



Legislation Review Committee

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I

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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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Functions of the 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.

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 Digest

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

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.

COMMENT ON 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 are set out in s 9 of the *Legislation Review Act 1987*.

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 MINISTERIAL CORRESPONDENCE ON BILLS

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

APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

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

Conclusions

PART ONE - BILLS

1. BUSINESS NAMES (COMMONWEALTH POWERS) BILL 2011

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

The Committee recognises the difficulties of determining commencement dates for projects that involve a number of jurisdictions. In the circumstances, the Committee considers there has been no inappropriate delegation of legislative power.

It is incumbent upon the Committee to note where legislation insufficiently subjects the exercise of legislative power to parliamentary scrutiny, such as the referral of powers provided for in this Bill. However, the Committee recognises that the nature of federalism will at times require the State to refer powers otherwise within its remit to the Commonwealth to ensure nationwide uniformity in particular matters. To this end, the Committee does not raise not raise any issue with this Bill.

2. ELECTION FUNDING, EXPENDITURES AND DISCLOSURES AMENDMENT BILL 2011

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Freedom of Communication

The Committee reiterates the concerns it has previously made that laws which restrict campaign expenditure may affect the freedom of political communication.

The Committee notes that this Bill may further impact on freedom of political communication in New South Wales.

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

3. PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT AMENDMENT (ETHICS AND PUBLIC SERVICE COMMISSIONER) BILL 2011

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

4. STATE REVENUE LEGISLATION AMENDMENT BILL 2011

The Committee makes no comment on the Bill in respect of the issues set out in s 8A(1) of the *Legislation Review Act 1987*.

PART TWO - REGULATIONS

The Committee makes no comment on Regulations in respect of the issues set out in s 9 of the *Legislation Review Act 1987*.

Part One - Bills

1. Business Names (Commonwealth Powers) Bill 2011

Date introduced	13 September 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Fair Trading

PURPOSE AND DESCRIPTION

1. The *Business Names (Commonwealth Powers) Bill 2011* passed both houses on 14 September 2011 and received Royal Assent on 20 September 2011. Under s 8A(2) of the *Legislation Review Act 1987* the Committee is not precluded from reporting on a Bill that has been passed by Parliament or has become an Act.
2. The object of this Bill is to refer certain matters relating to the registration and use of business names to the Commonwealth Parliament so as to enable the Commonwealth Parliament to make laws about those matters. The proposed Act will be enacted for the purposes of section 51 (xxxvii) of the Constitution of the Commonwealth, which enables State Parliaments to refer matters to the Commonwealth Parliament.
3. The Bill also makes provision for savings and transitional matters and the consequential repeal and amendment of certain legislation.
4. The Bill operates by reference to the text of the proposed *Business Names Registration Bill 2011* and *Business Names Registration (Transitional and Consequential Provisions) Bill 2011* of the Commonwealth tabled in the House of Assembly of Tasmania on 5 July 2011. This text of these proposed Commonwealth Bills is defined in the Bill to be the tabled text. Because the proposed Commonwealth Bills contain matters that are not within the legislative competence of the States, the Bill also contains a definition of initial business names matters, which means matters to which the provisions of the tabled text relate to the extent to which those matters are included in the legislative powers of the Parliament of the State.
5. The Bill refers to the Commonwealth Parliament the initial business names matters, but only to the extent of the making of laws with respect to those matters by enacting Commonwealth Acts in the terms, or substantially in the terms, of the tabled text. The Bill defines this reference to be the initial reference and the Commonwealth Acts enacted pursuant to it to be the national business names legislation.
6. The Bill also refers, subject to particular exclusions, certain matters (continuing business names matters) to the Commonwealth Parliament so as to enable that Parliament to make amendments to the national business names legislation from time to time. The Bill defines this reference to be the amendment reference.

7. The Bill enables both the initial and amendment references, or only the amendment reference, to be terminated by proclamation by the Governor.

BACKGROUND

8. In July 2008, the Council of Australian Governments (COAG) agreed to establish a national business names register as part of the national seamless economy partnership.
9. In July 2009, the Commonwealth, State and Territory governments signed an *Intergovernmental Agreement for Business Names Agreement* (Business Names Agreement 2009).

