



**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**STANDING COMMITTEE ON
LEGAL AFFAIRS
(PERFORMING THE DUTIES OF A SCRUTINY
OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)**

SCRUTINY REPORT NO. 33

5 JUNE 2003



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TERRITORY**

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(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION COMMITTEE)**

**MR BILL STEFANIAK MLA (CHAIR), MR JOHN HARGREAVES MLA,
MS KERRIE TUCKER MLA**

**MR WAYNE BERRY, MLA
SPEAKER
LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY
CANBERRA ACT 2601**

DEAR MR SPEAKER

PLEASE FIND ENCLOSED A COPY OF REPORT NO. 33 OF THE STANDING COMMITTEE ON LEGAL AFFAIRS (PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND SUBORDINATE LEGISLATION COMMITTEE). UNDER ITS RESOLUTION OF APPOINTMENT, THE COMMITTEE IS EMPOWERED TO SEND A REPORT TO YOU WHILE THE ASSEMBLY IS NOT SITTING SO THAT YOU MAY GIVE DIRECTIONS FOR ITS PRINTING, CIRCULATION AND PUBLICATION. I SEEK YOUR APPROVAL TO PRINT, PUBLISH AND CIRCULATE REPORT NO. 33.

YOURS SINCERELY

**BILL STEFANIAK MLA
CHAIR**

5 JUNE 2003

**APPROVED
WAYNE BERRY MLA
SPEAKER**

5 JUNE 2003

TERMS OF REFERENCE

The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

- (a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):
 - (i) is in accord with the general objects of the Act under which it is made;
 - (ii) unduly trespasses on rights previously established by law;
 - (iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
 - (iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;
- (b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee
- (c) consider whether the clauses of bills introduced into the Assembly:
 - (i) unduly trespass on personal rights and liberties;
 - (ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (d) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

MEMBERS OF THE COMMITTEE

MR BILL STEFANIAK, MLA (CHAIR)
MR JOHN HARGREAVES, MLA (DEPUTY CHAIR)
MS KERRIE TUCKER, MLA

LEGAL ADVISER: MR PETER BAYNE
SECRETARY: MR TOM DUNCAN
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)
ASSISTANT SECRETARY: MS CELIA HARSDORF
(SCRUTINY OF BILLS AND SUBORDINATE
LEGISLATION COMMITTEE)

ROLE OF THE COMMITTEE

The Committee examines all Bills and subordinate legislation presented to the Assembly. It does not make any comments on the policy aspects of the legislation. The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of totally non-partisan, non-political technical scrutiny of legislation. These traditions have been adopted, without exception, by all scrutiny committees in Australia. Non-partisan, non-policy scrutiny allows the Committee to help the Assembly pass into law Acts and subordinate legislation which comply with the ideals set out in its terms of reference.

BILLS

Bills - Comment

The Committee has examined the following Bills and offers these comments on them.

Electoral Amendment Bill 2003

This Bill would amend the *Electoral Act 1992* in relation, primarily, to the requirement that to be registered a party must have at least 100 members. The Bill also relates to party or group ballot registration; postal voting; donations to candidates; and information about those who place election advertisements.

Para 2(c)(i) – undue trespass on rights and liberties

The Committee makes no specific comment on the provisions of the Bill. Given that many of the clauses of the Bill are amendments to existing provisions of the Act, the Committee does not consider it appropriate to revisit the provisions of the Act.

It does, however, recognise that there is a point at which the regulation of political parties and the conduct of elections may be said to be in breach of the freedom of association, and, in a more general sense, incompatible with the practices of a democratic society.

The discussion in relation to the Gaming Machine (Political Donations) Amendment Bill 2003 is therefore also relevant to the Electoral Amendment Bill 2003.

Gaming Machine (Political Donations) Amendment Bill 2003

This is a Bill to amend the *Gaming Machine Act 1987* to provide that the licensee of a club must not give money to a political party or associated entity.

COMMENT

Proposed new subsection 30I(1) of the Act would read:

30I Political donations prohibited

(1) A club that is a licensee must not give money to a political party or associated entity.

The Explanatory Statement says:

This Bill seeks to place a distance between clubs and political parties and associated entities so as to make the process of gaming machine allocation more transparent. This will be done through making donations to political parties and associated entities by clubs a contravention of the *Gaming Machine Act 1987*. Currently, it is perceived that political donations made by clubs to political parties

and associated entities are made to gain some level of influence with the party or associated entity. Making political donations by clubs to political parties and associated entities a contravention of the *Gaming Machine Act 1987* will make allegations of bias or influence, in regards Gaming Machine re/allocation baseless.

It should also be noted clubs have a virtual monopoly over gaming machines in the ACT. This means that clubs can gain, or be perceived to gain, further influence through donating money to political parties received from gaming machines. This creates an inequity in the level of influence clubs can have within political parties and associated entities because other liquor licensees (such as Taverns and Pubs) do not receive the gaming machine revenue clubs do.

