



Legislation Review Committee

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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. CRIMES AMENDMENT (INTOXICATION) BILL 2014

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

Onus of proof

The Committee notes that the provisions in this Bill that reverse the onus of proof may violate a person's right to the presumption of innocence. The Committee accepts the purpose of the legislation is to prevent serious alcohol and drug related violent offences, however, the Committee refers these provisions to Parliament.

Mandatory sentencing

The Committee is always concerned when mandatory sentencing is proposed in legislation. Mandatory sentencing may restrict the discretion of judicial officers to impose a sentence depending upon the circumstances of the crime. This may lead to unjust penalties. The Committee refers this matter to Parliament for further consideration.

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

Commencement by proclamation

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

2. CRIMINAL ASSETS RECOVERY AMENDMENT BILL 2014

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

Retrospectivity

The Committee notes that, under this Bill, the changes to the definition of proceeds of criminal activity is to take place with retrospective effect. Nonetheless, the Committee notes that this provision is designed to tighten what may be an existing loophole, and does not consider the amendments unreasonable in the circumstances.

3. MINING AND PETROLEUM LEGISLATION AMENDMENT BILL 2014

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

By providing that a decision-maker may refuse to grant or renew a mining right or petroleum title if he or she is satisfied that an applicant has contravened any relevant legislation, regardless of whether or not the person has been prosecuted or convicted of an offence arising from the contravention, the Bill may deny applicants the presumption of innocence and the right to due process. Nonetheless, the Bill provides opportunity for merits review of such decisions by the Land and Environment Court. For this reason the Committee makes no further comment.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Reviewability of Administrative Decisions Affecting Mining Rights

The Bill allows a decision-maker to refuse an application for certain mining rights where satisfied the applicant has provided false or misleading information in connection with the application. This removes the current reasonableness requirement i.e. it is no longer necessary for the decision-maker to *reasonably* consider that false or misleading information has been provided. By removing the reasonableness requirement, the Bill may make review of such decisions (where review rights exist), more difficult. Nonetheless, these provisions are part of a package to address issues raised by the ICAC following Operations Jaspers and Acacia. In the circumstances, the Committee makes no further comment.

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

Matters which should be set by Parliament

The Bill allows a decision-maker to refuse to grant or renew a mining right or petroleum title if he or she is of the opinion the applicant is not a fit and proper person and for the purposes of determining whether a person is a “fit and proper person” the decision-maker may take into account matters prescribed by the regulations. The Committee prefers matters such as these, which affect rights, to be included in legislation and not delegated to subordinate legislation. However, regulations are subject to disallowance by the Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.

PART TWO – REGULATIONS

The Committee does not report on any Regulations in this Digest.

Part One - Bills

1. Crimes Amendment (Intoxication) Bill 2014

Date introduced	26 February 2014
House introduced	Legislative Assembly
Minister responsible	The Hon Barry O'Farrell
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

(a) to create various aggravated intoxication offences (in addition to the recently created offence of assault causing death when intoxicated) by increasing by 2 years the maximum penalty for the following offences under the Crimes Act 1900 if committed when an adult offender was intoxicated in public by alcohol or a narcotic drug (or by any other intoxicating substance in conjunction with alcohol or a narcotic drug):

- i an offence under section 35 (Reckless grievous bodily harm or wounding),
- ii an offence under section 59 (Assault occasioning actual bodily harm),
- iii an offence under section 60 (Assault and other actions against police officers),
- iv an offence under section 93C (Affray),

(b) to require the courts to impose the following minimum sentences of imprisonment (and minimum non-parole periods) on a person guilty of the following serious aggravated intoxication offences:

- section 35 (1AA) (Reckless grievous bodily harm when intoxicated in public and in company) 5 years
- section 35 (1A) (Reckless grievous bodily harm when intoxicated in public) 4 years
- section 35 (2A) (Reckless wounding when intoxicated in public and in company) 4 years
- section 35 (3A) (Reckless wounding when intoxicated in public) 3 years
- section 60 (3B) (Wounding or causing grievous bodily harm to police officers when intoxicated in public) 5 years

