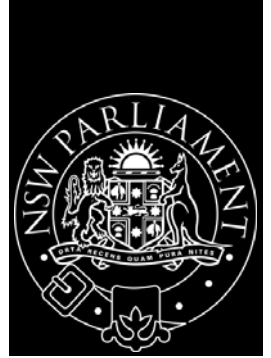


PARLIAMENT OF NEW SOUTH WALES



# Legislation Review Committee

## LEGISLATION REVIEW DIGEST

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No 3 of 2008

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\* Denotes Private Member's Bill

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## FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

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

### 8A Functions with respect to Bills

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

### 9 Functions with respect to Regulations:

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

## GUIDE TO THE *LEGISLATION REVIEW DIGEST*

### Part One – Bills

#### Section A: Comment on Bills

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

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

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

### Part Two – Regulations

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

#### Regulations for the special attention of Parliament

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

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

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

#### Copies of Correspondence on Regulations

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

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

## Appendix 1: Index of Bills Reported on in 2008

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

## Appendix 2: Index of Ministerial Correspondence on Bills for 2008

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

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

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

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

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

## SUMMARY OF CONCLUSIONS

### SECTION A: Comment on Bills

#### 1. Mining Amendment Bill 2008

##### Self-incrimination: Clauses 246S-246T

26. The right against self-incrimination is well recognised both at common law and in international law. Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that a person has a right not to be compelled to testify against himself or to confess guilt. However the right against self-incrimination needs to be balanced with the public benefit that may flow from obtaining information. Nonetheless, any abrogation of the right against self-incrimination should not be more than is justified in the circumstances.
27. The Committee understands that the mandatory audit provisions will be used principally to monitor compliance with the seven-year rehabilitation and environmental management plan that governs the carrying out of activities under a mining lease. The Committee accepts that the public interest in ensuring compliance with environmental laws is sufficient to support the adoption of these provisions. The Committee observes these provisions are based on Chapter 6 (Environmental audits) of the Protection of the Environment Operations Act 1997.

##### Issue: Alteration of conditions of a mining title by the Minister

29. Although a change in the conditions of a mining title after grant of title could financially disadvantage the holder, the Committee is satisfied there is a justified need for the Department to be able to adapt the environmental conditions of a mining lease to meet emerging community standards. The Committee is advised that the holder of the title would be consulted on the proposed changes.

##### Strict Liability

##### Issue: Breach of a condition of an authorisation will now be a strict liability offence

32. The Committee is satisfied that the strict liability provisions of the Bill have provided for a defence that is appropriate to ensure the holder of an authorisation is not punished if the contravention was caused by another person. The Committee also notes that a further defence is available if the defendant satisfies the court that the act or omission was necessary in order to comply with the requirements of other safety or environmental legislation. The Committee is also satisfied that the penalty provisions have been set appropriately having regard to the objectives of the *Mining Act*.



## 2. National Parks and Wildlife (Leacock Regional Park) Bill 2008

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

## 3. Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008\*

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

## 4. Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008\*

Issue: Privacy – Schedule 1 [2]: proposed Part 1A Prohibition on smoking in motor vehicles – section 5A Offence of smoking in motor vehicle

12. The Committee notes the recommendation from the June 2006 NSW Joint Select Committee on Tobacco Smoking was for NSW Health to implement a sustained educational campaign aimed at reducing smoking in cars, and that the Joint Select Committee's Report at paragraph 7.42 (page 134) stated: *While in the previous chapter we recommended that smoking be banned in children's playgrounds, we note that there is an important difference between these areas and cars. The former are public places, while cars are private. A ban on smoking in cars would thus entail a greater encroachment on individual liberties than one on behaviour in public areas.*
13. The Committee also notes that the NSW Joint Select Committee in reaching its conclusion with regard to smoking in cars, at paragraph 7.41 (page 134), stated that: *It considers that on balance, and particularly because of evidence concerning the remarkable success achieved through the educational 'car and home: smoke free zone' campaign, alongside the absence of research evidence in relation to a legislated ban, that an educational rather than legislative approach is desirable. The Committee is also persuaded by the concerns of police and advocacy-based inquiry participants about the enforceability of the bill's provisions.*
14. The Committee takes into consideration that in the Tasmanian and South Australian legislation, there are only restrictions on smoking in vehicles if a child is present (and under the Tasmanian legislation, there is a further restriction if in the course of employment, another person is present).
15. Accordingly, the Committee considers a ban on smoking in motor vehicles (even if the person were alone or in the absence of any children) could unduly trespass on individual rights and liberties including the right to privacy, and refers this to Parliament.