Making donations from clubs to political parties or associated entities a contravention of the *Gaming Machine Act 1987* will furthermore ensure more gaming machine revenue is spent on the community and the club itself.

Para 2(c)(i) – undue trespass on rights and liberties

The Bill raises an important yet very difficult issue. On the face of it, (but requiring more analysis), its central provision impinges on one or other (or both) of the political activity of (1) the licensed clubs, and (2) of political parties. The question arises whether it is an undue trespass on rights.

A number of right(s) could be seen to be in issue, but for our purposes, it is sufficient to examine the matter in the light of the High Court's jurisprudence on those freedoms that it has found are necessarily implied in the Constitution in order to make representative and responsible government more effective. These freedoms have the most obvious bearing on the matter, and, in any event, other ways of looking at rights would require much the same analysis.

It must be emphasised here that this comment is not in the nature of legal opinion as to the constitutional validity of the Bill. That issue is more complex. There are, for example, some questions about whether the implied freedoms have any bearing on the validity of Territory laws. It must also be noted that a legal opinion is just that - an educated guess as to what a court would decide were the issue presented to it in some way; (and the way it was presented would influence what it decided).

Moreover, the task for the Assembly is not the same as that of a court. The Assembly must decide whether to enact this law, and that is not determined by whether a court would find it constitutional. The Assembly might decide not to enact it even if the law is constitutional. On the other hand, doubts in the mind of some members as to its constitutional validity might be such as to lead them to think that it should not be enacted, irrespective of whether it is desirable as a matter of policy. Others might think that questions of constitutional validity are for the courts.

This general issue was a matter of debate in the years of the Whitlam government. It is of interest to note the position of the Opposition Shadow Attorney-General (Mr Ellicott) on the issue of whether the Parliament should pass laws to which there were constitutional objections:

Uncertainty as to the extent of constitution power should never be of itself a reason for opposing an otherwise worthwhile exercise of power; nor should it prevent a government, properly advised, trading where angels of constitution probity have feared to tread. The High Court, as we know, will readily give us the answer.

On the other hand, some people cannot afford to resort to the High Court.

The freedoms that must be implied in order to make representative and responsible government efficacious: their scope

In *Lange v ABC* (1997) 189 CLR 520 at 557, the High Court explained why there was to be implied in the Constitution of the Commonwealth of Australia a freedom of political communication.

[557] Representative and responsible government

Sections 7 and 24 of the Constitution, read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people of the States and of the Commonwealth respectively. **This requirement embraces all that is necessary to effectuate the free election of representatives at periodic elections.** What is involved in the people directly choosing their representatives at periodic elections, however, can be understood only by reference to the system of representative and responsible government to which ss 7 and 24 and other sections of the Constitution give effect; [emphasis added].

Later, the Court noted (at 559):

In his *Notes on Australian Federation: Its Nature and Probable Effects*, Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government.

The Court went on to hold that a freedom of communication was necessary to "effectuate the free election of representatives at periodic elections".

Freedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be "directly chosen by the people" of the Commonwealth and the States, respectively. At federation, representative government was understood to mean a system of government where the people in free elections elected their representatives to the legislative chamber which occupies the most powerful position in the political system. As Birch points out, "it is the manner of choice of members of the legislative assembly, rather than their characteristics or their behaviour, which is generally taken to be the criterion

of a representative form of government". However, to have a full understanding of the concept of representative government, Birch also states that :

"we need to add that the chamber must occupy a powerful position [560] in the political system and that the elections to it must be free, with all that this implies in the way of **freedom of speech and political organisation**" (emphasis added).

A freedom of political communication

Going on to speak of "[c]ommunications concerning political or government matters between the electors and the elected representatives, between the electors and the candidates for election and between the electors themselves were central to the system of representative government", the Court said

legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election.

That being so, ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.

As Gummow J put it in *Kruger v Commonwealth* (1997) 190 CLR 1 at 156, the "communication of information respecting, and discussion of, matters of political interest" is of "central importance to the efficacious working of the system of responsible and representative government established by the Constitution for the Commonwealth".

A freedom of political organisation?

Another matter that might be regarded in the same way is the "freedom of association" of those political organisations the effective functioning of which is also central to the working of the system of responsible and representative government. Indeed, the High Court's approval of what Birch had to say (see above) suggests support for this view. (This is not an argument that there is implied in the Constitution any right to freedom of association in a general sense, and High Court authority does not currently support such a view; see *Kruger* at 156-157.)

