

PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 7 of 2010

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

### 8A Functions with respect to Bills

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

### 9 Functions with respect to Regulations:

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

## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### Section A: Comment on Bills

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

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

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

### Part Two – Regulations

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

#### Regulations for the special attention of Parliament

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

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

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

#### Copies of Correspondence on Regulations

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

## Appendix 1: Index of Bills Reported on in 2010

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

## Appendix 2: Index of Ministerial Correspondence on Bills

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

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

This table specifies the action the Committee has taken with respect to Bills that received comment in 2010 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

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

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

## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. Anzac Memorial (Building) Amendment Bill 2010

Issue: Commencement by Proclamation

12. The Committee recognises that administrative arrangements may need to take place before this Bill can commence operation and notes its intended commencement on 1 July 2010. Therefore, the Committee has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.

#### 2. Health Practitioner Regulation Amendment Bill 2010

Issue: Procedural Fairness - Proposed section 150 of Subdivision 7 of Part 8, Division 3, Schedule 1 [15] – Suspension or conditions of registration to protect public [NSW]:

30. Despite the provisions on rights of review and appeal, the Committee notes that the affected health practitioner or student will not have legal representation at the Council proceedings as the Bill does not allow legal representation at such Council proceedings or inquiry, nor is the process open to external scrutiny. Therefore, in cases where the Health Care Complaints Commission investigation is lengthy, the onus is placed upon the practitioner to gather evidence on his/her own behalf and the review allowed under section 150A is only being conducted by the body undertaking the suspension.
31. While an appeal to the Medical Tribunal is also possible, it is also a reasonably lengthy and arduous process before the matter can be heard and adjudicated. The practitioner or student may therefore remain suspended under the proposed emergency powers for a longer duration than intended or necessary, having an adverse consequence upon a practitioner's earning capacity and ability to re-enter the workforce.
32. The Committee therefore has concerns that the current situation of allowing for emergency suspensions of not more than eight weeks in duration will now be extended to an indefinite period of time. Accordingly, the Committee refers this to Parliament for consideration as to whether the proposed section 150 of Subdivision 7 of Part 8, Division 3, Schedule 1 [15] of the Bill may trespass unduly on personal rights and liberties.

#### 3. Industrial Relations Amendment (Consequential Provisions) Bill 2010

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



**4. National Park Estate (Riverina Red Gum Reservations) Bill 2010 (No 2)**

**14. The Committee has not identified any issues under s8A(1)(b) of the *Legislation Review Act 1987*.**

**5. Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010**

**Issue: Commencement by Proclamation**

**14. The Committee recognises that administrative arrangements need to take place, including the finalisation of assessment methodology, before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**



## Part One – Bills

### SECTION A: COMMENT ON BILLS

# 1. ANZAC MEMORIAL (BUILDING) AMENDMENT BILL 2010

Date Introduced:	21 March 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon. Kristina Keneally MP
Portfolio:	Legislative Assembly

### Purpose and Description

1. The Bill makes the following people trustees of the Anzac Memorial Building (in addition to the existing trustees): the Director-General of the Department of Education and Training, the New South Wales Government Architect, the State Librarian and a community representative appointed by the Minister.
2. In addition, the Bill provides for a veterans' representative to be a trustee in place of the President of the T.B. Sailors, Soldiers and Airmen's Association of NSW (Inc.), at a future date to be determined by the Minister.
3. The Bill removes the Chief Executive Officer of the NSW Trustee and Guardian as a trustee, appoints the Premier as the Chairperson of the trustees, the President of the Returned and Services League of Australia (RSL) as the Deputy Chairperson and appoints the RSL as guardian of the Anzac Memorial Building.
4. Lastly, the Bill provides that a function of the trustees is the education of the community about Australia's military history and heritage.

### Background

5. The first incarnation for legislation to provide for the Anzac Memorial Building in Hyde Park, Sydney was the *Anzac Memorial (Building) Act* of 1923. This initial legislation was designed to unify under the care of a trust, a number of fundraising efforts that had first emerged during World War I, each with different memorial proposals.
6. The trust initially comprised the Premier, the Leader of the Opposition and the Lord Mayor, along with three ex-service organisations, including the forerunner to the RSL. The trust was responsible for overseeing the worldwide design competition and continued fundraising that initially saw the construction of the Anzac Memorial Building.
7. Since the establishment of the Veterans Affairs portfolio in 2009, one of its chief aims has been to preserve and restore memorials like the one at Hyde Park. The Government recently spent \$6 million on a capital upgrade for the memorial,

completed in November 2009. Recurrent budgetary allocations for the memorial's upkeep has been increased by \$750,000 and is now \$1.25 million for the 2009 – 2010 financial year.

8. This Bill undertakes reform in the memorial's governance and management by including additional people to be trustees of the Anzac Memorial Building, as well as facilitating the replacement of existing trustees with representatives from equivalent or closely related organisations. The Bill also makes consequential amendments related to the authorising of proxies and delegations of trustees, as well as the establishing of a quorum.

## The Bill

### 9. Outline of provisions

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

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

#### **Schedule 1 Amendment of *Anzac Memorial (Building) Act 1923 No 27***

**Schedule 1 [2]** makes the Director-General of the Department of Education and Training, the New South Wales Government Architect and the State Librarian trustees of the Anzac Memorial Building, in addition to the Premier, the Leader of the Opposition, the Lord Mayor of Sydney and the President of the RSL, who are currently trustees. The Chief Executive Officer of the NSW Trustee and Guardian will no longer be a trustee. There will also be two persons appointed by the Minister as trustees, referred to as the **veterans' representative** and the **community representative**. The President of the T.B. Sailors, Soldiers and Airmen's Association of NSW (Inc.), who is currently a trustee, will remain as a trustee until a date appointed by the Minister by order published on the NSW legislation website. On and from that date, the veterans' representative will be a trustee. **Schedule 1 [4]** provides that the veterans' representative will be a person nominated by the RSL and the community representative will be a person with financial or business qualifications or experience that will assist the trustees in the exercise of their functions.

**Schedule 1 [2]** also provides that the Premier is to be the Chairperson of the trustees and the President of the RSL is to be the Deputy Chairperson. **Schedule 1 [3]** provides that in the absence of the Premier, a proxy appointed by the Premier may, with the written authority of the Premier, exercise the Premier's functions as Chairperson.

**Schedule 1 [6]** provides that the trustees may promote the understanding of, and conduct community education about, Australia's military history and heritage and have the functions conferred on them by the *Returned and Services League of Australia (New South Wales Branch) Incorporation Act 1935* or any other Act.

**Schedule 1 [5]** is a consequential amendment.

**Schedule 1 [7]** enables the trustees to delegate any of their functions to a trustee or an officer of the Department of Premier and Cabinet.

**Schedule 1 [1]** inserts standard definitions of **exercise** and **function** for the purposes of the principal Act.

### **Schedule 2 Amendment of *Anzac Memorial (Building) By-laws 1937***

**Schedule 2** makes consequential amendments to the *Anzac Memorial (Building) By-laws 1937* and amendments of a statute law revision nature. The trustees will no longer elect the Chairperson and Deputy Chairperson as the principal Act will provide that the Premier is the Chairperson and the President of the RSL is the Deputy Chairperson. The quorum for a meeting of the trustees will be increased from 4 to 6 trustees, as a result of the increase in the number of trustees from 6 to 9.

### **Schedule 3 Amendment of *Returned and Services League of Australia (New South Wales Branch) Incorporation Act 1935 No 39***

**Schedule 3** provides that the RSL is the guardian of the Anzac Memorial Building. The trustees of the Anzac Memorial Building are required to appoint, as custodian of the building, a person nominated by the RSL. Any information or complaint in respect of an offence concerning the Anzac Memorial Building may be laid or made by the custodian. These arrangements are similar to the existing arrangements for the Cenotaph.

## **Issues Considered by the Committee**

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

#### **Issue: Commencement by Proclamation**

10. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all.
11. The Committee notes that administrative arrangements may need to take place before the Bill can commence operation, such as the nomination of suitable representatives as trustees to the Anzac Memorial Building. Further, from advice received from the Department of Premier and Cabinet, the Bill is to commence operation on 1 July 2010. Given these considerations, the Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power in this instance.

**12. The Committee recognises that administrative arrangements may need to take place before this Bill can commence operation and notes its intended commencement on 1 July 2010. Therefore, the Committee has not identified any issues under s 8A(1)(b)(iv) of the *Legislation Review Act 1987*.**

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

## 2. HEALTH PRACTITIONER REGULATION AMENDMENT BILL 2010

Date Introduced: 20 May 2010  
House Introduced: Legislative Assembly  
Minister Responsible: Hon Carmel Tebbutt MP  
Portfolio: Health

### Purpose and Description

1. This Bill amends the *Health Practitioner Regulation Act 2009* to modify the application of the Health Practitioner Regulation National Law with respect to matters relating to the health, conduct and performance of registered health practitioners and students; and for other purposes.
2. This Bill:
  - (a) makes provision for the matters not previously adopted (by further modifying the application of the National Law in this State) so as to establish a separate system for dealing with:
    - (i) complaints about registered health practitioners and students, and
    - (ii) concerns about the possible impairment of health practitioners and students, and
    - (iii) assessments of the professional performance of health practitioners, and
  - (b) provides for the regulation of the acquisition of interests in pharmacy businesses, and
  - (c) declares that this State is not participating in the health, performance and conduct processes provided by the National Law, and
  - (d) declares certain NSW bodies established by the National Law (NSW) to be adjudication bodies, co-regulatory authorities and responsible tribunals for the purposes of the application of the National Law (NSW) in NSW, and
  - (e) further deals with the application of other NSW legislation to the National Law (NSW), and
  - (f) amends other legislation as a consequence of the proposed commencement of the National Law (NSW), and
  - (g) repeals certain legislation that will be redundant when the National Law (NSW) commences.
3. As New South Wales is not adopting the national complaints model, the Bill contains the New South Wales provisions that will replace divisions 3 to 12 of part 8 of the national law. The amendments to the national law fall into three categories: amendments to provide for the establishment and functions of the New South Wales professional councils; amendments to provide for the New South Wales specific complaints, performance and impairment systems; and amendments to provide for the ongoing regulation of pharmacy businesses and premises.
4. As the New South Wales will maintain the specific complaints performance and impairment systems, the regulatory bodies will be established to administer those