- section 60 (3C) (Wounding or causing grievous bodily harm to police officers during public disorder and when intoxicated in public) 5 years
- (c) to amend the recently created offence of assault causing death when intoxicated to clarify the assaults to which it applies and to make consequential changes that reflect features of the other proposed aggravated intoxication offences created by this Bill,
- (d) to authorise a police officer to require a breath test or analysis, or require the provision of a blood or urine sample, after arresting an offender for any aggravated intoxication offence to confirm or disprove that the offender was intoxicated (by extending provisions that were recently enacted in relation to assaults causing death when intoxicated) and to amend those provisions by:
- i authorising a police officer to require the provision of a blood or urine sample within 12 hours (instead of 4 hours) after the alleged offence, and
 - ii making it an offence to consume or take alcohol or a narcotic drug within 12 hours after assaulting a person in order to alter the presence or concentration of the intoxicating substance in the person's breath, blood or urine and thereby avoid prosecution for an aggravated intoxication offence,
- (e) to make other consequential or related amendments.

BACKGROUND

2. This Bill follows the introduction of the *Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014* and the *Liquor Amendment Bill 2014* which were introduced in response to strong community concern over alcohol-related assaults in the Sydney CBD.

OUTLINE OF PROVISIONS

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Crimes Act 1900 No 40

5. Schedule 1 [11]–[31] amend the Act to create the aggravated intoxication offences referred to in paragraph (a) of the Overview, and to make consequential changes.
6. Schedule 1 [2] inserts proposed section 8A into the Act in relation to offenders intoxicated in public for the purposes of aggravated intoxication offences. The proposed section provides, in particular, that:
- (a) an offender is intoxicated if the offender's speech, balance, co-ordination or behaviour is noticeably affected as the result of the consumption or taking of alcohol or a narcotic drug (or of any other intoxicating substance in conjunction with alcohol or a narcotic drug), or if the offender has 0.15 or more grams of alcohol in the offender's breath or blood, and

- (b) an offender is intoxicated in public if the offender is intoxicated while in or in the vicinity of a public place, including any premises or land open to the public, any licensed premises, any premises or land regularly used by a local community for consuming or taking alcohol or narcotic drugs, premises declared under the *Restricted Premises Act 1943* and any premises or land occupied by a criminal group, and
 - (c) a person has a defence if the intoxication was not self-induced, and
 - (d) evidence may be given of the presence and concentration of any alcohol, drug or other intoxicating substance in the offender's breath, blood or urine as determined by an analysis carried out under the *Law Enforcement (Powers and Responsibilities) Act 2002*, and
 - (e) an offender who records a concentration of alcohol or a narcotic drug in the person's blood within 6 hours after the alleged offence is taken to have at least that concentration of alcohol or drug in the offender's blood at the time of the alleged offence, and
 - (f) an offender is presumed to be intoxicated at the time of an alleged offence if the offender refuses or fails to provide a blood sample for analysis.
7. Schedule 1 [1] omits the definition of *intoxication* by reference to Part 11A of the Act as a consequence of the special definition of *intoxication* inserted in proposed section 8A.
 8. Schedule 1 [2] inserts proposed section 8B into the Act to specify the minimum sentences of imprisonment (and non-parole periods) for adult offenders when tried on indictment as referred to in paragraph (b) of the Overview. The minimum sentences (and non-parole periods) do not apply to an offender who has a significant cognitive impairment. Schedule 1 [10] omits section 25B (which provided a minimum sentence for the recently created offence of assault causing death when intoxicated under section 25A) as a result of that minimum sentence being transferred to proposed section 8B.
 9. Schedule 1 [3]–[9] amend section 25A of the Act as referred to in paragraph (c) of the Overview.
 10. Schedule 1 [32] amends Schedule 11 to the Act to extend the review of the operation of sections 25A and 25B in relation to assaults causing death when intoxicated to all the proposed aggravated intoxication offences.

Schedule 2 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103

11. Schedule 2 [1]–[8] amend Division 4 of Part 10 of the Act to confer on police officers the breath testing and analysis powers and the blood and urine sampling powers referred to in paragraph (d) of the Overview relating to the proposed aggravated intoxication offences.
12. Schedule 2 [9] amends that Division 4 to create the offence referred to in paragraph (d) of the Overview relating to persons consuming or taking alcohol or drugs after an assault in order to alter the presence or concentration of alcohol or a narcotic drug in the person's breath, blood or urine.