The centrality of political parties in this way has been noted in decisions from Canada and the USA. In *Figueroa v Canada (Attorney General)* (2000-08-16) ONCA C31902, the Court of Appeal for Ontario, Doherty J quoted with approval the views of a political scientist:

Political parties are what the Royal Commission called "primary political organizations" in Canadian electoral democracy precisely because they provide for citizens the essential linkage between the processes of electoral democracy, on the one hand, and our institutions of representative and responsible parliamentary government, on the other. ... It follows from the structure and dynamics of our constitutional system that political parties, which first emerged in the evolution of

the struggles for responsible government as formations consisting primarily of elected political representatives, inexorably became more than parliamentary parties. ... Long before political parties became recognized in the election law, the practice had developed that candidates for election are nominated, almost exclusively, through local party constituency associations. By serving in this capacity, parties have explicitly structured the electoral choices for voters. By virtue of this structuring of electoral choice, voters have long been able to assess the consequences of their voting decisions for the prospects of competing parties in influencing the formation of the government. Parties thus perform important public functions for the practice of electoral democracy.

In *Buckley v Valeo* (1976) 424 US 1 at 14ff, the Supreme Court of the USA said:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. ... The First Amendment protects political association as well as political expression. The constitutional right of association explicated in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that "[e]ffective) advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas," a freedom that encompasses "[t]he right to associate with the political party of one's choice."

Thus, one might argue that as a matter of constitutional law, the legislative power cannot support an absolute denial of the freedom of those political organisations that are integral to the working of responsible government.

And, of course, irrespective of whether the High Court would accept this argument, the Assembly may take it into account simply by recognising a freedom of association as one of those rights that are relevant to its first term of reference. It is a right recognised in various international human rights instruments; see H Davis, *Political Freedom: associations, political purposes and the law* (2000), and the European Court of Human Rights decision in *United Communist Party of Turkey v Turkey* (1998) 26 EHHR 121.

The scope for legislative restriction of the freedoms

In *Lange* the High Court said that a law that impinges on the implied freedom might nevertheless be valid. It said (at 561-562):

[561] [T]he freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is [562] that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.

Later, the Court stated a framework for the resolution of a question whether a law breaches the freedom of communication.

[567] *The test for determining whether a law infringes the constitutional implication*

When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively "the system of government prescribed by the Constitution"). If the first question is [568] answered "yes" and the second is answered "no", the law is invalid. In *ACTV, [Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106]* for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid because there were other less drastic means by which the objectives of the law could be achieved.

As indicated by what the Court said at 561-562, (see above), the second limb can be broken down into two sub-parts:

- Is the end of regulation compatible with the implied freedom?
- Are the means adopted reasonably appropriate and adapted to serve that legitimate end?

There is then a refinement of this theory that has been recognised by some Australian judges, probably on the basis of the jurisprudence of the Supreme Court of the USA.

In the application of this last question, a court might make a further distinction. In *Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106* at 143, Mason J said:

A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication. Generally speaking, it will be extremely difficult to justify restrictions imposed on free communication which operate by reference to the character of the ideas or information. But, even in these cases, it will be necessary to weigh the competing public interests, though ordinarily paramount weight would be given to the public interest in freedom of

communication. So, in the area of public affairs and political discussion, restrictions of the relevant kind will ordinarily amount to an unacceptable form of political censorship.

On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification. The regulation of radio and television broadcasting in the public interest generally involves some restrictions on the flow and dissemination of ideas and information; [see too *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 396, per McHugh J].

It is common for USA judges to state this dichotomy in terms of whether the law is "content-based" - that is, directly impinging on speech and/or political association - in which case a strict test is applied; or "content-neutral" - that is, impinging not on speech or association itself, but on something that facilitates speech or political association - in which case a less strict test is applied.

The framework sketched above is complex, and, it will be apparent, leaves much room for individual judgement based on personal preference and indeed, ultimately, on political philosophy. Whatever might be said about whether judges should make such judgements, they are clearly suitable for politicians.

Analysis of this Bill in terms of the implied freedom

This framework will now be employed to assess the Gaming Machine (Political Donations) Amendment Bill 2003.

Taking the first limb of the Lange test, the first question is whether the Bill, if it became law, would burden the implied freedom of communication and/or political association?

The central provision of the Bill is the principle that a "club that is a licensee must not give money to a political party or associated entity".

There are two different ways of making the argument that regulation of donations burdens an implied freedom.

The Bill as a burden on political speech

This view takes a strong form if the act of making a monetary contribution is seen as a speech act. This is an approach taken by the Supreme Court of the USA. In *Buckley v Valeo* (1976) 424 US 1, the Court said that "contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct". Thus, it might be argued that by making some forms of contribution unlawful the Bill directly burdens speech.

On this view, a strict scrutiny of the law burdening the speech is called for. That is, taking what Mason J said in *ACTV*, "only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the

restriction must be no more than is reasonably necessary to achieve the protection of the competing public interest which is invoked to justify the burden on communication".

