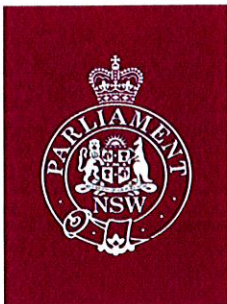


**INQUIRY INTO CONSTITUTION AMENDMENT (WATER
ACCOUNTABILITY AND TRANSPARENCY) BILL 2020
AND THE PROVISIONS OF THE WATER MANAGEMENT
AMENDMENT (TRANSPARENCY OF WATER RIGHTS)
BILL 2020 AND THE WATER MANAGEMENT
AMENDMENT (WATER ALLOCATIONS - DROUGHT
INFORMATION) BILL 2020**

Organisation: Clerk of the Parliaments

Date Received: 8 July 2020



LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

8 July 2020

D20/30054

The Hon Mark Banasiak MLC
Chair
Portfolio Committee No. 4 - Industry
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Mr Banasiak,

Submission – Water Bills inquiry

I thank the Committee for inviting me to make a submission. Ordinarily I would not provide a submission or other comment to an inquiry into bills before the House, and I do so reluctantly in this instance. I only do so because two of the bills have a direct impact on the Register of Disclosures for Members, a Register which I am required to maintain and about which I am often required to provide advice to Members on their disclosures.

I make no comment on the Water Management Amendment (Water Allocations – Drought Information) Bill 2020, not having any expertise or background knowledge in relation to water policy and the issues it covers.

My comments will be confined to highlighting the impact of these bills on Members of the Legislative Council and to remind Members of recommendations contained in previous reports of the Legislative Council Privileges Committee which they may wish to consider in relation to these bills. Whilst my main concern is in ensuring that Members are always able to comply with their disclosure requirements, I also draw attention to the impacts of the bills on the Office of the Clerk.

Background

The disclosure by Members of Parliament of their interests is designed to provide transparency regarding Members' private interests. In the second reading speech to introduce the *Constitution (Disclosures by Members) Amendment Bill 1981*, the then Premier, the Hon Neville Wran, stated:

The establishment of a scheme whereby Members of Parliament can be seen to be above reproach not only enhances the prestige of our parliamentary system but also protects the Members themselves against scurrilous attacks, which in the past they found difficult to rebut.¹

The interest disclosure regime is established under section 14A of the *Constitution Act 1902*. Section 14A(1) provides that the Governor may, subject to certain qualifications, make regulations for or with respect to the disclosure by Members of either House of all or any of a number of pecuniary interests and other matters. Pursuant to section 14A(1), the *Constitution (Disclosures by Members) Regulation 1983* was gazetted on 6 May 1983, establishing the details of the interest disclosure regime. It has been amended several times since.

The consequences for a Member who fails to comply with the disclosure obligations imposed by the Regulation can be severe. Section 14A(2) of the *Constitution Act 1902* provides that if a Member of the Legislative Council wilfully contravenes any regulation made under section 14A(1) of the Act (currently only the *Constitution (Disclosures by Members) Regulation 1983*), that House may declare the Member's seat vacant. There has not been a case in which a Member's seat has been declared vacant under these provisions. However, in 2002 the Legislative Council Standing Committee on Parliamentary Privilege and Ethics found that a Member had failed to disclose certain interests but that the errors were not wilful.²

The particular interests which Members are required to disclose in their returns are defined in the Regulation. Further guidance is provided in educative material published by the Parliament such as the Legislative Council Members' Guide. In addition, as the Clerk of the House, who is responsible for maintaining the Register of Disclosures by Members, I am happy to provide general advice, as is the Parliamentary Ethics Adviser. However Members may on occasion need to obtain their own legal advice on complex matters. These bills potentially introduce new complexity into the disclosure regime and Members affected may require specialist advice to assist.

My advice to Members, whenever consulted, is that any interest which generates income (ie any source of income) should be declared, including any ownership. Likewise, standing orders 113(2) (voting in the House) and 210 (10) (participating in committee inquiries) prohibit certain actions when there is a conflict of interest between a pecuniary interest and a parliamentary proceeding. Where there is any doubt as to whether a Member should declare a particular interest, my advice is always to err on the side of disclosure; that excessive disclosure is better than inadvertent non-disclosure.

