affected by the plan an opportunity to be heard before the plan is finalised.

23. Taken together with the fact that the Minister is not required to consult the water management committee in relation to Minister's plans, removing the requirement for public consultation could be regarded as an undue trespass on the right of those affected by the plan to be heard.

24. The Committee has written to the Minister seeking advice regarding the need to remove the requirement for publication of Minister's plans for public comment.

25. The Committee refers to Parliament the question of whether removing the mandatory publication of Minister's plans for public comment is an undue trespass on the right to be heard.

Diminution of "property" rights to water: Proposed sections 52(2) and 325

Proposed section 52(2)

26. Proposed section 52(2) [schedule 2, clause 2] provides that:

> owners or occupiers of new landholdings that are created by the subdivision of an existing landholding … must not take or use water …contrary to any prohibition or restriction imposed on them by or under the regulations…

27. This provision addresses the problem created by the ongoing subdivision of land bordering natural watercourses such as rivers. Each subdivision currently creates an additional stock and domestic right rather than dividing up the existing one. The result is that these rights are proliferating.

    Regulations can be made controlling the taking or use of water by those gaining domestic and stock rights through the subdivision of an existing riparian land. This has the potential effect of diminishing a new landholder's access to water.

28. There is, however, a compelling need to control the increased water usage stemming from rapidly increasing riparian subdivision along the coast and adjacent to inland centres. This results not only in further demands on the environment, but also conflict with other water users because it erodes security of supply in already overcommitted water resources.

29. Given the need to protect water resources from the effects of subdivision of riparian land and to minimise conflict between landholders, the Committee is of the view that it is reasonable to authorise the making of regulations that could limit a new landholder's right to take or use water.

30. The Committee is of the view that this provision does not unduly trespass on rights.

Proposed section 325

31. Proposed section 325 creates a process for constraining the exercise of *existing* stock and domestic rights. It empowers the Minister to establish "guidelines" relating generally to the "reasonable use" of water for domestic consumption and stock watering [proposed s 325(3) – Schedule 2[6]].

32. The draft guidelines must be placed on exhibition for public comment [proposed s 325(4)].

33. Under the Bill, the Minister can issue a written *direction* to an individual landholder to take specified measures to ensure that water is used in accordance with the guidelines [proposed s 325(1)(c)].

    There is a right of appeal to the Land and Environment Court [s 368(1)(n)]. It is a criminal offence to fail to comply with a direction [s 345].[102]

    The Minister can also apply for an injunction [proposed s 335], or take steps to implement the direction at the cost of the landholder [proposed s 334].

34. Section 328 already allows the Minister to issue a direction to a specific landholder who is using a water supply work (such as a pump or dam) to take water pursuant to a stock and domestic right "to take measures to protect the environment, to preserve basic landholder rights or to overcome a threat to public health".

35. Proposed s 325 assumes that *voluntary* guidelines will have the desired effect and that mandatory directions will be the exception rather than the rule. It will allow the reduction of water entitlements of specific holders of stock and domestic rights who are consuming water in a manner that is contrary to the guidelines.

36. Given the need to protect water resources, and the fact that these guidelines will be made the subject of public consultation and that the Minister's directions can be reviewed by the Land and Environment Court, the Committee is of the view that these provisions do not unduly trespass on individual rights and liberties.

Compensation for reductions in allocations: Proposed amendment to section 87 & proposed section 68A(1)

37. Section 87 currently sets out the circumstances in which compensation is payable to a holder of an access licence for reductions in water allocations arising from the Minister's amendment of a management plan.

38. The amendments to section 87 vary the circumstances in which compensation will be payable.

[102] Penalties are set out in section 348. See footnote below.

When is compensation currently payable?

39. Currently, compensation *is payable* for loss suffered by a licence holder when their water allocations under the Act are reduced as a consequence of the variation of a bulk access regime, except for the instances excluded by s 87(2) of the Act outlined below [s 87(1) of the Act].[103]

When is compensation currently <u>not</u> payable?

40. Compensation currently may *not* be claimed if the variation of the bulk access regime results from:

    (a) a management plan that has been made in relation to a water management area for which a bulk access regime has not been established by any other management plan [s 87(2)(a)]; or

    (b) a plan made by the Minister, provided that the Minister signs off on the bulk access regime put forward in a draft plan submitted by the water management committee [s 87(2)(b)]; or

    (c) the Minister amends a management plan in accordance with the provisions of the management plan itself [ss 87(2)(c) & 42(2)].

41. Under the Act, a decision of a water management committee to submit a draft water management plan for the Minister's approval must be unanimous [s 13(4) and Schedule 6, cl 12(3)(a)].

    Further, at least two members of a water management committee must have been appointed to represent the interests of water users [s 13(1)]. This effectively gives water users a power of veto.

Proposed amendments to section 87 – Schedule 1[22] – [24]

42. The Bill amends section 87 by expanding the circumstances in which compensation will *not* be payable.

    Proposed subparagraph 87(2)(a1) provides that compensation is not payable in respect of "a management plan that is made following the expiry of the management plan that established the bulk access regime".

    The Bill also replaces subparagraph 87(2)(c) to provide that no compensation is payable if the variation of the bulk access regime results from:

> an amendment of a management plan by the Minister under section 45[104] that is authorised by the plan or that is required to give effect to a decision of the Land and Environment Court relating to the validity of the plan.

[103] The Dictionary to the Act defines ***bulk access regime*** to mean a bulk access regime established by a management plan, as referred to in section 20(1)(e), or by a Minister's plan, and includes a bulk access regime as varied by the Minister under section 45.

[104] Under section 45, the Minister may readjust existing plans by order published in the Gazette if, for example, satisfied that it is in the public interest to do so. Under amendments proposed in this Bill, section 45 is considerably expanded. In addition to the public interest ground, proposed section 45 authorises the Minister to readjust existing plans as provided for in a plan and if the amendment is required to give effect to a

43. Consequently, under the Act as amended by the Bill, *compensation **is payable** for any variation to the bulk access regime during the life of the water management plan, unless that variation was provided for in the water management plan.*

*Compensation **is not payable** for a variation to the bulk access regime brought about by a new water management plan, whether that plan is the first plan for an area or replaces an expiring plan.*

Comment

44. Proposed section 87(2)(a1) provides that compensation is *not* payable where the bulk access regime is varied in a management plan *after* the expiry of the plan that first established it.