This view might however be stated in a weaker form if the act of making a monetary contribution is not seen as a speech act, but as an activity that facilitates speech acts (in this case, by the political party receiving the money). Many critics of the decision in *Buckley v Valeo* favour this view, and it was the view taken by the lower court in the *Buckley* case (519 F2d 821). On this view, a less strict view is called for. That is, taking what Mason J said in *ACTV*. The "restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification".

It is worth emphasising the point that if one attempts to analyse the question of whether there is a burden, and of what kind, in terms of the High Court's case-law, prediction of outcome is made difficult by reason of the fact that a judge has a choice as to how to classify the law (is it content-based or only content-neutral?), and also by reason of the very vagueness of the tests the court will apply having made its classification.

The Bill as a burden on political association

It would seem that the Bill is not in this regard content-based, for it does not seem to impinge directly in the freedom of a political party to undertake those activities that will assist the working of representative and responsible government. (This, however, might be arguable, for the distinction between a content-based and a content-neutral law is not clear-cut).

It is not, however, difficult to see the Bill as a burden on an activity – the giving of money – which facilitates the operations of political parties, and, indeed, is essential to their operation.

Assuming that the first limb of the *Lange* test provides a 'yes' answer to the question whether the law is a burden on an implied freedom, we now turn to the second limb, and break it down into two sub-questions.

Is the end or object of the Bill compatible with the implied freedom that is burdened?

Some general points

At the outset, two difficulties need to be noted.

The first is that the courts have taken a particular - one might think highly artificial - attitude to how they determine the objectives of the law. One might think the issue of the objective of the law is essentially one of fact, albeit that it is difficult to determine given that the Assembly, (which it must be assumed has passed the Bill for it to become a law subject to challenge,) is a deliberative body. The views of one Member are not necessarily those of the Assembly. But there is a view that nothing said by the parliamentary body is relevant. Rather, the court will take its own view about the

objectives of the law. (As one USA commentator said, the court acts as an "armchair empiricist".)

In *Sellars v Coleman* [2001] 2 Qd R 565 at 572 [29] (Queensland Court of Appeal), Muir J said that "The purpose, as well as the operation and effect of a law, may be taken into account in assessing whether the law curtails freedom of political communication or discussion in a manner or to an extent inconsistent with the constitutional implication". In this connection, Pincus J said (at 577), and in reference to the law in question there:

[9] In the present case there is no reason to think that the purpose of the by-law was other than legitimate; it was not made for the purpose of burdening "freedom of communication about government or political matters". To reach such a conclusion, one does not take evidence from those who made the law, but simply considers the likely purpose of the law, on its face.

This approach has very recently been adopted by the Full Court of the Federal Court in *Mulholland v Australian Electoral Commission* [2003] FCAFC 91 [26]-[27], where the Court said:

... the extensive use of [parliamentary reports] and debates in order to establish, as a fact, what Parliament "intended" is neither necessary nor appropriate. ... there is no need for any evidence to establish the relevant legislative object. So long as a legitimate objective exists it does not matter whether Parliament referred to it or was even aware of it.

There is no need for Members of the Assembly to take any such view.

Secondly, as what has just been said makes apparent, we are in an arena of value judgment. In *Sellars v Coleman* [2001] 2 Qd R 565 at 579, Jones J said:

[64] Whether one considers the effect of the subject by-law in terms of "compatibility with the maintenance of the constitutionally prescribed system of government" or "proportionality between the restriction ... and the freedom of communication", the outcome is likely to be the same. The end result is a value judgment on which minds may differ.

On this issue, a USA judge has identified a clash of political philosophy; see J Skelly Wright, "Politics and the Constitution: Is Money Speech?" (1976) 85 Yale LJ 1001. Wright identifies a pluralist image. This is that "the political process consists precisely of the pulling and hauling of various competing interest groups". On this image, the function of the First Amendment to the US Constitution (the free speech clause) "is to let group pressure run its course unimpeded, lest we skew the process that determines for us the public interest".

One criticism of this view is that if the well-organised are "deprived of certain financial advantages", "decisionmakers are then better able to respond to the interests of the under-organized, free from imperative obligations to special interest money-providers".

It also competes with another image. This sees the electorate as "a self-governing people", who "do not let the organized groups of the day play out their battle of influence and then vote the way of the prevailing forces".

[Instead] they see the group process as a way of calling forth the various positions. They listen to all - the weak and timid voice of the under-organised as well as the sometimes bombastic, sometimes sophisticated, but always elaborated communications of the affluent highly-organised. ... And then they choose which course is the wisest.

This rhetoric is matched at the same general level by those who propound a rhetoric that there should be a minimum of legislative restriction in the play of politics. In *Austin v Michigan Chamber of Commerce* (1990) 110 S Ct 1391 at 1408, Scalia J said that the "illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in *Buckley v Valeo*", where the Supreme Court said:

"... the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people".

Later he said:

Perhaps the Michigan law before us here has an unqualifiedly noble objective--to "equalize" the political debate by preventing disproportionate expression of corporations' points of view. But governmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our Bill of Rights, however, is that there are some things--even some seemingly desirable things--that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure "fair" political debate. ...