Attached for your information (at attachment '1') is a copy of an email message I forwarded to all Members of the Legislative Council on 19 November 2019 forwarding a memorandum from the Clerk of the Legislative Assembly to Members of the Legislative Assembly entitled 'Crown Solicitor's advice regarding declaration of Members' interest in water'. Although no Member of the Legislative Council had sought my advice on any obligations to declare any interest they may

¹ LA Debates (13/4/1981) 5710

² LC Minutes (31/10/2002) 453 also Standing Committee on Privileges and Ethics *Report on inquiry into the Pecuniary Interests Register*, Report 20, October 2002 p51.

have in water, had they done so I would have had no hesitation to endorse the advice circulated by the Clerk of the Legislative Assembly.

The two bills

The Constitution Amendment (Water Accountability and Transparency) Bill 2020 (the Government bill) and the Water Management Amendment (Transparency of Water Rights) Bill 2020 (the SFF bill) have similar aims.

I note that the Government bill was amended in the Legislative Assembly. The second print of the amended Government bill therefore deals with both the Water Access Licence Register under the *Water Management Act 2000* and the disclosure requirement for Members under the *Constitution (Disclosures by Members) Regulation 1983*. Specifically in relation to the *Constitution (Disclosures by Members) Regulation 1983* it provides for the establishment of a new Register of Water Trading Returns of Members compiled and maintained by the Clerks as well as making explicit the disclosure requirements under the existing registers of interests in respect of water interests.

The SFF bill deals with the Water Access Licence Register established under the *Water Management Act 2000* as well as making explicit the disclosure requirements under the existing registers of interests in respect of water interests, but also requiring the disclosure of such interests held by a Member's spouse and including interests held at any time during the period of five years prior to a Member taking the Pledge of Loyalty.

There are three technical drafting issues to which I wish to draw the attention of the Committee in relation to the bills:

- In relation to the Government bill there appears to be no new form to assist with preparation of disclosures under the new Register of Water Trading Returns, while there are detailed forms in both bills for the existing register including amendments to reflect the new disclosure requirements.
- Likewise, there is no indication in the Government bill as to whether the new Register of Water Trading Returns is to be tabled in the House.
- There may be scope for confusion as to whether income from water interests still needs to be disclosed as a source of income, and whether dispositions of property now defined to include water licenses and rights are to be separately disclosed as dispositions.

Moreover, due to the technical nature of the various definitions of water rights, I draw the attention of the Committee to the potential for the new disclosure requirements to add a level of additional complexity that could have the unintended consequence of resulting in a Member inadvertently failing to comply with the new disclosure requirements. Further, whilst as set out above I am always happy to try to assist Members by giving my best possible advice in response to their questions about their disclosure requirements, I envisage that in relation to these new

disclosure requirements I will almost always need to advise Members to seek their own legal advice.

Opportunity to simplify disclosure requirements

Both the Government and SFF bills assume the continuation of the current regime of primary, ordinary and supplementary disclosures.

In contrast, the Privileges Committee of the Legislative Council, in its 2018 report *Review of the Members' Code of Conduct*, like earlier reports in 2010, and 2014, commented on the overly complex and administrative burdensome six monthly reporting regime. The committee unanimously recommended a process of an annual return by members, together with exception reporting required within 30 days of any change occurring. The recommendation was consistent with evidence received from the Auditor General, and the ICAC also conceded the "cumbersome nature" of the current reporting regime.

Although it may be outside the leave of either of these bills to do so by way of amendment, members may like to give careful consideration to the recommendations of the Legislative Council Privileges Committee in relation to this matter. I have attached (at attachment '2') the section of the 2018 report of the Privileges Committee report which recommends simplification of the disclosure requirements. I have also sent a copy of this submission to the Chair of the Privileges Committee, so that Committee is aware of the impact of these bills on the pecuniary interest regime.

I trust this information is of assistance to the Committee in its deliberations. Please do not hesitate to contact me if the Committee requires any further information on any of these matters.

Yours sincerely,

David Blunt
Clerk of the Parliaments

cc The Hon. Peter Primrose MLC, Chair, Privileges Committee

1

From: David Blunt
Sent: Tuesday, 19 November 2019 1:39 PM
To: Abigail Boyd; Adam Searle; Anthony D'Adam; Ben Franklin; Cate Faehrmann; Catherine Cusack; Courtney Houssos; Daniel Mookhey; David Shoebridge; Emma Hurst; Fred Nile; Greg Donnelly; John Ajaka; John Graham; Justin Field; Lou Amato; Mark Banasiak; Mark Buttigieg; Mark Latham; Mark Pearson; Matthew Mason-Cox; Mick Veitch; Natalie Ward; Natasha Maclaren-Jones; Office of Scott Farlow; Penny Sharpe; Peter Primrose; Robert Borsak; Rod Roberts; Rose Jackson; Sam Farraway; Shaoquett Moselmane; Shayne Mallard; Tara Moriarty; Taylor Martin; Trevor Khan; Walt Secord; Wes Fang; Bronwyn Taylor
Damien Tudehope
Sarah Mitchell
Don Harwin