This appears to deny the payment of compensation where adjustments are made in a plan which succeeds the initial plan, even if the Minister diverges from the provisions of the draft plan proposed by the water management committee, or bypasses the committee altogether by making a Minister's plan.

45. The compensation scheme under the Bill gives security over water rights (in terms of compensation for loss for variation of the bulk access regime not approved by the plan) for the ten-year life of a water management plan, but no such security between plans.

The Committee notes that an holder of an access licence's *share* of the bulk access scheme is *not* affected by a change of water management plan.[105]

46. This scheme provides less than the *de facto* enduring entitlement to water referred to in the historical overview above.

The Committee notes, however, that any such *presumed* right does not appear to have legal, or at least statutory, force.

47. In his second reading speech, the Minister made it clear that a key objective of the Bill, including amendments to the compensation regime, is the need to provide a level of certainty and security sufficient to encourage private investment in water management, including investment in water conservation.[106]

48. The Committee also understands that the objective of the amendments to section 87 of providing licence holders with a ten-year period of security, is to be balanced with the need for adaptive management of the water resource to take into account new scientific evidence about environmental requirements.

49. The Committee notes that, under the Bill, no compensation is payable to variations in the bulk access regime introduced on the expiry of a ten-year water management plan.

decision of the Land and Environment Court relating to the validity of the plan. In addition, the Minister is given the power to repeal a plan at any time by order published in the Gazette.

[105] Proposed section 68A(1) [schedule 4, cl 12] provides that the Minister has the power to amend the share component or the access component of an access licence in accordance with the relevant management plan. However, such an amendment to an access licence is compensable under s 87.

50. Given the rights to compensation for variations to bulk access regimes during the life of ten-year management plans and the objectives of the Bill, the Committee is of the view that the amendments to the compensation regime under the Act do not unduly trespass on personal rights and liberties.

Proposed section 85B: penalties for illegally taken water

51. Proposed section 85B [schedule 4, clause 22] provides that, in addition to, or as an alternative to, prosecuting licence holders who take water in breach of their licence [s 341[107]], the Minister can also penalise them by:

(a) debiting their water account by up to 5 times the amount of water taken; and
(b) requiring them to pay a civil penalty of up to 5 times the fee for the water taken.

52. While such an enforcement strategy does not raise any issues of infringement of personal rights and freedoms where it is used as an *alternative* to prosecution, it could be seen as raising the prospect of double punishment where it is used in *addition* to prosecution.

Neither the court, on sentence, nor the Minister when making an order, is required to take account of the other's decision.

The additional penalty is not available where water is taken by someone who is not licensed. This reflects the fact that a breach of trust is involved where a licence holder is the offender.

53. The licence holder is to be given written notice of the proposed penalty under section 85B, and the opportunity to comment, and, in addition has a right of appeal to the Land and Environment Court [proposed s 368(1)(ma)].

Where the licence holder has also been prosecuted, an exercise of the latter rightwould involve contesting two separate proceedings.

The Committee is of the view that double punishment for the same offence is contrary to the fundamental right of a person not to be tried or punished twice for the same conduct.[108] The Committee considers that this principle is so fundamental that there should be no derogation from it, notwithstanding the importance of protecting water resources and that the penalties prescribed are monetary and not custodial.

54. The Committee has written to the Minister for advice as to the reasons for potentially subjecting a person to a double penalty.

[106]The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

[107]Section 348 sets out the penalty for a licence holder taking water unlawfully: in the case of a corporation, a maximum 2,500 penalty units and, in the case of a continuing offence, a further maximum of 1,200 penalty units for each day the offence continues; and in the case of an individual, a maximum of 1,200 penalty units and, in the case of a continuing offence, a further 600 penalty units for each day the offence continues.

[108]Article 17 of the International Covenant on Civil and Political Rights

55. The Committee refers to Parliament the question whether the additional penalty provided for in section 85B unduly trespasses on the fundamental right of a person not to be punished twice for the same offence.

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

Judicial review of plan-making functions: Schedule 1[18] (Proposed section 47)

56. Current section 47 provides that "the validity of a management plan may not be called into question in any legal proceedings other than those commenced in the Land and Environment Court within 3 months after the date of its publication in the Gazette".

57. Section 47 purports to give the Land and Environment Court exclusive jurisdiction in relation to legal proceedings contesting the validity of a water management plan. Any such proceedings *must be* commenced within three months of the date of the plan's publication in the Gazette.

Section 47 does not apply to proceedings challenging the validity of other decisions made under the legislation.

The amendments to section 47 elaborate in detail this limitation on judicial review of the validity of a management plan. The elements that have been added to the existing section 47 are designed to:

(a) emphasise that *only* the Land and Environment Court has judicial review jurisdiction in relation to the exercise of plan-making functions with special reference made of challenges based on failure to comply with the rules of natural justice;[109] and

(b) make it clear that the Land and Environment Court has no discretion to extend the 3 month period.

Limitation of the judicial review period

58. While any limitation of judicial review has the potential for trespassing on personal rights and liberties, there is also a strong public interest in the ongoing validity of water management plans.

59. Water management plans are a pivotal component of the system of water management and a form of subordinate legislation under the *Water Management Act.*

If a plan was to be successfully challenged once implementation had begun, it would result in a significant vacuum because the licensing and approvals systems contained in the legislation are intimately connected to the planning system.

60. The Committee considers that having a reasonable limit to the judicial review period provides an appropriate balance between a person's right to challenge the legality of the plan making process and the need for ongoing validity of such schemes.

[109] This would not appear to involve an attempt to exclude jurisdiction of the Court of Appeal on appeal from the Land and Environment Court, but the proposed section is not entirely unambiguous on this.

Procedural fairness in plan-making procedures

61. The Land and Environment Court's jurisdiction in relation to the *Water Management Act* appears to be limited to that conveyed by ss 335 and 336 of that Act – namely to grant injunctions directing a landholder to comply with certain directions and to hear proceedings for orders to remedy or restrain breaches of the Act.

    The Land and Environment Court has not been given the equivalent civil jurisdiction of the Supreme Court in relation to the Act "to review, or command, the exercise of a function conferred or imposed by a planning or environmental law".