Schedule 3 Consequential amendment of other Acts

13. Schedule 3.1 amends the *Crimes (Sentencing Procedure) Act 1999* to prescribe a standard non-parole period of 5 years for an offence under section 60 (3A) of the *Crimes Act 1900* (wounding or inflicting grievous bodily harm on police officer during public disorder)—the same period proposed as the minimum sentence (and non-parole period) under the amendments made by Schedule 1 to the proposed Act for the aggravated intoxicated form of that offence. This will provide a consistent approach for offences with a standard non-parole period that are to have an aggravated intoxicated form of the offence with a minimum sentence (and non-parole period).
14. Schedule 3.2 amends the *Criminal Procedure Act 1986* to enable any of the proposed aggravated intoxication offences that do not carry a minimum sentence to be disposed of summarily with the election (as appropriate) of the prosecution or accused.

ISSUES CONSIDERED BY COMMITTEE

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

Onus of proof

15. For the purposes of proceedings for an aggravated intoxication offence it is presumed the accused is intoxicated if they had the prescribed concentration of alcohol in their blood within six hours after the alleged offence. The onus is on the accused to prove the contrary.
16. The presumption is not rebutted unless the accused also proves that they did not consume or take alcohol or a narcotic drug within 6 hours after the alleged offence in order to alter the presence or concentration of alcohol.
17. The principle that the prosecution should bear the onus of proving all elements of an offence against an accused person is consistent with the presumption of innocence. This right should not be eroded unless it is in the public interest to do so.

The Committee notes that the provisions in this Bill that reverse the onus of proof may violate a person's right to the presumption of innocence. The Committee accepts the purpose of the legislation is to prevent serious alcohol and drug related violent offences, however, the Committee refers these provisions to Parliament.

Mandatory sentencing

18. The Bill creates a number of offences where the courts are required to impose a minimum sentence. The minimum sentences to be imposed range from 8 years for assault causing death (when intoxicated) to 3 years for reckless wounding when intoxicated in public. Nothing in section 21 of the *Crimes Sentencing Procedure Act 1999* or in any other Act or law authorises a court to impose a lesser sentence or no sentence.

The Committee is always concerned when mandatory sentencing is proposed in legislation. Mandatory sentencing may restrict the discretion of judicial officers to impose a sentence depending upon the circumstances of the crime. This may lead to unjust penalties. The Committee refers this matter to Parliament for further consideration.

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

Commencement by proclamation

19. Clause 2 of the Bill states that the Act commences on a day or days to be appointed by proclamation.

The Committee prefers legislation of this kind, which may impact on personal rights and liberties, to commence on a fixed date or assent.

2. Criminal Assets Recovery Amendment Bill 2014

Date introduced	25 February 2014
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 *Criminal Assets Recovery Bill 1990* to provide for proceeds of an activity engaged in by a person to include certain interests, services, advantages or benefits derived or realised (whether directly or indirectly) by other persons if the person engaged in the activity intended that result of knew, or ought reasonably to have known, that it would be likely to be the result.
2. The Bill also clarifies that proceeds of an activity can include an increase in the value of an interest in property in resulting from the activity.
3. Lastly, the Bill includes provisions of a savings or transitional nature.
4. This Bill is cognate with the *Mining and Petroleum Legislation Amendment Bill 2014*.

BACKGROUND

5. On 30 January 2014, the Parliament passed the *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* to cancel certain mining exploration licenses. In the Second Reading Speech, the Premier noted that the first tranche of legislation did not address all of the matters raised in the final report of the Independent Commission Against Corruption (ICAC) published on 18 December 2013.
6. The Government has subsequently introduced two further Bills to complete its legislative responses to the recommendations of the ICAC and other associated issues.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
9. Currently, section 4 (1) of the Act defines proceeds, in relation to an activity, to include certain interests in property, services, advantages or benefits that are derived or realised by a person (a secondary person) other than the person engaged in the activity (the perpetrator) if it was at the direction or request (given or made directly or indirectly) of the perpetrator.