## Part One – Bills

### SECTION A: COMMENT ON BILLS

## 1. MINING AMENDMENT BILL 2008

Date Introduced:	5 March 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Noreen Hay MP
Portfolio:	Parliamentary Secretary

### Purpose and Description

1. The purpose of this Bill is to make miscellaneous amendments to the Mining Act 1992. Significant changes include provisions to update the environmental regulation of the mining industry, improvements to the enforcement provisions of the principal act and a streamlining of the administration of mining in New South Wales.

### Background

2. According to the Agreement in Principle speech:

The amendments made by this Bill will ensure the Mining Act is consistent with contemporary environmental standards, community expectations and recent developments in New South Wales environmental regulatory framework. In 2005, the Government released a position paper for public comment that outlined the proposals in detail. Thirty- three submissions were received from industry and community stakeholders. The majority of the submissions were strongly supportive of the proposals. The amendments are therefore the result of a long and extensive period of consultation and will greatly improve the regulation of mining in New South Wales.

Mining is a significant and important industry in New South Wales. It contributes over \$9 billion to the New South Wales economy each year and directly and indirectly employs over 55,000 people in this State. In 2006 royalties from all minerals, including coal, paid under the Mining Act totalled about half a billion dollars. Mining is clearly a major source of income for the State. At the same time, mining operations must be managed to minimize long-term impacts on the environment and communities.

The bill will introduce an objects clause into the Mining Act. This outlines what the Act is intended to achieve. The object is to deliver a balance between development of minerals for the economic benefit of New South Wales and appropriate management of the environmental impacts of mining. The amendments make it clear that the environmental impacts associated with exploration and mining of minerals will be assessed prior to these activities being approved and carried out.

A main objective of the Bill is to improve the enforcement provisions to ensure that companies that do the wrong thing can be appropriately penalised. The breach of a condition of title will now be a strict liability offence, consistent with other environmental legislation in New South Wales.

The Bill introduces a number of new standard title conditions. One of the new standard conditions will be the requirement to prepare a rehabilitation and environmental management plan. This plan will replace the mining operations plans that mines are currently required to prepare. The rehabilitation and environmental management plan will be prepared by the titleholder and will identify how operations are to be carried out on the mine site. The plan will be reviewed at least every seven years to ensure that rehabilitation and environmental management practices take account of changing circumstances. The plan will be the primary management tool used by the Government to ensure that mining operations are carried out in a manner that will enable effective rehabilitation of disturbed land and water.<sup>1</sup>

## The Bill

3. Proposed sections 3A sets out the objects of the Principal Act. These outline what the Act is intended to achieve.
4. New sections 5 and 6 make it an offence to carry out certain mining purposes without an authorisation.
5. The mining of private minerals by its owner will in future have to be conducted under a Mineral Owner Authority. Previously an owner of private minerals did not need a title under the Mining Act. This provision will allow greater environmental management of these areas. Royalty will not be payable as the owner will still retain rights over the minerals.
6. Under the Bill, the Director - General of the Department will take over functions previously exercised by mining registrars relating to the grant of mineral claims, opal prospecting licenses and mineral owner authorities.
7. The Bill will amend section 25 to remove the current limitations on the size of exploration licenses. These will now be prescribed by regulation.
8. Under sections 29 and 30 the Minister will determine the prospecting that may be carried out under an exploration license. The Minister may authorise additional kinds of prospecting or prospecting operations.
9. The Bill amends section 70 of the Principal Act to impose on the holder of a mining lease a condition that the holder must comply with a rehabilitation and environmental management plan in carrying out activities authorised by the lease or other activities authorised under the act.
10. Section 81 of the Principal Act is amended to permit additional activities prescribed by the regulations to be carried out by the holder of a mining lease on the surface of the land subject to the lease with the consent of the landholder or the holder of an authorisation.
11. The Bill amends section 118 of the Principal Act to prohibit a mineral claim from being granted over land that is not within a mineral claims district.

