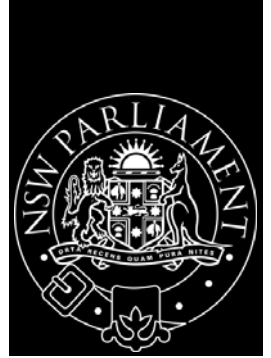


PARLIAMENT OF NEW SOUTH WALES



Legislation Review Committee

LEGISLATION REVIEW DIGEST

No 13 of 2008

10 November 2008

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations:

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

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

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

Section B: Ministerial correspondence – Bills previously considered

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

Part Two – Regulations

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

Regulations for the special attention of Parliament

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

Regulations about which the Committee is seeking further information

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

Copies of Correspondence on Regulations

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

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

Appendix 1: Index of Bills Reported on in 2008

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

Appendix 2: Index of Ministerial Correspondence on Bills for 2008

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

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

This table specifies the action the Committee has taken with respect to Bills that received comment in 2008 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2008

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

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Environmental Planning and Assessment Amendment (Affordable Housing Development Contributions) Bill 2008*

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

2. Gaming Machines Amendment Bill 2008

Issue: Strict Liability

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

27. The Committee is of the view that the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty. Accordingly, the Committee considers that the strict liability offences do not trespass unduly on individual rights and liberties.

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

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

Issue: Enabling the issuing of guidelines or directions influencing the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance (insufficiently defined administrative powers) - Schedule 1 [109] – proposed section 205 Additional functions of Authority:

31. The Committee notes the broad scope of additional functions, which the Minister may give directions and guidelines to the Authority on how to exercise its functions and would not be disallowable by Parliament. Therefore, the Committee considers that the proposed section 205 may be a delegation of legislative power that is insufficiently subject to parliamentary scrutiny, and refers this to Parliament.

3. Graffiti Control Bill 2008

Issue: Imprisonment of juveniles- Part 2 sections 4 and 5 - Graffiti related offences

12. The Committee considers that the monetary penalties are sufficiently moderate, and that adequate safeguards against excessive punishment apply in regard to the sentencing provisions. The provisions are also supported by the social objectives of the legislation. The Committee accordingly considers that these provisions do not trespass unduly on personal rights and liberties.

Issue: Strict liability – Part 3 proposed section 7 – Sale of paint cans to persons under 18

14. The Committee notes that the defence in section 7(4) mitigates this strict liability provision. Under that provision, it is a defence to a prosecution against the employer if it is proved that the employer had no knowledge of the contravention and that the employer could not, by the exercise of due diligence, have prevented the contravention. This proposed section, therefore, whilst not requiring the prosecution to prove mens rea allows the employee or employer to raise specific defences by way of exculpation. These safeguards address, in the Committee's opinion, concerns that might otherwise exist about the fairness of the proposed strict liability provision.

Issue: Strict liability – Part 3 proposed section 8 – Unsecured display by retailers of spray paint cans

15. Proposed section 8 is a strict liability provision requiring retailers of spray paint cans to properly secure the cans in the shop by means of a locked cabinet or within or behind a counter in such a manner that the public are not able to gain access without the assistance of the occupier or employee. The maximum penalty for breach of this provision is 10 penalty units (\$1100). The Committee regards this provision as reasonable and notes that the operation of it is to be reviewed by the Minister after a period of 12 months from its commencement.

Issue: Confiscation of property- Part 3 proposed section 9 - Confiscation of spray paint cans from minors

17. The provisions regarding seizure of property are confined by the requirement that a police officer must have reasonable grounds before acting. Regulatory provisions must also set out details of the procedure to be followed for the seizure of spray paint cans and their return. These provisions will be reviewable by Parliament. The Committee is satisfied that these provisions do not trespass unduly on personal rights and liberties.

Issue: Trespass on private property – Part 4 Proposed section 12 - graffiti removal work - without the agreement of the owner of land

18. Proposed section 12 authorises a local council, without the agreement of the owner or occupy of any land, to carry out graffiti removal work on private land. The Committee notes that the exercise of council's powers are restricted by the requirement that the work be carried out only from a public place and that the local council is to bear the costs, including the costs of compensation, for any damage caused. The Committee also notes that there is available under section 730 of the Local Government Act 1993, a procedure for the resolution of claims for compensation relating to damage in cases of dispute between the person claiming the compensation and the local council. The Committee is satisfied that these provisions provide adequate safeguards relating to the exercise of a council's powers and that the provisions do not trespass unduly on personal rights and liberties.

Issue: Strict liability - Schedule 2.4 - Proposed amendment of clause 36 of the Rail Safety General Regulation 2003 - vandalism and fixing posters

20. The Committee considers that the maximum monetary penalty for this offence is not excessive, and has been set at an appropriate and justifiable level having regard to the legislative objective of the provision. Under the general defence provisions of proposed clause 14 the offender would be entitled to raise exonerating circumstances if he or she considered that the offence was done with lawful authority. The Committee is of the opinion that this strict liability provision does not trespass unduly on personal rights and liberties.

Issue: Clause 2 - Commencement by proclamation

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

4. Racing Administration Amendment Bill 2008

Issue: Strict liability - Schedule 1[11] – proposed new section 33

11. The Committee refers for Parliament's consideration the concerns of the Committee that proposed section 33 is a strict liability provision that may subject a person to a term of imprisonment notwithstanding they may not have intended to commit the offence.

Issue: Deemed liability – Schedule 1[16] – amendment of section 33

13. Proposed Section 33 is one of deemed liability as it contravenes the presumption of innocence. Such a provision requires substantial justification, because it is significantly prejudicial to a person's defence to a prosecution under proposed section 33 relating to the unauthorised use of a NSW race field. The Committee refers the matter for Parliament's consideration.

Issue: Inappropriate delegation of legislative powers – Schedule 1[11] – proposed new section 33

15. In view of the penalties, including imprisonment, that might be attendant on a breach of section 33 it appears to the Committee that the ambit of this section should more properly be determined by Parliament rather than being left to the Regulations.

5. Security Industry Amendment Bill 2008**Issue: Strict Liability**

10. The Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.
11. The Committee believes that the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, despite that the contravention of visitor permit conditions in the case of an individual may attract imprisonment for 6 months (proposed section 39F (b) of Part 3A in Schedule 1 [8]). This is because the Committee is of the view that security licensees often operate in high-risk, high security environments and therefore, the community expects that these people will be vetted during the licensing process and that there will be compliance with visitor permit conditions for security licence holders from other States working on special events in New South Wales. Accordingly, the Committee considers that the strict liability offences do not trespass unduly on individual rights and liberties.

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

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

6. Thoroughbred Racing Further Amendment Bill 2008**Issue: Clause 2 - commencement of the Act (with the exception of Schedule 1[6] and [7] and Schedule 2 which commence on assent) on a day or days to be appointed by proclamation**

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

SECTION B: Ministerial Correspondence — Bills Previously Considered

7. Home Building Amendment Bill 2008

4. The Committee thanks the Minister for her reply.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (AFFORDABLE HOUSING DEVELOPMENT CONTRIBUTIONS) BILL 2008*

Date Introduced:	30 October 2008
House Introduced:	Legislative Council
Minister Responsible:	Ms Sylvia Hale MLC
Portfolio:	Non Government, The Greens

Purpose and Description

1. This Bill amends the *Environmental Planning and Assessment Act 1979* with respect to the collection of affordable housing contributions from developers; and for other purposes.
2. It seeks to amend the provisions of the Environmental Planning and Assessment Act in relation to affordable housing contributions from developers. It will allow but not force local councils to impose an affordable housing levy on developers of new multi-unit developments as a condition of development consent. Councils can choose the level of contribution required with the level capped at 25 per cent. They can choose where the levy is to be applied in their local areas. The Bill does not stipulate a fixed percentage or specify the areas where the levy is to apply.
3. It provides that where a council determines that there is requirement for an affordable housing contribution, that contribution can take the form of either:
 - a dedication to council or other social housing provider of a percentage ranging up to a maximum of 25 per cent of the total number of units in the development, provided that development comprises 10 or more dwellings, or
 - the monetary equivalent.
4. If the developer is a government agency (for example Landcom), the required percentage can be a maximum of 30 per cent. Housing New South Wales is exempt.
5. A new definition of who is eligible for affordable housing will be added. Affordable housing will be for people whose disposable income is in the lowest 40 per cent of household incomes based on the statistical subdivision of Sydney, as identified by the Australian Bureau of Statistics. They will be eligible for affordable housing and pay rent of not more than 30 per cent of their income. Section 93F currently contains provisions that allow for planning agreements between councils and developers, but

those provisions cannot be used to require affordable housing provisions as a condition of consent. The current provisions specify that only the affordable housing schemes listed in a State Environment Planning Policy can be funded via mandatory contributions. There are 3 such schemes listed in SEPP 70.

6. This Bill amends the Act so that New South Wales councils can legally levy for affordable housing. In the proposed section 116C, affordable housing is designated as community and public infrastructure, which will remove the necessity for a scheme to be listed in SEPP 70 and also remove the necessity for SEPP 70. Proposed new Division 5, Development contributions for affordable housing, contains a new section 116Y which outlines the conditions where contributions can be imposed. The conditions are that a local environment plan must identify a need for affordable housing within an area to which the plan applies.
7. The conditions also include that there must be:
 - a development contributions plan in place;
 - the new development must comprise 10 dwellings or more;
 - it must be a private development or a development undertaken by a government agency, such as Landcom;
 - social housing providers are exempted;
 - contributions may be up to 25 per cent in private developments and up to 30 per cent for government developments; and
 - developer contributions can be in the form of housing units.
8. Each council will work out the details that meet its specific local conditions. Proposed section 116ZB specifies what will be done with the affordable housing units or monetary equivalent.
9. Any affordable housing contributions will apply only to development applications that are received after the commencement date of the Bill. They will not apply to development applications that are made but are not yet approved.
10. The Bill will also apply to the Redfern-Waterloo area that currently has special provisions in the *Redfern-Waterloo Authority Act 2004*, but this provides for only a small affordable housing contribution of 1.5 per cent, which will be applied as the Minister sees fit.

Background

11. The Bill extends the ambit of State Environmental Planning Policy 70 [SEPP 70]. SEPP 70 enables a few councils to levy for affordable housing. At present, the Planning Minister has to authorise schemes via listing in the State environment planning policy [SEPP] 70. This Bill aims to use the planning legislation across the spectrum. It gives councils the flexibility with respect to the quantum and type of contribution they seek. A council may retain the housing, or transfer title and management to a social housing provider, such as the Department of Housing, a

- community housing or cooperative organisation, or a non-profit affordable housing body, such as City West Housing.
12. Similar legislation was adopted in the United Kingdom and the United States of America. South Australian Government is mandating 15 per cent affordable housing in new growth areas. According to the Second Reading speech, the evidence from overseas is that such levies work.
 13. From the Second Reading speech, the Australian Council of Social Service (ACOSS) paper "Response to the National Rental Affordability Scheme—technical discussion paper" of May 2008, found that nearly 30 per cent of low-income households (800,500 households across Australia), are in housing stress. They are paying more than 30 per cent of household income on housing cost. The position of low-income private renters is worse, with 65 per cent of low-income private renters experiencing housing stress. ACOSS attributes this to the decline in public housing stock and the increase in house prices.
 14. Another study by Yates, Kendig, Phillips, Milligan and Tanton, in February 2000, "Sustaining fair shares: the Australian housing system and intergenerational sustainability", found there was a downward trend in home ownership, especially for young to middle-aged people. Between 1981 and 2006, home ownership rates fell 9 per cent for 25- to 39-year-olds. The study found that between 1951 and 2006, house prices increased from nearly four times average income to more than seven times average income.

The Bill

15. The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* with respect to development contributions as follows:
 - (a) to require any development consent for the erection and use of buildings containing 10 or more dwellings to include a condition requiring the dedication of land, or the payment of a monetary contribution, for the purpose of providing affordable housing (and to require that development contribution to be no more than 25 per cent of the total floor area of the proposed building or buildings or its cash equivalent),
 - (b) to omit the consideration of the potential impact of a proposed development contribution on the affordability of housing from the key considerations for development contributions,
 - (c) to make affordable housing a key community infrastructure, so that a council's contributions plan can require a community infrastructure contribution to be made for the purpose of providing affordable housing,
 - (d) to omit a provision that requires that planning agreements entered into by councils be limited to key community infrastructure,
 - (e) to remove the Minister's power to direct a consent authority to transfer land dedicated, or a monetary contribution paid, as a compulsory development contribution to a person nominated by the Minister,
 - (f) to require the consent authority, in all cases, to make available land dedicated as a compulsory contribution, or to apply a monetary contribution paid as a compulsory development contribution, for the purposes of affordable housing or to transfer the land, or pay the monetary contribution, to a social housing provider or a council,

(g) to provide that any community infrastructure contribution or a State infrastructure contribution can be used for the purpose of providing affordable housing.