10. The Business Names Agreement 2009 states:

The purpose of this Agreement is to endorse a national business names registration scheme that will allow businesses to register once, regardless of how many State/Territory jurisdictions those businesses operate in. The national business names registration scheme will form part of a range of measures that will, in addition to business names registration, provide a variety of on-line services to businesses.¹

11. This agreement envisages that the States will refer their business names registration powers to the Commonwealth. In turn, the Commonwealth will establish a single national business names register, under which a person may register a national business name.
12. As noted, the *Business Names (Commonwealth Powers) Bill 2011*, which gives effect to the Business Names Agreement 2009, passed both houses on 14 September 2011 and received Royal Assent on 20 September 2011.
13. The Bill was proclaimed on 5 October 2011 and commenced operation on 10 October 2011.
14. It is foreshadowed that the establishment of the national register for business names will form the first tranche of long-term reform in this field.

OUTLINE OF PROVISIONS

15. Clause 1 sets out the name (also called the short title) of the proposed Act.
16. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
17. Clause 3 defines certain terms used in the proposed Act.
18. The term business name is defined to have the same meaning as it has in the tabled text. The term is defined in the tabled text to mean a name used, or to be used, in relation to one or more businesses. The tabled text defines business to mean an activity, or series of activities, done:

¹ Business Names Agreement 2009, [1.1], clause 2. The Business Names Agreement 2009 is available online at: http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/IGA_business_names.pdf

- (a) in the form of a profession, a trade, employment, a vocation or a calling, or
 - (b) in the form of an adventure or concern in the nature of trade, or
 - (c) on a regular or continuous basis, in the form of a lease, licence or other grant of an interest in property.
19. However, the definition of business in the tabled text excludes an activity, or a series of activities, done in circumstances in which an entity doing that activity or series of activities in, or in connection with, Australia would not be entitled to an ABN (Australian Business Number).
20. The term entity is defined to include an individual, body corporate or unincorporate, partnership or anything that is an entity within the meaning of the tabled text. The tabled text also includes trusts and superannuation funds as entities.
21. The term exemption provision is defined to mean a provision in the terms, or substantially in the terms, of clause 19 (5) or 20 (3) of the proposed *Business Names Registration Bill 2011* of the Commonwealth that forms part of the tabled text. Those provisions of the proposed Commonwealth Bill exclude entities from the operation of clauses 19 and 20 (which provide for the inclusion or display of business names in written communications and at places of business) in a manner that is contrary to a law of the State or a Territory or the Commonwealth.
22. The term government body is defined to mean:
- (a) the State or an agency or authority of the State or of the State acting jointly with the Commonwealth, another State or a Territory, or
 - (b) a local council or county council established under the *Local Government Act 1993*.
23. The term notified State register is defined to mean a register that is maintained under a State law and is a notified State/Territory register within the meaning given by clause 6 of the proposed *Business Names Registration Bill 2011* of the Commonwealth that forms part of the tabled text. A notified State/Territory register within the meaning of clause 6 of the proposed Commonwealth Bill is a State or Territory register, or kind of State or Territory register, specified in Schedule 1 to the proposed Commonwealth Act in respect of which the Australian Securities and Investments Commission receives regular electronic updates from the State or Territory concerned. The NSW registers that are notified State/Territory registers are as follows:
- (a) the Register of Co-operatives established under the *Co-operatives Act 1992*,
 - (b) the Register of Incorporated Associations established under the *Associations Incorporation Act 2009*,
 - (c) the Register of Limited and Incorporated Limited Partnerships established under the *Partnership Act 1892*,
 - (d) the register of co-operative housing societies and Starr-Bowkett societies established under the *Co-operative Housing and Starr-Bowkett Societies Act 1998*,