- systems. This Bill incorporates in the Act a new part 5A, which establishes a professional council for each profession. Proposed section 41B establishes a council for each profession that is currently included in the national scheme and provides that the list of councils may be amended by an order of the Governor. The reason for allowing amendment by Governor's order is to facilitate the inclusion of additional professions in the scheme, including those professions that will be included on 1 July 2012.
5. Proposed section 41E, in connection with part 1 of schedule 2, sets out the composition of each of the professional councils. Composition has been set for each of the following councils: the Dental Council, the Medical Council, the Nursing and Midwifery Council, the Pharmacy Council, the Physiotherapy Council and the Psychology Council. These compositions reflect the current compositions of the relevant State registration boards, with the addition of a dental prosthetist to the Dental Council to acknowledge the inclusion of dental prosthetists within the regulatory oversight of the Dental Council.
  6. The existing conduct definitions ('unsatisfactory professional conduct' and 'professional misconduct') from the *Medical Practice Act* are being retained and adapted for use by all professions. The principal definition of "unsatisfactory professional conduct" in the Bill is in proposed section 139B. Proposed sections 139C and 139D set out additional matters relevant to medical practitioners and pharmacists respectively.
  7. There are changes required to reflect the national law regarding the registration of students in all professions and changes to the council's powers regarding emergency suspensions.
  8. With regard to the registration of students, which in New South Wales has previously been limited to medical and dental students, the relevant provisions have been updated to allow complaints to be made and action to be taken against a student in limited circumstances. Those circumstances are: where a student has an impairment, where the student has been convicted or charged with a serious offence, or where the student has breached a condition of registration. Action may be taken against a student where the matter or matters giving rise to the complaint demonstrate that the student should not undertake clinical training involving contact with patients, or should undertake such training only subject to conditions. These provisions reflect similar arrangements that will apply in all other jurisdictions.
  9. With regard to emergency suspensions, the changes proposed involve moving from emergency suspensions of not more than eight weeks in duration to emergency suspensions that are not time limited. A practitioner who is subject to such a suspension may apply for a review of that suspension at any time and as frequently as he or she wishes.
  10. There are also provisions dealing with the regulation of pharmacies. Those provisions are to become schedule 5F of the Act. The intergovernmental agreement establishing the national registration and accreditation scheme excluded the regulation of pharmacies from the national process and left this to be dealt with at State and territory level. The Bill incorporates the existing provisions of the Pharmacy Practice

Act and the Pharmacy Practice Regulation with regard to the ownership and control of pharmacies and the standards for the approval of pharmacy premises.

## Background

11. The Agreement in Principle Speech explained that:

...the development of this scheme has been a lengthy process. The legislative milestones in the development of the national registration scheme have included the initial bill establishing the scheme's administrative arrangements, which passed through the Queensland Parliament in November 2008; the passage of the national law template through the Queensland Parliament in October 2009; the passage of the *Health Practitioner Regulation Act 2009* through this Parliament in November 2009; and the consideration of the current bill, which establishes the New South Wales specific complaints, performance and health processes, establishes each of the health professional councils in New South Wales to administer those systems and makes consequential amendments to a range of other New South Wales Acts, including the Health Care Complaints Act, the Poisons and Therapeutic Goods Act, and the Public Health Act.

12. The *Health Practitioner Regulation Act 2009* provides for the implementation in New South Wales of the Health Practitioner Regulation National Law. The national law sets out the regulatory framework for the National Registration and Accreditation Scheme for Health Professionals. It implements the agreement signed in 2008 by the Council of Australian Governments to establish the National Registration Scheme by 1 July 2010.

13. The Agreement in Principle Speech continued that:

The national law provides for the registration at a national level of 10 health professions: chiropractic, dentistry, medicine, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry and psychology. Four further professions will be added to the national scheme in July 2012: Aboriginal and Torres Strait Islander health practice, Chinese medicine, medical radiation practice and occupational therapy. The national law will ensure that nationally uniform processes and criteria exist for registering practitioners and accrediting educational programs. The establishment of these uniform processes and standards will mean that uniformly high standards will be applied nationwide and that the public can have increased confidence that all registered health practitioners meet appropriately high standards.

14. The national law's complaints model adopts processes similar to those that currently apply in most other States and Territories. However, it is different from the current New South Wales model.

15. The Government reached an agreement with the other States and Territories that will enable New South Wales to maintain the current New South Wales health complaints system and functions of the Health Care Complaints Commission. Therefore, New South Wales will participate in national registration as a co-regulatory jurisdiction. As a result of being a co-regulatory jurisdiction New South Wales has not adopted the national law complaints model, as set out in divisions 3 to 12 of part 8 of the national law. In New South Wales, the national registration boards will not deal with complaints about matters occurring in New South Wales and those matters must be referred to the New South Wales authorities, including the Health Care Complaints Commission.



16. The transitional provisions provide for the existing members of the relevant boards to become the members of the State councils for the relevant professions. However, after 12 months the size and composition of the State committees of the national boards may change based on an analysis of the work that those committees undertake and the cost of maintaining them. Therefore, section 41E allows for the composition of the councils to be varied by regulation. For the other four professions—chiropractic, optometry; osteopathy and podiatry—the compositions of the councils will be set by regulation. In each of these professions the relevant national board has determined that there will be no State or Territory committee.
17. The Bill also contains a range of transitional provisions that will ensure that the transition to the national scheme does not render the investigation or prosecution of any current complaints void. The transitional provisions also provide for existing approvals for pharmacy premises and owners to carry over as well as relevant appointments in terms of pharmacy premises and inspections.
18. Any pecuniary interest in a pharmacy that was unlawful under the previous pharmacy legislation will remain unlawful under this legislation. The *Pharmacy Practice Act 2006* includes a transitional provision to the effect that a person who lawfully held a pecuniary interest under previous pharmacy legislation is not precluded from continuing to hold that interest under the 2006 Act. This transitional provision was included for clarity because the 2006 Act incorporated a reasonably substantial updating of the pharmacy ownership provisions. As this Act does not include any such update, the transitional provision is unnecessary. Matters relating to the standards for the approval of pharmacy premises are currently dealt with in regulation.

## The Bill

19. The object of this Bill is to amend the *Health Practitioner Regulation Act 2009* (the *2009 Act*). The 2009 Act adopted as a law of New South Wales most of the Health Practitioner Regulation National Law (the *National Law*) set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* of Queensland, but did not adopt certain provisions of the National Law (relating to the health, conduct and performance of registered health practitioners and students, including the complaints and disciplinary scheme) that the NSW Government agreed to deal with separately. The National Law, as adopted by this State, is called the *National Law (NSW)*.

## 20. Outline of provisions

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

**Clause 2** provides for the commencement of the proposed Act. The amendments to the 2009 Act commence on the date of assent to the proposed Act. The consequential amendments to other legislation, and the consequential repeal of legislation, commence on the day the 2009 Act commences (which is 1 July 2010 or a later date appointed by proclamation made before 1 July 2010).

## Schedule 1 Amendment of *Health Practitioner Regulation Act 2009* No 86

### Modification of National Law (NSW)

**Schedule 1 [2]** provides that terms used in Part 2 of the 2009 Act and in the National Law (NSW) have the same meaning in Part 2 as they have in that Law.

**Schedule 1 [3]** provides that the National Law (NSW) applies as a law of NSW with the modifications set out in the Schedule of modifications inserted by this Bill.

**Schedule 1 [4]** provides (in proposed section 6) that New South Wales is not participating in the health, performance and conduct process provided in the National Law. Instead the National Law (NSW) establishes specific processes relating to the health, performance and conduct of registered health practitioners and students in New South Wales, including a complaints and disciplinary scheme (see Schedule 1 [6]).

**Schedule 1 [6]** inserts Schedule 1 into the 2009 Act, which contains the following modifications to the National Law for the purposes of the application of that Law in New South Wales.

### **Registration fees**

The Schedule of modifications provides that, if the Ministerial Council gives a policy direction about registration fees that provides that a registration fee is to separately identify a registration and accreditation element and a complaints element, then the amount of the complaints element for registration fees payable by NSW health practitioners for a particular profession is to be decided by the relevant Council for that profession (see proposed section 26A). The Ministerial Council gave a relevant fees policy direction on 13 November 2009.

### **Establishment of Councils**

The Schedule of modifications provides for the establishment of State Councils in relation to each of the professions of chiropractic, dental, medical, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology (see proposed Schedule 5C). Provision is made for the following:

- (a) the powers and functions of the Councils (which include the handling of complaints about registered health practitioners and students),
- (b) the membership, proceedings, administration and finances of the Councils (which are also dealt with in the modification made by inserting proposed Schedule 5C to the National Law (NSW)),
- (c) the preparation of annual reports by the Councils,
- (d) the information concerning the imposition of conditions on health practitioners, or certain other orders, that the Councils must make available to the public,
- (e) the matters that the Councils must take into account when dealing with a complaint about a registered health practitioner or student.

### **Administration of anaesthesia or sedation on dental patients**

The Schedule of modifications requires that the administration of a general anaesthesia on patients of a registered dentist must be carried out by a registered medical practitioner with qualifications in anaesthesia and that registered dentists who administer simple sedation by the intravenous route must have special qualifications and must be assisted by qualified persons (see proposed section 121A).

### **Professional indemnity insurance arrangements**

The Schedule of modifications provides that a registered health practitioner must not practise in New South Wales unless the practitioner is covered by approved professional indemnity insurance arrangements under the *Health Care Liability Act 2001* (in the case of a medical practitioner) or professional indemnity insurance arrangements that comply with a registration standard approved by the Ministerial Council are in force in relation to the practitioner (in the case of any other health practitioner). A contravention of this requirement does not constitute an offence but is unsatisfactory professional conduct for which disciplinary action may be taken under the National Law (NSW) (see proposed section 129 (1) and (4)).

### **Definitions and key concepts**

The Schedule of modifications modifies Part 8 of the National Law (NSW) by defining key terms and concepts relating to professional competence and conduct (see proposed Part 8, Division 1). The terms and concepts defined include the following:

- (a) competence to practise a health profession,
- (b) confidential information,
- (c) unsatisfactory professional conduct,
- (d) professional misconduct.

### **Handling of complaints about registered health practitioners and students**

The Schedule of modifications sets out a procedure for the handling of complaints about registered health practitioners, persons who were formerly registered health practitioners and students (see proposed Part 8, Division 3).