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<sup>1</sup> Noreen Hay MP, Legislative Assembly Hansard, 5 March 2008

12. The Bill amends section 213 to make it an offence for the holder of a mineral claim to fail to comply with obligations relating to the use of water, the felling of trees, fencing or removing rock or earth.
13. Fees under the Principal Act will now be prescribed by regulation rather than determined by the Minister.
14. Proposed sections 237-239 require the effect on the environment of approving applications relating to authorisations, and the environmental performance of an applicant, to be taken into account when decisions about applications are made. Environmental performance is to include whether or not there have been contraventions of environment protection legislation.
15. Proposed sections 239E - 240E empower the Director-General and inspectors to issue directions requiring compliance with the conditions of an authorisation and work to be done to address the environmental impact of activities carried out under an authorisation.
16. Proposed sections 242A - 246E allow the Minister to declare land to be a derelict mine site. This enables the Director - General of the Department to take steps to have the site rehabilitated. These provisions also establish a Derelict Mine Sites Fund to enable compensation to be paid to landholders affected by rehabilitation measures.
17. The Bill also makes provision for the forfeiture of mining plant that is not removed after the end of an authorisation. If the plant is not removed within six months of the cessation of the authorisation it can be forfeited by the Minister to a person who has the right to its control, use, or benefit or if there is no such person to the Crown or a landholder on whose land the plant is situated. Forfeiture has the effect of discharging all other estates and interests in the plant.
18. The Bill contains provisions for the periodic audit of prospecting and mining operations to provide information on compliance with obligations under an authorisation. The accreditation of auditors will be dealt with by regulation. Provision is made for both voluntary and mandatory audits. In the latter case self - incriminatory information is not exempt and is admissible in any prosecution of the holder of the authorisation.
19. Proposed sections 248C-248J set out the powers of inspectors to enter premises at which prospecting operations, mining operations or mining purposes are carried on or that are likely to be affected by such operations. Residential premises may only be entered with the occupier's consent or under the authority of a search warrant. Inspectors have the power to examine things, seize things and make records. The Director- General may, by written notice, require an owner or occupier to provide reasonable assistance and specified facilities to an inspector.
20. The Bill expands current provisions relating to security deposits. Proposed Part 12A contains a single regime for security deposits for all authorisations. A security deposit may take the form of a bank guarantee, cash, a bond or other appropriate form and one security deposit may apply to more than one authorisation.

21. The breach of a condition of a title will now be a strict liability offence consistent with other environmental legislation in New South Wales. However the Bill does provide certain defences for contravention of an authorisation including that the contravention was necessary to comply with other specified legislation.
22. New Schedule 7 specifies the conditions of authorisation, which, if breached, attract a higher maximum penalty than other breaches and sets out the offences under the Act that are to be dealt with on indictment. The schedule also specifies the offences for which there is a three-year period within which proceedings may be commenced.
23. Sections 378L-378X establish a scheme modelled on provisions of the Protection of the Environment Operations Act 1997 for the making and enforcement of restraining orders preventing the disposal of property by a defendant, if the court is satisfied that the offence was committed by the defendant and that it is likely that an order will be made against the defendant for the payment of costs or compensation.