- (e) any register of the same kind as a register mentioned in paragraphs (a) to (d), established in substitution for a register mentioned in one of those paragraphs.
24. Clause 4 defines the term initial business names matters in the manner described in the Overview.
25. Clause 5 provides for each of the matters that is to be a continuing business names matter for the purposes of the amendment reference. These matters are:
- (a) the registration of business names,
 - (b) the regulation of the use of business names to assist entities who engage with an entity carrying on business under a business name to identify the entity,
 - (c) the regulation of the use of business names to assist entities who engage with an entity carrying on business under a business name to contact the entity,
 - (d) the regulation of the use of business names to reduce the risks that arise from an entity carrying on a business under a name that is not the entity's own,
 - (e) the prohibition or restriction of the use of business names that are undesirable, offensive or confusing,
 - (f) the prohibition or restriction of the use of a business name by an entity because:
 - i the entity has engaged in unlawful conduct, or
 - ii a person involved in the management of the entity has engaged in unlawful conduct.
26. The proposed section also expressly excludes the following matters from the continuing business names matters (and, therefore, the amendment reference):
- (a) the imposition of a restriction on a government body affecting the ability of the body to carry on business under a name,
 - (b) the imposition of a restriction on an entity affecting the ability of the entity to carry on business under a name registered to the entity on a notified State register,
 - (c) the imposition of a restriction on an entity affecting the ability of the entity to carry on business under a name that is specified as the name of the entity in a State law,
 - (d) the imposition of an obligation on a government body to include a name in a communication or to display a name,
 - (e) the imposition of an obligation on an entity to include in a communication, or to display, a name that is registered to the entity on a notified State register,
 - (f) the imposition of an obligation on an entity to include in a communication, or to display, a name that is specified as the name of the entity in a State law,

- (g) the omission of an exemption provision without the insertion of an equivalent provision, or the imposition of a limitation on the operation of an exemption provision,
 - (h) any matter relating to the imposition or payment of taxes under a State law.
27. Clause 6 deals with the references described in the Overview. Clause 6 (1) and (2) make those references.
 28. Clause 6 (1) provides for the inclusion of the initial business names matters in Commonwealth Acts enacted in the terms, or substantially in the terms, of the tabled text. The expression “substantially in the terms” of the tabled text will enable minor adjustments to be made to the tabled text.
 29. Clause 6 (2) in effect refers the continuing business names matters to the Commonwealth Parliament in connection with the future amendment of the national business names legislation.
 30. Clause 6 (3) removes a possible argument that one of the references might be limited by the other.
 31. Clause 6 (4) makes it clear that the reference of a matter has effect only to the extent that the matter is not otherwise within the legislative power of the Commonwealth Parliament.
 32. Clause 6 (5) specifies the period during which a reference has effect.
 33. Clause 7 makes it clear that the State Parliament intends that the national business names legislation can be amended or affected by Commonwealth legislation enacted in reliance on other powers (though this may be the subject of provisions in the Intergovernmental Agreement that will underpin the scheme) and that instruments made or issued under that legislation may affect the operation of that legislation otherwise than by express amendment.
 34. Clause 8 deals with the termination of the period of the references specified under clause 6 (namely, the period ending on a day fixed by the Governor by proclamation). The clause enables the Governor, by proclamation, to fix a day as the day on which:
 - (a) the initial reference and the amendment reference are to terminate, or
 - (b) the amendment reference is to terminate, or
 - (c) the initial reference is to terminate (if the amendment reference has been previously terminated).
 35. Clause 9 makes it clear that it is the intention of the State Parliament that the separate termination of the period of the amendment reference does not affect laws already in place. Accordingly, the amendment reference continues to have effect to support those laws unless the period of the initial reference is also terminated.
 36. Clause 10 provides for the accuracy of a copy of the tabled text containing the proposed Commonwealth Acts to be certified by the Clerk of the House of Assembly of Tasmania.

Such a certificate is evidence of the accuracy of the tabled text and that the text was in fact tabled as contemplated by the Bill.

Schedule 1 Savings, transitional and other provisions

37. Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Repeal of existing business names legislation

38. Schedule 2 repeals each of the following:
- (a) the *Business Names Act 2002* No 97,
 - (b) the *Business Names Regulation 2004*,
 - (c) any other regulation made under the *Business Names Act 2002*.

Schedule 3 Consequential amendment of other legislation

39. Schedule 3 makes amendments to certain Acts and Regulations that are consequential on the enactment by the Commonwealth Parliament of the national business names legislation pursuant to the referral of matters by the proposed Act.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by proclamation

40. 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. However, the Committee recognises that this Bill is part of a national reform scheme requiring action by other jurisdictions, and NSW may not be in a position to unilaterally determine the commencement date.