This Bill also repeals *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)* and makes consequential amendments to the *Redfern–Waterloo Authority Act 2004* and a number of environmental planning instruments.

16. Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act.

Clause 3 is a formal provision that gives effect to the amendments to the *Environmental Planning and Assessment Act 1979* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Redfern–Waterloo Authority Act 2004* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the environmental planning instruments specified in Schedule 3.

Clause 6 repeals *State Environmental Planning Policy No 70—Affordable Housing (Revised Schemes)* as a consequence of the amendments made by Schedule 1 [1] and [7] to the proposed Act.

Clause 7 provides for the repeal of the proposed Act after the proposed Act commences. Once the proposed Act commences, it will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of *Environmental Planning and Assessment Act 1979*

Schedule 1 [1] replaces the existing definition of **affordable housing** in section 4 (1) of the *Environmental Planning and Assessment Act 1979* (which currently provides for the regulations or an environmental planning instrument to specify which households affordable housing is provided for). The revised definition covers housing that is intended to be supplied to households having disposable incomes in the lowest 40 per cent of household incomes, for the time being, for the Statistical Subdivision of Inner Sydney, according to data published by the Australian Bureau of Statistics, and at a rental of no more than 30 per cent of relevant tenants' incomes.

Schedule 1 [2] inserts a note that is consequential on the amendment made by Schedule 1 [7].

Schedule 1 [3] and [5] make affordable housing a kind of key community infrastructure. (Proposed section 116I provides that a council's contributions plan cannot allow the council to require a community infrastructure contribution unless the community infrastructure is key community infrastructure or additional approved community infrastructure).

Schedule 1 [4] omits the consideration of the potential impact of a proposed development contribution on the affordability of housing from the key considerations for development contributions for the purposes of proposed Part 5B (Provision of public infrastructure).

Schedule 1 [6] omits a provision that provides that planning agreements entered into by councils are limited to key community infrastructure.

Schedule 1 [7] replaces the provisions about affordable housing proposed to be inserted by uncommenced provisions of the *Environmental Planning and Assessment Amendment Act 2008*.

Proposed section 116Y requires the payment of monetary contributions, or the dedication of land, for the purpose of affordable housing as a condition of any development consent relating to the erection of buildings containing 10 or more dwellings. (At present a development contribution may be required (at the consent authority's discretion) for the

purpose of providing affordable housing in the case of any development.) The new provision may be imposed only if the need for affordable housing has been identified in a local environmental plan, rather than a State environmental planning policy.

Proposed section 116Z requires other contributions to be taken into account by a consent authority.

Proposed section 116ZA makes it clear that the proposed Division does not prevent the imposition of other conditions concerning affordable housing.

Proposed section 116ZB removes the Minister's power to direct a consent authority to transfer such land or such a monetary contribution to a person nominated by the Minister and requires the consent authority, in all cases, to make such land available, or apply such a monetary contribution, for the purposes of affordable housing.

Proposed section 116ZBA provides that a monetary contribution (together with any additional amount earned from its investment) may be applied for the purpose of providing affordable housing in the area concerned or an adjoining area even if the purpose for which the contribution was paid is not related to affordable housing.

Schedule 1 [8] makes an amendment that is consequential on the amendment made by Schedule 1 [1].

Schedule 1 [9] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 1 [10] makes provision of a savings and transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Consequential amendment of *Redfern–Waterloo Authority Act 2004*

Schedule 2 [1]–[6] contains amendments to the *Redfern–Waterloo Authority Act 2004* that are consequential on the amendment made by Schedule 1 [7].

Schedule 2 [7] amends clause 1 of Schedule 4 to the *Redfern–Waterloo Authority Act 2004* to enable the Governor to make regulations of a savings or transitional nature consequent on the amendments made to that Act by Schedule 2 [1]–[6].

Schedule 3 Consequential amendment of environmental planning instruments

Schedule 3 contains amendments to South Sydney Local Environmental Plan 1998, Sydney Regional Environmental Plan No 26—City West and Willoughby Local Environmental Plan 1995 that are consequential on the amendment made by Schedule 1 [7].

Issues Considered by the Committee

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

The Committee makes no further comment on this Bill.

2. GAMING MACHINES AMENDMENT BILL 2008

Date Introduced: 29 October 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon Kevin Greene MP
Portfolio: Gaming and Racing

Purpose and Description

1. This Bill amends the *Gaming Machines Act 2001* to make further provision with respect to the regulation, control and management of gaming machines in hotels and registered clubs; and for other purposes.
2. This Bill introduces additional harm minimisation and responsible gambling requirements. It reduces the statewide gaming machine cap by 5,000. The cap will be reduced from 104,000 to 99,000. This means there will be 5,000 less gaming machine entitlements available for hotels and clubs to operate than there were six years ago. The entitlements for those 5,000 machines will be permanently removed from operation. It also provides that the cap will be further reduced at least once every five years.
3. Another harm minimisation is prohibiting cash withdrawals from credit cards through ATM and EFTPOS facilities in gaming venues.
4. The Bill gives the Director of Liquor and Gaming power to require a venue to take action if gaming machines are located in a way that would inappropriately advertise or attract the attention of people outside the venue. The decisions by the Director are subject to administrative review by the Casino, Liquor and Gaming Control Authority, and there will be publicly available guidelines to give guidance on what is inappropriate.
5. It also introduces a limit on the number of multi-terminal gaming machines [MTGMs] that a club may operate. MTGMs are gaming machines that operate casino-style games such as blackjack or roulette. This Bill limits the number of MTGMs that an individual club can operate to no more than 15 per cent of its total number of gaming machine entitlements. It is proposed to give them five years to reduce their MTGM numbers to the 15 per cent limit.
6. One of the other significant changes is the introduction of the local impact assessment process (LIA), which will replace the current social impact assessment process. This is a new framework for assessing the appropriateness of the placement of additional gaming machines in licensed venues. The new system classifies each local government area (LGA) into Band 1, 2 or 3. There are different requirements in place under the new LIA system, depending on which band the venue falls within based on its location.
7. In general, the bands take into account gaming machine density, the expenditure on gaming machines and social data. The new LIA system will have guidelines on what

is required of a venue if it seeks additional machines, depending on the number sought and the location of the venue.

8. A number of amendments relate to requirements for registered clubs. Certain club-specific requirements are included that recognise the community contribution clubs can make, as well as the operational needs of related clubs. The Bill will remove the limit of 450 on the maximum number of gaming machines a club can operate. Removing this limit aims to encourage larger clubs to amalgamate with smaller struggling clubs, as they will no longer be limited in the maximum number of gaming machines they can operate. Clubs wanting to increase their poker machine entitlements above 450 will be required to submit the appropriate application, which will be assessed subject to the overall threshold of the local government area (LGA). They will be reviewed by the Casino, Liquor and Gaming Control Authority, which will take into account the level of increase and the number of machines in the venue and the LGA.
9. Clubs will be subject to the overall State cap and the removal of the maximum limit for clubs will not result in a breach of the overall cap. The review report recommended that the provision giving 10 free gaming machine entitlements to new clubs be repealed.
10. The Bill proposes a scheme that aims to assist new clubs to establish in new development areas, where there is sizable new residential development and there is no registered club to service the needs of that new community. It proposes that a club wanting to establish in a new development area may apply to operate up to 150 gaming machines, and for the first 50 machines, only one in six needs to be forfeited in any transfer. These areas are to be only in Band 1 LGAs, that is, with a low density of machines, which can accommodate the additional machine numbers.
11. There is clarification about the requirements for gaming venues located in or next to retail shopping centres. The Bill retains the current restrictions that existing venues in shopping centres cannot get additional gaming machines and that any hotel or club venue establishing in a shopping centre cannot operate gaming machines.
12. The Gaming Machines Regulation currently has some exceptions to the general requirements that let clubs remove or extend into a retail shopping centre. It is intended to introduce a more straightforward process enabling this type of club development. The new provisions provide that if a club removes or extends into a retail shopping centre, it can only operate gaming machines if patrons will not be able to gain access to the club's premises directly from the retail shopping centre. The new provisions also provide that the gaming machine threshold for the new premises is no more than the threshold for the club's previous premises, and in the case of a removal, the premises are both within the same suburb or town; and in the case of an extension, the club's premises remain predominantly where it was before the extension.
13. These requirements may assist clubs to redevelop by providing certainty regarding the requirements for venues seeking to locate in retail shopping centres.
14. The Act currently provides for reduced forfeiture rates for related clubs when they transfer entitlements between venues where the venues are located within one kilometre for metropolitan regions and within 50 kilometres for non-metropolitan

regions. With the new local impact assessment (LIA) process setting requirements based on local government area, it is proposed to amend these requirements to allow related club premises to transfer without forfeiture if both premises are within the same local government area. This is regardless of whether it is a metropolitan or non-metropolitan area.

15. If related club premises are in different local government areas, a reduced forfeiture rate of one entitlement in every six transferred will apply, rather than one in every three for a transfer.
16. Another amendment is to repeal those changes made relating to the transfer of hotel poker machine entitlements. The policy intention of this provision is to revert to the position existing immediately prior to the Gaming Machines (Temporary Freeze) Act amendments in 2008. Various judicial decisions considered the application of the laws, as they existed before those amendments. On changing back to the former provisions, these decisions should provide guidance on the interpretation of the provisions, as they existed prior to the 2008 amendments.
17. Amendments aim to also ensure that the gaming machine industry operates with integrity. There are new requirements related to gaming machine technicians, with a new requirement that work undertaken by technicians on gaming machines be recorded by hotels and clubs, and a new offence to ensure that any work done on a gaming machine by a technician does not affect the way the machine is supposed to operate. There are new offences for falsely claiming a gaming machine prize on a gaming machine and new requirements for the operation of linked gaming systems, ensuring that all machines designated to be on a link are actually connected to the link except where specific approval has been given and where strict rules about providing relevant information to players are in place.

Background

18. According to the Agreement in Principle speech:

The amendments seek to achieve a number of aims: to continue to implement appropriate harm minimisation and responsible gambling requirements and to refine existing requirements; to provide greater certainty for industry and to introduce some simplification in the administrative processes; to increase integrity and compliance within the gaming industry; to cut red tape, and to provide clarification and machinery changes to allow the Act to operate more effectively and efficiently. When the Gaming Machines Act came into force, as it introduced a new regulatory framework for the operation of gaming machines in New South Wales, it included a requirement for a five-year review of the Act to ensure that the objectives of the Act remain valid and that the Act is operating appropriately and effectively. This review process was undertaken in 2007. Extensive consultation was undertaken with industry participants, community groups, problem gambling counselling services and individuals, and a report was tabled in Parliament in December 2007. The report found that the policy objectives of the Act remain valid but a number of amendments could be made to improve the operation and effectiveness of the Act.

19. The five-year review report noted that some club venues had significant numbers of MTGMs in their venue, up to 40 per cent in one case. Due to the higher bet limits and prize limits on MTGMs as well as that they run casino-style games, it considered to

limit their use to a certain level. Only 15 clubs have MTGM numbers over the 15 per cent limit.

20. There will also be guidelines on what is required in an application for additional machines depending on the number of machines sought, the location of the venue and from where the additional machines are being bought. Applicants will no longer be required to provide a cost benefit analysis as part of their application. The authority will make this type of assessment based on information provided by the applicant and relevant social profile data gathered by the authority. Under this new process, the applicant will provide information on the number of additional machines and the positive contribution it will make to the local community. This seeks to give hotels and clubs a clear idea of what would be required of them in any application and to allow them to make an informed decision on the likely success of an application. This type of certainty is something that industry participants have requested during consultation on this issue.
21. The Act and regulations will require that venues located in Bands 1, 2 and 3 will be subject to the appropriate review mechanism by the authority, depending on the range of the proposed increase in machines and the number of gaming machines in the venue. This ensures that only appropriate increases in gaming machine numbers will be approved by the Casino, Liquor and Gaming Control Authority. Therefore, clubs in areas with an already high density of machines will find it difficult to obtain approval for additional machines.
22. The five-year review report recommended that the legislation be amended to ensure that the licence owner be able to object to the transfer of entitlements from a leased hotel in all cases, but that the issue should be kept under review. According to the Agreement in Principle speech, the Office of Liquor, Gaming and Racing has held extensive consultation with the hotel industry and has concluded that the original legislation provides a reasonable framework to allow lessors to object and that the amendments are not required.
23. The hotel industry has also advised that only a very small number (17) of disputes remain unresolved, and that any legislative amendment would only disrupt a precedent set by court decisions. The unresolved agreements are private financial arrangements between the parties. The Act will continue to allow lessors with a relevant financial interest in a hotel to be able to object to the transfer of poker machine entitlements by a lessee by making a submission to the Casino, Liquor and Gaming Control Authority.