Subject: FW: Memo: Declaration of Water Interests
Attachments: Memorandum - To all Members - Declaration~ Constitution (Disclosures by Members) Regulation 1983 - dated 19 November 2019.pdf; Form 4 Discretionary return (4).doc

Dear members,

I am forwarding you an email that the Clerk of the Legislative Assembly has this morning sent to all members of Assembly and which she has shared with me for the information of MLCs. The subject is advice received from the Crown Solicitor regarding the declaration of members' interests in water.

Please do not hesitate to contact me if you have any questions about this matter.

Kind regards,
David

From: LA Clerk
Sent: Tuesday, 19 November 2019 10:32 AM
To: Members of the Legislative Assembly
Cc: Electorate Offices ; Speaker ; Rebecca Cartwright ; Colleen Symington ; Viv Lee ; Kate Cadell
Subject: Memo: Declaration of Water Interests

Dear Members

Please find attached a memorandum relating to Crown Solicitor's advice regarding declaration of Members' interests in water

Kind regards

Helen Minnican
Clerk of the Legislative Assembly



LEGISLATIVE ASSEMBLY
OFFICE OF THE CLERK

MEMORANDUM

To: Members of the Legislative Assembly

From: Clerk of the Legislative Assembly

Date: 19 November 2019

TRIM Ref: D19/44214

Subject: Crown Solicitor's Advice regarding declaration of Members' interests in water

My office has received a number of requests for clarity as to whether Members are required under any part of the Constitution (Disclosures by Members) Regulation 1983 (the Regulation) to declare any interest they may have in water – e.g. by holding a water access licence. Advice has been sought from the Crown Solicitor and is provided below.

The advice states that a water licence issued under the *Water Act 1912* is required to be disclosed under clause 8(1) of the Regulation. The advice further states that the position in relation to a water access licence issued under the *Water Management Act 2000* is less clear but may constitute a right 'in or over property', which is required to be disclosed under clause 8(1).

Whether or not a particular licence is required to be disclosed will depend on the terms of the licence in question. A member who holds such a licence may consider making a discretionary disclosure under clause 16.

Additionally, members will be required to disclose that income was received from a licence under the *Water Act 1912* or a water access licence under the *Water Management Act 2000*, provided that the income received is assessable income under income tax laws and exceeded, or is reasonably expected to exceed, \$500 p.a.

The advice was provided to me on an urgent basis and the Crown Solicitor did refer to the need for Members to obtain their own legal advice.

Members who wish to update their declaration may do so by completing a Discretionary Disclosure form and lodging it with the Office of the Clerk. These will be placed on the Register of Pecuniary and Other Interests, which is available for public inspection.

Helen Minnican
Clerk of the Legislative Assembly

Chapter 3 The pecuniary interests regulation

This chapter examines possible reforms to the pecuniary interests disclosure regime established by the Constitution (Disclosures by Members) Regulation 1983. The potential reforms concern:

- the replacement of the current system of disclosure returns by a system of 'exception reporting' involving the reporting of any changes to interests disclosed in a previous return
- the publication of members' disclosure returns on the internet
- the expansion of the disclosure requirements to include the interests of related parties such as members' spouses/partners and dependent children.

As with the review of the Code of Conduct discussed in chapter 2, the committee has approached its review of the Regulation with the aim of seeking to reach a uniform position with its counterpart in the Assembly wherever possible. Accordingly the committee has had regard to previous recommendations by both committees as well as the views expressed in submissions to this review. The committee notes, however, that the Assembly committee began a review of the Regulation in 2018 and had not reported on that review when this report was prepared.