    This is because the *Water Management Act 2000* has not been prescribed as a "planning or environmental law" for the purposes of s 20(2)(c) of the *Land and Environment Court Act 1979*.

62. Consequently, the proposed provision appears to remove *altogether* the potential for review of plan-making procedures on the grounds of failure to comply with rules of natural justice (procedural fairness) implied by the common law.

63. However, aside from the issue of jurisdiction, there is considerable doubt as to whether the rules of procedural fairness would apply to the water management plan-making process. The general position is that "political decisions" do not attract the operation of the rules.

    Plan-making involves the making of policy, generally applicable to water users, and is essentially a form of delegated legislation. Although provisions in plans flow through to conditions attached to individual licences [s 66(1)(a)], these do not single out particular individuals but apply generally to categories of water user.

64. The legislation itself provides an elaborate procedure allowing stakeholder input into plans through water management committees, and the public exhibition of draft plans.

65. However, the Committee notes, as discussed above, that proposed s 50(2A) in the Bill would remove the requirement for exhibition of a Minister's Plan for public comment, leaving such plans free from requirements for either public consultation or procedural fairness.

66. The Committee draws to Parliament's attention the need to ensure that the Act provides adequate opportunity for persons affected by water management plans to be heard, whether through public consultation or an enforceable right to be heard.

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

Commencement by proclamation: Clause 2

67. The ensuing Act is to commence on a day, or days, to be appointed by proclamation.

68. The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it choses, or not to commence the Act, or parts of the Act, at all.

69. In his second reading speech, the Minister stated that it is intended that all the provisions of the Bill, other than those related to water-sharing plans in relation to six groundwater sources, will commence by 1 July 2004.

Those provisions relating to the water-sharing plans for the six groundwater sources will not commence until July 2005 to allow for time for ongoing discussions with the Federal Government on assistance in the implementation of these plans to be concluded.[110]

Domestic and stock rights and water usage: Schedule 2, Proposed section 52(2)

70. As discussed above, proposed section 52(2) contemplates that restrictions on water use by owners and occupiers of new riparian subdivisions will be imposed by regulation.

71. The Committee is of the view that, because such regulations are disallowable and may involve a high level of detail, proposed section 52(2) *does not* comprise an inappropriate delegation of legislative power.

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

Domestic and stock rights and water usage: Schedule 2, Proposed section 325

72. As discussed above, proposed section 325 allows the Minister to establish guidelines relating to use of water for stock and domestic consumption by order published in the Gazette.

Such guidelines can provide the basis for mandatory directions to individual landholders by the Minister.

73. Parliament is not provided with any opportunity to scrutinise or disallow these guidelines. The Minister must, however, publicly exhibit draft guidelines before gazettal.

74. Given the requirement for public consultation and the primarily voluntary force of the guidelines, the Committee *does not* consider that this delegation of legislative power is "insufficiently subject to parliamentary scrutiny".

The Committee makes no further comment on this Bill.

[110]The Hon Craig Knowles MP, Minister for Natural Resources, Second Reading Speech, Legislative Assembly, *Parliamentary Debates (Hansard)* 12 May 2004.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

9. FILMING APPROVAL BILL 2004

Date Introduced:	5 May 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon R J Debus MP
Portfolio:	Environment

Background

1. The Committee reported on the *Filming Approval Bill 2004* in Legislation Review Digest No 7 of 2004.

2. The Committee noted that this Bill provided that the ensuing Act is to commence on a day or days to be appointed by proclamation and therefore wrote to the Minister for the Environment seeking his advice as to the reasons for commencement of the Act by proclamation and the likely commencement date.

Minister's Reply

3. By letter dated 12 May 2004 (attached), the Minister advised the Committee that he is currently investigating whether it is necessary to draft a regulation in order to define "scientific, research, educational or tourism purposes."

   According to clause 4(3) of the Bill, these are the only filming activities permissible in a wilderness area.

4. The Minister further advises that he anticipates that proclamation will occur as soon as practicable following assent.

Committee's Response

5. The Committee thanks the Minister for his reply

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

11 May 2004

Our Ref: LRC716/CP4032

The Hon R J Debus MP
Minister for the Environment
Level 36, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister,

Filming Approval Bill

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 7 of 2004*.

The Committee notes that this Bill provides that the ensuing Act is to commence on a day or days to be appointed by proclamation.

The Committee notes that providing for an Act to commence on proclamation delegates to the Government the power to commence the Act on whatever day it chooses after assent, or not to commence the Act at all. While there may be good reasons why such a discretion is required, the Committee considers that, in some circumstances, it can give rise to an inappropriate delegation of legislative power.

The Committee has therefore resolved to seek your advice as to the reasons for commencing this Bill by proclamation, and a likely commencement date of the Act.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

NEW SOUTH WALES

MINISTER FOR THE ENVIRONMENT

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

12 MAY 2004

Dear Mr Collier

FILMING APPROVAL BILL 2004

I refer to your letter dated 11 May 2004 regarding the *Filming Approval Bill 2004* (the Bill).

I note that the Legislation Review Committee has requested advice as to the reasons for commencing this Bill by proclamation.

Commencement on proclamation would be required if a Regulation is necessary for the operation of the Bill. I am currently investigating the drafting of Regulation to define scientific, research, educational or tourism purposes, which in accordance with clause 4(3) of the Bill are the only filming activities permissible in a wilderness area.

Commencement by assent has benefits, such as alleviating the current uncertainty regarding filming permissibility immediately upon assent of the Bill. However, should a Regulation be required, I advise that my preference is to retain the current commencement provision of the Bill. It is anticipated that proclamation would occur as soon as practicable following assent.

I trust this information will satisfy the Committee's concerns.

Yours sincerely

Bob Debus

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10. MINING AMENDMENT (MISCELLANEOUS PROVISIONS) BILL 2004

Date Introduced:	2 April 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Kerry Hickey MP
Portfolio:	Mineral Resources

Background

1. The Committee reported on the *Mining Amendment (Miscellaneous Provisions) Bill 2004* in Legislation Review Digest No 3 of 2004 (3 May 2004).

2. The amendments remove the possibility of a landholder suing the Crown or any person administering the Act for compensation for damage suffered as a result of the exercise of any right conferred by an authority or mineral claim, including acts of negligence.