Provision is made for the grounds on which complaints may be made about registered health practitioners and students, who may make a complaint and the procedure for making complaints (which can be made either to the relevant Council or to the Health Care Complaints Commission (*the Commission*)).

A Council to whom a complaint has been made must notify the Commission, and the National Board for the relevant health profession, about that complaint and must before any further action is taken consult with the Commission. All serious complaints must be referred to the relevant Tribunal.

The courses of action available to a Council on a complaint include making its own inquiries about the complaint and conducting an inquiry or referring the complaint to the Commission, the relevant Tribunal, a Professional Standards Committee or an Assessment Committee or the relevant National Board, directing the practitioner or student to attend counselling or taking no action in respect of the complaint. The Council also has the power to require a practitioner or student to undergo a health examination. Sanctions are provided in relation to a practitioner or student who fails to do so.

The courses of action available to the Commission on a complaint include referring the complaint to the relevant Council, Tribunal, Professional Standards Committee, Assessment Committee or National Board, referring the complaint for conciliation or taking no action.

Provision is made for how Professional Standards Committees (relating to the medical profession and nursing and midwifery profession only) to whom complaints may be referred

are to handle complaints and the disciplinary powers of the Committees, which include cautioning or reprimanding the health practitioner, imposing conditions on the person's practising of the person's profession, ordering medical or psychiatric treatment, requiring the completion of educational courses, requiring periodic reporting or the seeking of advice on management, imposing fines and recommending suspension or cancellation of the health practitioner's registration on the grounds of lack of physical or mental capacity.

If a complaint about a registered health practitioner is referred by a Council to an Assessment Committee (relating to professions other than medical, nursing and midwifery), the complaint is to be dealt with by investigating and endeavouring to settle the complaint. The Committee has the power to direct the practitioner to undergo skills testing and may make recommendations to the Council that the Council deal with the complaint by inquiry, direct the health practitioner to attend counselling or dismiss the complaint.

A complaint about a registered health practitioner or student may also be dealt with by inquiry at a meeting of a Council. The Council may, after conducting the inquiry, caution or reprimand the practitioner or student, make an order withholding or refunding fees, impose conditions on the practitioner's or student's registration, order the practitioner or student to seek and undergo medical or psychiatric treatment or counselling, complete educational courses, report on his or her practice or seek advice relating to management, impose fines on the practitioner or recommend suspension or cancellation of the health practitioner's or student's registration on the grounds of lack of physical or mental capacity. Provision is also made for the giving of notice of the Council's decision.

The disciplinary powers of the Tribunals in relation to health practitioners or students include cautioning or reprimanding the health practitioner or student, imposing conditions on the practitioner's or student's registration, ordering the practitioner or student to seek and undergo medical or psychiatric treatment or counselling, complete educational courses, report on his or her practice or seek advice relating to management, imposing fines or recommending suspension or cancellation of the health practitioner's or student's registration on the grounds of incompetence or being guilty of professional misconduct.

The Council also has powers to act where it is necessary to take urgent action for the protection of the public. These emergency powers including the power to suspend, or to impose conditions on, a registered health practitioner's or student's registration.

Provision is made for the review or reversal of the exercise of that power and the referral of the matters that formed the basis for the exercise of the emergency powers to the Commission, the requiring of the registered health practitioner or student to undergo a performance assessment or the referral of the matter to an Impaired Registrants Panel.

A duty is imposed on the management of a mental health facility to inform the relevant Council if a registered health practitioner or student becomes a mentally incapacitated person or is involuntarily admitted to a mental health facility. A duty is also imposed on courts who convict registered health practitioners of certain offences to refer the matter to the Executive Officer of the relevant Council.

### **Handling of concerns about the impairment of registered health practitioners or students**

The Schedule of modifications sets out a procedure for dealing with a registered health practitioner or student who has or may have an impairment (see proposed Part 8, Division 4).

Provision is made for the giving of notice of impairment matters and the referral of impairment matters by the Commission to the Council for the relevant health profession. A Council that believes a registered health practitioner or student may be impaired has the power to require the practitioner or student to undergo an examination by a registered health practitioner or may refer the practitioner or student to an Impaired Registrants Panel. Certain matters relating to impairment must be dealt with as complaints.

The procedure for the conduct of an inquiry by an Impaired Registrants Panel is specified, as is the requirement for the giving of notices relating to the inquiry. The consequences of an inquiry by an Impaired Registrants Panel include the counseling of the practitioner or student by the Panel, a recommendation that the practitioner or student agree to the voluntary suspension of, or the imposition of conditions on, his or her registration or the making of recommendations to the Council as to the actions it should take. Any conditions imposed on registration as a result of a Panel's action may subsequently be reviewed and any reports made by a Panel to a Council are confidential.

### **Assessments of professional performance**

The Schedule of modifications provides matters relating to the professional performance of registered health practitioners (see proposed Part 8, Division 5).

Provision is made for the degree of professional performance that is considered unsatisfactory and the power of a Council to have the professional performance of a health practitioner assessed. Any person may notify a Council of concerns about the professional performance of a registered health practitioner and the Commission may also refer concerns to the relevant Council. If the matter is too serious to be referred for assessment the Council must deal with the matter as a complaint.

The conduct of assessments of professional performance by an assessor is specified, including how a Council obtains an assessment, the information to be given to the health practitioner the subject of the assessment, the making of reports and recommendations by the assessor and the action that may be taken by the Council after receiving the report of an assessor, which includes requiring a Performance Review Panel to conduct a review of the professional performance of the practitioner, the making of a complaint, a referral to an Impaired Registrants Panel, counselling the practitioner or taking no further action.

After receiving an assessor's report a Council may decide to refer the matter to a Performance Review Panel for the conduct of a performance review. The action that may be taken by a Panel includes recommending the imposition of conditions, ordering further education, ordering a report on the practitioner's practise of the relevant health profession or ordering the practitioner to seek and take advice. After a performance review is concluded, the relevant Council may monitor compliance with any decisions or orders made by the Performance Review Panel and evaluate the effectiveness of the orders in improving the professional performance of the registered health practitioner.

Further provision is made in proposed Schedule 5B for matters relating to performance assessments.

## **Appeals and reviews**

The Schedule of modifications provides for the following appeals and reviews of decisions:

- (a) appeals to a Tribunal against actions of a Committee, Council or Performance Review Panel (see proposed Division 6 of Part 8),
- (b) appeals to the Supreme Court on points of law and against a Tribunal's decisions and actions (see proposed Division 7 of Part 8),
- (c) reviews by a Council, a National Board or Tribunal of prohibition orders or orders of Committee or a Performance Review Panel (see proposed Division 8 of Part 8).

## **Enforcement**

The Schedule of modifications makes provision for enforcement powers (see proposed Part 8, Division 9) including the following:

- (a) providing for the appointment of authorised persons and specifying their powers,
- (b) providing for the conduct of searches with the authority of a search warrant,
- (c) creating offences relating to enforcement.

## **Establishment of Tribunals**

The Schedule of modifications provides for the establishment of Tribunals for each of the professions of chiropractic, dental, medical, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology (see proposed Part 8, Division 10). The matters provided for include the following:

- (a) the constitution and administration of the Tribunals,
- (b) the membership of the Tribunals,
- (c) the functions of the Tribunals, which include the handling of complaints,
- (d) the proceedings of the Tribunals (which is also dealt with in proposed Schedule 5C to the National Law (NSW)),
- (e) the conduct of inquiries and appeals by the Tribunals.

## **Establishment of Professional Standards Committees**

The Schedule of modifications provides for the establishment of Professional Standards Committee for the medical and nursing and midwifery professions (see proposed Part 8, Division 11). The matters provided for include the following:

- (a) the membership and administration of the Committees,
- (b) functions of the Committees, which include the handling of complaints against medical practitioners, nurses and midwives,
- (c) the proceedings of the Committees (see also proposed Schedule 5C to the National Law (NSW)),
- (d) the conduct of inquiries before the Committees.

## **Establishment of Assessment Committees**

The Schedule of modifications provides for the establishment of Assessment Committees for professions other than the medical and nursing and midwifery professions (see proposed Part 8, Division 12). Matters provided for include the membership and administration of the Committees.

### **Establishment of Impaired Registrants Panels**

The Schedule of modifications provides for the establishment of Impaired Registrants Panels by a Council for a health profession and makes provision for membership and decisions of the Panels (see proposed Part 8, Division 13).

### **Establishment of Performance Review Panels**

The Schedule of modifications provides for the establishment, membership and procedure of Performance Review Panels and the appointment of assessors (see proposed Part 8, Division 14).

### **Regulation of pharmacy businesses**

The Schedule of modifications provides for the regulation of pharmacy businesses (see proposed Schedule 5F). In particular, provision is made for the following:

- (a) a requirement for pharmacies to be approved by the Pharmacy Council,
- (b) a requirement for the holders of pecuniary interests in approved pharmacies to be registered,
- (c) a requirement for the notification of the Pharmacy Council of any acquisition of a pecuniary interest in a pharmacy business,
- (d) a restriction on the persons who may have pecuniary interests in a pharmacy business (with exemptions for certain friendly societies and bodies corporate),
- (e) a limit on the corporations or firms that may indicate that they are pharmacy businesses,
- (f) a restriction on the number of pharmacy businesses in which pharmacists may have a pecuniary interest,
- (g) the regulation of the provisions of leases or licences relating to pharmacy businesses and certain arrangements that create a security interest in pharmacy businesses,
- (h) a requirement that a pharmacist be in charge of each pharmacy business,
- (i) the procedures for the approval of premises as suitable for carrying on a pharmacy business and the registration of pecuniary interests in pharmacy businesses,
- (j) a requirement that the Pharmacy Council keep a register containing particulars of approved premises and registered holders of pecuniary interests,
- (k) a requirement that annual returns be submitted by the holders of pecuniary interests in pharmacy businesses,
- (l) enabling the Pharmacy Council to require persons to supply information about pecuniary interests in pharmacy businesses.

### **NSW regulations**

The Schedule of modifications empowers the Governor to make regulations for or with respect to any matter required or permitted by a NSW provision (that is, a provision included in the Schedule of modifications). In particular, the regulations may make provision for or with respect to the following:

- (a) the standards applicable to premises used for pharmacy businesses,
- (b) the infection control standards to be followed by health practitioners,
- (c) the records to be kept by health practitioners,
- (d) the reimbursement by the Councils of the costs incurred by the Department of Health in establishing the national registration and accreditation scheme for registered health practitioners and students.