The premise of our system is that there is no such thing as too much speech--that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.

Applying the theory to the Bill

In this context, it probably does not matter which freedom is seen to be burdened: that of political communication, and/or that of political association.

The Explanatory Statement identifies two ends of the Bill. The first is to inhibit the possibility or perhaps only the appearance of corruption in the sense that a party may, in return for a donation, take some particular action if it comes to have an influence over government. This argument has been upheld by the USA Supreme Court in cases such as *Buckley v Valeo*, a case that takes a minimalist position on the extent of permissible legislative regulation of contributions to political parties.

It is a fair guess that an Australian court would accept that the end or objective of this Bill is compatible with the implied freedom. The next question is the critical one.

Are the means adopted reasonably appropriate and adapted to serve that legitimate end?

Introduction

The Committee is diffident about entering upon too much analysis here. This is essentially a political question. What follows is a sketch of two competing lines of argument.

These are not the only arguments that might be made, and it is essential to bear in mind that, ultimately, the debate turns on how the first principles sketched above should apply. If one looks at this in terms of the High Court's implied freedoms case-law, the question is whether the law facilitates or not the working of representative and responsible government.

It is hoped that the statement will be seen not as advocating one or the other position, or as even a statement of what might even be said along these lines. It is designed to point to the kind of analysis that needs to be made, and to identify some of the general considerations that might be brought into focus within just this framework.

A Member of the Assembly might identify some other framework altogether. Attention is drawn again to the Explanatory Statement.

Two competing lines of argument

I.

On the one hand, an proponent of the Bill might argue along the following lines. The points are not necessarily interdependent.

1. Licensed clubs are uniquely the beneficiaries of state protection, in that they can conduct on their premises activities, and in particular gambling, that are otherwise unlawful.

2. There is a public interest in the extent to which gambling should be permitted, given its harmful effects on those who are gamblers.
3. This degree of protection for gambling, and its harmful affects, warrants a close degree of regulation of the clubs, and in particular of their profits, given that profits derive in a large measure from gambling. This is recognised in Territory laws.
4. In particular, there should be a close regulation of the freedom of the clubs have both to promote gambling, and to inhibit attempts by others to reduce the level of gambling.
5. Thus, the state has a strong interest in ensuring that the funds of the clubs are not used to unduly distort public debate and governmental action as it bears on the conduct of gambling.
6. One way to do this is to prohibit the clubs from making donations to political parties. The law applies equally to all political parties. There is no other way which can reach the degree of effectiveness of this law in securing the object of inhibiting the ability of the clubs to distort public debate.
7. That difficulties that may arise in the application of the key notion of giving money do not in this context raise a rights issue. The concept is no less precise than that found in many other legislative provisions and can be applied sensibly so that the law is quite workable. The law does state a standard that is capable of reasonable application.

II.

On the other hand, an opponent of the Bill might argue along the following lines. The points are not necessarily interdependent.

1. The argument that donations carry the risk of corruption has a surface plausibility, but it can be overstated. In this context, the person or body determining whether the law is valid must address:

- the degree and nature of the risk (of corruption);
- whether the law deals with that risk; and
- whether the law is crafted in way that minimises the impact on the implied freedom; and
- in particular, whether there is some other way in which the risk might not be accommodated without the need to impinge on the implied freedom in the way the laws does.

The proponent of the law has the primary obligation to show that these matters are satisfied.

2. Licensed clubs are not the only bodies that receive a degree of state protection. This may be said about public companies. They receive a very large measure of state protection through the statutory grant of limited liability, and to some extent through tax advantages, etc.

3. Nor are licensed clubs the only bodies that undertake action that requires a measure of state regulation.
4. The law is therefore under-inclusive. It breaches a principle of equal treatment under the law; in particular with regard to the freedom of political speech of the clubs.
5. Fundamentally, the law pays insufficient attention to the rationale for the implied freedoms. It gives too little recognition to the ability of the public to sort out the wheat from the chaff. The issues of public interest in relation to licensed clubs are not difficult to understand and there is lack of open public debate.
6. An independent point is that the law applies only to political parties and associated entities. It does not apply to non party sitting Members, non party candidates nor indeed to any person who is not a political party or associated entity who engages in political activity.
7. The lack of clarity in the concept of giving money to a party or associated entity has a result that a club could not, to a reasonable degree, be sure in advance as to whether the support it gave to a party or entity would breach the law and thus expose it to disciplinary action of the kind this law would authorize. A law impinges on rights when it does not state standards of behaviour at a level of specificity such that the person can reasonably determine whether they would be in breach of the law.

Further comment

The weight to be attached to some of these arguments turns on the detail about just how licensed clubs are regulated in the Territory, and just how gambling is regulated. Their weight also turns on the facts about who has access to the profits of the licensed club, and who makes decisions about how that money is spent.