3. The Committee wrote to the Minister seeking clarification as to the rights of landholders who suffer damage as a result of the exercise of a right conferred on a mining titleholder who has insufficient funds to pay proper compensation.

Minister's Reply

4. In his reply, which the Committee received on 17 May 2004, the Minister set out landholder entitlements to compensation under the *Mining Act 1992*.

   He advised that these include an entitlement to compensation from the holder of a mining title for compensable loss suffered by the landholder as a result of the exercise of the rights conferred by the title.

5. In addition, the mining titleholder must not exercise those rights unless relevant compensation procedures have been followed. These procedures include the making an agreement with the landholder on the amount of compensation payable.

   The Minister advised that if a titleholder fails to comply with such an agreement, the title is subject to cancellation.

6. The Minister further advised that the amendments in the Bill extending Crown immunity do not affect these compensation and penalty arrangements and would apply in cases where a mining titleholder is unable to pay proper compensation to a landholder.

   Furthermore, if landholders have difficulty recovering from a titleholder, they may apply to the Warden's Court for an appropriate order.

7. In addition to these measures, the *Mining Act* provides that the Minister can cause rehabilitation work to be done on land if a titleholder fails to properly rehabilitate it. The Crown then recovers the cost of the rehabilitation from the titleholder.

8. Finally, the Minister advised that there is a special compensation regime in the case of mine subsidence districts.

   The *Mine Subsidence Compensation Act 1961* establishes a trust fund that is financed by colliery owners for the purpose of compensation for damage caused by subsidence from coal mining. This regime is unaffected by the amendments in the Bill.

Committee's Response

9. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

30 April 2004

Our Ref: LRC678

The Hon Kerry Hickey MP
Minister for Mineral Resources
Level 17
157 Liverpool Street
Sydney NSW 2000

Dear Minister

Mining Amendment (Miscellaneous Provisions) Bill 2004

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 6 of 2004*.

The Committee resolved to write to you to seek further information about the extension of Crown immunity provided for under the Bill.

The Committee is concerned that extending Crown immunity as proposed by the Bill may have the effect of unduly trespassing on the right of a landholder to compensation for loss incurred or damage suffered.

While the amendments do not remove the compensation rights of landholders, they may diminish those rights by requiring the landholder to recover from private persons or corporations who may have insufficient funds to pay proper compensation.

The Committee seeks your advice as to the rights of landholders who suffer damage as a result of the exercise of a right conferred on a person under the Act by way of an authority or mineral claim who has insufficient funds to pay proper compensation to the landholder.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

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New South Wales

The Hon. Kerry Hickey MP
Minister for Mineral Resources

MC04/47 & 55
M04/0035

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

Dear Mr Collier

I refer to your recent letter concerning the provisions of the Mining Amendment (Miscellaneous Provisions) Bill 2004 in relation to Crown immunity.

With regard to landholder entitlements to compensation, the relevant provisions of the current *Mining Act 1992* may be summarised as follows:

- A landholder is entitled (as detailed in Part 13 of the Act) to compensation from the holder of a mining title (ie authority, mineral claim or opal prospecting licence) for compensable loss suffered or likely to be suffered by the landholder as a result of the exercise of rights conferred by the mining title.

- Compensable loss is widely defined to cover damage to the surface of land, crops, trees, vegetation, buildings, structures, deprivation of use of land, loss of or interference with stock, consequential damage etc (section 262).

- The mining titleholder must not exercise rights conferred by the title unless relevant compensation procedures have been followed, in particular, the reaching of agreement with the landholder on the amount of compensation or alternatively assessment of compensation by a mining warden.

- If a mining titleholder fails to comply with an agreement or assessment in relation to the payment of compensation, the title is subject to cancellation (sections 125, 203 and 233).

- Related compensation provisions are included in Division 2 of Part 8 of the Act as part of access arrangements for exploration licences and assessment leases.

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The proposals in the Bill that would extend Crown immunity do not affect the above compensation arrangements, including situations where, for example, a mining titleholder has insufficient funds to pay compensation to a landholder. The *Mining Act* places that compensation liability on mining titleholders.

Section 385 of the Act, which is unchanged by the Bill, specifies that compensation to landholders, under either Part 13 or an access arrangement, is not payable out of money appropriated by Parliament.

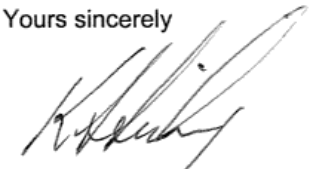
If a landholder encounters difficulty obtaining payment of agreed or assessed compensation from a mining titleholder, he or she can apply to the Warden's Court for an appropriate order. Procedures in that Court are relatively informal and inexpensive.

The existing provisions referred to above, that deny miners access until compensation processes are followed and the sanction of possible cancellation of mining title, should minimise instances where landholders' entitlements are not met. It might also be noted that, where a mining title holder or former holder fails to comply with requirements to rehabilitate damaged land, section 241 of the *Mining Act* allows the Minister to cause the rehabilitation work to be done and enables the Crown to recover the cost from the defaulter. This benefits landholders in such situations, whether or not the mining titleholder satisfied its compensation liability to the landholder.

In the case of mine subsidence districts proclaimed under the *Mine Subsidence Compensation Act 1961*, a special scheme of compensation exists. Specifically, that Act provides that compensation is payable from a fund, administered by the Mine Subsidence Board and financed by contributions from colliery proprietors, for damage to improvement or household or other effects due to subsidence caused by coal mining. The Act provides that colliery proprietors who are not in arrears in their contributions to the fund and who comply with title conditions are not liable, other than in cases of negligence, for damage of that kind. These provisions are not affected by the proposals in the Bill.

If your office requires any further information on this matter, your staff can contact Ms Siobhan Barry, Policy Adviser, in my office on (02) 9475 7600.

Yours sincerely



Kerry Hickey
MINISTER

11. STOCK DISEASES AMENDMENT (ARTIFICIAL BREEDING) BILL 2004

Date Introduced:	2 April 2004
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Ian Macdonald MLC
Portfolio:	Agriculture and Fisheries

Background

1. The Committee reported on the *Stock Diseases Amendment (Artificial Breeding) Bill 2004* in Legislation Review Digest No 6 of 2004.