## **Issues Considered by the Committee**

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

#### **Self-incrimination: Clauses 246S-246T**

24. The Bill makes provision for the periodic audit of authorisations for the purpose of providing information on compliance with the provisions of title. Audits can be voluntary or mandatory. In the case of a mandatory audit new section 246S states that information must be supplied by the holder of the authorisation whether or not the information might incriminate the person. New section 246T permits the use of the information in evidence in any prosecution of the holder of the authorisation.
25. The Department of Primary Industries has supplied some explanatory material to the Committee on the intent and practical operation of these provisions. It advises:

The main purpose for audits to be carried out is to identify areas of poor performance in relation to compliance and identify means of addressing these failures. While the results of the mandatory audit can be used in a prosecution for breach of conditions, the primary purpose is to identify areas for improvement and encourage titleholders to run a compliant operation by having a regular process that identifies deficiencies and areas for improvement. By imposing the audit requirement in conditions, the titleholder is on notice that the audit will be occurring and allow the operator to get their house in order... With regard to 246S, there is no protection from self-incrimination in a mandatory audit. The purpose of the audit is to identify compliance failures, if there was a protection from providing self-incriminating information in the audit, the audit would not be performing its function. The material contained in the audits can be used in proceedings against a person, but it wouldn't be definitive proof of a breach - further investigation and evidence collection would almost certainly be required following the audit if any breach were to be pursued.

26. **The right against self-incrimination is well recognised both at common law and in international law. Article 14(3)(g) of the International Covenant on Civil and Political Rights provides that a person has a right not to be compelled to testify against himself or to confess guilt. However the right against self-incrimination needs to be balanced with the public benefit that may flow from obtaining information. Nonetheless, any abrogation of the right against self-incrimination should not be more than is justified in the circumstances.**
27. **The Committee understands that the mandatory audit provisions will be used principally to monitor compliance with the seven-year rehabilitation and environmental management plan that governs the carrying out of activities under a mining lease. The Committee accepts that the public interest in ensuring compliance with environmental laws is sufficient to support the adoption of these provisions. The Committee observes these provisions are based on Chapter 6 (Environmental audits) of the Protection of the Environment Operations Act 1997.**

**Issue: Alteration of conditions of a mining title by the Minister**

28. One of the submissions made by the mining industry in relation to the mining amendments was that the conditions of title should not be able to be changed at the discretion of the Minister. The Department's view on this matter is that flexibility is required in a number of cases. The first of these is the need to be able to re-assess security deposits relating to rehabilitation. The Committee was advised that some adjustment in the amount of these would arise over the 21-year life of a mining lease. A further area where a change in conditions could become necessary is for the purpose of maintaining parity between the environmental requirements of the Mining Act and the Environmental Planning and Assessment Act.

29. **Although a change in the conditions of a mining title after grant of title could financially disadvantage the holder, the Committee is satisfied there is a justified need for the Department to be able to adapt the environmental conditions of a mining lease to meet emerging community standards. The Committee is advised that the holder of the title would be consulted on the proposed changes.**

**Strict Liability**

**Issue: Breach of a condition of an authorisation will now be a strict liability offence**

30. The Agreement in Principle speech states that a breach of a condition of a mining or prospecting title will now be a strict liability offence consistent with other environmental legislation in New South Wales. A strict liability offence generally refers to an offence that does not require proof of guilty intent but for which there is a defence if the wrongful action is based on a reasonable mistake of fact.
31. Section 374A currently states that the holder of a lease, license or mineral claim must not, without reasonable excuse, fail to comply with the conditions of that title. Under the new section 378D, which replaces this section, if the condition of an authorisation is contravened by any person each holder of the authorisation is guilty of an offence. In place of the defence of reasonable excuse section 378E establishes certain new defences. It will be a defence against prosecution if the holder of the authorisation

establishes that the contravention was caused by another person not associated with the holder, and that the holder of the title took all reasonable steps to prevent contravention.