The Committee recognises the difficulties of determining commencement dates for projects that involve a number of jurisdictions. In the circumstances, the Committee considers there has been no inappropriate delegation of legislative power.

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny: s 8A(1)(b)(v) of the LRA

Referral of Powers

41. The purpose of this Bill is to refer matters relating to the registration and use of business names to the Parliament of the Commonwealth. In this respect, and unless the State terminates the reference, all future amendments to the prospective Act as well as regulations made under it will be powers respectively granted to the Parliament of the Commonwealth and the relevant Minister. Conversely, the Parliament of NSW will no longer be able to scrutinise amending legislation or disallow regulations concerning the registration and use of business names.

42. It is incumbent upon the Committee to note legislation that insufficiently subjects the exercise of legislative power to parliamentary scrutiny, such as this Bill.
43. However, the Committee also notes that the creation of a 'seamless national economy', and the general nature of federalism itself, will at times require the State to refer powers otherwise within its remit to the Commonwealth to ensure nationwide uniformity in particular matters. In this respect, the Committee appreciates the reasons for the referral of powers and does not raise any issue with this reference.

It is incumbent upon the Committee to note where legislation insufficiently subjects the exercise of legislative power to parliamentary scrutiny, such as the referral of powers provided for in this Bill. However, the Committee recognises that the nature of federalism will at times require the State to refer powers otherwise within its remit to the Commonwealth to ensure nationwide uniformity in particular matters. To this end, the Committee does not raise not raise any issue with this Bill.

2. Election Funding, Expenditures and Disclosures Amendment Bill 2011

Date introduced	12 September 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The purpose of this Bill is to make amendments to the *Election Funding, Expenditure and Disclosures Act 1981* with respect to:
 - (a) Providing that campaign expenditure incurred by any affiliated organisation of a political party for a State election is to be aggregated with the campaign expenditure of the political party it is affiliated with for the purposes of the statutory cap on campaign expenditure; and
 - (b) Prohibiting political donations from corporations and other entities.

BACKGROUND

2. In 2008, the Legislative Council Select Committee on Electoral Matters released its report into electoral and political party funding in NSW. This inquiry, which coincided with the Commonwealth Government's Electoral Reform Green Paper, provided a comprehensive review of the state of election finance in NSW and recommended that the Government consider substantive changes.
3. In 2009, the NSW Government introduced the *Election Funding and Disclosures (Property Developers Prohibition) Act 2009* which prohibited political donations by professional corporate property developers and their close associates. This reform came on the back of longstanding community concern about the making of political donations by interested parties and its perceived impact on the integrity of Government.
4. In December 2009, the Government made a reference to the Joint Standing Committee on Electoral Matters to consider, amongst other things:

'... whether any restrictions should be imposed on expenditure by political parties and candidates more generally and, if so, what restrictions should apply and how should expenditure be monitored.'
5. The Committee sought public comment and received 30 submissions from a wide cross section of the community, including from political parties, academia, independent statutory offices and other interested parties. The Committee also held formal hearings in February 2010 in which it sought expert legal and constitutional opinion.

6. The Committee published its report – *The Public Funding of Election Campaigns* – on 26 March 2010 in which it made 51 recommendations.
7. In October 2010, the Keneally Labor Government introduced the *Election Funding and Disclosures Amendment Bill 2010* which essentially gave legislative effect to the recommendations made by the Joint Committee. This included amendments which placed caps on political donations, imposed limits on campaign expenditure, regulated the electoral participation of third parties and increased the public funding for State election campaigns.
8. This Bill makes further changes to the *Election Funding and Disclosures Act 1981* by providing that the campaign expenditure of entities affiliated to political parties be aggregated with the expenditure of their parent political parties (and therefore subject to the same expenditure caps), as well as prohibiting the making of political donations from all but individuals on the electoral roll.