10. Schedule 1 [1] amends the definition of proceeds to make it clear that it includes an increase in the value of an interest in property resulting from an activity.
11. Schedule 1 [2] amends the definition of proceeds so that it is not necessary to establish that the interest, service, advantage or benefit derived or realised by a secondary person from an activity was at the direction or request of the perpetrator. A new test will be substituted requiring the perpetrator:
 - (a) to intend for the secondary person to derive or realise (whether directly or indirectly) the interest, service, advantage or benefit, or
 - (b) to know, or to ought reasonably to have known, that the secondary person would be likely to derive or realise (whether directly or indirectly) the interest, service, advantage or benefit.
12. Schedule 1 [3] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of another Act that amends the Act (including the proposed Act).
13. Schedule 1 [4] provides for the amendments made to the Act by the proposed Act to extend to:
 - (a) activities engaged in, and to proceeds that were derived or realised, before the commencement of the amendments, and
 - (b) pending applications for orders under the Act.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity

14. Schedule 1[4] of the Bill provides that the amendments made to the Act by the Bill will extend to activities engaged in, and to proceeds that were derived or realised, before the commencement of those amendments. These amendments relate to changes to the definition of proceeds of criminal activity. The amendments also extend to applications for orders under the Act made (but not yet determined) before the commencement of those amendments.
15. The Committee generally comments when provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows people to order their affairs according to what the law is at the time of their activity.
16. However, the Committee notes that this provision is designed to tighten what might otherwise be a loophole in existing legislation. In particular, the legislation is drafted to ensure that proceeds from criminal activity that have been transferred into family trust or associated entities are recoverable under the Act.

The Committee notes that, under this Bill, the changes to the definition of proceeds of criminal activity is to take place with retrospective effect. Nonetheless, the Committee notes that this provision is designed to tighten

what may be an existing loophole, and does not consider the amendments unreasonable in the circumstances.

3. Mining and Petroleum Legislation Amendment Bill 2014

Date introduced	25 February 2014
House introduced	Legislative Assembly
Minister responsible	Hon. Barry O'Farrell MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend mining, petroleum and planning laws to address further issues raised in the Independent Commission Against Corruption's reports on the investigations known as Operation Jasper and Operation Acacia. In particular, this Bill:
 - (a) standardises provisions dealing with the basis on which administrative functions affecting mining authorities and petroleum titles may be exercised, and
 - (b) removes the public interest test as a ground on which certain administrative decisions about mining rights and petroleum titles may be made, and replaces it with a test based on whether the applicant or other relevant person is a "fit and proper person", and
 - (c) prevents an application for development consent under the Environmental Planning and Assessment Act 1979 (the Planning Act) to mine coal from being made or determined unless the applicant is the holder of a mining authority for coal on the land (to prevent development consent being used to avoid the mining exploration licence process), and
 - (d) provides that the grant, renewal or transfer of a mining lease or petroleum title can be refused on the ground that the applicant is not a fit and proper person despite planning approval for integrated development, State significant development, State significant infrastructure or a Part 3A project under the Planning Act, and
 - (e) makes it clear that the public interest can be taken into account in deciding whether or not to approve a transitional Part 3A project under the Planning Act, and
 - (f) extends the operation of provisions of the Mining Act 1992 that relate to the conditions of a mining authority so that they will apply to the preserved conditions of the exploration licences cancelled by the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014.
2. The Bill also amends the Planning Act to include notes about the effect of the above amendments and makes a consequential change to the requirements for the content of applications for development consent under that Act.

BACKGROUND

3. In his second reading speech to Parliament, the Hon Barry O'Farrell MP, Premier, stated that the Bill is part of the Government's legislative response to the recommendations of the Independent Commission Against Corruption (ICAC) following its investigations and proceedings, Operations Jasper and Acacia. The Bill aims to tighten the regulation of mining rights to reduce opportunities for corruption.

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 assent to the proposed Act.

Schedule 1 Amendment of Mining Act 1992 No 29 Standardisation of basis for making administrative decisions concerning mining rights

6. Schedule 1 [1]–[10] and [12]–[22] standardise provisions about the basis on which administrative functions affecting mining rights may be exercised so that the grounds for taking administrative action must be established to the satisfaction of the decision-maker.
7. Schedule 1 [25] inserts a savings and transitional provision that extends the operation of the amendments to a decision with respect to a matter that was pending on the commencement of the amendments and a decision based on conduct that occurred, or on a matter that arose, before that commencement.