The first regulations made for the purposes of the NSW provisions will not require a regulatory impact statement under the *Subordinate Legislation Act 1989*.

### **Savings and transitional provisions**

The Schedule of modifications provides for savings and transitional matters that are specific to New South Wales (see proposed Schedule 5A).

Matters for which savings and transitional arrangements are made include:

- (a) complaints and disciplinary proceedings, including complaints received by a former board before the commencement of the National Law (NSW) but not yet dealt with, and
- (b) the continuation of appointments of Board members, Tribunal members, members of Professional Standards Committees and other committees and assessors appointed under repealed Acts in the equivalent offices under the National Law (NSW), and
- (c) the employment of staff of certain former Boards and the Health Professional Registration Boards Division of the Government Service, including preserving the entitlements of those staff, and
- (d) the transfer of amounts held in Education and Research Accounts under repealed Acts to accounts established under the National Law (NSW), and
- (e) matters relating to approvals, authorisations and consents given under the repealed *Pharmacy Practice Act 2006*.

### **Miscellaneous modifications**

In addition, the Schedule of modifications provides a number of other matters including the following:

- (a) protection from liability (including liability in defamation) for any publication in good faith of a written statement of a decision made by a Council, Committee, Panel or Tribunal (see proposed section 176E),
- (b) the need for an adjudication body to consult with certain third parties if the decision proposed to be made by the body will impose an appreciable burden on the third party in connection with a registered health practitioner's practice or the clinical training undertaken by a student (see proposed section 176C),
- (c) by specifying the decisions of which notice is required to be given by an adjudication body (see proposed section 176 (2)),



- (d) by excluding the disclosure of information by a person exercising functions under the National Law (NSW) to the National Agency or a National Board from a provision about confidentiality (see proposed section 216 (2) (ba)),
- (e) by providing that persons exercising functions under a NSW provision are not personally liable for anything done or omitted to be done in good faith in the exercise or purported exercise of a function under a NSW provision (see proposed section 236A),
- (f) by providing for the evidentiary value of certain certificates (see proposed section 244A),
- (g) by omitting transitional provisions that relate to the dissolution of local registration authorities (see proposed omission of sections 295, 297 and 298 of the National Law),
- (h) by omitting a requirement for the keeping of certain records relating to registration (see proposed modification of section 296 of the National Law),
- (i) by making enforcement provisions relating to performance assessments and performance reviews (see proposed Schedule 5B), including the following:
  - (i) entry to premises,
  - (ii) the power to conduct assessment exercises,
  - (iii) the conduct of performance reviews,
  - (iv) the power to summon witnesses and take evidence and to obtain documents,
- (j) by making provision for matters relating to the membership and procedure of Councils (see proposed Schedule 5C),
- (k) by making provision for matters relating to proceedings before a Professional Standards Committee or a Tribunal (see proposed Schedule 5D),
- (l) by making provision for matters relating to Assessment Committees (see proposed Schedule 5E).

## Other amendments

**Schedule 1 [1]** changes the name of the 2009 Act to the *Health Practitioner Regulation (Adoption of National Law) Act 2009*.

**Schedule 1 [4]** declares certain NSW entities established under the National Law (NSW) to be adjudication bodies, co-regulatory authorities and responsible tribunals for the purposes of the National Law.

**Schedule 1 [5]** deals with the application of other NSW legislation to the National Law (NSW) by adding to the list of legislation that does not apply to the National Law (NSW) at all, and specifies the NSW legislation that only applies to the NSW provisions (which are the modifications made by **Schedule 1 [6]** to the proposed Act).

## Schedule 2 Amendments to other legislation

**Schedule 2** makes amendments to the other Acts and instruments specified in that Schedule. The amendments are generally consequential on the adoption of the National Law and the commencement of the National Law (NSW). The amendments fall into the following categories.

### Amendments about health care complaints

**Schedule 2.22** amends the *Health Care Complaints Act 1993* as follows:

- (a) to extend the power of seizure granted to an authorised officer by enabling a search warrant to permit the taking of stocks of any substance or drugs,
- (b) to extend the power of seizure granted to an authorised officer by enabling a search warrant to permit the removal of records for the purpose of taking copies or notes,
- (c) to enable the Health Care Complaints Commission to issue an interim prohibition order with respect to an unregistered health practitioner (which may include prohibiting the practitioner from providing health services or imposing conditions on the provision of health services by the practitioner),
- (d) to update references to bodies established under legislation that is to be repealed with references to new bodies established under the National Law (NSW),
- (e) to update existing references to registered health practitioners to references to newly defined terms for those practitioners in the *Interpretation Act 1987*,
- (f) to update references to health registration Acts to references to the National Law (NSW).

### Miscellaneous amendments updating terms and references

**Schedule 2.29** amends the *Interpretation Act 1987* to insert definitions of words and expressions used in any NSW Act or statutory rule to describe registered health practitioners in the National Law (such as **enrolled nurse**, **registered medical practitioner** and **registered pharmacist**).

The remaining amendments made by Schedule 2:

- (a) update existing references to registered health practitioners in legislation by reference to the newly defined terms in the *Interpretation Act 1987*, and
- (b) update references to bodies established under legislation that is to be repealed with references to new bodies established under the National Law (NSW), and
- (c) update existing references to health registration Acts with references to the National Law or National Law (NSW).

### Schedule 3 Repeals

**Schedule 3** repeals existing legislation that deals with the registration of health practitioners. The legislation will be redundant when the National Law (NSW) comes into force.

## Issues Considered by the Committee

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

**Issue: Procedural Fairness - Proposed section 150 of Subdivision 7 of Part 8, Division 3, Schedule 1 [15] – Suspension or conditions of registration to protect public [NSW]:**

21. Division 3 of Part 8 provides that a Council to whom a complaint has been made must notify the Commission, and the National Board for the relevant health profession, about that complaint and must before any further action is taken consult with the Commission. All serious complaints must be referred to the relevant Tribunal.

22. The disciplinary powers of the Tribunals in relation to health practitioners or students include cautioning or reprimanding the health practitioner or student, imposing conditions on the practitioner's or student's registration, ordering the practitioner or student to seek and undergo medical or psychiatric treatment or counselling, complete educational courses, report on his or her practice or seek advice relating to management, imposing fines or recommending suspension or cancellation of the health practitioner's or student's registration on the grounds of incompetence or being guilty of professional misconduct.
23. Under proposed section 150 of Subdivision 7, the Council also has powers to act where it is necessary to take urgent action for the protection of the public. These emergency powers including the power to suspend, or to impose conditions on, a registered health practitioner's or student's registration.
24. Under proposed section 150 (2): A suspension of a registered health practitioner's or student's registration under subsection (1) has effect until the first of the following happens – (a) the complaint about the practitioner or student is disposed of; (b) the suspension is ended by the Council.
25. Proposed section 150A provides for the review of certain decisions of the Council made under the new section 150.
26. Proposed section 150D (1) provides that: A Council, must as soon as practicable but no later than 7 days after taking action under section 150, refer the matter to the Commission for investigation. Subsection (4) provides that: The Commission must investigate the complaint or cause it to be investigated and, as soon as practicable after it has completed its investigation and if it considers it appropriate to do so, refer the complaint to the Tribunal or a Committee for the health profession in which the health practitioner or student is registered.
27. Proposed section 159 of Subdivision 2 of Division 6 of Part 8 also contains the provisions on appeal against actions by Council [NSW]. Subsection (1) states that a person may appeal to the Tribunal for a health profession - (a) against a suspension by the Council for the health profession under Division 3 or a refusal to end a suspension. This includes the right of appeal against suspension or conditions of registration to protect the public made by Council under the proposed section 150 of Subdivision 7, which falls within Division 3 of Part 8.
28. While protection of the public from health practitioners who may cause harm or otherwise provide inadequate care is extremely important, the Committee is concerned about the effect that such suspensions, which can be made on the basis of very little evidence and are not subject to outside scrutiny, can have upon practitioners' livelihoods. Further, investigations against health practitioners by the Health Care Complaints Commission are generally lengthy processes and in some complex instances can take up to several years. While proposed section 150A provides that a practitioner may request a review from the relevant council at any time, the onus is placed upon the practitioner to gather evidence on his/her own behalf and the review is only being conducted by the body undertaking the suspension.

29. While an appeal to the Medical Tribunal is also possible it can take several months to constitute a Tribunal and undertake preliminaries such as directions hearings before the matter can be adjudicated. The Committee is therefore concerned that the eight weeks timeframe has been removed from the suspension power and substituted with an indefinite period.

**30. Despite the provisions on rights of review and appeal, the Committee notes that the affected health practitioner or student will not have legal representation at the Council proceedings as the Bill does not allow legal representation at such Council proceedings or inquiry, nor is the process open to external scrutiny. Therefore, in cases where the Health Care Complaints Commission investigation is lengthy, the onus is placed upon the practitioner to gather evidence on his/her own behalf and the review allowed under section 150A is only being conducted by the body undertaking the suspension.**

**31. While an appeal to the Medical Tribunal is also possible, it is also a reasonably lengthy and arduous process before the matter can be heard and adjudicated. The practitioner or student may therefore remain suspended under the proposed emergency powers for a longer duration than intended or necessary, having an adverse consequence upon a practitioner's earning capacity and ability to re-enter the workforce.**

**32. The Committee therefore has concerns that the current situation of allowing for emergency suspensions of not more than eight weeks in duration will now be extended to an indefinite period of time. Accordingly, the Committee refers this to Parliament for consideration as to whether the proposed section 150 of Subdivision 7 of Part 8, Division 3, Schedule 1 [15] of the Bill may trespass unduly on personal rights and liberties.**

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

### 3. INDUSTRIAL RELATIONS AMENDMENT (CONSEQUENTIAL PROVISIONS) BILL 2010

Date Introduced:	21 May 2010
House Introduced:	Legislative Council
Minister Responsible:	The Hon John Robertson MLC
Portfolio:	Industrial Relations

#### Purpose and Description

1. The object of this Bill is to make miscellaneous amendments to the *Industrial Relations Act 1996* as a consequence of the enactment of the *Industrial Relations (Commonwealth Powers) Act 2009* which referred certain matters relating to workplace relations to the Commonwealth Parliament.
2. This Bill amends the *Industrial Relations Act 1996* to update existing references to Commonwealth workplace relations legislation, including the *Fair Work Act 2009* (Cth).
3. This Bill also facilitates the transition of federal industrial instruments relating to specified State or local government employers to the State industrial relations system, in circumstances where they are declared not to be national system employers.