OUTLINE OF PROVISIONS

9. Clause 1 sets out the name (also called the short title) of the proposed Act.
10. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
11. Schedule 1 [1] provides that electoral communication expenditure incurred by a party is to be treated as expenditure that exceeds the applicable cap if that expenditure and any other electoral communication expenditure incurred by an affiliated organisation exceeds the applicable cap for the party. The applicable cap for the party is both the overall cap (generally \$100,000 multiplied by the number of Assembly electorates contested) and the separate cap for expenditure in each electorate (\$50,000). An *affiliated organisation* of a party means a body or other organisation, whether incorporated or unincorporated, that is authorised under the rules of that party to appoint delegates to the governing body of that party or to participate in pre-selection of candidates for that party (or both).
12. Schedule 1 [2] prohibits political donations from corporations or other entities so that political donations may only be made by individuals on the electoral roll. An offence is committed under section 96I of the Act if a donation from a corporation or other entity is accepted, if an individual makes a political donation on behalf of a corporation or an entity, or if a corporation or other entity makes a gift to an individual for the purpose of the individual making a political donation. As a result of the amendments, it will be unlawful for a corporation or other entity (including an industrial organisation) to pay annual or other subscriptions to a party for affiliation with the party. The prohibition will not extend to transfers between branches of parties or between associated parties.
13. Schedule 2 [1]–[9] are minor amendments consequent on the prohibition on political donations from corporations and other entities made by Schedule 1 [2]. Schedule 2 [10] makes it clear that a person cannot be punished twice for an offence under the Act that constitutes a breach of the proposed prohibition on political donations by corporations and a breach of the existing prohibition on political donations by property developers and tobacco and liquor or gambling industry business entities, their directors and other associates.

14. Schedule 2 [11] enables savings and transitional regulations to be made as a consequence of the proposed Act. Schedule 2 [12] contains transitional provisions. The prohibition on political donations from corporations will apply to political donations made after the commencement of the proposed Act. The amendment relating to the aggregation of expenditure of parties and affiliated organisations will apply to elections held after the commencement of the proposed Act.

ISSUES CONSIDERED BY COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

Freedom of Communication

15. One of the central tenets of the *Election Finance and Disclosures Amendment Act 2010* was to place a cap on campaign expenditure. The effect of this was to limit how much candidates, or their advocates, would be able to spend on campaigning during an election period.
16. The proposed Bill further limits the amount political parties can spend on election campaigning by requiring that the campaign expenditure of affiliated organisations to a political party be aggregated with the total amount allowed to be spent by its parent political party.
17. As the nature of contemporary campaigning requires candidates and their advocates to spend significant sums on producing campaign literature and advertising, it necessarily follows that any restriction on campaign expenditure could affect the ability of political parties (or their advocates) to advertise their credentials, promote their policies, and generally engage with voters.
18. On this issue, the Legislation Review Committee noted in its 2010 consideration of the *Election Funding and Disclosures Amendment Bill 2010* that:
- ... it is fair to assert that candidates or advocates should be free to campaign largely unencumbered, and that a free and fair democracy should not be setting controls that limit the extent to which a candidate or (their) advocate can campaign.²
19. This issue has also been considered by the High Court in its 1992 decision of *Lange v Australian Broadcasting Corporation*.³ That case considered the validity of Commonwealth legislation which had similarly limited political advertising during an election period.
20. In that instance, the High Court found the legislation to be unconstitutional. Of particular relevance was that there existed an implied freedom of communication which was deemed an 'indispensable incident' of the system of government established by the Constitution. In the course of its judgement, the High Court established what has since become known as the *Lange Test* in which:

'Laws that ban or impose limits upon political donations or election campaign expenditure are likely to be regarded as burdening the constitutionally implied freedom of political communication. This is because they have the effect of

² Legislation Review Committee, *Parliament of NSW*, Digest No 15 of 2010 at p 25

³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

limiting the quantity and breadth of communication about political matters. Such laws will only be held valid by the courts if they are reasonably and appropriately adapted to serving a legitimate end in a manner which is compatible with the system of representative and responsible government prescribed by the Commonwealth Constitution.⁴

21. As the provisions of this Bill further restrict the scope of affiliated organisations to incur political expenditure on behalf of a political party, as well as limiting the making of political donations to all but individuals on the electoral roll, it appears that the Bill may further restrict the constitutionally implied freedom of political communication.
22. In his Agreement in Principle Speech, the Premier, Barry O'Farrell, recognised this when he said:

'It is inevitable that these laws and, I expect, this Bill will trigger discussion and debate about constitutional principles.'⁵
23. Despite this, it is not the role of this Committee to determine whether this Bill complies with those principles. It is, however, the role of the Committee to identify those provisions which may affect the freedom of political communication, regardless of their constitutional implications.
24. To this end, the Committee reiterates the concerns this Committee has previously made on this issue in its review of the *Election Funding and Disclosures (Amendment) Act 2010* about the impact such legislation may have on the freedom of political communication.