2. The Committee noted that Schedule 1[7] to 1[9] and [27] of the Bill proposed amendment regarding inspectors entering any land, building, vessel, vehicle, aeroplane or airship. The Committee further noted that there did not appear to be any constraint on these entry powers other than their purpose, or the times at which entry may be made. The Committee was therefore concerned that the amendment may provide inspectors the power to enter private dwellings at any time without a warrant to enforce the Act in relation to artificial breeding material.

   The Committee was aware, however, that similar provisions already apply under the *Stock Diseases Act 1923* and the *Stock Diseases (Artificial Breeding) Act 1985.*

3. The Committee therefore sought the advice of the Minister for Agriculture and Fisheries as to what limits exist on the place and times inspectors may enter land and buildings as well as the need for such broad powers of entry.

Minister's Reply

4. In a letter dated 21 May 2004 (below), the Minister advised the Committee that:

   - the limits that exist on the places and times that these powers may be exercised are imposed by the common law, which implies into legislation that the powers of inspectors be exercised reasonably and in strict accordance with the enabling Act;
   - NSW Agriculture requires that all persons appointed as inspectors under the Act complete three stages of legal training, and the need for inspectors' powers to be exercised reasonably and strictly is frequently emphasised at these courses;
   - inspectors are well aware that the onus is on them to prove that they have used their powers reasonably in each situation, and the repercussion of failing to do so are disciplinary processes thorough which inspectors may lose their appointment as inspectors, which may in turn lead to loss of employment; and
   - inspectors seldom resort to the use of their powers, except in extenuating circumstances and that most inspections and animal treatments are performed

during business hours and with the consent, or at the request of, the landholder. The only time inspections are undertaken without consent are when consent cannot reasonably be obtained and the inspection must go ahead in the interest of disease control.

Committee's Response

5. The Committee thanks the Minister for his reply.

The Committee makes no further comment on this Bill.

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

30 April 2004

Our Ref: LRC680

The Hon Ian Macdonald MLC
Minister for Agriculture and Fisheries
Level 30, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Stock Diseases Amendment (Artificial Breeding) Bill 2004

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee will be reporting its consideration of the Bill in its *Legislation Review Digest No 6 of 2004*.

The Committee noted that Schedule 1[7] to [9] and [27] of the Bill propose amendments regarding inspectors entering any land, building, vessel, vehicle, aeroplane or airship.

The Committee noted that there does not appear to be any constraint on entry powers other than their purpose, or the times at which such entry may be made.

The Committee is concerned that the amendment may provide inspectors the power to enter private dwellings at any time without a warrant to enforce the Act in relation to artificial breeding material.

The Committee is aware that similar provisions already apply under the *Stock Diseases Act 1923* and the *Stock Diseases (Artificial Breeding) Act 1985*. The Committee is nevertheless of the view that Parliament should consider these issues before enacting the provisions.

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Inspectors on the whole adopt an advisory approach to the enforcement of this Act. They mostly live in the districts where they work and are protective of their reputations and of the reputation of NSW Agriculture and Rural Lands Protection Boards.

It is important to point out that inspectors under the *Stock Diseases Act 1923* seldom resort to the use of their powers, except in extenuating circumstances. Most inspections and animal treatments are performed during business hours and with the consent, or at the request of, the landholder.

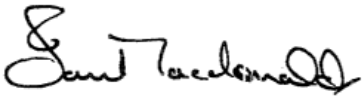
There is a very good practical reason for this. Inspectors often have to travel long distances to undertake these inspections and the cooperation of the landholder in opening locked gates and mustering stock is needed. No competent inspector would arrive at a property without prior arrangement for fear that their trip resulted in a waste of time.

The only times inspections are undertaken without consent are where consent cannot be reasonably obtained and the inspection must go ahead in the interests of disease control. In such instances the inspector would be very careful to exercise their powers reasonably. Such a situation would exist during an outbreak of a significant disease where a landholder is absent and cannot be quickly located.

Notice of an inspection is also usually given, unless to do so would defeat the purpose of the use of the power. For example, the swill feeding of pigs is prohibited under the *Stock Diseases Act 1923* due to the possibility of the transmission of disease through the ingestion of contaminated waste products. Indeed, the origin of the foot and mouth disease outbreak in England in the 1990s was traced to the swill feeding of pigs at a particular farm. Inspectors would not give advance warning of an inspection of a pig farm in this instance to avoid the possible prior removal of evidence.

The need for strong powers of entry in the interests of disease control has long been recognised. The requirement that these powers be exercised reasonably protects the public from inappropriate exercise of these powers, such as inspections inside a private dwelling. The fact that the onus lies with the inspector to prove that they acted reasonably is a strong protection. The absence of instances where these powers have been abused, despite being in existence for over 80 years, further emphasises this point.

Yours sincerely



IAN MACDONALD MLC
NSW MINISTER FOR PRIMARY INDUSTRIES

NEW SOUTH WALES

MINISTER FOR AGRICULTURE AND FISHERIES

21 MAY 2004

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

Dear Mr Collier

Thank you for your letter dated 30 April 2004 regarding the *Stock Diseases Amendment (Artificial Breeding) Bill 2004*.

You ask what limits exist on the places and times inspectors may enter land and buildings as well as the need for such broad powers of entry that exist under the *Stock Diseases Act 1923*.

The limits that exist on the places and times that these powers may be exercised are imposed by the Common Law. The Common Law implies into the legislation that powers of inspectors be exercised reasonably and strictly in accordance with the enabling Act.

NSW Agriculture requires that all persons appointed as Inspectors under the Act complete three stages of legal training. The need for inspectors' power to be exercised reasonably and strictly in accordance with the *Stock Diseases Act 1923* is frequently emphasised at these courses.

Inspectors are well aware that the onus is on them to prove that they have used their powers reasonably in each situation. They are careful to also carry their identification cards and produce these as required.

The repercussions of using these powers unreasonably are that the inspector faces a disciplinary process through which they may lose their appointment as an inspector. Loss of this appointment may lead to the loss of employment.

In addition, their legal training ensures that they understand that a Court has the discretion to exclude evidence that has been illegally or unfairly obtained. The exclusion of such evidence may lead to the failure of the prosecution action being undertaken. The Department only embarks on prosecutions where significant breaches have occurred. Loss of such prosecutions is felt keenly by inspectors as it undermines their credibility. They are therefore careful to adhere to the technical rules when gathering evidence.