The equal treatment under law argument is complex.

Is there an advantage possessed by some political groups that will be addressed by this Bill, so that it may be said to have an element of positive discrimination?

Or does this ignore the fact that political parties necessarily different resource bases - in respect not only of money, but also in terms of personnel, access to the media, and other matters? The discrimination lies in addressing only one particular source of support.

SUBORDINATE LEGISLATION

There is no matter for comment in this report.

INTERSTATE AGREEMENTS

There is no matter for comment in this report.

REGULATORY IMPACT STATEMENTS

There is no matter for comment in this report.

Bill Stefaniak MLA
Chair

June 2003

**LEGAL AFFAIRS – STANDING COMMITTEE
(PERFORMING THE DUTIES OF A SCRUTINY OF BILLS AND
SUBORDINATE LEGISLATION COMMITTEE)**

RESPONSES

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>REPORTS – 2001-2003</u>	
<u>Report No. 1, dated 12 December 2001</u>	
Nil	
<u>Report No. 2, dated 19 February 2002</u>	
Crimes Amendment Bill 2001 (No. 2) (PMB) <i>Act citation: Crimes Amendment Act 2002 (Passed 5.3.02)</i>	No. 5
Crimes (Abolition of Offence of Abortion) Bill 2001 (PMB).....	
Health Regulation (Maternal Health Information) Repeal Bill 2001 (PMB).....	
Land (Planning and Environment) Legislation Amendment Bill 2001 (PMB).....	
Supreme Court Amendment Bill 2001 (No. 2) (PMB).....	
Subordinate Law No 40 – Building Regulations Amendment.....	No. 8
Subordinate Law No 41 – Building and Construction Industry Training Levy Regulations 2001.....	
Subordinate Law No 42 – Crimes Regulations 2001.....	
Subordinate Law No 43 – Dangerous Goods Regulations Amendment	
Subordinate Law No 44 – Road Transport (Driver Licensing) Regulations Amendment.....	No. 8
Subordinate Law No 45 – Road Transport (Public Passenger Services Regulations 2002.....	No. 8
Subordinate Law No 46 – Road Transport Amendment Regulations 2001.....	
Subordinate Law No 47 – Maternal Health Information Regulations Repeal 2001.....	No. 10
Health Professions Board (Procedures) Act – Determination No 221 of 2001.....	No. 10
Health Professions Board (Procedures) Act – Determination Nos. 216-220, 222, 225 to 237 of 2001.....	No. 10
Independent Pricing and Regulatory Commission Act - Determination No. 291 of 2001.....	No. 8
Legislative Assembly (Members’ Staff) Act - Determination No. 292 of 2001.....	No. 23
Residential Tenancies Act – Determination Nos. 301 to 304 of 2001..	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Rehabilitation of Offenders (Interim) Act 2001 -	
Determination No. 305 of 2001.....	
Commissioner for the Environment Act -	
Determination No. 315 of 2001.....	No. 8
Psychologists Act - Determination No. 318 of 2001.....	No. 10
Auditor-General Act – Determination No. 323 of 2001.....	
Drugs of Dependence Act – Determination No. 328 of 2001.....	No. 10
National Exhibition Centre Trust Act - Determination Nos. 330 and	
331 of 2001.....	No. 8
Appointment to the Racing Tribunal.....	No. 8
<u>Report No. 3, dated 21 February 2002</u>	
Rehabilitation of Offenders (Interim) Amendment Bill 2002	
(Passed 21.2.02).....	
<u>Report No. 4, dated 5 March 2002</u>	
Inquiries Amendment Bill 2002 (PMB).....	
Gene Technology Bill 2002.....	No. 12
Legislation Amendment Bill 2002 (Passed 15.4.02).....	No. 9
Subordinate Law No 49 – Road Transport (Offences)	
Regulations 2001.....	No. 8
Road Transport (Safety and Traffic Management) Regulations 2000 –	
Disallowable Instrument No 4.....	No. 8
Road Transport (Driver Licensing) Regulations 2000 –	
Disallowable Instrument No 7.....	No. 8
Health and Community Care Services Act – Determinations	
Nos 5 and 15.....	
<u>Report No. 5, dated 5 March 2002</u>	
Nil	
<u>Report No. 6, dated 7 March 2002</u>	
Nil	
<u>Report No. 7, dated 27 March 2002</u>	
Drugs of Dependence Amendment Bill 2002 (Passed 14.5.02).....	No. 10
Duties Amendment Bill 2002 (Passed 11.4.02).....	No. 8
Fair Trading Amendment Bill 2002 (PMB) (Passed 29.08.02).....	