The Committee reiterates the concerns it has previously made that laws which restrict campaign expenditure may affect the freedom of political communication.

The Committee notes that this Bill may further impact on freedom of political communication in New South Wales.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

25. The Bill provides that the Act is to commence on a day or days to be appointed by proclamation. The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

⁴ Dr Anne Twomey, *The reform of political donations, expenditure and funding*, Department of Premier and Cabinet, November 2008 at p 6

⁵ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 12 September 2011 at p 5432

3. Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Bill 2011

Date introduced	15 September 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Public Sector Employment and Management Act 2002* as follows:
 - (a) to establish an ethical framework for the public sector comprising core values (namely, integrity, trust service and accountability) and the principles that guide the implementation of those core values;
 - (b) to provide for the appointment of a Public Service Commissioner and to confer on the Commissioner functions in relation to the public sector workforce (including the existing public sector policy functions of the Director of Public Employment and the EEO functions of the Director of Equal Opportunity in Public Employment);
 - (c) to establish the Public Service Commission Advisory Board which will determine general policies and strategic directions for the exercise of the Commissioner's functions and provide advice to the Premier on matter relating to the management and performance of the public sector; and
 - (d) to make a number of other miscellaneous amendments of a minor or consequential nature, including the capacity for public sector workers to be temporarily assigned to work for another body, with any such assignment to be in accordance with the Commissioner's guidelines.

BACKGROUND

2. On 14 November 2008, Mr O'Farrell MP outlined an intention to establish a Public Service Commission.⁶ On 14 April 2011, the Premier announced the appointment of Professor Peter Shergold AC as the incoming Chair of the Board of the NSW Public Service Commission. The Premier noted that Professor Shergold was to commence immediately to oversee a working group in the Department of Premier and Cabinet to develop details roles and functions of the new Commission.
3. On 13 September 2011, the Premier announced the appointment of Mr Graeme Head as the inaugural Commissioner of the NSW Public Service Commission.

⁶ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 14 November 2008 at p 11872

4. In the Agreement in Principle speech, the Premier stated that the Bill incorporated three main amendments: an ethical framework for the public sector, the introduction of a Public Service Commissioner and the establishment of a Public Service Commission Advisory Board.⁷
5. With respect to the establishment of the ethical framework for the public sector, the Premier outlined the twin objectives of:
 - 'recognising the role of the public sector in preserving the public interest, defending public value and adding professional quality and value to the commitments of the government of the day' and
 - ' establishing an ethical framework for a merit-based, apolitical and professional public sector that implements the decisions of the government of the day.'⁸
6. The Premier described the Public Service Commissioner's role as being to promote:
 - 'the core values of integrity, trust, service and accountability by articulating outcomes rather than prescribing or imposing complex processes'.⁹
7. The Premier noted that the Public Service Commission Advisory Board will assist and support the Commissioner, with the objective of the Board being:
 - 'to provide the Public Service Commissioner and the Premier with strategic, independent and expert advice concerning the management and performance of the public sector workforce'.¹⁰

OUTLINE OF PROVISIONS

8. Clause 1 sets out the name (also called the short title) of the proposed Act.
9. Provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Amendment of Public Sector Employment and Management Act 2002 No 43

10. Schedule 1.1 establishes the ethical framework for the public sector referred to in the Purpose and Description above. The Public Service Commissioner will have the function of promoting and maintaining the public sector core values.
11. Schedule 1.2 [1] inserts definitions of Advisory Board and Commissioner.
12. Schedule 1.2 [2] provides for the appointment by the Governor of a Public Service Commissioner. An appointment may only be made if the Advisory Board has approved the appointment. The Commissioner may be removed from office by the Governor but only for incapacity, incompetence or misbehaviour following an independent review of the Commissioner's performance or conduct and recommendation for removal by the

⁷ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5825

⁸ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5826

⁹ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5826

¹⁰ The Hon. Barry O'Farrell MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5825

Advisory Board. However, any such independent review is not required for the removal of the Commissioner if the performance or conduct concerned has been the subject of an inquiry and report by the ICAC or a Special Commission of Inquiry or a finding by a court.