- 32. The Committee is satisfied that the strict liability provisions of the Bill have provided for a defence that is appropriate to ensure the holder of an authorisation is not punished if the contravention was caused by another person. The Committee also notes that a further defence is available if the defendant satisfies the court that the act or omission was necessary in order to comply with the requirements of other safety or environmental legislation. The Committee is also satisfied that the penalty provisions have been set appropriately having regard to the objectives of the *Mining Act*.**

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

## 2. NATIONAL PARKS AND WILDLIFE (LEACOCK REGIONAL PARK) BILL 2008

Date Introduced:	5 March 2008
House Introduced:	Legislative Assembly
Minister Responsible:	Hon Verity Firth MP
Portfolio:	Climate Change and the Environment

### Purpose and Description

1. This Bill revokes the reservation of certain land currently reserved under the *National Parks and Wildlife Act 1974* as part of Leacock Regional Park; and for other purposes.
2. Lands reserved under the Act may not be revoked except by an Act of Parliament.

### Background

3. The proposed revocation seeks to allow for the construction of the Southern Sydney Freight Line. The revocation of lands will generally be done as a last resort and only where appropriate. The construction of the Southern Sydney Freight Line aims to provide reliable freight train operations through the southern Sydney metropolitan area without affecting passenger rail services.
4. According to the Agreement in Principle speech:

The Australian Rail Track Corporation, which is a Commonwealth Government-owned company, and RailCorp have entered into a joint arrangement for the construction, operation and maintenance of the Southern Sydney Freight Line. The Southern Sydney Freight Line is to be a single bidirectional non-electrified dedicated freight line for a distance of 30 kilometres between Macarthur and Sefton in south Sydney. The capital value of the project is estimated to be in excess of \$190 million.

The key objective of the Southern Sydney Freight Line is to enable freight and passenger trains to run independently and to increase the reliability and efficiency of freight and passenger train operations. The Southern Sydney Freight Line will be managed by the Australian Rail Track Corporation while RailCorp will continue to own the corridor. The design of the southern and northern approach ramps to accommodate a proposed Glenfield flyover and the grade and curvature limitations of the railway track have resulted in design constraints and the requirement for acquisition and de-gazettal of a small portion of Leacock Regional Park to accommodate the proposed route of the Southern Sydney Freight Line.

The project was assessed under part 3A of the *Environmental Planning and Assessment Act 1979* with an environmental assessment report prepared and publicly exhibited in May and June 2006. The Minister for Planning approved the construction of the Southern Sydney Freight Line in December 2006. The Southern Sydney Freight Line is to be completed in 2009. The proposed revocation is required because the construction of a freight line is not permissible on land reserved under the National Parks and Wildlife Act. This development requires the revocation of 1,564 square metres of land from Leacock Regional Park.



Leacock Regional Park was reserved under the *National Parks and Wildlife Act 1974* in September 1997 and there was a small addition to the park in 2001. Leacock Regional Park is situated within a region where there is high demand for recreational areas for activities such as walking, bicycle riding and picnics. The park, in combination with other protected areas in the Sydney Basin, forms an important refuge area for native animals. It also protects an important range of vegetation communities that have largely been cleared elsewhere in the Sydney Basin. The proposed revocation represents a small area of the park—less than 0.5 per cent of the total area of about 34.3 hectares—and the land to be revoked does not have any significant natural and cultural heritage values. Compensation will be determined by the Valuer General and will be used to purchase compensatory land.

The Agreement in Principle speech also stated that:

While a small area of land will be lost from the reserve system, the compensation paid will be used to purchase compensatory land in the vicinity of Leacock Regional Park where this is appropriate for park management purposes and consistent with the objectives of the National Parks and Wildlife Act.

## The Bill

5. The object of this Bill is to revoke the reservation of certain land at Casula, south of Liverpool, which is currently reserved as part of Leacock Regional Park. The revocation is required to allow for the development of the Southern Sydney Freight Line.

### 6. Outline of provisions

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

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

**Clause 3** revokes the reservation of part of Leacock Regional Park under the *National Parks and Wildlife Act 1974*. The revocation relates to 1,564 square metres of land at the south-eastern boundary of the regional park.