#### Background

4. In October 2009, the Commonwealth Parliament passed the *Fair Work (State Referrals and Other Measures) Act 2009*. This legislation was designed to facilitate the referral of industrial relations powers from the States to the Commonwealth and was completed after lengthy consultations with the States on the creation of a national uniform system.
5. In late 2009, the NSW Parliament passed the *Industrial Relations (Commonwealth Powers) Act 2009*. This Act referred to the Commonwealth Parliament the ability to make laws with respect to private sector industrial relations. The Act took effect on 1 January 2010 and resulted in the creation of a largely national uniform system for private sector employers and employees.
6. According to the Agreement in Principle speech, because there was limited time to draft and pass the referral legislation before Parliament rose in 2009 (and therefore before the intended commencement date of the national system on 1 January 2010), the Government opted to introduce legislation necessary to give effect to the referral and its consequences in two parts. The first tranche of legislation covered the essential features of referral that enabled the national system to commence operation on 1 January 2010. The second tranche of legislation is captured by this Bill.
7. Firstly, the Bill makes transition and consequential amendments to the *Industrial Relations Act 1996* and other industrial relations legislation. Key provisions of this

Bill ensure that all the participating jurisdictions are aligned and the terminology used in the national system legislation is properly reflected in NSW Acts.

8. This Bill also reflects an agreement made between the NSW Government and the Commonwealth that enables the NSW Minister for Industrial Relations to declare local government and State public service entities to be outside of the national system and, its place, provides coverage by the State industrial relations system.

## The Bill

### 9. Outline of provisions

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

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

#### **Schedule 1 Amendment of *Industrial Relations Act 1996 No 17***

**Schedule 1 [1]** provides that federal industrial instruments relating to specified State or local government employers that are declared by the Minister not to be national system employers under the *Commonwealth Fair Work Act* will be established as either State awards or enterprise agreements under the principal Act. The Industrial Relations Commission of NSW will have power to vary such awards or agreements or provide exemptions where necessary.

**Schedule 1 [4]** makes an amendment consequential on the enactment of the Commonwealth Fair Work Act to provide that decisions of the Minimum Wage Panel and a Full Bench of Fair Work Australia (instead of the now defunct Australian Industrial Relations Commission) will be decisions that the Industrial Relations Commission of NSW must adopt and apply to State awards, unless the Commission is satisfied that the decision is not consistent with the objects of the principal Act or that there are other good reasons for not doing so.

**Schedule 1 [10]** makes it clear that the Industrial Relations Commission of NSW may exercise certain dispute resolution functions in respect of federal enterprise agreements known as preserved State agreements, which were continued under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* of the Commonwealth.

**Schedule 1 [2], [3], [5]–[9] and [11]–[15]** make amendments by way of statute law revision to update references to Commonwealth workplace relations legislation, as referred to in the Overview above.

#### **Schedule 2 Amendment of *Long Service Leave Act 1955 No 38***

**Schedule 2** makes a statute law revision amendment to the *Long Service Leave Act 1955* to update a reference to a definition of an award.

## Issues Considered by the Committee

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| <ol style="list-style-type: none"><li>10. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</li></ol> |
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***The Committee makes no further comment on this Bill.***

## 4. NATIONAL PARK ESTATE (RIVERINA RED GUM RESERVATIONS) BILL 2010 (NO 2)

Date Introduced: 22 April 2010  
House Introduced: Legislative Assembly  
Minister Responsible: The Hon Frank Sartor MP  
Portfolio: Environment and Climate Change

### Purpose and Description

1. The objects of the Bill are:

- (a) to transfer to the national park estate certain river red gum State forest lands in the Riverina area, and
- (b) to enable the transfer to Aboriginal ownership and conservation of certain other State forest lands in the Riverina area, and
- (c) to enable forestry operations to continue on land in the Riverina area remaining as State forest, and
- (d) to enable payments to be made from the Environmental Trust Fund, established under the *Environmental Trust Act 1998*, for the purpose of implementing forestry restructure and assistance programs and schemes in the Riverina area, and
- (e) to enable the collection of firewood for non-commercial purposes to continue in areas reserved as national or regional parks under the proposed Act and to make other miscellaneous provisions.

### Background

2. In July 2009, the NSW Government requested the Natural Resources Commission ('the Commission') to undertake a regional forest assessment and to make recommendations on the use and management of the public land in the Riverina.
3. In December 2009, the Commission handed down the 'Riverina Bioregion Regional Forest Assessment River Red Gums and Woodland Forests' Final Report'.
4. The Commission made numerous findings and recommendations to attempt to address the decline of the river red gums habitat and the industries and social systems, supported by the forests and that are affected by its decline.
5. The Government has indicated its intention to adopt nearly every recommendation of the report, including those recommendations that are being implemented through this Bill.
6. Key features of the Bill include the establishment of over 100,000 hectares of new protected areas, including the establishment of Indigenous protected areas, the funding of the National Parks and Wildlife Service for the adequate, active



## National Park Estate (Riverina Red Gum Reservations) Bill 2010 (No 2)

management of the new reserves, the funding of trials focused on ecological thinning and structural adjustment packages for the possible exiting of timber-based industries.

7. According to the Agreement in Principle speech of the *National Park Estate (Riverina Red Gum Reservations) Bill 2010 (No 1)*, funding has been set aside for worker assistance payments for those employees that lose their jobs during the restructure. Additional monies are to be set aside in a regional employment and community development fund for the Riverina region.
8. The Bill also provides further measures for the collection and use of firewood subject to strict conditions.
9. The *National Park Estate (Riverina Red Gum Reservations) Bill 2010* was introduced in 22 April 2010 but withdrawn on 19 May 2010, with the *National Park Estate (Riverina Red Gum Reservations) Bill 2010 (No 2)* introduced on the same day. The Bill passed Parliament on 20 May 2010 and was assented on 24 May 2010.
10. The primary difference between the first and second Bill is that in the first Bill timber harvesting was proposed to continue until 2015, subject to a forestry code. In the second Bill, the transition period has been abolished and logging is to be discontinued sooner.
11. In addition, whereas the first Bill provided for certain State forests to be vested in the Minister for Climate Change and the Environment on 1 July 2015 for later transfer to Aboriginal ownership, the second Bill brought forward that date to 1 July 2010.
12. Other changes between the two Bills were of a minor or largely inconsequential nature.

## The Bill

### 13. Outline of provisions

#### Part 1 Preliminary

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

**Clause 2** provides for the commencement of the proposed Act on 1 July 2010.

**Clause 3** defines certain words and expressions used in the proposed Act.

#### Part 2 Land transfers

**Clause 4** revokes the dedication as State forest of lands that are to be reserved as national park or regional park or vested in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974*. The dedication of the lands specified in Schedules 1, 3, 5 and 6 is revoked on 1 July 2010.

**Clause 5** reserves, on 1 July 2010, certain lands in revoked State forests as national park or regional park. The lands concerned are set out in Schedule 1

**Clause 6** reserves, on 1 July 2010, certain Crown lands as state conservation area. The lands concerned are set out in Schedule 2.

**Clause 7** vests, on 1 July 2010, certain lands in revoked State forests in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974*. The lands concerned are set out in Schedule 3.

**Clause 8** reserves, on 1 July 2010, certain lands controlled by the Forestry Commission (and taken to be State forest) as national park. The lands concerned are set out in Schedule 4.

**Clause 9** vests, on 1 July 2010, certain lands in revoked State forests in the Crown as Crown land, which will be subject to the *Crown Lands Act 1989* (with an assessed preferred use for the purposes of nature conservation). The lands concerned are set out in Schedule 5.

**Clause 10** vests, on 1 July 2010, certain lands in revoked State forests in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974*. The Minister may deal with those lands by vesting them in an Aboriginal landholding body. The lands concerned are set out in Schedule 6.

**Clause 11** reserves, on 1 July 2010, certain lands that had been vested in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974* as state conservation area.

**Clause 12** changes the names of, and consolidates, certain reserved lands that are currently within national parks, nature reserves and state conservation areas.

**Clause 13** enables the Director-General of the Department of Environment, Climate Change and Water (the **Director-General**) to adjust the descriptions of land in Schedules 1–7 in order to alter the boundaries of the land for the purposes of effective management of national park estate land and State forest land, to adjust boundaries to public roads, to adjust descriptions of easements or to provide a more detailed description of the boundaries of the land.

### **Part 3 Forestry operations on land remaining as State forest**

**Clause 14** defines certain words and expressions used in proposed Part 3. ***Riverina forestry operations*** is defined to mean forestry operations within the meaning of the *Forestry and National Park Estate Act 1998* to which Part 4 of that Act applies that are carried out in Riverina State forests.

**Clause 15** provides that an integrated forestry operations approval may be granted under Part 4 of the *Forestry and National Park Estate Act 1998* for Riverina forestry operations. The clause makes transitional arrangements to enable forestry operations to continue pending the granting of an approval.

### **Part 4 Miscellaneous**

**Clause 16** provides that firewood may be collected from land reserved as national or regional park or other land reserved under the *National Parks and Wildlife Act 1974* in certain circumstances. The firewood is not to be collected for commercial purposes. It must be collected only by an individual or not-for-profit organisation, licensed by the Director-General, and must be collected from firewood collection zones as determined by the Director-General. The collection of firewood must comply with any conditions of a licence issued to the person or the organisation and any regulations.

**Clause 17** provides that the proposed Act binds the Crown.

**Clause 18** enables the making of regulations for the purposes of the proposed Act.

### **Schedule 1 State forests reserved as national park or regional park on 1 July 2010**

This Schedule sets out the lands within State forests (whose dedication as State forest is revoked) that are, on 1 July 2010, reserved as national or regional park.

### **Schedule 2 Crown lands reserved as state conservation area on 1 July 2010**

This Schedule sets out the Crown lands that are, on 1 July 2010, reserved as state conservation area.

### **Schedule 3 State forests vested in NPW Minister on 1 July 2010**

This Schedule sets out the lands (whose dedication as State forest is revoked) that are, on 1 July 2010, vested in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974*.