The Commissioner will have policy-related objectives and functions in relation to the public sector (which includes all the public sector services such as the Government Service, Health Service, NSW Police Force and Teaching Service). The Commissioner is to exercise his or her functions in accordance with the general policies and strategic directions determined by the Advisory Board and will report to the Premier. However, the Commissioner will not be subject to the control and direction of the Premier in the exercise of his or her functions. The Commissioner will assume most of the public sector policy-related functions currently exercised by the Director of Public Employment and the Director-General of the Department of Premier and Cabinet. These include the issuing of guidelines relating to the employment and management of staff and requiring the head of a public sector agency to provide the Commissioner with a report relating to the staff or personnel policies and practices of the agency.

The Commissioner will also have more general functions in relation to matters affecting the public sector (particularly in relation to the strategic development and management of the public sector workforce). The Commissioner will be able to give directions to the heads of public sector agencies in relation to their staff but only after consultation with those agency heads and with other relevant persons. Any direction by the Commissioner is to be made publicly available and the head of the public sector agency to whom a direction is given must comply with any such direction. The Commissioner (or a person authorised by the Commissioner) may also conduct an inquiry into any matter relating to the administration or management of a public sector agency.

Schedule 1.2 [2] also established the Public Service Commission Advisory Board, which will consist of a person appointed by the Premier as the Chairperson, 4 other persons appointed by the Premier, the Commissioner (or the Commissioner's nominee) and the Director-General of the Department of Premier and Cabinet (or the Director-General's nominee). The functions of the Advisory Board include determining general policies and strategic directions in relation to the functions of the Commissioner and providing the Premier with advice on matters relating to the management and performance of the public sector.

13. Schedule 1.2 [3] establishes the staff of the Commissioner as a Division of the Government Service to be known as the Public Service Commission.
14. Schedule 1.2 [4] inserts provisions relating to the Commissioner (such as terms of office) and to the members and procedures of the Advisory Board.
15. Schedule 1.3 generally contains amendments to the principal Act that are consequential on the creation of the position of the Public Service Commissioner and the abolition of the position of Director of Public Employment (whose functions under the principal Act are transferred to the Commissioner). The Commissioner will also assume any public sector policy-related functions of the Director-General of the Department of Premier and Cabinet who will retain certain industrial relations functions in respect of the public sector.

16. Schedule 1.3 [23] provides that persons who are employed in or by a NSW public sector agency may be temporarily assigned to work for another body and also provides for persons who are employed in or by any such other body to be temporarily assigned to work for a NSW public sector agency. Any such assignment is to be in accordance with the Commissioner's guidelines.

Amendment of other legislation

17. Schedule 2.1 transfers the EEO functions of the Director of Equal Opportunity in Public Employment under Part 9A of the *Anti-Discrimination Act 1977* to the Public Service Commissioner and consequentially abolishes the Director's position.

The remainder of the amendments made by Schedule 2 are consequential on the other amendments made by the proposed Act.

ISSUES CONSIDERED BY COMMITTEE

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

Commencement by Proclamation

18. The Bill is to commence on a day or days to be appointed by proclamation [proposed section 2].
19. The Committee notes that this arrogates to the Executive the power to commence the Act on whatever day it chooses, or not at all.

The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

4. State Revenue Legislation Amendment Bill 2011

Date introduced	15 September 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Mike Baird MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:
 - (a) To amend the *Duties Act 1997*:
 - (i) to extend the duty concession for transfers of property, and to provide for a new concession, in connection with persons changing superannuation funds; and
 - (ii) to provide for an exemption from duty in relation to special disability trusts under the *Veterans' Entitlements Act 1986* of the Commonwealth; and
 - (iii) for law revision purposes; and
 - (b) to amend the *First Home Owner Grant Act 2000* to make further provision in relation to the recovery of certain amounts required to be paid under that Act.