**Clause 4** provides for the land to vest in the Minister administering Part 11 of the *National Parks and Wildlife Act 1974*.

**Clause 5** ensures that the proposed Act does not operate to extinguish native title rights and interests existing in relation to the land immediately before its vesting under the proposed Act.

## Issues Considered by the Committee

- |   |
|---|
| <ol style="list-style-type: none"><li>7. <b>The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i>.</b></li></ol> |
|---|

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

## 3. OCCUPATIONAL HEALTH AND SAFETY AMENDMENT (LIABILITY OF VOLUNTEERS) BILL 2008\*

Date Introduced:	6 March 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Richard Colless MLC
Portfolio:	Non-Government, The Nationals

### Purpose and Description

1. This Bill amends the *Occupational Health and Safety Act 2000* to remove prosecution liabilities from officers of community based corporations, trusts and organisations who are volunteers; and for other purposes.
2. The object of this Bill is to amend the *Occupational Health and Safety Act 2000* to exempt from prosecution the non paid directors and those involved in a voluntary capacity on public trust boards or other such corporations when accidents occur on land or facilities managed by such trusts or corporations.
3. At present, trust members are considered to be the same as directors and managers under section 26 of the *Occupational Health and Safety Act*. Section 26 (1) of the current Act states that each director is liable in the case of an incident and that each director can be personally prosecuted.
4. As the current legislation stands, each person who is a volunteer concerned with the management of a corporation is held liable for breaches of the *Occupational Health and Safety Act* should death or injury take place with any user of that facility. These volunteers also face the threat of being forced to provide compensation to the aggrieved party, even though they do not profit from their efforts as a member of a public trust board.

### Background

5. This Bill is introduced by the Nationals. According to the Second Reading Speech, until the potential for volunteers to be prosecuted under occupational health and safety legislation is removed, fewer people will volunteer their time on these boards. The amendment will ensure that employees or voluntary workers of a trust are not impacted upon in the event of an accident. The trust is still required to have insurance cover for all people involved. However, individual trust members will not be personally prosecuted and their personal assets will no longer be at risk. It will encourage more community members to serve as trust members and contribute to the management of local parks and community facilities.
6. There are around 850 reserves throughout NSW, administered under trust boards, with about 6,000 volunteers contributing their time to manage Crown land reserves. Trust board membership is an honorary position appointed by the Minister

administering the Crown Lands Act. They are not entitled to any financial benefit from the position, but they are entitled to recoup out-of-pocket expenses incurred in carrying out their trust duties.

7. The trust boards are responsible for the management and maintenance of publicly owned facilities such as community halls, showgrounds, recreation areas and other community facilities. According to the Second Reading speech, public uses of these facilities include show ring events, rodeos, bullock and bull riding, water sports on trust lands surrounding major water storages and motor vehicle sports. At times participation in any one of those sports has the potential for injury.
8. The Minister acknowledged that a review was commenced 2 years ago, which recommended that legislative changes needed to be made to the Occupational Health and Safety Act to remove any doubt about liability with respect to trust volunteers. Currently, section 26(2) allows for directors to be prosecuted even if the corporation is not prosecuted.

## The Bill

9. The object of this Bill is to amend the *Occupational Health and Safety Act 2000 (the Act)* to provide that directors or persons concerned in the management of a corporation who are volunteers are not personally liable for prosecution for a contravention of the Act by the corporation.

### 10. Outline of provisions

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

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

**Clause 3** is a formal provision that gives effect to the amendment to the *Occupational Health and Safety Act 2000* set out in Schedule 1.

**Clause 4** provides for the repeal of the proposed Act after the amendment made by the proposed Act has commenced. Once the amendment has commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

#### Schedule 1 Amendment

**Schedule 1** amends section 26 of the Act to provide that a director or person concerned in the management of a corporation who is a volunteer is not liable to be prosecuted under that section for anything done or omitted to be done by the person as a volunteer. A *volunteer* is a person doing work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose and that is done on a voluntary basis. The reimbursement of the person's reasonable expenses in doing the work does not mean the work ceases to be regarded as work done on a voluntary basis.