### **Schedule 4 Forestry Commission controlled land reserved as national park on 1 July 2010**

This Schedule sets out the lands controlled by the Forestry Commission that are, on 1 July 2010, reserved as national park.

### **Schedule 5 State forests made subject to Crown Lands Act 1989 on 1 July 2010**

This Schedule sets out the lands (whose dedication as State forest is revoked) that are, on 1 July 2010, vested in the Crown as Crown land and subject to the *Crown Lands Act 1989*.

### **Schedule 6 State forests vested in NPW Minister on 1 July 2010 for transfer to Aboriginal ownership**

This Schedule sets out the lands (whose dedication as State forest is revoked) that are, on 1 July 2010, vested in the Minister for Climate Change and the Environment for the purposes of Part 11 of the *National Parks and Wildlife Act 1974* for later transfer to Aboriginal ownership.

### **Schedule 7 Land vested in the NPW Minister reserved as state conservation area on 1 July 2010**

This Schedule sets out the lands vested in the Minister for Climate Change and the Environment that are, on 1 July 2010, reserved as state conservation area.

### **Schedule 8 Change of names and consolidation of national parks, nature reserves and state conservation areas on 1 July 2010**

This Schedule sets out the land affected by the changes in the national park estate referred to in clause 12.

### **Schedule 9 Land transfers—ancillary and special provisions**

This Schedule makes ancillary and special provisions with respect to land transferred under the proposed Act.

### **Schedule 10 Amendment of Acts**

**Schedule 10.1** amends the *Forestry and National Park Estate Act 1998* to remove the requirement for a forest agreement to be prepared under that Act before an integrated forestry operations approval can be prepared under that Act in respect of the Riverina area, and makes a consequential change to the application of the *Environmental Planning and Assessment Act 1979*.

**Schedule 10.2** amends the *Forestry Restructuring and Nature Conservation Act 1995* to enable payments to be made to the Consolidated Fund from the Environmental Trust Fund, established under the *Environmental Trust Act 1998*, to offset expenditure from the Consolidated Fund for the purposes of implementing forestry restructure and assistance programs and schemes in the Riverina area. The total amounts paid from the Fund in respect of the Riverina area must not exceed \$45,813,000 and payments from the Fund in respect of the Riverina area can only be made until 30 June 2015. Annual progress reports are to be made and tabled in Parliament on expenditure in the Riverina area, including an independent final 5-year report on that expenditure and the outcomes of those policies.

**Schedule 10.3** amends the *Native Title (New South Wales) Act 1994* to preserve native title rights and interests in respect of a reservation or vesting of, or declaration over, land or waters by the operation of the proposed Act.

## **Issues Considered by the Committee**

<p><b>14. The Committee has not identified any issues under s8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></p>
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***The Committee makes no further comment on this Bill.***

## 5. THREATENED SPECIES CONSERVATION AMENDMENT (BIODIVERSITY CERTIFICATION) BILL 2010

Date Introduced:	20 May 2010
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Frank Sartor MP
Portfolio:	Climate Change and Environment

### Purpose and Description

1. The object of this Bill is to amend the *Threatened Species Conservation Act 1995* to establish new arrangements for the biodiversity certification of land.
2. Under the new arrangements, the Minister administering the *Threatened Species Conservation Act 1995* (**the Minister**) may, on application by a planning authority, confer biodiversity certification on specified land. The effect of biodiversity certification is as follows:
  - (a) the environmental assessment requirements for the approval of a project, or a concept plan for a project, under Part 3A of the *Environmental Planning and Assessment Act 1979* (**the Planning Act**) do not require an assessment of the impact of the project on biodiversity values if the project is carried out or proposed to be carried out on biodiversity certified land,
  - (b) development on biodiversity certified land is taken, for the purposes of Part 4 of the Planning Act, to be development that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat,
  - (c) an activity to which Part 5 of the Planning Act applies which is carried out or proposed to be carried out on biodiversity certified land is taken, for the purposes of Part 5 of the Planning Act, to be an activity that is not likely to significantly affect any threatened species, population or ecological community under the principal Act, or its habitat,
  - (d) the *Native Vegetation Act 2003* does not apply to the biodiversity certified land.
3. The Minister may confer biodiversity certification only if the planning authority has a biodiversity certification strategy, which is a policy or strategy for the implementation of conservation measures that ensure that the overall effect of biodiversity certification is to maintain or improve biodiversity values.
4. The Bill also makes provision for the following matters, which are explained in more detail below:

- (a) the establishment of a biodiversity certification assessment methodology (the methodology will set out the rules that are to be used as the basis for assessing whether biodiversity certification improves or maintains biodiversity values),
  - (b) the enforcement of conservation measures against parties who agree to the biodiversity certification,
  - (c) the suspension, revocation or modification of biodiversity certification,
  - (d) biodiversity certification agreements, which are agreements entered into in connection with biodiversity certification.
5. The new arrangements replace existing arrangements for the biodiversity certification of environmental planning instruments. The existing arrangements will continue to have effect, with some modifications, in relation to the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (the **Growth Centres SEPP**) and in relation to any biodiversity certification proposals that are certified or are the subject of public consultation before the repeal of those arrangements.

## Background

6. Biodiversity certification became law in 2004 with passage of the *Threatened Species Legislation Amendment Act 2004*, designed to 'equip the community' with the tools to better protect native plants, animals and fish.
7. Biodiversity certification establishes a process to assess the environmental impacts of future development at the strategic planning stage. If proposed conservation measures will equal or exceed the impacts of proposed development, resulting in improvement or maintenance of biodiversity values overall, the Minister may grant certification to areas of land.
8. This Bill is designed to establish greater legal certainty for biodiversity certification decisions. For example, the existing legislation fails to define the term 'improve or maintain biodiversity values'.
9. In addition, the Bill provides for the certification of land instead of environmental planning instruments. This is designed to ensure that the benefits of certification are recognised regardless of which planning controls apply, or if multiple planning controls apply. It clarifies the process of making a biodiversity certification, including that only planning authorities can make an application and that applications must be accompanied by a biodiversity certification strategy.
10. The Bill also amends the compliance and enforcement mechanisms of existing legislation and creates voluntary biodiversity certification agreements.

## The Bill

### 11. Outline of provisions

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

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

**Schedule 1 Amendment of *Threatened Species Conservation Act 1995 No 101*****Biodiversity certification of land**

The principal amendment is **Schedule 1 [4]**, which sets out the new arrangements relating to biodiversity certification of land (proposed new Part 7AA).

The new arrangements enable the Minister to confer biodiversity certification on specified land, by order published in the Gazette. The effect of biodiversity certification is as explained in the overview.

**Application for biodiversity certification**

An application for biodiversity certification may be made to the Minister by a planning authority or by 2 or more planning authorities jointly. Planning authorities include the Minister for Planning and local councils. Biodiversity certification may be conferred only if the applicant has a biodiversity certification strategy. A biodiversity certification strategy is a policy or strategy for the implementation of conservation measures to ensure that the overall effect of biodiversity certification is to improve or maintain biodiversity values. The strategy is to be used as the basis for the assessment of the application. A biodiversity certification strategy must identify the following:

- (a) the land proposed for biodiversity certification,
- (b) the land proposed for biodiversity conservation (being any land on or in respect of which the conservation measures are to be implemented),
- (c) the proposed conservation measures,
- (d) the parties required to implement the conservation measures.

Conservation measures include:

- (a) the adoption or continuation of development controls under the Planning Act that limit or prohibit development on land or the taking of any other measures under that Act that conserve or enhance the natural environment, and
- (b) the entering into of a biodiversity certification agreement, and
- (c) the entering into of a planning agreement under the Planning Act that makes provision for development contributions to be used or applied towards the conservation or enhancement of the natural environment, and
- (d) the making of a State infrastructure contribution under the Planning Act for the conservation or enhancement of the natural environment, and
- (e) certain other measures relating to the conservation, use and management of land.

The Bill sets out further requirements applicable to an application for biodiversity certification, including public notification requirements.

**Assessment of application for biodiversity certification**

Biodiversity certification may be conferred only if biodiversity certification will improve or maintain biodiversity values. Biodiversity certification will improve or maintain biodiversity values only if the Minister determines, on the basis of a biodiversity certification assessment, that certification will improve or maintain biodiversity values. A biodiversity certification assessment is an assessment of the effect of biodiversity certification on biodiversity values. The assessment is to be made in accordance with the biodiversity certification assessment methodology, and not otherwise. The Minister may, in a particular case, permit a minor

variation to be made to the biodiversity certification assessment methodology in certain circumstances.

The Minister must refuse to confer certification if the certification does not improve or maintain biodiversity values. The Bill also confers broad powers on the Minister to refuse to confer biodiversity certification in other circumstances.

### **Biodiversity certification assessment methodology**

The Bill enables the Minister, by order published in the Gazette, to make rules with respect to the circumstances in which biodiversity certification is to be regarded as improving or maintaining biodiversity values.

In particular, the rules are to establish a methodology for assessing:

- (a) the loss of biodiversity values on land proposed for biodiversity certification, and
- (b) the impact, or likely impact, of proposed conservation measures on land proposed for biodiversity conservation.

The Bill makes provision for:

- (a) publication of the proposed methodology, and of any proposed change to the methodology, including requirements for public consultation, and
- (b) the circumstances in which changes to the methodology do not require public consultation.

### **Conferral, extension and review of certification**

The Minister may, in an order conferring biodiversity certification, specify any approved measures under the biodiversity certification. The approved measures are as follows:

- (a) the proposed conservation measures on which the biodiversity certification assessment was based,
- (b) any requirements, as determined by the Minister, as to the timing of the implementation of the proposed conservation measures,
- (c) any requirements, as determined by the Minister, as to monitoring, reporting or auditing of the implementation of proposed conservation measures,
- (d) any other matters provided for by the regulations.

The Minister may require a party to the biodiversity certification to comply with the approved measures. A planning authority that applies for biodiversity certification is a party to any biodiversity certification that is conferred as a consequence of the application. Other persons or bodies may also be named as parties to the biodiversity certification, with their consent.

The Bill makes provision for the duration of biodiversity certification, extension of biodiversity certification and the periodic review of biodiversity certification.