Subordinate Law 2002 No 1 – Radiation Regulations 2002.....	No. 10
<u>Report No. 8, dated 1 May 2002</u>	
Discrimination Amendment Bill 2002 (PMB) (Passed 5.6.02).....	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Gaming Machine (Women’s Sports) Amendment Bill 2002 (Passed 4.6.02)	No. 10
Subordinate Law No. 3 – Road Transport (Public Passenger Services) Regulations 2002.....	No. 15
Subordinate Law No. 4 – Community Title Regulations 2002.....	No. 15
Road Transport (Public Passenger Services) Regulations 2002 – Disallowable Instruments Nos 12 and 18.....	No. 15
Road Transport (General) Act – Disallowable Instrument No. 20.....	No. 15
Public Place Names Act – Disallowable Instrument No. 24.....	No. 15 (No. 32)
<u>Report No. 9, dated 7 May 2002</u>	
Nil	
<u>Report No. 10, dated 14 May 2002</u>	
Building Amendment Bill 2002 (Passed 16.5.02).....	No. 16
<u>Report No. 11, dated 14 May 2002</u>	
Nil	
<u>Report No. 12, dated 16 May 2002</u>	
Justices of the Peace Act – Disallowable Instrument No. 25.....	
Residential Tenancies Act – Disallowable Instrument No. 26.....	
<u>Report No. 13, dated 29 May 2002</u>	
Cemeteries and Crematoria Bill 2002.....	No. 15
Duties (Insurance Exemptions) Amendment Bill 2002.....	No. 15
Road Transport Legislation Amendment Bill 2002.....	No. 16
<u>Report No. 14, dated 4 June 2002</u>	
Statute Law Amendment Bill 2002 (Passed 29.08.02).....	No. 15
<u>Report No. 15, dated 20 June 2002</u>	
Workers Compensation (Acts of Terrorism) Amendment Bill 2002....	No. 17
Remuneration Tribunal Act – Disallowable Instrument No. 34.....	No. 23
Hotel School Act – Disallowable Instrument No. 35.....	No. 18
Road Transport Act – Disallowable Instrument No. 39.....	No. 17
Commissioner for the Environment Act No. 38.....	No. 17
<u>Report No. 16, dated 25 June 2002</u>	
Maternal Health Legislation Amendment Bill 2002 (PMB).....	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Medical Practitioners (Maternal Health) Amendment Bill 2002 (Passed 21.08.02) (PMB)	
Health and Community Care Services Act – Disallowable Instrument No. 41.....	No. 19
Public Place Names Act – Disallowable Instrument No. 43.....	No. 17
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Building Act – Disallowable Instrument No. 50.....	No. 17
<u>Report No. 17, dated 9 August 2002</u>	
Justice and Community Safety Legislation Amendment Bill 2002 (Passed 22.08.02)	
Magistrates Court (Refund of Fees) Amendment Bill 2002 (Passed 25.09.02)	
Planning and Land Bill 2002 (Passed 12.12.02)	No. 20
Plant Diseases Bill 2002 (Passed 12.11.02)	No. 18
Revenue Legislation Amendment Bill 2002 (Passed 22.08.02)	No. 18
Subordinate Law 2002 No. 11 – Custodial Escorts Regulations 2002..	
Land (Planning and Environment) ACT Heritage Council Appointments 2002 (No 1) - DI 2002—56.....	No. 20
Roads and Public Places (Fees) Revocation and Determination 2002 (No 1) - DI 2002—71.....	No. 19
Roads and Public Places (Fees) Revocation and Determination 2002 (No 2) - DI 2002—72.....	No. 19
Roads Transport (General) (Fees) Revocation and Determination 2002 – DI2002—73.....	No. 19
Hawker (Fees) Revocation and Determination 2002 – DI2002—74....	No. 19
Roads and Public Places (Fees) Revocation and Determination 2002 (No 3) – DI2002-75.....	No. 19
Water Resources (Fees) Revocation and Determination 2002 – DI2002-76.....	No. 19
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Stock (Fees) Revocation and Determination 2002 (No 2) – DI2002-78	No. 19
Pounds (Fees) Revocation and Determination 2002 – DI2002-79.....	No. 19
Nature Conservation (Fees) Revocation and Determination 2002 – DI2002-80.....	No. 19
Lakes (Fees) Revocation and Determination 2002 – DI2002-81.....	No. 19
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Domestic Animals (Fees) Revocation and Determination 2002 – DI2002-83.....	No. 19
Animal Welfare (Fees) Revocation and Determination 2002 – DI2002-84.....	No. 19
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Road Transport (General) (Parking Permit Fees) Revocation and	