## Issues Considered by the Committee

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| 11. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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***The Committee makes no further comment on this Bill.***

## 4. SMOKE-FREE ENVIRONMENT AMENDMENT (MOTOR VEHICLE PROHIBITION) BILL 2008\*

Date Introduced:	6 March 2008
House Introduced:	Legislative Council
Minister Responsible:	Hon Fred Nile MLC
Portfolio:	Non-Government, Christian Democratic Party (Fred Nile Group)

### Purpose and Description

1. This Bill amends the *Smoke-free Environment Act 2000* to prohibit smoking in motor vehicles. It introduces a maximum penalty of 5 units or \$550 for such an offence.

### Background

2. This Bill is introduced by the Christian Democratic Party (the Fred Nile Group). The Bill, in the past, had been referred to the Joint Select committee on Tobacco Smoking as part of its terms of reference, with the Final Report published in Jun 2006.
3. The Hon Verity Firth, the Minister for Women and as the Minister Assisting the Minister for Health (Cancer), has just released background information on a public consultation process and discussion paper dealing with the harmful impact of tobacco products and about future possible measures to protect children from tobacco harm. The Second Reading speech also referred to the Minister's discussion paper as covering a number of areas, such as the banning of smoking in cars in which a child is present.
4. The recommendation from the June 2006 Joint Select Committee on Tobacco Smoking was for NSW Health to implement a sustained educational campaign aimed at reducing smoking in cars rather than a legislative ban.
5. The Joint Select Committee wrote to the other Australian jurisdictions and at the time, no jurisdiction had such legislation. At the time, Tasmania had released a discussion paper in May 2006 on a range of issues aimed at enhancing measures to protect children from ETS (environmental tobacco smoke). The Report noted that at paragraph 7.38 on page 133:

The main disadvantage indicated is that the ban involves excessive regulation of behaviour in a private vehicle. In lieu of a ban the discussion paper recommends a strong on-going public education campaign to encourage parents and adults to voluntarily not smoke in a vehicle when a child is present.
6. The Joint Select Committee also noted at paragraph 7.39 (page 133), that a similar proposal to ban smoking in vehicles carrying children was made to the Western Australian Government. However, Western Australia indicated that they support an educative approach like Victoria.

7. Since the NSW Joint Select Committee's report, South Australia and Tasmania have passed legislation on the banning of smoking in vehicles if they carried a child (Tasmania and South Australia), or another person if in the course of employment (Tasmania).

## The Bill

8. The object of this Bill is to amend the *Smoke-free Environment Act 2000* (the *Principal Act*) to prohibit smoking in motor vehicles (maximum penalty: 5 penalty units or \$550).

9. **Outline of provisions**

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

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

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

### Schedule 1 Amendments

**Schedule 1 [1]** inserts a definition of *motor vehicle* into the Principal Act.

**Schedule 1 [2]** inserts proposed Part 1A into the Principal Act, having the effect described above in the overview.

**Schedule 1 [3] and [4]** contain consequential amendments.

## Issues Considered by the Committee

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

#### Issue: Privacy – Schedule 1 [2]: proposed Part 1A Prohibition on smoking in motor vehicles – section 5A Offence of smoking in motor vehicle

10. The proposed section does not refer to the prohibition on smoking in the context of a motor vehicle carrying a child or any other person. It prohibits a person from smoking in a motor vehicle even if the person were alone or with other consenting adults or in the absence of children. The smoking of cigarettes by an adult person is not an unlawful activity in itself unless if it is carried out in a public place or enclosed public space that is regulated by a smoking prohibition.
11. The Committee notes that Tasmania has recently passed a Bill to commence under their amended *Public Health Act 1997* (amended section 67H) that places restrictions on smoking in vehicles where a person must not smoke inside a vehicle in the course of any employment if another person is in the vehicle and on or after 1 January 2008, a person must not smoke inside a vehicle if a child is inside the vehicle. In South Australia, Part 4 of their *Tobacco Products Regulation Act 1997*, has restrictions on smoking if a child is present in the vehicle.