### **Enforcement of approved measures**

The Minister may require a party to a biodiversity certification to rectify any failure to comply with the approved measures under the biodiversity certification. The Minister may require a party who fails to comply with the requirement to pay to the Minister a penalty based on the



cost of implementing the approved measures or equivalent conservation measures. A party to biodiversity certification (other than a government authority) may appeal to the Land and Environment Court against a decision of the Minister to make an order against the party. If the party concerned is a government authority (that is, a Minister or a public authority) a dispute concerning the implementation of the approved measures may be submitted to the Premier for settlement.

### **Biodiversity certification agreements**

The Bill enables the Minister to enter into an agreement with another person in connection with biodiversity certification (including a proposed conferral, extension or modification of biodiversity certification). The agreement (a ***biodiversity certification agreement***) may require a person to make monetary contributions to the Minister, to dedicate land or to carry out certain works on land owned by the person. It may also make other provision with respect to conservation measures agreed to be implemented by the person. An agreement may be registered on the title of land so that it is binding on successors in title.

The Bill makes provision for the following:

- (a) the duration of biodiversity certification agreements,
- (b) the enforcement of biodiversity certification agreements,
- (c) variation to agreements.

The regulations may make further provision in respect of biodiversity certification agreements.

### **Suspension, revocation and modification of certification**

The Minister may, by order published in the Gazette, suspend or revoke any biodiversity certification. The Bill provides for the grounds on which this action can be taken, with the key ground being a failure to comply with the approved measures under the biodiversity certification.

The Minister may, by order published in the Gazette, modify any biodiversity certification by:

- (a) modifying the description of the land that is biodiversity certified (to extend or limit biodiversity certification), or
  - (b) modifying the approved measures under the biodiversity certification.
- Biodiversity certification may be modified on the Minister's own initiative on specified grounds (including a failure to comply with the approved measures).

Biodiversity certification may also be modified on the application of a party to the biodiversity certification. A party to a biodiversity certification (other than a government authority) may appeal to the Land and Environment Court against a decision of the Minister to suspend, revoke or modify biodiversity certification. If the party concerned is a government authority, a dispute concerning the Minister's decision may be submitted to the Premier for settlement.

### **Other general matters**

The Bill makes provision for the notification of biodiversity certification and changes to biodiversity certification. The suspension, revocation or expiry of biodiversity certification does not affect the obligations of parties to the biodiversity certification, or parties to an agreement entered into in connection with the biodiversity certification, unless the Minister otherwise directs.

The suspension, revocation, modification or expiry of biodiversity certification does not affect any consent or approval given, or activity commenced, under the Planning Act before the suspension, revocation, modification or expiry. The Minister may determine the application of the suspension, revocation or modification to matters pending under the Planning Act. The regulations may make further provision in relation to an expiry of biodiversity certification.

The Bill also makes provision for the following:

- (a) the arrangements for settlement of disputes under the biodiversity certification provisions between government authorities and the Minister,
- (b) the use of enforcement powers by authorised officers to investigate compliance with the approved measures under a biodiversity certification or with a biodiversity certification agreement,
- (c) the effect of a failure to comply with procedural requirements,
- (d) power to make regulations in connection with the operation of the new provisions,
- (e) other matters of a related or consequential nature.

### **Amendments relating to repeal of former biodiversity certification**

#### **Arrangements**

**Schedule 1 [3]** repeals the existing arrangements under which biodiversity certification can be conferred on an environmental planning instrument (*EPI*).

**Schedule 1 [14]** saves those arrangements in relation to any EPI which is certified before the repeal of those arrangements or which is the subject of a proposal to confer biodiversity certification that is advertised or publicly exhibited before the repeal of those arrangements.

The provisions largely continue the existing arrangements for those EPIs, with the following modifications:

- (a) the new provisions make it clear that an established EPI (that is, an EPI that is in force) can be certified,
- (b) the new provisions require any certification that is conferred after the repeal of the former arrangements to specify any relevant measures to be taken under the certification and any conditions of the certification,
- (c) the new provisions make it clear that a failure to comply with the relevant measures or to implement any conditions of the certification does not invalidate the certification, but is a ground for suspension or revocation of the certification,
- (d) the new provisions require the Minister to undertake periodic reviews of any biodiversity certification conferred on an EPI under the former arrangements.

The amendments also contain other provisions of a consequential nature.

**Schedule 1 [10]–[13]** make changes to the existing arrangements under Part 7A of Schedule 7 to the principal Act, which confer biodiversity certification on the Growth Centres SEPP. At present, those arrangements partly rely on provisions in the main body of the principal Act relating to the biodiversity certification of EPIs generally (that is, Division 5 of

## Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010

Part 7 of the Act). As those provisions are being repealed, the amendments transfer the relevant provisions to Part 7 of Schedule 7.

**Schedule 1 [9]** makes it clear that biodiversity certification applies to any development that may be carried out on the subject land, including development that may be carried out under another EPI (besides the Growth Centres SEPP) that applies to the subject land.

**Other amendments**

**Schedule 1 [5]** removes the definitions of *consent authority* and *owner* from Part 7 of the principal Act. These definitions are transferred to the front of the principal Act by **Schedule 1 [1]**. The definition of *owner* is extended to permit the regulations to prescribe other persons who are taken to be the owner of land and is updated to remove a reference to a repealed Act.

**Schedule 1 [1]** also inserts a definition of *Planning Act* in the front of the Act.

**Schedule 1 [2]** is a consequential amendment.

**Schedule 1 [6]** is an amendment that is consequential on the new biodiversity certification arrangements. The amendment enables assessors to be accredited for the purposes of the scheme.

**Schedule 1 [7]** removes a provision that requires a review to be carried out of EPIs that are granted biodiversity certification. The provisions in **Schedule 1 [14]** enable the Minister to undertake periodic reviews of biodiversity certification.

**Schedule 1 [8]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

**Schedule 2 Amendment of other legislation**

**Schedule 2.1 [1], [3], [4] and [5]** insert notes in the Planning Act to alert readers to the impact of the biodiversity certification arrangements on relevant provisions of those Acts.

**Schedule 2.1 [2]** transfers a provision from the *Threatened Species Conservation Act 1995* (currently section 126N) to the Planning Act. The provision relates to the imposition of conditions on the grant of concurrence to development by the Director-General of Department of Environment, Climate Change and Water.

**Schedule 2.1 [6]** is a consequential amendment.

**Schedule 2.2** amends the *Environmental Planning and Assessment Regulation 2000*:

- (a) to require an indication as to whether biodiversity certification arrangements apply in respect of development to be included in a development application, and
- (b) to make it clear that a species impact statement is not required in relation to a development application if the biodiversity certification arrangements apply, and
- (c) to require a planning certificate to include an indication that land is biodiversity certified land.

**Schedule 2.3** amends the *Land and Environment Court Act 1979* to require appeals to the Land and Environment Court under the new biodiversity certification arrangements to be heard in the class 1 jurisdiction of that Court.

**Schedule 2.4** amends the *National Parks and Wildlife Act 1974* so that:

- (a) money received in the administration of the biodiversity certification scheme is not paid into the National Parks and Wildlife Fund under that Act, and
- (b) the costs incurred by the Minister in connection with the scheme are not paid from that Fund.

**Schedule 2.5** amends the *Native Vegetation Act 2003* so that biodiversity certified land is excluded from the operation of that Act.

## Issues Considered by the Committee

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

#### Issue: Commencement by Proclamation

- 12. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to commence the Act on whatever day it chooses or not at all.
- 13. However, the Committee recognises that operation of the Bill is contingent on administrative arrangements that need to take place. On advice received from the Office of the Minister of Climate Change and the Environment, finalisation of the biodiversity certification assessment methodology is required before the scheme can commence operation. The assessment methodology is currently in draft format and must be placed on public exhibition for 28 days, with all subsequent submissions considered, before it can be finalised.

<p><b>14. The Committee recognises that administrative arrangements need to take place, including the finalisation of assessment methodology, before this Bill can commence operation and therefore has not identified any issues under s 8A(1)(b)(iv) of the <i>Legislation Review Act 1987</i>.</b></p>
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***The Committee makes no further comment on this Bill.***

## SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

# CREDIT (COMMONWEALTH POWERS) BILL 2010

### Ministerial Correspondence

Date Introduced:	24 February 2010
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Virginia Judge MP
Portfolio:	Fair Trading

### Background

1. The Committee reported on this Bill in its *Legislation Review Digest 2 of 2010*.
2. The Committee resolved to write to the Minister seeking advice with regard to concerns with strict liability offences, 'Henry VIII' clauses and delegation of legislative power.

### Minister's Reply

3. By letter dated 18 May 2010, the Minister replied to the Committee's concerns, stating the following with regard to strict liability offences:

I am advised that, although the strict liability offences change the offences formerly contained in the Uniform Consumer Credit Code, they are consistent with the previous policy intent. The changes have been made in order to conform with the requirements of the Commonwealth Criminal Code.

I note the Committee's concerns regarding the possible penalty of imprisonment for up to three months. The Commonwealth advises that this penalty would be a last resort for serial offenders whose behaviour has not been influenced by lesser penalties. The NSW Government considers this to be an appropriate way of dealing with serial offenders.

4. The Minister advised the following with regard to the 'Henry VIII' clauses:

I also note the Committee's concerns about "Henry VIII" clauses and the provision in the National Credit Code for the Australian Securities and Investment Commission to exclude specified consumer leases. In the fringe lending area, traders in the past have restructured their practices to evade regulation. Consumers can suffer severe consequences if such evasion occurs and there is no regulatory protection. The provisions provide the ability to respond quickly to such attempts and ensure that strong protection for consumers is maintained.

It should be noted that consumer credit is an area where the most vulnerable in the community can be exploited, and I believe that it is necessary to have the appropriate regulatory tools available to deal efficiently with unacceptable practices.

### Committee's Response

5. **The Committee thanks the Minister for her reply.**



PARLIAMENT OF NEW SOUTH WALES  
LEGISLATION REVIEW COMMITTEE

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8 March 2010

Our Ref: LRC 3196

The Hon Virginia Judge MP  
Minister for Fair Trading  
Level 36 Governor Macquarie Tower  
1 Farrer Place  
SYDNEY 2000

Dear Minister,

Credit (Commonwealth Powers) Bill 2010

Pursuant to its obligations under s 8A of the *Legislation Review Act 1987*, the Committee has considered the above Bill. The Committee has reported its consideration of the Bill in its *Legislation Review Digest No 2 of 2010*.

The Committee resolved to write to you for advice on the following matters of concern.