Interrelationship between mining laws and planning laws

8. Schedule 1 [23] inserts a section that provides that an application for development consent under the Planning Act for consent to mine for coal cannot be made or determined unless the applicant is the holder of an authority under the Mining Act 1992 that is in force in respect of coal and the land where the mining is proposed to be carried out. The provision also applies to the modification of a development consent. The section provides that a mining lease that is for mining purposes only is not an authority that can be relied on for the purposes of making an application under the Planning Act in compliance with the section. Schedule 1 [25] inserts a savings and transitional provision that extends this amendment to applications for development consent that are pending on the date of assent to the Bill.
9. Schedule 1 [24] inserts (as section 380A (4)) a provision that overrides various provisions of the Planning Act so as to allow the grant, renewal or transfer of a mining lease to be refused on the ground that the Minister is of the opinion that the applicant is not a fit and proper person, even if the mining lease is necessary for the carrying out of State significant development, State significant infrastructure or a transitional Part 3A project or has been approved as integrated development.
10. Schedule 1 [11] inserts a note drawing attention to that new provision in a provision about development consent.
11. Schedule 1 [25] inserts a savings and transitional provision that extends this amendment to development consents already granted.

Introduction of “fit and proper person” considerations in making certain decisions about mining rights

12. Schedule 1 [24] omits an existing public interest test (under which the public interest is a relevant ground for making certain decisions about mining rights) and inserts instead a section that provides that certain decisions about mining rights may be made on the ground that, in the opinion of the decision-maker, a relevant person is not a fit and proper person. This does not limit any other ground on which such a decision may be made. The relevant decisions to which the new section applies are as follows:
 - (a) a decision to refuse to grant, transfer or renew a mining right,
 - (b) a decision to cancel a mining right or to suspend operations under a mining right,
 - (c) a decision to restrict operations under a mining right by the imposition or variation of conditions of a mining right.
13. Schedule 1 [25] inserts a savings and transitional provision that extends the operation of the fit and proper person test to a decision with respect to an application or other matter that was pending on the commencement of the amendment and a decision based on conduct that occurred, or on a matter that arose, before that commencement.

Application of Act to preserved conditions

14. Schedule 1 [26] and [27] extend provisions of the Act that apply to conditions of an authority to include the preserved conditions of the exploration licences cancelled by the Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014. This extends an existing provision provided for the limited application of provisions to those preserved conditions.

Schedule 2 Amendment of Environmental Planning and Assessment Act 1979 No 203

15. Schedule 2 [1]–[11] insert notes into various provisions of the Act to draw attention to the new provisions that will allow a mining lease under the Mining Act 1992 or a production lease under the Petroleum (Onshore) Act 1991 to be refused on the ground that the applicant is not a fit and proper person and that will prevent the making or grant of an application for development consent to mine coal or petroleum unless an appropriate mining authority or petroleum title is held.
16. Schedule 2 [12] makes it clear that the public interest can be taken into account in deciding whether to approve a project under Part 3A of the Act, whether or not the Director-General’s report on the project gives consideration to or makes any recommendation about the public interest or any particular aspect of the public interest.

Schedule 3 Amendment of Environmental Planning and Assessment Regulation 2000

17. Schedule 3 amends the requirements for the documents that are required to accompany an application for development consent so that, in the case of development comprising the mining of coal, documentary evidence will be required showing that the

applicant holds an authority under the Mining Act 1992 for coal on the land concerned or has the written consent of the holder of such an authority to make the application.

Schedule 4 Amendment of Mining Amendment Act 2008 No 19

18. Schedule 4 removes uncommenced amendments to the Mining Act 1992 concerning the taking into account of environmental performance in decision-making under that Act. Those amendments will become redundant as a result of the amendments made by Schedule 1, to the extent that the new fit and proper person test includes consideration for the conduct of a person, or a body corporate of which the person is a director, under relevant environmental legislation.

Schedule 5 Amendment of Petroleum (Onshore) Act 1991 No 84

19. Schedule 5 [1] and [2] amend provisions that authorise the cancellation or suspension of a petroleum title so that the grounds that need to be established to justify cancellation or suspension are required to be established to the satisfaction of the Minister.
20. Schedule 5 [4] inserts a savings and transitional provision that extends the operation of the amendments to a decision with respect to a matter that was pending on the commencement of the amendments and a decision based on conduct that occurred, or on a matter that arose, before that commencement.