- 12.** The Committee notes the recommendation from the June 2006 NSW Joint Select Committee on Tobacco Smoking was for NSW Health to implement a sustained educational campaign aimed at reducing smoking in cars, and that the Joint Select Committee's Report at paragraph 7.42 (page 134) stated: *While in the previous chapter we recommended that smoking be banned in children's playgrounds, we note that there is an important difference between these areas and cars. The former are public places, while cars are private. A ban on smoking in cars would thus entail a greater encroachment on individual liberties than one on behaviour in public areas.*
- 13.** The Committee also notes that the NSW Joint Select Committee in reaching its conclusion with regard to smoking in cars, at paragraph 7.41 (page 134), stated that: *It considers that on balance, and particularly because of evidence concerning the remarkable success achieved through the educational 'car and home: smoke free zone' campaign, alongside the absence of research evidence in relation to a legislated ban, that an educational rather than legislative approach is desirable. The Committee is also persuaded by the concerns of police and advocacy-based inquiry participants about the enforceability of the bill's provisions.*
- 14.** The Committee takes into consideration that in the Tasmanian and South Australian legislation, there are only restrictions on smoking in vehicles if a child is present (and under the Tasmanian legislation, there is a further restriction if in the course of employment, another person is present).
- 15.** Accordingly, the Committee considers a ban on smoking in motor vehicles (even if the person were alone or in the absence of any children) could unduly trespass on individual rights and liberties including the right to privacy, and refers this to Parliament.

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

## Appendix 1: Index of Bills Reported on in 2008

	Digest Number
Conveyancing Amendment (Mortgages) Bill 2007*	1
Crimes Amendment (Drink and Food Spiking) Bill 2008	2
Energy Services Corporations Ownership (Parliamentary Powers) Bill 2008*	2
Food Amendment (Public Information on Offences) Bill 2008	2
Gaming Machines Amendment (Temporary Freeze) Bill 2008	2
Local Government Amendment (Election Date) Bill 2008	2
Marine Parks Amendment Bill 2007	1
Mining Amendment Bill 2008	3
National Parks and Wildlife (Leacock Regional Park) Bill 2008	3
Occupational Health and Safety Amendment (Liability of Volunteers) Bill 2008*	3
Road Transport Legislation Amendment (Car Hoons) Bill 2008	2
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	3
TAFE (Freezing of Fees) Bill 2007*	1
Totalizator Amendment Bill 2008	2

## Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2007	Digest 2008
APEC Meeting (Police Powers) Bill 2007	Minister for Police	03/07/07		1	
Criminal Procedure Amendment (Vulnerable Persons) Bill 2007	Minister for Police	29/06/07		1	
Drug and Alcohol Treatment Bill 2007	Minister for Health	03/07/07	28/01/08	1	1
Guardianship Amendment Bill 2007	Minister for Ageing, Minister for Disability Services	29/06/07	15/11/07	1,7	
Mental Health Bill 2007	Minister Assisting the Minister for Health (Mental Health)	03/07/07		1	
Statute Law (Miscellaneous) Provisions Bill 2007	Premier	29/06/07	22/08/07	1,2	
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2007	Minister for Police	03/07/07		1	



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

	(i) Trespasses on rights	(ii) Insufficiently defined powers	(iii) Non reviewable decisions	(iv) Delegates powers	(v) Parliamentary scrutiny
Crimes Amendment (Drink and Food Spiking) Bill 2008				R	
Food Amendment (Public Information on Offences) Bill 2008				R	
Gaming Machines Amendment (Temporary Freeze) Bill 2008	N				
Mining Amendment Bill 2008	N				
Road Transport Legislation Amendment (Car Hoons) Bill 2008	R		R	R	
Smoke-free Environment Amendment (Motor Vehicle Prohibition) Bill 2008*	N, R				

### Key

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