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Inspectors on the whole adopt an advisory approach to the enforcement of this Act. They mostly live in the districts where they work and are protective of their reputations and of the reputation of NSW Agriculture and Rural Lands Protection Boards.

It is important to point out that inspectors under the *Stock Diseases Act 1923* seldom resort to the use of their powers, except in extenuating circumstances. Most inspections and animal treatments are performed during business hours and with the consent, or at the request of, the landholder.

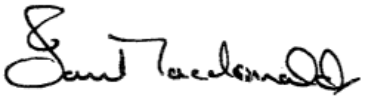
There is a very good practical reason for this. Inspectors often have to travel long distances to undertake these inspections and the cooperation of the landholder in opening locked gates and mustering stock is needed. No competent inspector would arrive at a property without prior arrangement for fear that their trip resulted in a waste of time.

The only times inspections are undertaken without consent are where consent cannot be reasonably obtained and the inspection must go ahead in the interests of disease control. In such instances the inspector would be very careful to exercise their powers reasonably. Such a situation would exist during an outbreak of a significant disease where a landholder is absent and cannot be quickly located.

Notice of an inspection is also usually given, unless to do so would defeat the purpose of the use of the power. For example, the swill feeding of pigs is prohibited under the *Stock Diseases Act 1923* due to the possibility of the transmission of disease through the ingestion of contaminated waste products. Indeed, the origin of the foot and mouth disease outbreak in England in the 1990s was traced to the swill feeding of pigs at a particular farm. Inspectors would not give advance warning of an inspection of a pig farm in this instance to avoid the possible prior removal of evidence.

The need for strong powers of entry in the interests of disease control has long been recognised. The requirement that these powers be exercised reasonably protects the public from inappropriate exercise of these powers, such as inspections inside a private dwelling. The fact that the onus lies with the inspector to prove that they acted reasonably is a strong protection. The absence of instances where these powers have been abused, despite being in existence for over 80 years, further emphasises this point.

Yours sincerely



IAN MACDONALD MLC
NSW MINISTER FOR PRIMARY INDUSTRIES

Part Two – Regulations

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

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

SECTION B: COPIES OF CORRESPONDENCE ON REGULATIONS

Regulation & Correspondence	Gazette ref
Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003 • Letter to the Minister for Roads dated 13 February 2004 • Letter from the Minister for Roads dated 13 May 2004	29/08/2003 p. 8610

1. Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003

PARLIAMENT OF NEW SOUTH WALES
LEGISLATION REVIEW COMMITTEE

13 February 2004

Our Ref:382
Your Ref:

The Hon Carl Scully MP
Minister for Roads
Level 36 Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

Dear Minister

Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003

At its meeting of 24 October 2003, the Committee considered the above Regulation and resolved to write to the Privacy Commissioner for advice on the privacy implications, if any, of clause 25B of the Regulation.

The Committee received this advice on 28 November 2003. It is attached for your information.

In his advice to the Committee, the Acting Privacy Commissioner stated that clause 25B allows disclosure of personal information "to any person without regard to the privacy of individuals, and as such would allow a significant incursion into the privacy rights of the participants".

To protect the privacy rights of participants, the Commissioner advised that he would prefer to see limitations as to the recipients of such information (eg, the Police). He also advised that limited circumstances in which such recipients are entitled to the information should be described.

The Committee has considered the Commissioner's advice and is of the view that the Regulation should be amended as he recommended.

In particular, the Committee suggests that the Regulation clearly set out which agencies should be entitled to have access to the personal information of participants in the interlock device program. Secondly, the Committee suggests that the Regulation clearly specifiy the limited circumstances under which those agencies might have access to that information.

The Committee agrees with the Acting Privacy Commissioner that making these amendments will enhance this important program by better protecting the privacy rights of participants.

Yours sincerely

BARRY COLLIER MP
CHAIRPERSON

M04/1244

NEW SOUTH WALES

Minister for Roads
Minister for Housing
Leader of the House

RECEIVED
20 MAY 2004
LEGISLATION REVIEW COMMITTEE

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

13 MAY 2004

Dear Mr Collier

I refer to your representations on behalf of the Legislation Review Committee, regarding the concerns raised by the Acting Privacy Commissioner about the privacy implications of Clause 25B of the *Road Transport (Driver Licensing) Regulation 1999* (which was inserted by the *Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003).*

As you will be aware, the Road Transport Legislation Amendment (Interlock Devices) Act 2002 ("Act") was implemented in order to provide courts with an additional penalty option to use when sentencing serious drink drivers which incorporates an education and rehabilitation component. It is hoped that this new penalty will be of particular use to country courts. It is of great concern to the Government that research by the Judicial Commission of NSW has shown that country courts are three times more likely than metropolitan courts to dismiss drink driving charges. This may have contributed to the 74% increase in the number of drink driving fatal crashes in country NSW in the period 1998 to 2002.

The interlock program includes a conditional interlock licence period during which a driver is restricted to driving a car fitted with an approved interlock device by an approved interlock installer which is regularly maintained by an approved interlock service provider.

The *Road Transport (Driver Licensing) Regulation 1999* prescribes eligibility and sets out the application process for the Roads and Traffic Authority (RTA) to approve devices and for individuals to be approved by the RTA as installers and service providers. It also provides for the RTA to enter into an agreement with a person for the supply or provision of management services relating to the installation, removal, maintenance and inspection of interlock devices.

Clause 25B of the Regulation provides for the RTA to disclose to any person data or information recorded in the driver licence register for the purpose of enabling the RTA to perform functions conferred or imposed on the RTA by or under the Act. It restricts the RTA to the provision of information relating to the management of the alcohol interlock program.

2./

Level 36, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Tel.: (02) 9228 4455 Fax.: (02) 9228 4633

2.

The Clause refers to 'any person' to enable the RTA to provide relevant information to contracted Program Managers and to provide for the situation in which the list of persons approved as interlock installers and/or service providers changes on an ongoing basis.