The Bill

The object of this Bill is to amend the *Gaming Machines Act 2001 (the principal Act)* as follows:

- (a) to rationalise the scheme for the allocation and transfer of poker machine entitlements and to reduce the overall State cap on the number of entitlements allocated,
- (b) to modify the scheme under which hotels and registered clubs can, in accordance with the overall State cap on the number of gaming machines, increase their gaming machine thresholds,

- (c) to remove the limit on the maximum number of gaming machines that may be kept on the premises of a particular registered club,
- (d) to introduce new gambling harm minimisation measures (including authorising the Director of Liquor and Gaming to require venues to move or screen gaming machines that are located in a manner designed to attract the attention of people outside the venue),
- (e) to introduce new provisions designed to protect the integrity of the gaming machine industry (including offences relating to technicians who carry out work on gaming machines),
- (f) to remove the requirement for persons who act as gaming machine advisers to hold a gaming-related licence,
- (g) to make a number of other miscellaneous amendments of a consequential, minor or machinery nature.

24. Outline of provisions

Schedule 1 Amendment of *Gaming Machines Act 2001*

Gaming machine thresholds for venues and local impact assessment process

Schedule 1 [44] replaces the social impact assessment scheme under Division 1 of Part 4 of the principal Act with a new scheme that provides for the setting by the Authority of a gaming machine threshold for each venue. The gaming machine threshold for a venue is similar to the existing concept of a SIA threshold (in that it refers to the maximum number of gaming machines that may be authorised to be kept in the venue). Under the new scheme, a venue may apply to the Authority to increase its gaming machine threshold. The requirements under the proposed Division in relation to a proposed increase will depend on the classification of the local government area in which the venue is situated (the LGA classification is done by the Authority) and the level of the increase applied for. In some cases, these requirements will involve the provision of a local impact assessment (*LIA*) which must be approved by the Authority in order for the venue to get its increased threshold. If the threshold for a venue is increased, the venue will have a limited period in which to acquire poker machine entitlements to fill its threshold.

The new Division also contains special provision for clubs in new development areas (namely, the club will only have to do a class 1 *LIA*, rather than a more stringent class 2 *LIA*, if it wants up to 150 gaming machines in a new development area and it will only have to forfeit one in 6 poker machine entitlements (rather than one in 3) when it acquires entitlements to meet its threshold). The new Division also restates the existing provision relating to gaming machines in retail shopping centres. Under the new provision, the gaming machine threshold for a venue in a shopping centre cannot be increased, and if a venue is established in a shopping centre its threshold will be zero.

The amendments made by **Schedule 1 [2], [9], [20], [31] and [56]** are consequential on the introduction of the new gaming machine threshold scheme. **Schedule 1 [8], [57] and [58]** are consequential on the provisions about retail shopping centres being moved to the new Division 1 of Part 4.

Amendments relating to tradeable poker machine entitlement scheme

Schedule 1 [14] reduces the overall State cap on the number of gaming machines from 104,000 to 99,000 (the new cap will refer to the number of poker machine entitlements instead of actual machines). Provision is also made to further reduce the State cap by regulation, as the number of poker machine entitlements will be progressively reduced as a result of entitlements being forfeited when venues trade them.

Schedule 1 [16] makes it clear that the scheme for allocating (or acquiring) poker machine entitlements is subject to the overall State cap and that a gaming machine cannot be kept in a venue unless it is authorised to be kept in the venue.

Schedule 1 [18] repeals a transitional provision relating to the reduction of poker machine entitlements held by certain clubs. The clubs have paid to retain these entitlements (which they would have otherwise been required to forfeit) and the gaming machines to which the retained entitlements related have been removed from the relevant premises under the existing provision.

Schedule 1 [19], [22], [23], [27], [30] and [32]–[37] make miscellaneous changes to the way in which the tradeable poker machine entitlement scheme operates.

Schedule 1 [21] removes the provision for the allocation of “free” poker machine entitlements to certain clubs (such as small or new clubs).

Schedule 1 [24] and [25] have the effect of repealing the amendments made to section 19 of the principal Act by the *Gaming Machines Amendment (Temporary Freeze) Act 2008*.

Schedule 1 [26] makes it clear that the gaming machine threshold for a venue is to be decreased when the venue transfers any of its poker machine entitlements (including those which are required to be forfeited as a result of a transfer).

Schedule 1 [38], [40] and [41] modify the scheme relating to the approval to keep hardship gaming machines. In particular, if a venue is notified by the Authority that it has met all of the conditions relating to the approval to keep a hardship gaming machine, the venue will have 12 months to acquire a poker machine entitlement for the machine.

Amendments relating to maximum number of machines in clubs

Schedule 1 [15] removes the limit on the maximum number of gaming machines that may be kept on the premises of a registered club (the current limit is 450 gaming machines). As a consequence of the removal of the cap, provisions relating to large-scale clubs (ie those clubs that had more than 450 gaming machines when the cap was set in 2002), are also removed.

Amendments relating to gambling harm minimisation measures

Schedule 1 [46] enables the Director of Liquor and Gaming to require venues to move or screen gaming machines if they are located in a manner that is designed to attract the attention of the public from outside the venue.

Schedule 1 [47] makes it clear that the requirement for a venue to provide problem gambling counselling services only applies if the venue is authorised to keep gaming machines.

Schedule 1 [48] requires a venue to provide an inspector with written evidence of the arrangements that the venue is required to enter into for the provision of problem gambling counselling services.

Schedule 1 [50] provides that if a prize won from playing gaming machines is issued as a cheque, the prize winning cheque must be identified as a prize winning cheque and must include the statement prescribed by the regulations for the purposes of proposed section 47B.

Schedule 1 [50] also makes it an offence for a hotelier or club to permit a cash dispensing facility (such as an ATM) to be located or installed in the venue if the facility provides cash from a credit card account.

Schedule 1 [51] and [52] provide that venues can operate their own self-exclusion schemes for patrons if the scheme is established and conducted in accordance with the regulations.

Amendments relating to gaming-related licences and licensees

Schedule 1 [11], [53], [66], [71], [72], [87], [88] and [102] modify references relating to the holder of a technician's licence in the principal Act (the term *technician* will refer to the holder of a technician's licence instead of the latter term being used throughout the Act).

Schedule 1 [89] removes the requirement that a person must be licensed to act as a gaming machine adviser (ie a person who gives advice, or issues analyses and reports, about poker machines). As a consequence, **Schedule 1 [3], [5], [79], [81], [82], [84], [85], [90] and [99]** amend provisions relating to gaming machine advisers' licences, and **Schedule 1 [80]** provides that the authority conferred by a dealer's licence will no longer include acting as a gaming machine adviser. The amendment made by **Schedule 1 [80]** also makes it clear that a dealer's licence is to specify the premises (rather than places) on which the dealer is authorised to manufacture and assemble gaming machines.

Schedule 1 [91] provides that conditions may be imposed by the Authority on a work permit either when the permit is issued or at any later time.

Schedule 1 [92] modifies the information relating to interested persons that must be disclosed by an applicant for a gaming-related licence.

Schedule 1 [93] provides that the costs of investigation by the Director or the Commissioner of Police in relation to an application for a gaming-related licence are payable by the applicant. A similar provision was included in the principal Act before the Act was amended to replace the Licensing Court with the Authority as the body responsible for granting gaming-related licences.

Schedule 1 [94] enables the holder of testing facility licence to apply to change the premises specified in the licence.

Schedule 1 [95] removes a provision that allows the Authority to prevent dealers, when manufacturing poker machines, from using parts that are not made in Australia.

Schedule 1 [96] provides that persons acting under the authority of a dealer's licence may be required by the Authority to alter gaming machines in venues.

Schedule 1 [97] removes a provision enabling an application to be made for a refund of a licence fee when the licence is surrendered. The Authority already has a discretion under section 111 of the principal Act to refund a licence fee when the licence is surrendered or cancelled.

Schedule 1 [98] increases the penalty for certain offences under section 122 of the principal Act (which relate to the provision of financial assistance by gaming-related licensees) from 20 to 50 penalty units.

Schedule 1 [100] provides that the notification required to be given to the Authority by technicians or sellers when they commence (or cease) work with a dealer must be given in the manner approved by the Authority.

Miscellaneous amendments

Schedule 1 [1] replaces the objects of the principal Act. The new objects refer specifically to the on-going reduction of poker machine numbers (which is achieved through the tradeable poker machine entitlement scheme).

Schedule 1 [7] removes an obsolete provision in the definition of *new hotel*.

Schedule 1 [10] modifies the definition of *subsidiary equipment* so that it refers specifically to things that affect the playing of a gaming machine or the meters of a gaming machine.

Schedule 1 [12] requires the Authority to be notified when poker machines are kept or operated for non-gambling purposes and **Schedule 1 [13]** allows gaming machines to be operated at trade shows provided they are not used for gambling purposes.

Schedule 1 [42] is consequential on other amendments made by the proposed Act in relation to the various gaming machine entitlements that may be held by venues.

Schedule 1 [43] enables Liquor Act poker machine permits (which were issued under section 182C of the *Liquor Act 1982* before the principal Act commenced) to be retained for a limited period following the cancellation or surrender of the relevant hotel licence.

Schedule 1 [45] makes it clear that the offence of publishing gaming machine advertising does not apply if the advertising material consists of internal promotional material that has been removed from the venue concerned by a patron for their own personal use.

Schedule 1 [54] enables the Authority to cancel the authorisation of a venue to keep gaming machines if the venue has failed to comply with any conditions of the Authority's approval of a LIA under proposed Division 1 of Part 4 (as inserted by Schedule 1 [44]).

Schedule 1 [55], [62] and [75] provide that certain functions of the Director of Liquor and Gaming in relation to gaming machines are to be exercised instead by the Authority.

Schedule 1 [59]–[61] modify provisions relating to the limit on the number of multi-terminal gaming machines that may be kept by a registered club. In particular, a club will be given 5 years to reduce its number of MTGMs to 15% of its number of poker machine entitlements.

Schedule 1 [63] extends the existing offence of possessing a gaming machine that has not been approved so that it also applies to the supply, sale or installation of an unapproved gaming machine. **Schedule 1 [64]** provides that the offence of possessing an unapproved gaming machine does not apply in relation to a gaming machine that is kept on a trial basis under section 66 of the principal Act.

Schedule 1 [65] makes it clear that the offence of supplying an unapproved gaming machine component extends to the sale of the unapproved component.

Schedule 1 [67], [68], [70], [73], [74] and [86] modify existing offence provisions relating to gaming machines.

Schedule 1 [69] creates new offences relating to work carried out by technicians.

Schedule 1 [76] creates a new offence of falsely claiming a prize from the playing of a gaming machine.

Schedule 1 [77] consolidates existing offences relating to a person fraudulently gaining an advantage during the design, manufacture, assembly, maintenance or repair of a gaming machine.

Schedule 1 [101] makes it clear that a gaming machine is connected to an authorized CMS for the purposes of Part 9 of the principal Act if information in respect of the gaming machine is provided to the authorised CMS in accordance with arrangements approved by the Minister.

Schedule 1 [103] creates a new offence of permitting a gaming machine that is part of a linked gaming system to operate in stand alone mode when the linked gaming system is not operating. The offence will not apply in such circumstances as may be approved by the Minister. If the gaming machine itself ceases to operate as part of the linked gaming system, it will also be an offence to permit the gaming machine to be used for the purposes of gambling during that time.

Schedule 1 [104] requires technicians to ensure that all the components of an authorised linked gaming system (including the actual gaming machines) are properly connected to the system after the technician does any work on the system in a venue.

Schedule 1 [105]–[107] specify additional matters in respect of which an allegation in any proceedings is taken to have been proved.

Schedule 1 [108] re-establishes the Community Development Fund. The Fund is currently established under section 15B of the principal Act, but will have other sources of money paid into it as a consequence of the proposed Act.

Schedule 1 [109] enables the Minister to give directions to the Authority in relation to certain functions of the Authority.

Schedule 1 [110] enables information acquired under the principal Act to be disclosed to the NSW Police Force or the police force of any other Australian jurisdiction.