**Strict Liability Offences in the Commonwealth legislation – implications arising from the Bill's adoption of the existing national legislation:**

The Committee notes that there are various sections under the *National Consumer Credit Protection Act 2009* containing strict liability offences as identified in the Senate's Standing Committee for the Scrutiny of Bills' *Alert Digest Report No. 9 of 2009*.

The Committee has received a letter from the Standing Committee for the Scrutiny of Bills on 17 August 2009, where the Senate Standing Committee drew attention to the substantial number of strict liability offences included in the national legislation.

Strict liability will in some cases cause concern as it effectively displaces the common law requirement that the prosecution prove beyond reasonable doubt that the offender intended to commit the offence, and is thus contrary to the fundamental right of presumption of innocence. However, the imposition of strict liability may in some cases be considered reasonable. Factors to consider when determining whether or not it is reasonable include the impact of the offence on the community, the potential penalty (imprisonment is

usually considered inappropriate), and the availability of any defences or safeguards.

In particular, the Committee notes that under the national legislation, section 290(2) deals with a person who must not refuse or fail to comply with a requirement made under sections 258(2)(a) or 274(4), 284(1), (2) or (4), which are all strict liability offences. Under section 290(2) of the national legislation, the criminal penalty is 10 penalty units or 3 months' imprisonment or both.

The Committee is concerned with the Bill's adoption of the national legislation in relation to the strict liability offences contained in the national legislation where such offences carry a possible criminal penalty of 3 months' imprisonment. The imposition of strict liability with a potential penalty of imprisonment is generally considered inappropriate, as it may lead to undue trespasses on individual rights and liberties.

1. The Committee seeks your advice on whether the concerns identified by the Senate's Standing Committee for the Scrutiny of Bills with regard to the strict liability offences in the national legislation may require further attention given the context of the Bill's adoption of the national legislation.

**Inappropriate delegation of legislative powers - Henry VIII provisions (which allow amendment of an Act by a Regulation) of the Commonwealth legislation – implications arising from the Bill's adoption of the existing national legislation:**

The Committee notes that the Standing Committee for the Scrutiny of Bills raised concerns with regard to the extent to which 'Henry VIII' clauses have been used to change powers, entitlements and obligations conferred by the principal Commonwealth legislation. The Standing Committee for the Scrutiny of Bills expressed that they do "not condone the use of 'Henry VIII' clauses as a standard drafting practice, even in cases where the explanatory memorandum provides reasons for that use or where the bill reflects COAG agreement". They considered that "the apparent increasing reliance on the use of regulations to potentially alter fundamental functions, powers, obligations, entitlements and rights conferred by a principal piece of legislation is cause for concern".

The Committee shares the concerns of the Senate's Standing Committee for the Scrutiny of Bills where the implications from the Bill's adoption of the national legislation may also give rise to 'Henry VIII' clauses which will permit subordinate legislation such as regulations to amend or take precedence over the principal legislation, which could constitute an inappropriate delegation of legislative power.

2. The Committee seeks your advice on whether the concerns expressed by the Senate's Standing Committee for the Scrutiny of Bills with regard to the extent to which 'Henry VIII' provisions are used in the

national legislation may require further attention in the context of this Bill's adoption of the national legislation.

**Inappropriate delegation of legislative powers - matters which should be regarded by Parliament – implications from the Bill's adoption of the existing national legislation:**

The Standing Committee for the Scrutiny of Bills noted that sections 171(4) and (5) of Part 11 of Schedule 1 (National Credit Code) to the Commonwealth *National Consumer Credit Protection Act 2009* gave ASIC a broad discretion since the exemption made by ASIC would not be a legislative instrument. Therefore, it would also not be subject to Parliamentary scrutiny.

3. Therefore, the Committee also seeks your advice on whether the concerns raised by the Senate's Standing Committee for the Scrutiny of Bills with regard to sections 171(4) and (5) under the national legislation as not being subject to Parliamentary scrutiny could constitute an inappropriate delegation of legislative power (since this may involve matters that should be regarded by Parliament), and could require further attention with the proposed adoption of the national legislation.

Thank you for your attention to this matter. The Committee looks forward to receiving your advice. If you should have any further queries, please contact Catherine Watson, Committee Manager, on 9230 2036 or email: [Catherine.Watson@parliament.nsw.gov.au](mailto:Catherine.Watson@parliament.nsw.gov.au)

Yours sincerely



Allan Shearan MP  
Chair





RML: M10/1080  
File No: 08/035692

Mr A F Shearan MP  
Chair, Legislation Review Committee  
Parliament of NSW  
Macquarie Street  
SYDNEY NSW 2000

18 MAY 2010

Dear Mr Shearan *Alan*

Thank you for your correspondence regarding the Legislation Review Committee's consideration of the Credit (Commonwealth Powers) Bill 2010.

I appreciate the concerns of the Committee about strict liability offences and "Henry VIII" clauses in the *National Consumer Credit Protection Act 2009*.

I am advised that, although the strict liability offences change the offences formerly contained in the Uniform Consumer Credit Code, they are consistent with the previous policy intent. The changes have been made in order to conform with the requirements of the Commonwealth Criminal Code.

I note the Committee's concerns regarding the possible penalty of imprisonment for up to three months. The Commonwealth advises that this penalty would be a last resort for serial offenders whose behaviour has not been influenced by lesser penalties. The NSW Government considers this to be an appropriate way of dealing with serial offenders.

I also note the Committee's concerns about "Henry VIII" clauses and the provision in the National Credit Code for the Australian Securities and Investment Commission to exclude specified consumer leases. In the fringe lending area, traders in the past have restructured their practices to evade regulation. Consumers can suffer severe consequences if such evasion occurs and there is no regulatory protection. The provisions provide the ability to respond quickly to such attempts and ensure that strong protection for consumers is maintained.

It should be noted that consumer credit is an area where the most vulnerable in the community can be exploited, and I believe that it is necessary to have the appropriate regulatory tools available to deal efficiently with unacceptable practices.

I trust that this information clarifies the Committee's concerns.

Yours sincerely

Virginia Judge MP  
Minister

Level 36, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000  
Ph: (02) 9228 5900 Fax: (02) 9228 5899

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State Senate Bill 2010	2
Sydney Olympic Park Authority Amendment Bill 2009	1
Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010	7
Transport Administration Amendment Bill 2010	6
Trees (Dispute Between Neighbours) Amendment Bill 2010	5
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	3
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)	4
Weapons and Firearms Legislation Amendment Bill 2010	4
Workers Compensation Amendment (Commission Members) Bill 2010	2

## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1			
Casino Control Amendment Bill 2010	Minister for Gaming and Racing and Attorney General	08/03/10	18/03/10				2, 5
Civil Liability Legislation Amendment Bill 2008	Attorney General	28/10/08			12		
Contaminated Land Management Amendment Bill 2008	Minister for Climate Change and the Environment	22/09/08	03/12/08		10	1	
Credit (Commonwealth Powers)	Minister for Fair Trading	08/03/10					2, 7
Crimes (Administration of Sentences) Amendment Bill 2008	Attorney General and Minister for Justice	2/12/07			15		
Crimes (Administration of Sentences) Amendment Bill 2009	Minister for Corrective Services	08/08/09				10	
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08	06/02/09		9		
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1		2	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1		
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning		12/06/08		8		
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7			
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13		
Liquor Legislation Amendment Bill 2008	Minister for Gaming and Racing	24/11/08	05/01/09		14	2	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1		2	
Parking Space Levy Bill 2009	Minister for Transport	23/03/09	26/05/09			3, 8	

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008	Digest 2009	Digest 2010
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2			
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1			
Water Management Amendment Bill 2008	Minister for Water	28/10/08	15/12/08		12	2	

## Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2010

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Anzac Memorial (Building) Amendment Bill 2010				N	
Building and Construction Long Service Payments Amendment Bill 2009				N	
Casino Control Amendment Bill 2010	N, R, C		N, R		
Children and Young Persons (Care and Protection) Amendment (Parental Responsibility) Bill 2010*	N				
Coal Mine Health and Safety Amendment Bill 2010	N, R			N, R	
Commercial Arbitration Bill 2010	N, R		N, R	N	
Coroners Amendment (Domestic Violence Death Review Team) Bill 2010				N	
Court Information Bill 2010	N, R			N	
Credit (Commonwealth Powers) Bill 2010	N, R, C			N, R, C	
Crimes Amendment (Child Pornography and Abuse Material) Bill 2010	N			N	
Crimes Amendment (Grievous Bodily Harm) Bill 2010*	N, R				
Crimes Amendment (Police Pursuits) Bill 2010	N, R				
Environment Planning and Assessment Amendment (Development Consents) Bill 2010			N, R		
Gas Supply Amendment Bill 2009				N	
Health Practitioner Regulation Amendment Bill 2010	N, R				
Housing Amendment (Community Housing Providers) Bill 2009	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
James Hardie Former Subsidiaries (Winding Up and Administration) Amendment 2009				N	
Liquor Legislation Amendment Bill 2010	N				
Mining and Petroleum Legislation Amendment (Land Access) Bill 2010	N, R				
National Gas (New South Wales) Amendment (Short Term Trading Market) Bill 2010				N	N
National Parks and Wildlife Amendment Bill 2010	N, R			N, R	
NSW Self Insurance Corporation Amendment (Home Warranty Insurance) Bill 2010	N, R			N	
Relationships Register Bill 2010	N			N	
Road Transport Legislation Amendment (Unauthorised Vehicle Use) Bill 2010				N, R	
Sydney Olympic Park Authority Amendment Bill 2009	N, R			N	
Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010				N	
Transport Administration Amendment Bill 2010				N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010	N			N	
Waste Recycling and Processing Corporation (Authorised Transaction) Bill 2010 (No 2)				N	
Weapons and Firearms Legislation Amendment Bill 2010	N, R			N	

## Key

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

## Appendix 4: Index of correspondence on regulations

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008	Digest 2009	Digest 2010
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12		
Criminal Procedure Amendment (Local Court Process Reforms) Regulation 2010	Attorney General	23/02/10	28/04/10			1, 5
Fisheries Management Legislation Amendment (Fishing Closures) Regulation 2009	Minister for Primary Industries	23/11/09	11/01/10		16	1
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08	5/01/09	10	2	
Retirement Villages Regulation 2009	Minister for Fair Trading	22/02/10				1
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10		