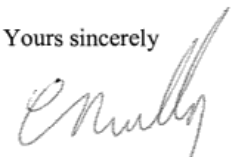
A key instance in which the provision of relevant personal information to the above persons is necessary to enable the RTA to perform functions imposed by the RTA under the Act relates to the requirement that a valid interlock driver licence is held throughout the interlock participation period (IPP). A condition of a valid licence is that the licence holder has had an approved interlock device fitted to a vehicle for the duration of the IPP.

In some circumstances such as demerit point suspension the IPP will be extended beyond the original period set by the court. To ensure that an interlock device is not accidentally removed before the expiry date the RTA will provide personal information such as the name and date of birth to approved interlock installers and to a contracted Program Manager in order to confirm the identity of an interlock driver licence holder presenting at a service centre to have an approved interlock device removed and confirm that the person's IPP has expired.

Clause 25B enables the RTA to provide this information to the Program Manager and/or the approved interlock installer as a final check that the interlock licence condition has expired before the device is removed.

I trust that this clarifies the issues you have raised.

Yours sincerely



CARL SCULLY MP
Minister for Roads

Appendix 1: Index of Bills Reported on in 2004

	Digest Number
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	2
Appropriation (Budget Variations) Bill 2004	5
Botany Bay National Park (Helicopter Base Relocation) Bill 2004	5
Children (Detention Centres) Amendment Bill 2004	4
Civil Liability Amendment (Offender Damages) Bill 2004	5,7
Community Protection (Closure of Illegal Brothels) Bill 2003*	1
Compulsory Drug Treatment Correctional Centre Bill 2004	8
Constitutional Amendment (Pledge of Loyalty) Bill 2004*	7
Courts Legislation Amendment Bill 2004	7
Crimes Amendment (Child Neglect) Bill 2004	7
Crimes Legislation Amendment Bill 2004	3
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003	1
Criminal Procedure (Sexual Offence Evidence) Bill 2004	8
Cross-Border Commission Bill 2004	3
Education Amendment (Non-Government Schools Registration) Bill 2004	2
Electricity (Consumer Safety) Bill 2003	1,2
Fair Trading Amendment Bill 2004	4
Filming Approval Bill 2004	7,8
Fisheries Management Amendment Bill 2004	6
Food Legislation Amendment Bill 2004	3
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	2
Greyhound and Harness Racing Administration Bill 2004	7
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	6
Health Legislation Amendment Bill 2004	6
Institute of Teachers Bill 2004	8
Legal Profession Legislation Amendment (Advertising) Bill 2003	1
Liquor Amendment (Parliament House) Bill 2004	6
Liquor Amendment (Parliamentary Precincts) Bill 2004	8
Local Government Amendment (Council and Employee Security) Bill 2004	5
Mine Health and Safety Bill 2004	8

	Digest Number
Mining Amendment (Miscellaneous Provisions) Bill 2004	6,8
National Competition Policy Amendment (Commonwealth Financial Penalties) Bill 2004	2
National Competition Policy Health and Other Amendments (Commonwealth Financial Penalties) Bill 2004	7
National Competition Policy Liquor Amendment (Commonwealth Financial Penalties) Bill 2004	7
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	1
Parliamentary Electorates and Elections Amendment (Prohibition on Voting by Criminals) Bill 2004*	5
Partnership Amendment (Venture Capital Funds) Bill 2004	3
Passenger Transport Amendment (Bus Reform) Bill 2004	8
Police Amendment (Crime Reduction and Reporting) Bill 2004	3
Prevention of Cruelty to Animals (Tail Docking) Bill 2004	4,6
Public Lotteries Legislation Amendment Bill 2004	2
Regional Development Bill 2004	7
Retirement Villages Amendment Bill 2004	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	1
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	1,7
Snowy Mountains Cloud Seeding Trial Bill 2004	5
State Revenue Legislation Amendment Bill 2004	7
State Water Corporation Bill 2004	8
Stock Diseases Amendment (Artificial Breeding) Bill 2004	6,8
Stock Diseases Amendment (False Information) Bill 2004	4
Strata Schemes Management Amendment Bill 2003	1,3
Superannuation Administration Amendment Bill 2003	1
The Synod of Eastern Australia Property Amendment Bill 2004	2
Thoroughbred Racing Legislation Amendment Bill 2004	4,6
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	6
Wool, Hide and Skin Dealers Bill 2004	2

Appendix 2: Index of Ministerial Correspondence on Bills from September 2003

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Bail Amendment (Firearms and Property Offences) Bill 2003	Attorney General	28/11/03	12/01/04	7	1
Catchment Management Authorities Bill 2003; Natural Resources Bill 2003 and Native Vegetation Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Child Protection Legislation Amendment Bill 2003	Minister for Community Services	12/09/03	07/11/03	2,5	
Civil Liability Amendment Bill 2003	Minister for Health	28/11/03	22/12/03	7	1
Civil Liability Amendment (Offender Damages) Bill 2004	Minister for Justice	26/03/04	13/04/04		5,7
Compulsory Drug Treatment Correctional Centre Bill 2004	Special Minister of State	28/05/04			8
Coroners Amendment Bill 2003	Attorney General	07/11/03	27/11/03	5,7	
Courts Legislation Amendment Bill 2003	Attorney General	07/11/03	25/11/03	5,7	
Crimes Legislation Further Amendment Bill 2003	Attorney General	28/11/03	16/12/03	7	1
Electricity (Consumer Safety) Bill 2003	Minister for Fair Trading	13/02/04	18/02/04		1,2
Environmental Planning and Assessment (Development Consents) Bill 2003	Minister for Infrastructure and Planning	24/10/03	19/03/04	4	5
Environmental Planning and Assessment Amendment (Planning Agreements) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	28/11/03	19/03/04	7	5
Environmental Planning and Assessment (Quality of Construction) Bill 2003	Minister for Infrastructure, Planning and Natural Resources	18/11/03	19/03/04	6	5
Filming Approval Bill 2004	Minister for the Environment	11/05/04	12/03/04		7,8
Gaming Machines Amendment (Miscellaneous) Bill 2003	Minister for Gaming and Racing	10/10/03	26/11/03	3,7	
Greyhound and Harness Racing Administration Bill 2004	Minister for Gaming and Racing	11/05/04			7
Independent Commission Against Corruption Amendment (Ethics Committee) Bill 2003	Premier	07/11/03	27/11/03	5,7	