Schedule 1 [111], [112] and [114] enable regulations to be made with respect to the operation of temporary self-exclusion schemes for hotel and club patrons, the operation of authorised linked gaming systems and the allocation and transfer of poker machine entitlements.

Schedule 1 [116] includes savings and transitional provisions as a consequence of the proposed Act. In particular, special provision is made in respect of existing SIA thresholds and pending SIA applications that have been provided before the commencement of the proposed Act.

Issues Considered by the Committee

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

Issue: Strict Liability

25. Numerous clauses¹ in the Bill provide for strict liability offences or are silent on knowledge or intention. The imposition of strict liability may give rise to concern as the Authority is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

26. **The Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.**²

27. **The Committee is of the view that the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, with no terms of imprisonment imposed as a penalty. Accordingly, the Committee considers that the strict liability offences do not trespass unduly on individual rights and liberties.**

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

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

28. The Committee notes that the proposed Act³ is to commence on a day or days to be appointed by proclamation. This may delegate to the government the power to

¹ Clauses such as in Schedule 1 [46]: proposed section 44A (2) – Location of gaming machines in venues – {notice to comply}; Schedule 1 [48]: proposed section 46 (3) – a hotelier or registered club must provide an inspector with written evidence of the arrangements entered into by the hotelier or club if requested by an inspector; Schedule 1 [50]: proposed section 47B – Requirements relating to prize winning cheques; proposed section 47C – Prohibition on certain cash dispensing facilities; Schedule 1 [52]: proposed section 49 (3) – {regarding self-exclusion schemes}; Schedule 1 [69]: proposed section 76B – Hoteliers and registered clubs to record work done by technicians; Schedule 1 [74]: proposed section 79 – Consignment or movement of gaming machines; Schedule 1 [100]: proposed section 124 – Notification of change of employer; Schedule 1 [104]: proposed section 158A – Technicians required to reconnect to authorised linked gaming system.

² Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

³ Except as provided by subsection (2): Schedule 1 [18], and Schedule 1 [116] to the extent that it inserts clause 44 into Schedule 1 to the *Gaming Machines Act 2001*, commence (or are taken to have commenced) on 1 December 2008.

commence the Act on whatever day it chooses or not at all. While there may be good reasons why such discretion is required, the Committee considers that, in some circumstances, this may give rise to an inappropriate delegation of legislative power.

29. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill⁴ commencing by proclamation rather than on assent, is an inappropriate delegation of legislative power.

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

Issue: Enabling the issuing of guidelines or directions influencing the exercise of powers without any obligation for them to be tabled in Parliament or subject to disallowance (insufficiently defined administrative powers) - Schedule 1 [109] – proposed section 205 Additional functions of Authority:

30. The proposed section 205 reads: (1) The Minister may, after consultation with the Authority [Casino, Liquor and Gaming Control Authority], give directions and furnish guidelines to the Authority in relation to the following: (a) hardship gaming machines, (b) classifying local government areas for the purposes of Division 1 of Part 4, (c) approving local impact assessments under Division 1 of Part 4, (d) determining whether an area of land is a new development area for the purposes of section 37A, (e) declaring poker machines or devices as approved gaming machines under Division 2 of Part 5.

31. The Committee notes the broad scope of additional functions, which the Minister may give directions and guidelines to the Authority on how to exercise its functions and would not be disallowable by Parliament. Therefore, the Committee considers that the proposed section 205 may be a delegation of legislative power that is insufficiently subject to parliamentary scrutiny, and refers this to Parliament.

The Committee makes no further comment on this Bill.

⁴ Except as provided by subsection (2): Schedule 1 [18], and Schedule 1 [116] to the extent that it inserts clause 44 into Schedule 1 to the *Gaming Machines Act 2001*, commence (or are taken to have commenced) on 1 December 2008.

3. GRAFFITI CONTROL BILL 2008

Date Introduced:	31 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon John Hatzistergos MLC
Portfolio:	Attorney General

Purpose and Description

1. The purpose of this Bill is to consolidate existing graffiti laws into a specific Act dealing with graffiti. This includes a number of provisions currently in the *Summary Offences Act 1988* dealing with graffiti related offences and spray paint. On the enactment of the new Act these provisions are repealed. The Bill replicates the scheme set out in section 67A – 67C of the *Local Government Act 1993* for the carrying out of graffiti removal work by local councils and it enables penalty notices to be issued for offences relating to the sale or display of spray paint cans.
2. Under clause 4 it is an offence to intentionally damage or deface any premises or other property by means of a graffiti implement. *Graffiti implement* is defined to mean spray paint, a marker pen, or any implement designed or modified to produce a mark that is not readily removable by wiping or by use of water or detergent. The maximum penalty for this offence is 20 penalty units (\$2200) or imprisonment for six months. Under this provision where a court convicts a person of an offence the court must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this clause or clause 5 on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.
3. Under clause 5 a person must not have any graffiti implement in the person's possession with the intention that it be used to damage or deface premises or other property. This offence carries a maximum penalty of 10 penalty units (\$1100) or imprisonment for three months. This provision contains the same restriction as clause 4 on the sentencing by a court of a person to imprisonment. If a person is convicted of an offence under this clause, the court may, in addition to any other penalty it may impose, make an order that the graffiti implement be forfeited to the Crown.
4. Under the new Act a person who sells a spray paint can to a person under the age of 18 years is guilty of an offence that carries a maximum penalty of 10 penalty units (\$1100). Under clause 7, it is a defence to a prosecution for an offence under this provision that the person selling the spray paint can believed on reasonable grounds that the person to whom the spray can was sold was of or above the age of 18 years. The burden of proof of this defence lies on the person who sold the spray paint can. Under this clause if an employee contravenes the provision the employer is taken to have contravened the same provision whether or not the employee contravened the provision without the employer's authority or contrary to the employer's orders or instructions. It is a defence to a prosecution against an employer if it is proved that

the employer had no knowledge of the contravention and that the employer could not by the exercise of due diligence, have prevented the contravention.

5. Under the new Act it will be an offence, carrying a maximum penalty of ten penalty units (\$1100), for a retailer not to properly secure paint cans that are displayed in shops. This provision is the same as section 10E of the *Summary Offences Act 1998*.
6. Under clause 9 a police officer will be able to confiscate a spray paint can in the possession of a minor in a public place, unless the possession is for a lawful purpose. The police officer must have reasonable grounds to suspect the person is under the age of 18 years.
7. Part 4 of the Bill deals with graffiti removal work by local councils. Clause 11 authorises a local council to enter into an agreement with the owner or occupier of private land for the council to carry out graffiti removal work on that land. However a local council can carry out graffiti removal work on private land without the consent of the owner or occupier providing the work is carried out from a public place. This relates to circumstances where the graffiti is visible from the public place. In this case the Council bears the cost of the work and must pay compensation for any damage caused in carrying out the work.

Background

8. The Parliamentary Secretary in his Agreement in Principle speech in the Legislative Assembly, on behalf of the Hon David Campbell MP, said that the Bill was an important initiative in the fight against graffiti and graffiti vandals in New South Wales. He said that for the first time New South Wales would have one act covering every aspect of graffiti law ranging from graffiti offences through to the regulation of the possession and sale of spray paint. He said that the Bill extended the reach of graffiti offences to cover more than just those offences that involve the use of spray paint.
9. Graffiti is often done with a variety of different tools and the inclusion of a new offence of the possession of graffiti implements will capture the inappropriate use of these tools, he said. The Parliamentary Secretary said that the Bill provides new powers to ensure that laws regulating the sale and display of spray paint are enforced. For the first time, he said, police and other authorised officers will be given the power to issue penalty notices to retailers for breaching provisions concerning the sale and display of spray paint. The Parliamentary Secretary referred to clause 14 of the Bill that provides for a general defence of lawful authority. Under this provision, he said, a person can defend himself or herself against any of the criminal provisions of the Act if he or she can satisfy a court that he or she committed an offence with lawful authority. He said that this defence is identical to that available for all offences in the *Summary Offences Act 1988*.

The Bill

Outline of provisions

Part 1 Preliminary

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

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

Clause 3 defines certain words and expressions used in the proposed Act. Most of the defined terms are taken from the *Summary Offences Act 1988*. The new definition of graffiti implement covers not only spray paint, but also marker pens and other implements (such as etching implements) designed or modified to produce a mark that is not readily removable.

Part 2 Graffiti related offences

Clause 4 makes it an offence to intentionally damage or deface any premises or other property by means of a graffiti implement. The new offence is based on section 10A of the *Summary Offences Act 1988*, which is limited to damage or defacing by means of spray paint only. The maximum penalty remains the same (20 penalty units or imprisonment for 6 months).

Clause 5 makes it an offence to possess a graffiti implement with the intention that it be used to damage or deface property. The new offence is based on section 10B of the *Summary Offences Act 1988* which is limited to possession of spray paint only. The maximum penalty remains the same (10 penalty units or imprisonment for 3 months).

Clause 6 replicates the offence under section 9 of the *Summary Offences Act 1988* of putting up posters on premises, or intentionally marking premises with chalk or other material, without the consent of the occupier and so that the poster or marking can be seen from a public place. The maximum penalty remains the same (4 penalty units).

Part 3 Sale and confiscation of spray paint cans

Clause 7 makes it an offence to sell a spray paint can to a person under the age of 18 years. The new offence replicates section 10C of the *Summary Offences Act 1988* (including the maximum penalty of 10 penalty units).

Clause 8 makes it an offence for retailers not to properly secure spray paint cans that are displayed in shops. The new offence replicates section 10D of the *Summary Offences Act 1988* (including the maximum penalty of 10 penalty units).

Clause 9 authorises police officers to confiscate spray paint cans in the possession of minors in public places (unless the possession is for a purpose that is not unlawful). The new provision replicates section 10E of the *Summary Offences Act 1988*.

Part 4 Graffiti removal work by local councils

Clause 10 provides that certain expressions in the proposed Part have the same meanings as in the *Local Government Act 1993*.

Clause 11 provides that a local council may, by agreement with the owner or occupier of any private land, carry out graffiti removal work on the land.

Clause 12 enables a local council, without the agreement of the owner or occupier of any land, to carry out graffiti removal work on the land if the graffiti concerned is visible from a public place. Any such work may only be carried out from a public place and the local council is to bear the cost of the work and pay compensation for any damage caused in carrying out the work.

Clause 13 requires a local council to keep a register of the graffiti removal work it carries out in accordance with the proposed Part.

Part 5 Miscellaneous

Clause 14 provides that it is a defence to a prosecution for an offence under the proposed Act if the act concerned was done with lawful authority.

Clause 15 enables a court to order a person to perform community service work as an alternative to fining or imprisoning the person for a graffiti-related offence under proposed section 4 or 5.

Clause 16 enables penalty notices to be issued for the offences under the proposed Act relating to the sale of spray paint cans to minors and the display of spray paint cans by retailers.

Clause 17 replicates section 13 of the *Summary Offences Act 1988* which provides for a charge to be adjourned or dismissed by a court if particulars relating to the offence concerned are not provided to the defendant.

Clause 18 enables a court to require a person who is convicted of an offence under the proposed Act to pay for the cost of repairing any damage caused by the act constituting the offence.

Clause 19 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 20 provides that proceedings for offences under the proposed Act may be dealt with summarily before the Local Court.

Clause 21 is a formal provision that gives effect to the savings, transitional and other provisions set out in Schedule 1.

Clause 22 is a formal provision that gives effect to the amendments to the legislation set out in Schedule 2.

Clause 23 provides for the review of the proposed Act in 3 years.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. In particular, provision is made for the continuation of anything done by a local council under the existing graffiti removal scheme under the *Local Government Act 1993*.

Schedule 2 Amendment of other legislation

Schedule 2.1 repeals the offence contained in the *Crown Lands (General Reserves) By-law 2006* of defacing Crown reserves with graffiti.

Schedule 2.2 provides that penalty notices issued under the proposed Act are penalty notices for the purposes of the *Fines Act 1996* and may be enforced in accordance with that Act.

Schedule 2.3 amends the *Local Government Act 1993* to repeal provisions relating to graffiti removal work carried out by local councils and to make consequential amendments.

Schedule 2.4 modifies the offence provision under the *Rail Safety (General) Regulation 2003* relating to graffiti and vandalism so that it no longer refers to the defacing of property. However, an authorised officer will be able to direct a person who is damaging or defacing property by means of a graffiti implement on a train or railway land to leave the train or land.

Schedule 2.5 amends the *Summary Offences Act 1988* to repeal, as a consequence of the proposed Act, provisions relating to graffiti and spray paint cans.