BACKGROUND

2. The Bill makes amendments to the *Duties Act 1997*. These amendments have the effect of the following:
 - (a) Allowing for transfers of property *to* a life company *from* a trustee of a complying superannuation fund in connection with members changing funds to attract the same concession as transfers of property *from* a life company *to* the trustee;
 - (b) Providing consistency with the transfer duty concessions by providing for a concessional duty of \$500 on an acquisition of an interest in a landholder that results from members ceasing to become entitled to benefits in one complying superannuation fund and becoming entitled to benefits in another complying superannuation fund; and
 - (c) Removing the impediment to the establishment of special disability trusts by extending the duties exemptions to special disability trusts established under the Commonwealth *Veterans Entitlements Act 1986* as they are currently applied to such trusts established under the Commonwealth *Social Security Act 1991*.¹¹

¹¹ The Hon. Mike Baird MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5804-5805

3. The Bill amends the *First Home Owner Grant Act 2000* to improve recovery of grants that are required to be repaid. The Bill provides that a grant recipient's liability to repay the grant and any penalty is a first charge on the land, with priority over all other encumbrances except land tax. This amendment is to apply prospectively only to grants paid on transactions occurring after 1 October 2011.¹²

OUTLINE OF PROVISIONS

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of the assent to the proposed Act.

Schedule 1 – Amendment of *Duties Act 1997* No 123

6. Schedule 1 [1] extends an existing duty concession that applies to certain transfers of dutiable property that are made in connection with a person changing superannuation funds. The amendment provides for payment of duty at the concessional rate of \$500 (or the ad valorem rate, if lower) on a transfer of marketable securities from the trustee of a superannuation fund, or a custodian of the trustee of a superannuation fund, to a life company or custodian for a life company if the transfer is made in consideration of the issue of a policy of life insurance in connection with changing superannuation funds.
7. Schedule 1 [2] updates a reference to the *Workplace Relations Act 1996* of the Commonwealth, which has been replaced by the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth.
8. Schedule 1 [3] establishes a duty concession that applies to certain transfers of shares or units in a unit trust scheme that are made in connection with a person changing superannuation funds. The duty concession applies to acquisitions of interests in landholders. It is similar to the duty concession that applies to transfers of dutiable property that are made in connection with a person changing superannuation funds. Duty is charged at the concessional rate of \$500.
9. Schedule 1 [4] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act. Schedule 1 [5] provides for transitional matters.
10. Schedule 1 [6] extends a provision that exempts from duty instruments establishing, or transferring property to, special disability trusts within the meaning of the *Social Security Act 1991* of the Commonwealth. It also extends a provision that specifies that duty of \$50 is chargeable in respect of a transfer of dutiable property to a trustee of a special disability trust within the meaning of that Act. The amendment extends these provisions to special disability trusts within the meaning of the *Veterans' Entitlements Act 1986* of the Commonwealth.

Schedule 2 – Amendment of *First Home Owner Grant Act 2000* No 21

11. Schedule 2 [1] provides that the liability of an applicant for a first home owner grant to pay certain amounts under that Act is a first charge on that applicant's interest in the home for which the first home owner grant is sought. Schedule 2 [2] provides that once a caveat lodged by the Chief Commissioner of State Revenue in respect of the home is

¹² The Hon. Mike Baird MP, NSWPD (*Legislative Assembly*), 15 September 2011 at p 5805

recorded in the Register kept under the *Real Property Act 1900*, the charge has priority over all other encumbrances except land tax. Schedule 2 [3] makes it clear that these provisions apply despite section 42 of the *Real Property Act 1900*, which states that the registered proprietor of an interest in land holds the interest free of any interests that are not recorded in a folio of the Register kept under that Act.

12. Schedule 2 [4] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.
13. Schedule 2 [5] provides for transitional matters.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of the issues set out in s 8A(1) of the *Legislation Review Act 1987*.

Part Two - Regulations

The Committee makes no comment on Regulations in respect of the issues set out in s 9 of the *Legislation Review Act 1987*.

Appendix One – Index of Ministerial correspondence on Bills

The Committee currently has no ministerial correspondence on Bills.

Appendix Two – Index of correspondence on Regulations on which the Committee has reported

The Committee currently has no correspondence in respect of Regulations on which it has reported.