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Legal Profession Legislation Amendment (Advertising) Bill 2003	Attorney General	13/02/04	23/03/04		1,5
Local Government Amendment Bill 2003	Minister for Local Government	28/11/03		7	
Lord Howe Island Amendment Bill 2003	Minister for the Environment	07/11/03	28/11/03	5	1
Mine Health and Safety Bill 2004	Minister for Mineral Resources	28/05/04			8
Mining Amendment (Miscellaneous Provisions) Bill 2004	Minister for Mineral Resources	30/04/04	17/05/03		6,8
Motor Accidents Legislation Amendment Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1
National Parks and Wildlife Amendment (Kosciuszko National Park Roads) Bill 2003	Minister for the Environment	07/11/03	08/12/03	5	1
Partnership Amendment (Venture Capital Funds) Bill 2004	Attorney General	05/03/04	23/03/04		3,5
Passenger Transport Amendment (Bus Reform) Bill 2004	Minister for Transport Services	28/05/04			8
Police Legislation Amendment (Civil Liability) Bill 2003	Minister for Police	18/11/03	24/12/03	6	1
Powers of Attorney Bill 2003	Attorney General	12/09/03	07/10/03	2,4	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004	Minister for Agriculture and Fisheries	16/03/04	05/04/04		4,6
Privacy and Personal Information Protection Amendment Bill 2003	Attorney General	24/10/03	25/02/04	4	3
Registered Clubs Amendment Bill 2003	Minister for Gaming and Racing	28/11/03	25/02/04	7	3
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	Minister for Roads	13/02/04	23/03/04		1,5
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003	Minister for Roads	13/02/04	05/05/04		1,7
State Revenue Legislation Further Amendment Bill 2003	Treasurer	28/11/03	15/12/03	7	1
Stock Diseases Amendment (Artificial Breeding) Bill 2004	Minister for Agriculture and Fisheries	30/04/04	21/05/04		6,8
Stock Diseases Amendment (False Information) Bill 2004	Minister for Agriculture and Fisheries	16/03/04			4
Strata Schemes Management Amendment Bill 2003	Minister for Fair Trading	13/02/04	27/02/04		1,3
Superannuation Administration Amendment Bill 2003	Treasurer	13/02/04	18/03/04		1,5

Bill	Minister/Member	Letter sent	Reply	Digests 2003	Digest 2004
Sydney Water Amendment (Water Restrictions) Bill 2003	Minister for Energy and Utilities	24/10/03	27/10/03	4,5	
Thoroughbred Racing Legislation Amendment Bill 2004	Minister for Gaming Racing	16/03/04	07/04/04		4,6
Transport Administration Amendment (Rail Agencies) Bill 2003	Minister for Transport Services	18/11/03		6	
Transport Legislation Amendment (Safety and Reliability) Bill 2003	Minister for Transport Services	07/11/03	21/11/03	5,7	
Veterinary Practice Bill 2003	Minister for Agriculture and Fisheries	07/11/03	03/11/03	5	1
Workers Compensation Amendment (Insurance Reforms) Bill 2003	Minister for Commerce	18/11/03	05/01/04	6	1

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

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Animal Diseases Legislation Amendment (Civil Liability) Bill 2004	N				
Botany Bay National Park (Helicopter Base Relocation) Bill 2004				N	
Civil Liability Amendment (Offender Damages) Bill 2004	R			C	
Community Protection (Closure of Illegal Brothels) Bill 2003	R				
Compulsory Drug Treatment Correctional Centre Bill 2004	N			N, C	
Courts Legislation Amendment Bill 2004				N	
Crimes Amendment (Child Neglect) Bill 2004				N	
Crimes (Sentencing Procedure) Amendment (Victims Impact Statements) Bill 2003				N	
Criminal Procedure (Sexual Offence Evidence) Bill 2004	N				
Education Amendment (Non-Government Schools Registration) Bill 2004				N	
Electricity (Consumer Safety) Bill 2003	N, R				C
Fair Trading Amendment Bill 2004				N	
Filming Approval Bill 2004				C	
Fisheries Management Amendment Bill 2004				N	
Food Legislation Amendment Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Freedom of Information Amendment (Terrorism and Criminal Intelligence) Bill 2004	N			N	
Greyhound and Harness Racing Administration Bill 2004			R, C	N	
Health Care Complaints Amendment (Special Commission of Inquiry) Bill 2004	N		R		
Health Legislation Amendment Bill 2004	N			N	
Institute of Teacher Bill 2004				N	
Legal Profession Legislation Amendment (Advertising) Bill 2003	C, R		C, R	N	
Liquor Amendment (Parliamentary Precincts) Bill 2004				N	
Local Government Amendment (Council and Employee Security) Bill 2004	N			N	
Mine Health and Safety Bill 2004	N, R	N	C	N, R	
Mining Amendment (Miscellaneous Provisions) Bill 2004	C, R			N	
Occupational Health and Safety Amendment (Prosecutions) Bill 2003	N				
Parliamentary Electorates and Elections Amendment (Prohibition on Voting Rights by Criminals) Bill 2004*	R				
Partnership Amendment (Venture Capital Funds) Bill 2004	C			C	
Passenger Transport Amendment (Bus Reform) Bill 2004	N, R		N, C, R	N	
Prevention of Cruelty to Animals Amendment (Tail Docking) Bill 2004				C	
Public Lotteries Legislation Amendment Bill 2004				N	
Regional Development Bill 2004				N	

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Road Transport Legislation Amendment (Public Transport Lanes) Bill 2003	N, C				
Road Transport (Safety and Traffic Management) Amendment (Alcohol) Bill 2003				C	
Snowy Mountains Cloud Seeding Trial Bill 2004				N	
State Water Corporation Bill 2004				N	
Stock Diseases Amendment (Artificial Breeding) Bill 2004	C, R			N	N
Stock Diseases Amendment (False Information) Bill 2004	C			C	
Strata Schemes Management Amendment Bill 2003				N,C	
Superannuation Administration Amendment Bill 2003	N			C	
Thoroughbred Racing Legislation Amendment Bill 2004				C	
Transport Administration Amendment (New South Wales and Commonwealth Rail Agreement) Bill 2004	R			N	
Wool, Hide and Skin Dealers Bill 2004				N	

Key

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

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

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