Issues Considered by the Committee

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

Issue: Imprisonment of juveniles- Part 2 sections 4 and 5 - Graffiti related offences

10. The Committee notes that both sections 4 and 5 provide for graffiti related offences carrying a monetary penalty or a penalty of imprisonment. In the case of proposed

section 4 the maximum penalty for intentionally damaging or defacing any premises is 20 penalty units (\$2200) or imprisonment for six months. In the case of proposed section 5, the maximum penalty is 10 penalty units (\$1100) or imprisonment for three months for possession of a graffiti implement with the intention to damage or deface property. These provisions are based, respectively, on sections 10A and 10B of the *Summary Offences Act 1988*.

11. These provisions are not strict liability offences, as they require the element of intention in regard to the commission of the offence. The Committee's concern with these provisions arises from the appropriateness or otherwise of having a penalty of imprisonment in circumstances where the offenders will be predominantly juveniles. The Committee notes, however, that under both provisions the court must not sentence the person to imprisonment unless the person has previously been convicted under either of these provisions on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again. The Committee also notes that the court, under proposed section 15, may make an order requiring the person to perform community service work instead of imposing a fine or sentencing the person to imprisonment.

- 12. The Committee considers that the monetary penalties are sufficiently moderate, and that adequate safeguards against excessive punishment apply in regard to the sentencing provisions. The provisions are also supported by the social objectives of the legislation. The Committee accordingly considers that these provisions do not trespass unduly on personal rights and liberties.**

Issue: Strict liability – Part 3 proposed section 7 – Sale of paint cans to persons under 18

13. Under this provision, a person commits an offence if they sell a spray paint can to a person under 18 years. This proposed section is one of strict liability carrying a maximum penalty of 10 penalty units (\$1100). Under section 7(2) it is a defence (proof of which lies on the person selling the spray paint can) to a prosecution for an offence under this section that the person selling the spray paint can believed on reasonable grounds that the person to whom the spray paint can was sold was of or above the age of 18 years. This section also makes an employer vicariously liable for the contravention by the employee. Under section 7(3), the employer is taken to have contravened the provision. even if the employee acted without the employer's authority or contrary to the employer's orders or instructions.

- 14. The Committee notes that the defence in section 7(4) mitigates this strict liability provision. Under that provision, it is a defence to a prosecution against the employer if it is proved that the employer had no knowledge of the contravention and that the employer could not, by the exercise of due diligence, have prevented the contravention. This proposed section, therefore, whilst not requiring the prosecution to prove mens rea allows the employee or employer to raise specific defences by way of exculpation. These safeguards address, in the Committee's opinion, concerns that might otherwise exist about the fairness of the proposed strict liability provision.**

Issue: Strict liability – Part 3 proposed section 8 – Unsecured display by retailers of spray paint cans

15. Proposed section 8 is a strict liability provision requiring retailers of spray paint cans to properly secure the cans in the shop by means of a locked cabinet or within or behind a counter in such a manner that the public are not able to gain access without the assistance of the occupier or employee. The maximum penalty for breach of this provision is 10 penalty units (\$1100). The Committee regards this provision as reasonable and notes that the operation of it is to be reviewed by the Minister after a period of 12 months from its commencement.

Issue: Confiscation of property- Part 3 proposed section 9 - Confiscation of spray paint cans from minors

16. Under this provision a police officer may seize a spray paint can in the possession of a person in a public place if the officer suspects on reasonable grounds that the person is under the age of 18 years, unless the person satisfies the officer that the person has a spray paint can in his or her possession for a purpose that is not unlawful. The spray paint can seized is forfeited to the crown. Regulations may provide for the procedure to be followed regarding the seizure of spray paint cans and the procedure to be followed in circumstances in which spray paint cans seized are to be returned, including the jurisdiction of a court to order their return. The section contains a definition of a *public place*.

17. The provisions regarding seizure of property are confined by the requirement that a police officer must have reasonable grounds before acting. Regulatory provisions must also set out details of the procedure to be followed for the seizure of spray paint cans and their return. These provisions will be reviewable by Parliament. The Committee is satisfied that these provisions do not trespass unduly on personal rights and liberties.

Issue: Trespass on private property – Part 4 Proposed section 12 - graffiti removal work - without the agreement of the owner of land

18. Proposed section 12 authorises a local council, without the agreement of the owner or occupy of any land, to carry out graffiti removal work on private land. The Committee notes that the exercise of council's powers are restricted by the requirement that the work be carried out only from a public place and that the local council is to bear the costs, including the costs of compensation, for any damage caused. The Committee also notes that there is available under section 730 of the Local Government Act 1993, a procedure for the resolution of claims for compensation relating to damage in cases of dispute between the person claiming the compensation and the local council. The Committee is satisfied that these provisions provide adequate safeguards relating to the exercise of a council's powers and that the provisions do not trespass unduly on personal rights and liberties.

Issue: Strict liability - Schedule 2.4 - Proposed amendment of clause 36 of the Rail Safety General Regulation 2003 - vandalism and fixing posters

19. Under this provision, a person must not affix any poster to, or destroy or damage any train, any part of the infrastructure of a railway or any property on railway land or monorail works. This is a strict liability offence carrying a maximum penalty of 20 penalty units (\$2200).

20. The Committee considers that the maximum monetary penalty for this offence is not excessive, and has been set at an appropriate and justifiable level having regard to the legislative objective of the provision. Under the general defence provisions of proposed clause 14 the offender would be entitled to raise exonerating circumstances if he or she considered that the offence was done with lawful authority. The Committee is of the opinion that this strict liability provision does not trespass unduly on personal rights and liberties.

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

Issue: Clause 2 - Commencement by proclamation

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

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

The Committee makes no further comment on this Bill.

4. RACING ADMINISTRATION AMENDMENT BILL 2008

Date Introduced:	29 October 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Kevin Greene
Portfolio:	Minister for Gaming and Racing

Purpose and Description

1. The purpose of this Bill is to amend the *Racing Administration Act 1998* (the Principal Act) in response to the recent court cases of *Betfair Pty Limited v Western Australia [2008] HCA 11 (the Betfair case)* and *Tom and Bill Waterhouse Pty Ltd v Racing New South Wales [2008] NSWSC 1013 (the Waterhouse Case)*.
2. The Principal Act is to be amended so that certain provisions relating to the publication of betting information and advertising of betting information and betting services apply equally to wagering operations licensed in New South Wales and those licensed in other States and Territories. This change is made in response to the Betfair case which found that certain laws of Western Australia were invalid as contrary to section 92 of the Commonwealth Constitution. A further important change is the proposed inclusion in section 27 of a new definition of *licensed wagering operator*, which is defined to mean a wagering operator that holds a license or authority under the legislation of this or any other State or Territory to carry out its wagering operations.
3. Section 29(1) of the Principal Act makes it an offence to publish any betting information as defined in section 27. Schedule 1[5] substitutes section 29 (2) and provides instead that the offence in section 29(1) does not operate to prohibit the publication of betting information relating to a licensed wagering operator or betting information relating to a wagering operator prescribed by the regulations. This amendment has also been made in response to the Betfair case.
4. The Bill also contains a number of amendments consequent upon the Waterhouse case. The effect of this decision was that a bookmaker who accepted a bid on a horse or greyhound in a NSW race (without doing anything further such as putting up the list of horses or greyhound's racing) would not be required to obtain authorisation under section 33. The amendments arising from this case include an amendment to section 33 to make it an offence for any person to publish, whether in New South Wales or elsewhere, a NSW race field unless the person is authorised by a race field publication approval or is authorised under the Regulations. The section is to apply to information about an individual horse or greyhound in a race rather than the whole field.
5. New section 32A defines "use NSW race field information". In summary, a person uses NSW race field information, if the person, whether in Australia or elsewhere, publishes any NSW race field information, or communicates any NSW race field

information to a person, or acknowledges or confirms any NSW race field information communicated to the person, or makes a written or electronic record that contains or refers to any NSW race field information, or uses any NSW race field information in a manner prescribed by the regulations, or causes any of these activities to occur.

Background

6. The Minister in his Agreement in Principle speech said this Bill has two main purposes. It amends the provisions in the *Racing Administration Act 1998* relating to the publication of betting information and the advertising of betting services to remove doubts over their validity under the Australian Constitution and that it also clarifies certain provisions in the Act relating to the publication and use of race fields in New South Wales.
7. On 27 March 2008, the High Court handed down its decision in the *Betfair* case and held that certain laws of Western Australia were invalid as they were contrary to section 92 of the Commonwealth Constitution. Section 92 requires trade, commerce and intercourse among the States to be absolutely free. The effect of the decision is that State laws must not operate to discriminate against wagering operators who are licensed in other States or Territories of Australia in order to protect wagering operators licensed in New South Wales.
8. The Minister in his Agreement in Principle speech says that following on from the High Court judgment that the prohibitions in sections 29 and 30 of the *Racing Administration Act* have been challenged in the Federal Court. The Minister said that the Government had hoped to make changes at the conclusion of the review that it had commissioned by Mr. Alan Cameron, AM into wagering in New South Wales. That review is intended to provide a framework for the future growth and sustainability of the racing industry. The Minister said that laws relating to the publication of betting information and the advertising of wagering services were specifically identified for examination as part of that review, which is expected to report in the near future. However, the Federal Court challenge had prompted a more immediate response to ensure sections 29 and 30 were valid.

The Bill

Overview of Bill

The object of this Bill is to amend the *Racing Administration Act 1998* (the Principal Act) as follows in response to the recent court cases of *Betfair Pty Limited v Western Australia [2008] HCA 11* (the *Betfair Case*) and *Tom & Bill Waterhouse Pty Ltd v Racing New South Wales [2008] NSWSC 1013* (the *Waterhouse Case*):

- (a) to provide that certain provisions in the Principal Act relating to the publication and advertising of betting information and betting services apply equally to wagering operators licensed in New South Wales and those licensed in other States and Territories,
- (b) to amend the provisions of the Principal Act that prohibit the publication of NSW race field information by any person without authorisation to provide that:
 - (i) specified listed uses of that information (not just publication of that information as at present) will be prohibited without authorisation, and

- (ii) those provisions will apply only to wagering operators and persons (or persons belonging to a class of persons) prescribed by the regulations under the Principal Act, and
 - (iii) those provisions extend to using information about an individual horse or greyhound in a race (or scratched from a race),
- (c) to make other miscellaneous amendments.

The Bill also makes consequential amendments to the *Racing Administration Regulation 2005* (the Principal Regulation).

Outline of provisions

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

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

Clause 3 is a formal provision that gives effect to the amendments to the Racing Administration Act 1998 set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the Racing Administration Regulation 2005 set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after the proposed Act commences. Once the amendments contained in the proposed Act have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Racing Administration Act 1998 Amendments in response to the Betfair Case

On 27 March 2008, the High Court handed down its decision in the Betfair Case and held that certain laws of Western Australia were invalid as they were contrary to section 92 of the Commonwealth Constitution. Section 92 requires trade, commerce and intercourse among the States to be absolutely free. The effect of the decision is that State laws must not operate to discriminate against wagering operators (bookmakers and operators of totalizators and betting exchanges) who are licensed in other States or Territories of Australia in order to protect wagering operators licensed in this State. The following amendments are proposed in response to that court decision. In summary, the Principal Act is to be amended so that certain provisions relating to the publication of betting information and advertising of betting information and betting services apply equally to wagering operators licensed in New South Wales and those licensed in other States and Territories.

Schedule 1 [1] inserts a number of new definitions into section 27 of the Principal Act for the purposes of Part 4 of that Act (Betting information and advertising).

Among the new definitions is ***licensed wagering operator*** which is defined to mean a wagering operator that holds a licence or authority (however described) under the legislation of this or any other State or Territory to carry out its wagering operations (whether in that State or Territory or elsewhere).

Section 29 (1) of the Principal Act makes it an offence to publish any betting information (as defined in section 27). Section 29 (2) contains certain limited exclusions from the offence.

Schedule 1 [5] substitutes section 29 (2) and provides instead that the offence in section 29 (1) does not operate to prohibit the publication of:

- (a) betting information relating to a licensed wagering operator, or
- (b) betting information (of the kind prescribed by the regulations) relating to a wagering operator (other than a licensed wagering operator) prescribed by the regulations.

Section 30 (1) of the Principal Act makes it an offence to publish certain advertisements relating to betting information or betting services. Section 30 (2) contains certain limited exclusions from the offence. Schedule 1 [6] substitutes section 30 (2) and provides instead that the offence in section 30 (1) does not operate to prohibit the publication of an advertisement relating to a licensed wagering operator. However, it is made clear that section 30 does not limit the operation of any regulations relating to responsible practices in the conduct of betting, including regulations restricting or prohibiting the conduct of promotions or other activities (including advertising).