Reform of the system of returns

The current system of disclosure returns

- 3.1 The Constitution (Disclosures by Members) Regulation 1983 ('the Regulation') established a regime for the disclosure of members' pecuniary and other interests which provides for the lodging of disclosure returns by members at specified times each year and the maintenance of a Register of Disclosures.
- 3.2 The Regulation includes provisions for the lodging of four types of disclosure returns:
 - The primary return is the first return lodged by a member following his or her election to Parliament.
 - Ordinary returns are annual returns which disclose the interests held by each member during the 12 month period to 30 June.
 - Supplementary ordinary returns disclose interests held during the six month period from July to December in the previous year
 - Discretionary returns may be lodged by a member at any time.
- 3.3 The effect of these provisions is that members are required to lodge a return every six months. If a change in a member's interests occurs before the six months have expired there is no requirement for the member to disclose the change until the next return date. Conversely a member must lodge a return every six months even if there has been no change in the member's interests since their last return.
- 3.4 The benefit of the current system is that each primary and ordinary return provides a complete snapshot of the member's interests as at the return date while there is also provision for an

update each year in the form of a supplementary ordinary return. However, the system does not provide an accurate picture of a member's current interests if changes occur between return dates and is complex with multiple returns dates which members are required to meet each year.

An alternative approach

- 3.5 An alternative to the lodging of disclosure returns at set times throughout the year is to require members to continuously update their returns against a single complete return as and when any changes occur. Under this approach only the member's first return provides a comprehensive picture of his or interests, and to understand the member's interests at a later point in time it is necessary to also take account of any updates the member may have provided. However the approach ensures the Register of Disclosures is kept up-to-date and is a more streamlined disclosure process for the vast majority of members whose interests do not often change.
- 3.6 The practice of updating interests disclosed against a previous full return is known as continuous disclosure or exception reporting. Various Parliaments have incorporated this practice into their interest disclosure regimes. However, there are differences between those Parliaments with respect to specific issues such as the timeframe for notifying changes to interests and for tabling updates in the House.

Previous inquiries

- 3.7 The desirability of varying the system of returns in New South Wales to incorporate exception reporting has been considered in a number of previous inquiries.
- 3.8 In 2003 the Independent Commission Against Corruption recommended that members should be required to update the Register within 30 days of new interests arising or changes to current interests occurring, that updates should be incorporated in the Register within seven days of receipt, and that updates should be tabled in Parliament at the commencement of the next sitting period.³³
- 3.9 In 2006 the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics recommended a form of exception reporting whereby members would continue to provide a full return every year but would update the Register within 35 days of any change occurring and the Clerk would table all updates received quarterly at the next sitting of the House.³⁴
- 3.10 In 2010 this committee recommended a form of exception reporting whereby members would provide one full return each Parliament³⁵ and update the Register within 35 days of any change occurring with updates to be tabled in the House every six months. In support of such a system

³³ Independent Commission Against Corruption, *Regulation of secondary employment for members of the NSW Legislative Assembly*, September 2003, p 75, Recommendation 10 – Updating the Register of Pecuniary Interests.

³⁴ Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Review of the proposed amendments to the Code of Conduct and draft Constitution (Disclosure by Members) Regulation 2006*, September 2006, p 26.

³⁵ As members of the Legislative Council are elected for two terms of Parliament, the committee envisioned that a member would lodge a primary return at the start of the first Parliament of his or her term and an ordinary return in the second Parliament.

primary disclosure, followed by exception reporting of updates as necessary, the better.⁴¹

3.16 The Parliamentary Ethics Adviser advised:

I ... support the proposal for exception reporting – in that a Member makes an initial disclosure following their election and then notifies changes when they occur.⁴²

3.17 The Auditor-General, Ms Margaret Crawford, expressed support for the reporting of changes to an ordinary return to be lodged annually, rather than a single return to be lodged every Parliament, as this committee has previously recommended:

In relation to exception reporting being the primary means of updating the pecuniary interest register, I recommend that such registers are supported by annual declarations as well as exception reporting. While the committee's proposed changes may create some efficiency in administration, regular returns and sign offs act as a useful reminder and support accurate disclosures and record keeping.⁴³

3.18 Ms Crawford also noted that a requirement for annual declarations would be consistent with a recommendation she had recently made in relation to public sector senior executives.⁴⁴

Committee comment

3.19 In previous reviews this committee has recommended the introduction of exception reporting against a single return to be lodged by a member in each Parliament. The Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics has also supported exception reporting but has recommended that members be required to report any changes against an ordinary return to be lodged every year rather than against a single return lodged every Parliament. In the current review, to facilitate a consensus, the committee recommends the reporting of changes against a return to be lodged each year consistently with the recommendations of the Assembly committee in 2006. This approach was also supported by a submission from the Auditor-General to this committee's review.

3.20 There remain small differences between the versions of exception reporting recommended by the two committees. While the Assembly committee in 2006 recommended that returns be lodged within 35 days this committee recommends a timeframe of 30 days; while the Assembly committee has recommended that updates be tabled quarterly this committee recommends that they be tabled every six months. The committee does not believe that these differences are of such significance that they constitute an obstacle to the introduction of an amending regulation to provide for exception reporting. Further, the committee notes that under section 14A(5) of the *Constitution Act 1902* any proposed regulation for the disclosure of members' interests must be referred to a committee of either House established for the purpose which must be given an opportunity to consider the regulation and make representations.