ISSUES CONSIDERED BY COMMITTEE

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

Denial of Due Process

21. Schedule 1, item 24 of the Bill and schedule 5, item 3 of the Bill provide that a decision-maker can refuse to grant or renew a mining right or petroleum title if the decision-maker is of the opinion that an applicant for such a right or title is not a “fit and proper person”.
22. For the purpose of determining whether a person is a “fit and proper person” the decision-maker may take into account whether the person has “compliance or criminal conduct issues”. The Bill further provides that a person has such issues if the decision-maker is satisfied he or she has contravened any relevant legislation whether or not the person has been prosecuted or convicted of an offence arising from the contravention.

By providing that a decision-maker may refuse to grant or renew a mining right or petroleum title if he or she is satisfied that an applicant has contravened any relevant legislation, regardless of whether or not the person has been prosecuted or convicted of an offence arising from the contravention, the Bill may deny applicants the presumption of innocence and the right to due process. Nonetheless, the Bill provides opportunity for merits review of such decisions by the Land and Environment Court. For this reason the Committee makes no further comment.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Reviewability of Administrative Decisions Affecting Mining Rights

23. Schedule 1, items 2, 4, 6, 8, 10, 14, and 16 alter current provisions about the basis on which administrative functions affecting certain mining rights may be exercised. For example, currently an application for an exploration licence may be refused where a decision-maker *reasonably* considers that the applicant provided false or misleading information in or in connection with the application. However, schedule 1, item 2 amends this to provide that such an application may be refused where the decision-maker is satisfied that the applicant provided false or misleading information in connection with the application, that is, the reasonableness requirement is removed.

The Bill allows a decision-maker to refuse an application for certain mining rights where satisfied the applicant has provided false or misleading information in connection with the application. This removes the current reasonableness requirement i.e. it is no longer necessary for the decision-maker to *reasonably* consider that false or misleading information has been provided. By removing the reasonableness requirement, the Bill may make review of such decisions (where review rights exist), more difficult. Nonetheless, these provisions are part of a package to address issues raised by the ICAC following Operations Jaspers and Acacia. In the circumstances, the Committee makes no further comment.

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

Matters which should be set by Parliament

24. Schedule 1, item 24 of the Bill and schedule 5, item 3 of the Bill provide that a decision-maker can refuse to grant or renew a mining right or petroleum title if the decision-maker is of the opinion that an applicant for such a right or title is not a “fit and proper person”. For the purpose of determining whether a person is a “fit and proper person” the decision-maker may take into account matters prescribed by the regulations.

The Bill allows a decision-maker to refuse to grant or renew a mining right or petroleum title if he or she is of the opinion the applicant is not a fit and proper person and for the purposes of determining whether a person is a “fit and proper person” the decision-maker may take into account matters prescribed by the regulations. The Committee prefers matters such as these, which affect rights, to be included in legislation and not delegated to subordinate legislation. However, regulations are subject to disallowance by the Parliament under section 41 of the *Interpretation Act 1987*. Given this safeguard, the Committee makes no further comment.

Part Two – Regulations

The Committee does not report on any Regulations in this Digest.

Appendix One – Index of Ministerial Correspondence on Bills

The Committee does not report on any Ministerial Correspondence on Bills in this Digest.

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

1. In Digest 9/55, the Committee reported on the Work Health and Safety (Savings and Transitional) Regulation 2011, and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 17 April 2012 which addresses to the Committee's satisfaction the issues raised.
2. In Digest 12/55, the Committee reported on the Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
3. In Digest 16/55, the Committee reported on the Home Building Amendment (Threshold for Home Warrant Insurance) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.
4. In Digest 12/55, the Committee reported on the Local Government (General) Amendment (Election Procedures) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 21 June 2012 which addresses to the Committee's satisfaction the issues raised.
5. In Digest 15/55, the Committee reported on the Police Amendment (Death and Disability) Regulation 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 9 July 2012 which addresses to the Committee's satisfaction the issues raised.
6. On 8 May 2012 the Committee wrote to the Attorney General in relation to James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Statutory Recovery Claims) Regulation 2012. The Committee was in receipt of a response from the Attorney General dated 10 August 2012 which addressed to the Committee's satisfaction the issues raised. Further information in relation to this can be found in Digest 23/55.