Schedule 1 [4] and [7]–[9] make consequential amendments.

Amendments in response to the Waterhouse Case

Currently, section 33 of the Principal Act makes it an offence for any person to publish, whether in New South Wales or elsewhere, a NSW race field unless the person:

- (a) is authorised to do so by a race field publication approval and complies with the conditions (if any) to which the approval is subject, or
- (b) is authorised to do so by or under the regulations under the Principal Act.

On 29 September 2008, the Supreme Court held in the Waterhouse Case (among other things) that:

- (a) “publish” in section 33 means publish to the world at large (not one-on-one communication, such as when placing a bet with a bookmaker), and
- (b) a “NSW race field” in that section means the complete list of all greyhounds or horses in a race (or all scratchings).

The effect of the decision was that a bookmaker who accepted a bet on a horse or greyhound in a NSW race (without doing anything further such as putting up the list of horses or greyhounds racing) would not be required to obtain authorisation under section 33.

The following amendments are made in response to that decision. In summary, the Principal Act is to be amended so that:

- (a) section 33 is to apply only to wagering operators and persons (or persons belonging to a class of persons) prescribed by the regulations under the Principal Act, and
- (b) only specified listed uses will be prohibited by the section, and
- (c) the section is to apply to information about an individual horse or greyhound in a race (or scratched from a race) rather than the whole field (or all the scratchings).

Schedule 1 [11] omits section 33 of the Principal Act and replaces it with proposed section 32A and proposed new section 33.

Proposed section 32A provides that in Division 3 of Part 4 of the Principal Act, a person **uses NSW race field information** only if the person, whether in Australia or elsewhere:

- (a) publishes any NSW race field information, or
- (b) communicates any NSW race field information to a person (regardless of whether the person already knew the information), or
- (c) acknowledges or confirms any NSW race field information communicated to the person (including acknowledging or confirming the information by accepting, or facilitating the making of, a bet), or
- (d) makes a written or electronic record (such as a betting ticket, statement of account or notice) that contains or refers to any NSW race field information (regardless of whether the record is communicated to any person), or
- (e) uses any NSW race field information in a manner prescribed by the regulations, or

(f) causes any of the activities referred to in paragraphs (a)–(e) to occur.

Proposed new section 33 makes it an offence for a wagering operator or prescribed person to use NSW race field information unless the wagering operator or person:

- (a) is authorised to do so by a race field information use approval and complies with the conditions (if any) to which the approval is subject, or
- (b) is authorised to do so by or under the regulations under the Principal Act.

It will be a defence to a prosecution for the new offence if a wagering operator proves that the use of NSW race field information:

- (a) did not occur in connection with the making or accepting of a bet (or the offer to make or accept a bet), and
- (b) did not occur in the course of the business of the wagering operator.

Schedule 1 [2] replaces the definition of NSW race field in section 27 of the Principal Act with a definition of NSW race field information. The new term is defined to mean information that identifies, or is capable of identifying, the name or number of a horse or greyhound:

- (a) as a horse or greyhound that has been nominated for, or otherwise taking part in, an intended race to be held at any race meeting on a licensed racecourse in New South Wales, or
- (b) as a horse or greyhound that has been scratched or withdrawn from an intended race to be held at any race meeting on a licensed racecourse in New South Wales.

Schedule 1 [3], [10] and [12]–[15] make consequential amendments.

Miscellaneous amendments

Schedule 1 [16] amends section 36 of the Principal Act to provide that if a written publication or communication (including on the Internet) of NSW race field information refers to a person as being the person by whom or on whose behalf the publication or communication is made, the person so referred to is, in the absence of proof to the contrary, taken to have published or communicated the information.

Schedule 1 [17] and [18] make consequential amendments.

Schedule 1 [19] inserts proposed section 40 into the Principal Act to provide that in proceedings for an offence under section 33 of the Principal Act, certain certificate evidence (relating to race field information use approvals and NSW race field information) is admissible and is prima facie evidence.

Schedule 1 [20] amends Schedule 1 (Savings and transitional provisions) to the Principal Act to enable regulations of a savings or transitional nature consequent on the enactment of the proposed Act to be made.

Schedule 1 [21] inserts a Part into Schedule 1 to the Principal Act to provide that a race field publication approval in force immediately before the commencement of the proposed Act is taken, with all necessary modifications, to be a race field information use approval. Such a race field publication approval that authorises a person to publish a NSW race field in respect of a specified race or class of races is taken to authorise the person to use NSW race field information in respect of that race or class of races.

Schedule 2 Amendment of Racing Administration Regulation 2005

Schedule 2 [1] amends clause 12 of the Principal Regulation to provide that the controls set out in that clause on publishing gambling-related advertising that currently apply only to licensed bookmakers, apply to all licensed wagering operators.

Schedule 2 [2] inserts proposed paragraph (h) into clause 12 (1) of the Principal Regulation to make it an offence for a non-proprietary association or licensed wagering operator (or an employee or agent of a non-proprietary association or licensed wagering operator), to publish any gambling advertising that offers any credit, voucher or reward as an inducement to participate, or to participate frequently, in any gambling activity (including as an inducement to open a betting account). The offence will carry a maximum penalty of 50 penalty units (currently \$5,500).

Schedule 2 [3] makes a consequential amendment. **Schedule 2 [4]–[14]** make amendments to the Principal Regulation consequent on the amendments to the provisions of Division 3 of Part 4 of the Principal Act referred to above.

Schedule 2 [15] makes an amendment to the Principal Regulation consequent on the repeal of section 28 of the Principal Act by Schedule 1 [4] (itself a consequential amendment).

Issues Considered by the Committee

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

Issue: Strict liability - Schedule 1[11] – proposed new section 33

9. This proposed section provides for a strict liability offence. The imposition of strict liability may give rise to concern, as the prosecution is not required to prove that the offender intended to commit the offence and may be seen as contrary to the right to the presumption of innocence. This provision prohibits a wagering operator or prescribed person from using NSW race field information, unless the person is authorised to do so by a race field information use approval and complies with the conditions of that approval or is authorised to do so by or under the regulations. The provision carries a maximum penalty for a first offence, in the case of a person, of 50 penalty units or imprisonment for 12 months, or both and for a second or subsequent offence, 100 penalty units or imprisonment for two years or both. In the case of a corporation the maximum penalty is 500 penalty units.
10. The Committee has repeatedly stated its position that, like the Senate Standing Committee for the Scrutiny of Bills, it considers imprisonment to be an inappropriate penalty for an offence of which a person may be guilty without intending to commit the offence. This position is not affected by the fact that the severity of the proposed provision is mitigated by the existence of the defence contained in proposed section 33(2).

11. The Committee refers for Parliament's consideration the concerns of the Committee that proposed section 33 is a strict liability provision that may subject a person to a term of imprisonment notwithstanding they may not have intended to commit the offence.

Issue: Deemed liability – Schedule 1[16] – amendment of section 33

12. This provision amends section 33 of the Principal Act to provide that if a written publication or communication (including on the Internet) of NSW race field information refers to a person as being the person by whom or on whose behalf the publication or communication is made, the person so referred to is, in the absence of proof to the contrary, taken to have published or communicated the information.

13. Proposed Section 33 is one of deemed liability as it contravenes the presumption of innocence. Such a provision requires substantial justification, because it is significantly prejudicial to a person's defence to a prosecution under proposed section 33 relating to the unauthorised use of a NSW race field. The Committee refers the matter for Parliament's consideration.

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

Issue: Inappropriate delegation of legislative powers – Schedule 1[11] – proposed new section 33

14. Proposed section 33 delegates to the regulations two important matters. The first is the power to prescribe other persons so as to bring those persons within the ambit of proposed section 33. The other regulatory power is to determine those cases, for the purpose of proposed section 33, where use of NSW race field information is permitted.

15. In view of the penalties, including imprisonment, that might be attendant on a breach of section 33 it appears to the Committee that the ambit of this section should more properly be determined by Parliament rather than being left to the Regulations.

The Committee makes no further comment on this Bill.

5. SECURITY INDUSTRY AMENDMENT BILL 2008

Date Introduced: 30 October 2008
House Introduced: Legislative Assembly
Minister Responsible: Hon Tony Kelly MLC
Portfolio: Police

Purpose and Description

1. This Bill amends the *Security Industry Act 1997* to provide for visitor permits and to make further provision with respect to the regulation of persons in the security industry; and for other purposes.
2. The changes proposed through this Bill that will align New South Wales with the national standards agreed to through the Council of Australian Governments (COAG) process are:
 - To provide for visitor permits for the purpose of providing security activities for special events;
 - To exclude the application of section 12 of the *Criminal Records Act 1991* in relation to applications for security licences to allow the Commissioner of Police to take any spent conviction into account in determining whether a person should be granted a licence; and
 - To amend the *Security Industry Regulation 2007* to exclude from obtaining a security licence those persons who have received a fine of \$500 or more, a term of imprisonment, or both, for drug offences under the *Drug Misuse and Trafficking Act 1985* or prescribed restricted substances under the *Poisons and Therapeutic Goods Regulation 2008*.
3. This Bill also aims to provide for an enhanced licensing and training regime for the dog-handling security services. The intention is to ensure that holders of provisional subclass 1D licences under the *Security Industry Act 1997*, that is, trainee dog handlers, have access to competency-based training provided by accredited employers established in the industry. The master licensees authorised to provide such training will need to be able to show that they have strategies to manage a range of factors, including the selection, training and kennelling of dogs to be used, and the use of force guidelines and guidelines determining the situations in which dogs will be deployed. The application process for master licensees will provide some flexibility. For example, firms opting not to use dogs in crowd control situations and only for patrolling would require a less rigorous training regime than would be the case for firms specialising in the use of dogs for crowd control situations.

Background

4. This Bill introduces visitor permits for security licence holders from other States wishing to work on special events in New South Wales.

5. According to the Agreement in Principle speech:

This bill seeks to make three specific amendments to current legislation governing the New South Wales security industry that are designed to align our law with national standards agreed to through the Council of Australian Governments [COAG] process. This will allow us to benefit in future from mutual recognition provisions.

6. With regard to the amendment on spent convictions, the Agreement in Principle speech explained that:

The bill also contains a provision aimed at excluding the application of section 12 of the *Criminal Records Act 1991* in relation to applications for security licences. Security licensees often operate in high-risk, high security environments. The community has a right to expect that these people will be thoroughly vetted during the licensing process. To do this the commissioner should have access to a person's entire criminal history, including spent convictions. Until now, the commissioner has not been afforded this power. Under the *Criminal Records Act 1991* all convictions are capable of becoming spent, except convictions for which a prison sentence of more than six months has been imposed, convictions for sexual offences, convictions imposed against bodies corporate, and convictions prescribed by the regulations...Pursuant to section 8(2) of that Act, a conviction becomes spent if a person is found guilty of an offence without proceeding to a conviction. In cases such as these, the conviction is spent immediately after the finding has been made. This has caused problems in cases when an individual has been found guilty of a particular security industry offence but the magistrate has ruled that the finding should not proceed to a conviction. The individual's conviction is thus immediately considered spent and the commissioner is unable to take the conviction into consideration to revoke the individual's security licence. The individual therefore remains licensed.

The Bill

7. The object of this Bill is to amend the Security Industry Act 1997 (**the Principal Act**):
- (a) to provide for visitor permits to enable persons licensed or authorised in other States or Territories to carry on security activities to carry out security activities for special events in this State, and
 - (b) to exclude the application of section 12 of the *Criminal Records Act 1991* in relation to licence applications to allow the Commissioner to take any spent conviction into account in determining whether a person should be granted a licence, and
 - (c) to require holders of class P1D licences to complete approved training provided by approved master licensees providing dog handling security services.

The Bill also makes related amendments to the *Firearms Act 1996* and the *Security Industry Regulation 2007*.

8. 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.