⁴¹ Submission 1, Clerk of the Parliaments, p 2.

⁴² Submission 5, Parliamentary Ethics Adviser, Mr John Evans, p 9.

⁴³ Submission 2, Auditor-General, page 2.

⁴⁴ Submission 2, Auditor-General, page 2.

the committee noted that exception reporting has been adopted by various other Houses of Parliament including the Senate which requires updates to be lodged within 35 days and the House of Representatives which requires updates to be lodged with 28 days.³⁶

- 3.11 In 2014 this committee recommended a system of exception reporting in similar terms to that which it had recommended in 2010.³⁷ In support of its recommendations the committee noted a submission from the Clerk of the Parliaments which highlighted the overly complex nature of the current system of returns and a submission from the Department of Premier and Cabinet which indicated that the Government was open to the idea of simplifying the current arrangements relating to returns.³⁸
- 3.12 In 2014 the Legislative Assembly's Standing Committee on Parliamentary Privilege and Ethics expressed support for exception reporting in the following terms:

In the committee's view the current requirement for six monthly updates results in members' returns being up to six months out of date. Updating returns whenever changes to members interests occurs is timely for both the public who have access to information on changes at the time they occur, and for members who can update their returns as changes occur and not have to remember to make changes some months later. The Senate model provides members 35 days to make an update.³⁹

Submissions to the current review

- 3.13 Four of the submissions to the current review addressed the issue of exception reporting.
- 3.14 The Independent Commission Against referred to the issue indirectly, expressing support for review of 'the timeliness with which disclosures are made' and 'the cumbersome nature' of the current regime.⁴⁰
- 3.15 The Clerk of the Parliaments supported introduction of exception reporting noting that:

Over the last four years since 2014, many established and new members, and other stakeholders, have continued to struggle with the overly complex and unhelpful reporting regime, involving primary, ordinary, supplementary ordinary, and discretionary disclosures. The sooner the reporting regime moves [to] one of an initial

³⁶ Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct*, Report 54, December 2010, Recommendation 6.

³⁷ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014, p 43, Recommendations 4 and 7.

³⁸ Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014, paragraphs 3.48 and 3.52.

³⁹ Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Inquiry into matters arising from the ICAC report entitled 'Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources'*, July 2014, paragraph 6.4.

⁴⁰ Submission 3, Independent Commission Against Corruption, paragraph 38.

3.21 The committee therefore recommends:

Recommendation 2

That the current system of primary, ordinary, supplementary ordinary and discretionary returns be amended to introduce a simpler system of exception reporting requiring:

- (a) A primary return to be lodged following a member's election to Parliament as at present
- (b) An ordinary return to be lodged in each subsequent year
- (c) Any changes to interests disclosed in a preceding return to be disclosed in an alteration of interest return lodged with the Clerk within 30 days of the change occurring
- (d) Alteration of interest returns to be tabled in the House every six months
- (e) Discretionary disclosures to continue to be available as at present for the disclosure of interests not required to be disclosed by the Regulation but which a member chooses to disclose

Online publication of returns

Current arrangements for access to members' disclosure returns

- 3.22 The Regulation provides for the Clerk of each House to compile and maintain a Register containing the disclosures lodged by members of the House during the previous eight years.⁴⁵ The Register is open to public inspection at the office of the Clerk of the House between 10.00 am and 4 pm on any day except on Saturday, Sunday or a public holiday, and is also open to inspection by members of the House at any time the House is sitting.⁴⁶
- 3.23 Within 21 sitting days after the last day for the lodgment of primary and any ordinary returns, the Clerk is to provide a copy of that part of the Register which has not previously been tabled to the presiding officer for tabling. On tabling the Register is ordered to be printed or published as a parliamentary paper.⁴⁷
- 3.24 The effect of these provisions is that the Register is only accessible by a member of the public who physically visits the office of the Clerk within certain hours or who obtains one of the limited number of printed copies. There is no provision for the Register or for individual returns to be published electronically.

⁴⁵ Constitution (Disclosures by Members) Regulation 1983, clauses 17, 18, 19.

⁴⁶ Constitution (Disclosures by Members) Regulation 1983, clause 20.

⁴⁷ Constitution (Disclosures by Members) Regulation 1983, clause 21.