Clause 3 is a formal provision that gives effect to the amendments to the *Security Industry Act 1997* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Firearms Act 1996* and *Security Industry Regulation 2007* set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of *Security Industry Act 1997*

Schedule 1 [8] inserts proposed Part 3A into the Principal Act to provide that a visitor permit authorises an interstate licensee to carry on security activities specified in the visitor permit during the period of a special event declared by the Commissioner. An interstate licensee must supply evidence that the licensee is authorised or licensed in another State or Territory to carry out the security activities specified in the visitor permit and any additional information required by the Commissioner. The Commissioner may refuse to grant a visitor permit where such evidence or information is not supplied to the Commissioner's satisfaction or if the Commissioner is satisfied that the applicant is not a fit and proper person or that the special event does not require provision of security activities of the kind specified in the application. Proposed section 39F makes it an offence for the holder of a visitor permit to contravene any condition of the visitor permit. **Schedule 1 [1]** inserts a definition of *visitor permit*. **Schedule 1 [2], [3], [6], [7] and [9]** make consequential amendments relating to the creation of visitor permits. **Schedule 1 [10]** inserts a regulation-making power in relation to visitor permits.

Schedule 1 [4] inserts proposed section 14 (6) into the Principal Act to exclude the application of section 12 of the *Criminal Records Act 1991* in relation to applications for licences under the Principal Act to allow the Commissioner to take any spent conviction into account in determining whether a person should be granted a licence.

Schedule 1 [5] inserts proposed section 23D into the Principal Act to require holders of class P1D licences to complete approved training by an approved master licensee providing dog handling security services.

Schedule 1 [11] enables the making of savings and transitional regulations consequential on the enactment of the proposed Act.

Schedule 1 [12] inserts savings and transitional provisions relating to the amendments made by Schedule 1 [4] and [5]. Holders of class P1D licences in force immediately before the commencement of proposed section 23D will be required to complete the relevant approved training within such period as the Commissioner determines. The exclusion of the application of section 12 of the *Criminal Records Act 1991* will not apply to an application for a licence that was not finally determined before the commencement of proposed section 14 (6).

Schedule 2 Other amendments

Schedule 2.1 amends the *Firearms Act 1996* to apply the Commissioner's power to revoke a firearms licence to a visitor permit that authorises the licensee to carry out security activities of a kind authorised by a P1F licence and to extend the right for police officers to inspect storage of firearms held by security guard employers to holders of a visitor permit authorised under the Principal Act to carry out security activities of a kind authorised by a master licence.

Schedule 2.2 [1] amends the *Security Industry Regulation 2007* to exclude from obtaining a security licence those persons who have received a fine of \$500 or more, or a term of imprisonment, or both, for offences relating to prohibited plants or prohibited drugs within the meaning of the *Drug Misuse and Trafficking Act 1985* or prescribed restricted substances within the meaning of the *Poisons and Therapeutic Goods Regulation 2008*. **Schedule 2.2 [2]** prescribes the fee and the information and particulars that must accompany an application for a visitor permit. **Schedule 2.2 [3]** inserts a transitional provision relating to the proposed exclusion in Schedule 2.2 [1].

Issues Considered by the Committee

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

Issue: Strict Liability

9. Numerous clauses⁵ in the Bill provide for strict liability offences or are silent on knowledge or intention. The imposition of strict liability may give rise to concern as the prosecutor is not required to prove that the offender intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence.

10. The Committee notes that the imposition of strict liability will not always unduly trespass on personal rights and liberties. It may be relevant to consider: the impact of the offence on the community; the penalty that may be imposed; and the availability of any defences or safeguards.⁶

11. The Committee believes that the strict liability provisions in the Bill appear necessary in terms of encouraging compliance with the provisions of the Bill and the public interest in ensuring that compliance, despite that the contravention of visitor permit conditions in the case of an individual may attract imprisonment for 6 months (proposed section 39F (b) of Part 3A in Schedule 1 [8]). This is because the Committee is of the view that security licensees often operate in high-risk, high security environments and therefore, the community expects that these people will be vetted during the licensing process and that there will be compliance with visitor permit conditions for security licence holders from other States working on special events in New South Wales. Accordingly, the Committee considers that the strict liability offences do not trespass unduly on individual rights and liberties.

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

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

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. While there may be good

⁵ Clauses such as in Schedule 1 [5]: proposed section 23D - Special conditions – dog handling security services; Schedule 1 [8]: new Part 3A - proposed section 39F – contravention of visitor permit conditions; and proposed section 39H – visitor permit to be produced on demand.

⁶ Legislation Review Committee, *Strict and Absolute Liability: Responses to the Discussion Paper*, Report No 6, 17 October 2006, p 4.

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

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

The Committee makes no further comment on this Bill.

6. THOROUGHBRED RACING FURTHER AMENDMENT BILL 2008

Date Introduced:	31 October 2008
House Introduced:	Legislative assembly
Minister Responsible:	Hon Kevin Greene MP
Portfolio:	Minister for Gaming and Racing

Purpose and Description

1. The purpose of this Bill is to amend the *Thoroughbred Racing Act 1996* (the Principal Act) and the *Thoroughbred Racing Amendment Act 2008* (which was an earlier amending Act) to require the five appointed members of Racing NSW to be persons recommended for appointment by a Selection Panel established by the Minister. Under the previous provisions these appointments were on the nomination of the Appointments Panel.
2. The Bill requires the Minister to review the new appointments process within three years of the date of assent to the proposed Act. Under the Bill, the Selection Panel is required to make its recommendations based on the merit of candidates for appointment and on the basis of skills - based criteria. The Panel may recommend terms of appointment up to four years. The Minister is to give effect to those recommendations. The Minister advises that these provisions mean that the Panel of three eminent people will make the decisions and that he will support and endorse those decisions.
3. The Bill will continue the requirement under the earlier amending Act for the conduct of a probity check of candidates for appointment with the assistance of a Probity Adviser. As a result of these new arrangements, the Bill repeals the requirements of the earlier amending Act for a recruitment consultant in connection with the appointment of members of Racing NSW. The Bill dissolves the Appointments Panel established under the earlier amending Act.

Background

4. In his Agreement in Principle speech the Minister emphasises that there was considerable industry consultation during the development of the legislation and that there is bipartisan support for the provisions. The Minister advises that Government intervention in this matter, by way of the Bill, was required because the Probity Adviser advised that he was not able to give probity assurance in relation to the process, which had been in train since August 2008. He states that his immediate goal is to put the process back on track and have a new Board appointed as soon as possible. He gives an assurance to the industry that the Government is doing everything possible to ensure that the new Racing NSW Board, which will oversee the growth and sustainable economic development of the thoroughbred racing industry, is established in a way which will provide confidence in future leadership and governance.

The Bill

Outline of provisions

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

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation with the exception of transitional provisions and the amendments made to the earlier amending Act, which are to commence on the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Thoroughbred Racing Act 1996* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Thoroughbred Racing Amendment Act 2008* set out in Schedule 2.

Clause 5 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Thoroughbred Racing Act 1996

Schedule 1 [1] carries forward definitions from the earlier amending Act with changes to reflect the proposed new appointment process provided for by **Schedule 1 [2]**.

Schedule 1 [2] provides a new appointment process for the appointment of members of Racing NSW to replace the existing appointment process provided for by the earlier amending Act. Under the existing appointment process, appointed members of Racing NSW were to have been appointed on the nomination of an Appointments Panel consisting of representatives of industry participants. Under the new appointment process, appointments will be made on the recommendation of a Selection Panel established by the Minister. The new appointment process provides for the Selection Panel's recommendations to be made on the basis of merit and in accordance with the skills-based criteria currently provided for under the existing appointment process. The new appointment process provides for the term of an appointment to be for a period of up to 4 years as recommended by the Selection Panel (rather than for the period recommended by the Appointments Panel under the existing appointment process). The requirement under the existing appointment process for the Appointments Panel to engage a recruitment consultant is repealed. The amendment also provides for the Minister to review the new appointment process after 3 years and for a report on the review to be tabled in Parliament.

Schedule 1 [3] makes a consequential amendment.

Schedule 1 [4] and [5] carry forward amendments made by the earlier amending Act (with consequential changes resulting from the repeal of provisions for the fresh recruitment process provided for by the earlier amending Act).

Schedule 1 [6] inserts a savings and transitional regulation-making power.

Schedule 1 [7] carries forward the transitional arrangements made by the earlier amending Act, subject to the following:

- (a) provisions for convening the Appointments Panel under the earlier amending Act are replaced with provisions for establishing the Selection Panel, to facilitate the reconstitution of the membership of Racing NSW in accordance with the amendments,
- (b) the Appointments Panel provided for under the earlier amending Act will be dissolved and the exercise of any function of the Appointments Panel (including any nomination of a person for appointment as a member of Racing NSW) is declared to be of no effect.

Schedule 2 Amendment of Thoroughbred Racing Amendment Act 2008

Schedule 2 makes consequential amendments to the earlier amending Act.

Issues Considered by the Committee

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

Issue: Clause 2 - commencement of the Act (with the exception of Schedule 1[6] and [7] and Schedule 2 which commence on assent) on a day or days to be appointed by proclamation

5. The Committee notes that the proposed Act with the exception of Schedule 1[6] and [7] and Schedule [2] commence on a day or days to be appointed by proclamation. This may delegate to the Government the power to commence these provisions on whatever day it chooses or not at all.

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

The Committee makes no further comment on this Bill.

SECTION B: MINISTERIAL CORRESPONDENCE — BILLS PREVIOUSLY CONSIDERED

7. HOME BUILDING AMENDMENT BILL 2008

Ministerial Correspondence

Date Introduced:	29 August 2008
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* 10 of 2008.
2. The Committee concluded that the proposed section 42A (6) of Schedule 1 [2] is very broad. It has the potential to deny a person natural justice by removing the opportunity for review of any decision by the Director General to defer or not to defer the operation of the suspension of a licence. The Committee noted that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, unless there is a strong public interest in doing so. The Committee referred this to Parliament.

Minister's Reply

3. By letter dated 27 October 2008, the Minister replied to the Committee's concern and advised that there is a strong public interest in excluding review:

The automatic suspension of a licence under section 42A is the core provision in the Bill. It ensures that recalcitrant contractors who ignore a court or Tribunal orders to pay money are removed from the industry until they comply with the order. The automatic suspension also provides the key event which enables a home owner to submit an early home warranty insurance claim.

Subsection 42A (6) provides the Director-General with the capacity to defer the commencement of the automatic suspension. This provision is included in the Bill to provide some flexibility to deal with unintended consequences. An example would be where the contractor can demonstrate that suspension will cause hardship to their employees, that they have arrangements in place to ensure compliance by a specified date and the money order relates to a small value contract, which is below the threshold requiring home warranty insurance.

The Bill excludes the Administrative Decisions Tribunal from reviewing a decision by the Director-General to refuse to defer the commencement of the automatic suspension. If a review was available, it could be expected that many contractors who have their licence automatically suspended would seek a deferral and would then appeal any refusal to the Administrative Decisions Tribunal. The automatic suspension would be deferred beyond the period of 28 days specified in the Act in many instances, defeating the purpose of the Bill.

The Commissioner for Fair Trading will publish guidelines on the deferral of the automatic suspension. These guidelines will ensure that the power to defer the commencement of a suspension is used transparently and equitably.

Committee's Response

4. The Committee thanks the Minister for her reply.
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MINISTER FOR FAIR TRADING
MINISTER FOR CITIZENSHIP
MINISTER ASSISTING THE PREMIER ON THE ARTS

RECEIVED
30/10/08

RML: M08/4706

27 OCT 2008

Mr A F Shearan MP
Chairperson, Legislation Review Committee
Parliament House
Macquarie Street, SYDNEY, 2000

Dear Mr Shearan *A lan*

I refer to comments made by the Legislation Review Committee in its Digest No 10 of 2008 (dated 22 September 2008) regarding the Home Building Amendment Bill 2008.

The Committee referred the proposed subsection 42A(6) to Parliament with the comment that the provision is very broad and has the potential to deny a person natural justice by removing the opportunity for review of any decision by the Director-General to defer or not defer the operation of a suspension of a licence. The Committee also noted that an appeal or review may not be necessary in some instances where there was a strong public interest. I consider that this is the case.

Section 42A of the Bill automatically suspends the licence of a building contractor or building consultant if they fail to comply with an order made by a court or by the Consumer, Trader and Tenancy Tribunal to pay money in respect of a building claim. The suspension takes effect 28 days after the due date for payment or a date set by the Director-General if the order does not include a due date. The licence is not cancelled. It is suspended until the licence holder complies with the money order.

If there is an appeal against the decision of the court or Tribunal to issue a money order then the operation of money order is stayed and the operation of the automatic suspension is also stayed until the appeal is determined.

The automatic suspension of a licence under section 42A is the core provision in the Bill. It ensures that recalcitrant contractors who ignore a court or Tribunal orders to pay money are removed from the industry until they comply with the order. The automatic suspension also provides the key event which enables a home owner to submit an early home warranty insurance claim.

Subsection 42A(6) provides the Director-General with the capacity to defer the commencement of the automatic suspension. This provision is included in the Bill to provide some flexibility to deal with unintended consequences. An example would be where the contractor can demonstrate that suspension will cause hardship to their employees, that they have arrangements in place to ensure compliance by a specified date and the money order relates to a small value contract, which is below the threshold requiring home warranty insurance.

Level 36, Governor Macquarie Tower
1 Farrer Place, Sydney NSW 2000

Telephone: (02) 9228 5900
Facsimile: (02) 9228 5899

The Bill excludes the Administrative Decisions Tribunal from reviewing a decision by the Director-General to refuse to defer the commencement of the automatic suspension. If a review was available, it could be expected that many contractors who have their licence automatically suspended would seek a deferral and would then appeal any refusal to the Administrative Decisions Tribunal. The automatic suspension would be deferred beyond the period of 28 days specified in the Act in many instances, defeating the purpose of the Bill.

The Commissioner for Fair Trading will publish guidelines on the deferral of the automatic suspension. These guidelines will ensure that the power to defer the commencement of a suspension is used transparently and equitably.

I trust that this information is of assistance to the Committee.

Yours sincerely



Virginia Judge, MP
Minister

Appendix 1: Index of Bills Reported on in 2008

	Digest Number
Administrative Decisions Tribunal Amendment Bill 2008	11
Adoption Amendment Bill 2008	11
Appropriation Bill 2008	8
Appropriation (Budget Variations) Bill 2008	6
Appropriation (Parliament) Bill 2008	8
Appropriation (Special Offices) Bill 2008	8
Auditor-General (Supplementary Powers) Bill 2008	9
Australian Jockey Club Bill 2008	7
Bible Society NSW (Corporate Conversion) Bill 2008	12
Board of Adult and Community Education Repeal Bill 2008	5
Building Professionals Amendment Bill 2008	7
Callan Park Trust Bill 2008*	11
Child Protection (Offenders Registration) Amendment Bill 2008	10
Children and Young Persons (Care and Protection) Amendment (Body Piercing and Tattooing) Bill 2008	7
Children (Criminal Proceedings) Amendment Bill 2008	8
Children (Criminal Proceedings) Amendment (Youth Conduct Orders) Bill 2008	12
Children (Detention Centres) Amendment Bill 2008	8
Civil Liability Legislation Amendment Bill 2008	12
Classification (Publications, Films and Computer Games) Enforcement Amendment (Advertising) Bill 2008	11
Clean Coal Administration Bill 2008	5
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2008	8
Consumer, Trader and Tenancy Tribunal Amendment Bill 2008	5
Contaminated Land Management Amendment Bill 2008	10

	Digest Number
Conveyancing Amendment (Mortgages) Bill 2007*	1
Courts and Crimes Legislation Amendment Bill 2008	8
Crimes Amendment (Cognitive Impairment – Sexual Offences) Bill 2008	10
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Crimes Amendment (Rock Throwing) Bill 2008	6
Crimes (Administration of Sentences) Legislation Amendment Bill 2008	5
Crimes (Forensic Procedures) Amendment Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Life Sentences) Bill 2008	9
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008	10
Criminal Case Conferencing Trial Bill 2008	4
Dangerous Goods (Road and Rail Transport) Bill 2008	10
Dividing Fences and Other Legislation Amendment Bill 2008	5
Education Amendment Bill 2008	4
Election Funding Amendment (Political Donations and Expenditure) Bill 2008	9
Electricity Industry Restructuring Bill 2008	8
Electricity Industry Restructuring Bill 2008 (No 2)	10
Electricity Industry Restructuring (Response to Auditor-General Report) Bill 2008	10
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Environmental Planning and Assessment Amendment Bill 2008	7
Environmental Planning and Assessment Amendment (Affordable Housing Development Contributions) Bill 2008*	13
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	4
Exotic Diseases of Animals Amendment Bill 2008	8
Fair Trading Amendment (Mandatory Funeral Industry Code) Bill 2008*	5
Filming Related Legislation Amendment Bill 2008	8

	Digest Number
Fines Amendment Bill 2008	4
Firearms Amendment Bill 2008*	8
First State Superannuation Amendment Bill 2008	7
Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008	12
Food Amendment (Public Information on Offences) Bill 2008	2
Food Amendment (Trans Fatty Acids Eradication) Bill 2008*	12
Gaming Machines Amendment Bill 2008	13
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Gas Supply Amendment Bill 2008	4
Graffiti Control Bill 2008	13
Growth Centres (Development Corporations) Amendment Bill 2008	4
Health Services Amendment (Mandatory Background Checks of Medical Practitioners) Bill 2008*	9
Hemp Industry Bill 2008	6
Higher Education Amendment Bill 2008	5
Home Building Amendment Bill 2008	10
Housing Amendment (Tenant Fraud) Bill 2008	4
Human Tissue Amendment (Children in Care of State) Bill 2008	7
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008*	8
Jury Amendment Bill 2008	7
Justices of the Peace Amendment Bill 2008	5
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property Bill) 2008	10
Local Government Amendment (Election Date) Bill 2008	2
Local Government Amendment (Elections) Bill 2008	4
Local Government Amendment (Legal Status) Bill 2008	12

	Digest Number
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008	9
Marine Parks Amendment Bill 2007	1
Marine Safety Amendment Bill 2008	8
Medical Practice Amendment Bill 2008	6
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	10
Mining Amendment Bill 2008	3
Mining Amendment (Improvements on Land) Bill 2008	11
Miscellaneous Acts Amendment Bill 2008	6
National Gas (New South Wales) Bill 2008	5
National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008*	3
Peak Oil Response Plan Bill 2008*	6
Police Integrity Commission Amendment (Crime Commission) Bill 2008	9
Port Macquarie-Hastings Council Election Bill 2008*	5
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008	11
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008*	8
Public Health (Tobacco) Bill 2008	11
Public Sector Employment Management Amendment Bill 2008	4
Racing Administration Amendment Bill 2008	13
Rail Safety Bill 2008	11
Retirement Villages Amendment Bill 2008	10
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008	11
Road Transport Legislation Amendment Bill 2008	9
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2

	Digest Number
Security Industry Amendment Bill 2008	13
Shop Trading Bill 2008	8
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	3
Snowy Mountains Cloud Seeding Trial Amendment (Extension) Bill 2008	6
Sporting Venues Authorities Bill 2008	6
State Arms, Symbols and Emblems Amendment (Black Opal) Bill 2008	5
State Emergency and Rescue Management Amendment (Botany Emergency Works) Bill 2008	5
State Revenue Legislation Amendment Bill 2008	4
State Revenue and Other Legislation Amendment (Budget) Bill 2008	8
Statute Law (Miscellaneous Provisions) Bill 2008	8
Strata Management Legislation Amendment Bill 2008	7
Succession Amendment (Family Provision) Bill 2008	10
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	6
Superannuation Administration Amendment Bill 2008	4
TAFE (Freezing of Fees) Bill 2007*	1
Thoroughbred Racing Amendment Bill 2008	9
Thoroughbred Racing Further Amendment Bill 2008	13
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	9
Totalizator Amendment Bill 2008	2
Tow Truck Industry Amendment Bill 2008	10
Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008	12
Vexatious Proceedings Bill 2008	10
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	5
Water (Commonwealth Powers) Bill 2008	11
Water Management Amendment Bill 2008	11
Western and Crown Lands Amendment (Special Purpose Leases) Bill 2008	8

	Digest Number
Workers Compensation Amendment Bill 2008	5
Workers Compensation Legislation Amendment (Financial Provisions) Bill 2008	8

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
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			10
Crimes (Forensic Procedures) Amendment Bill 2008	Minister for Police	24/06/08			9
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Environmental Planning and Assessment Amendment Bill 2008; Building Professionals Amendment Bill 2008	Minister for Planning				8
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Home Building Amendment	Minister for Fair Trading		30/10/08		10, 13
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	
Water Management Amendment Bill 2008	Minister for Water	28/10/08			12

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

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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Crimes (Sentencing Procedure) Amendment (Victim Impact Statements) Bill 2008				R	
Criminal Case Conferencing Trial Bill 2008	N, R				
Dangerous Goods (Road and Rail Transport) Bill 2008	N			R	
Dividing Fences and Other Legislation Amendment Bill 2008				N, R	
Education Amendment Bill 2008	N, R				
Election Funding Amendment (Political Donations and Expenditure) Bill 2008				N, R	
Electricity Industry Restructuring Bill 2008	N, R	N, R		N, R	
Electricity Industry Restructuring Bill 2008 (No 2)	N, R	N, R		R	
Environmental Planning and Assessment Amendment Bill 2008	N, R	N, R	N, R	N, R	N, R
Environmental Planning and Assessment Amendment (Restoration of Community Participation) Bill 2008	N, R	N, R			
Filming Related Legislation Amendment Bill 2008				N, R	
Fisheries Management and Planning Legislation Amendment (Shark Meshing) Bill 2008				N, R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Food Amendment (Trans Fatty Acids Eradication) Bill 2008*	N				
Gaming Machines Amendment Bill 2008	N			N, R	N, R
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Graffiti Control Bill 2008	N			N, R	
Hemp Industry Bill 2008	N, R		N, R	N, R	
Home Building Amendment Bill 2008	N		N, R		
Housing Amendment (Tenant Fraud) Bill 2008	N, R	R			
Independent Commission Against Corruption Amendment (Reporting Corrupt Conduct) Bill 2008	N				
Jury Amendment Bill 2008	N				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Law Enforcement (Powers and Responsibilities) Amendment (Detained Person's Property) Bill 2008				R	
Local Government Amendment (Legal Status) Bill 2008				N	
Local Government and Planning Legislation Amendment (Political Donations) Bill 2008				N, R	
Marine Safety Amendment Bill 2008				N, R	
Mental Health Legislation Amendment (Forensic Provisions) Bill 2008	N			R	
Medical Practice Amendment Bill 2008	N, R			N, R	
Mining Amendment Bill 2008	N				
Mining Amendment (Improvements on Land) Bill 2008	N, R				
Miscellaneous Act Amendment (Same Sex Relationships) Bill 2008	N			N, R	
National Gas (New South Wales) Bill 2008					N
Police Integrity Commission Amendment (Crime Commission) Bill 2008	N		N		
Ports and Maritime Administration Amendment (Port Competition and Co-ordination) Bill 2008				N, R	
Protected Disclosures Amendment (Supporting Whistleblowers) Bill 2008		N, R		N, R	
Public Health (Tobacco) Bill 2008	N			N, R	
Public Sector Employment and Management Amendment Bill 2008	R				
Racing Administration Amendment Bill 2008	R			R	
Rail Safety Bill 2008	N			N, R	
Retirement Villages Amendment Bill 2008	N			R	
Road Transport Legislation Amendment Bill 2008	N			N, R	
Road Transport (Driver Licensing) Amendment (Demerit Points System) Bill 2008				N, R	
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Security Industry Amendment Bill 2008	N			N	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Sporting Venues Authorities Bill 2008	N				
State Emergency and Rescue Management Amendment (Botany Emergency Works Bill 2008	N				
State Revenue Legislation Amendment Bill 2008	N, R				
Statute Law (Miscellaneous Provisions) Bill 2008	N			N, R	
Strata Management Legislation Amendment Bill 2008				N, R	
Succession Amendment (Family Provision) Bill 2008				R	
Summary Offences and Law Enforcement Legislation Amendment (Laser Pointers) Bill 2008	N, R			N, R	
Thoroughbred Racing Amendment Bill 2008			N, R	N, R	
Thoroughbred Racing Further Amendment Bill 2008				N, R	
Threatened Species Conservation Amendment (Special Provisions) Bill 2008	N				
Tow Truck Industry Amendment Bill 2008	N			R	
Transport Administration Amendment (Rail and Ferry Transport Authorities) Bill 2008			N, R	N, R	
Vexatious Proceedings Bill 2008	N			R	
Waste Avoidance and Resource Recovery (Container Recovery) Bill 2008*	N, R				
Water (Commonwealth Powers) Bill 2008	N				
Water Management Amendment Bill 2008	N, R			N, R	
Western Crown Lands Amendment (Special Purpose Leases) Bill 2008		N, R			
Workers Compensation Amendment Bill 2008	N, R				

Key

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

Appendix 4: Index of correspondence on regulations reported on in 2008

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2008
Companion Animals Regulation 2008	Minister for Local Government	28/10/08		12
Liquor Regulation 2008	Minister for Gaming and Racing and Minister for Sport and Recreation	22/09/08		10
Tow Truck Industry Regulation 2008	Minister for Roads	22/09/08		10