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Determination 2002 – DI2002-86.....	No. 19
Road Transport (General) (Vehicle Impounding and Seizure/Speed Tests) Revocation and Determination 2002 – DI2002-89.....	No. 19
<u>Report No. 18, dated 27 August 2002</u>	
Cooperatives Bill 2002...(Passed 19.11.02).....	No 22
<u>Report No. 19, dated 20 September 2002</u>	
Adventure Activities (Liability) Bill 2002 (PMB)	No. 20
Civil Law (Wrongs) Bill 2002 (Passed 26.09.02)	No. 20
Injuries Compensation Framework Bill 2002 (PMB)	No. 20
Prostitution Amendment Bill 2002 (Passed 24.09.02)	No. 20
Disallowable Instrument DI 2002—99 being the Machinery (Fees) Revocation and Determination 2002	No. 22
Disallowable Instrument DI 2002—102 being the Architects (Fees) Revocation and Determination 2002	No. 22
Disallowable Instrument DI 2002—103 being the Building (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—104 being the Building (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—105 being the Community Title (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—106 being the Construction Practitioners Registration (Fees) Determination and Revocation 2002	No. 22
Disallowable Instrument DI 2002—109 being the Water and Sewerage (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—110 being the Water and Sewerage (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—111 being the Land (Planning and Environment) (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—112 being the Land (Planning and Environment) (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—113 being the Surveyors (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—114 being the Surveyors (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—115 being the Unit Titles (Fees) Revocation 2002	No. 22
Disallowable Instrument DI 2002—116 being the Unit Titles (Fees) Determination 2002	No. 22
Disallowable Instrument DI 2002—120 being the Plumbers, Drainers and Gasfitters Board (Fees) Revocation and Determination 2002	No. 22
Disallowable Instrument DI 2002—128 being the Scaffolding and Lifts (Fees) Revocation and Determination 2002	No. 22

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Disallowable Instrument DI 2002—129 being the Occupational Health and Safety (Fees) Revocation and Determination 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI 2002—130 being the Workers’ Compensation (Fees) Revocation and Determination 2002	
Disallowable Instrument DI 2002—131 being the Dangerous Goods (Fees) Revocation and Determination 2002	
Disallowable Instrument DI2002—107 being the Electricity (Fees) Revocation 2002	No. 22
Disallowable Instrument DI2002—108 being the Electricity (Fees) Determination 2002	No. 22
Disallowable Instrument DI2002—144 being the Cultural Facilities Corporation Appointment 2002	No. 32
Disallowable Instrument DI 2002—137 being the Agents Act 1968 – Board Appointments 2002 (No. 1)	
Disallowable Instrument DI 2002—138 being the Agents Act 1968 – Board Appointments 2002 (No. 2)	
Disallowable Instrument DI2002—142 being the Gungahlin Development Authority Appointment 2002 (No 1)	No. 22
Disallowable Instrument DI2002—140 being the Waste Minimisation (Fees) Revocation and Determination 2002	No. 32
<u>Report No 20, dated 11 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (Passed 4.03.03)	
Criminal Code 2002 (Passed 10.12.02).....	No. 22
Planning and Land Bill 2002 (Further response).....	No. 22
Disallowable Instrument DI2002—161 being the Community and Health Services Complaints – Community and Health Rights Advisory Council – Appointment 2002 (No 1)	No. 24
Disallowable Instrument DI2002—167 being the Nurses Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002—168 being the Physiotherapists Board of the ACT Appointments 2002 (No 1)....	No. 24
<u>Report No 21, dated 19 November 2002</u>	
Administrative Appeals Tribunal Amendment Bill 2002.....	No. 23
Building (Water Efficiency) Amendment Bill 2002 (PMB)	
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2).....	
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1).....	
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) – Veterinary Surgeons Board Appointments 2002 (No 1).....	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
<u>Report No 22, dated 21 November 2002</u>	
Civil Law (Wrongs) Amendment Bill 2002 (No 2) (PMB)	
Crimes Amendment Bill 2002 (PMB)	
Revenue Legislation Amendment Bill 2002 (No 2) (Passed 10.12.02)	No. 23
Disallowable Instrument DI2002-174 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-175 being the Health Professions Boards (Procedures) Optometrist Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-176 being the Health Professions Boards (Procedures) Veterinary Surgeons Board Appointments 2002 (No 1)	No. 24
Disallowable Instrument DI2002-183 being the Justices of the Peace – Appointment of Justices of the Peace 2002	
Disallowable Instrument DI2002-188 being the Health Professions Boards (Procedures) – Medical Board of the ACT Appointments 2002 (No 2)	No. 24
<u>Report No 23, dated 6 December 2002</u>	
Discrimination Amendment Bill 2002 (No 2) (Passed 13.03.03)	
Health and Community Care Services (Repeal and Consequential Amendments) Bill 2002 (Passed 10.12.02)	
Litter Amendment Bill 2002 (PMB)	
<u>Report No 24, dated 28 January 2003</u>	
ACTION Authority Amendment Bill 2002 (Passed 18.2.03)	
Taxation (Government Business Enterprises) Bill 2002 (Passed 11.03.03)	No 27
Community Based Sentences (Transfer) Bill 2002 (Passed 20.2.03) ..	
Cemeteries and Crematoria Bill 2002 (No 2) (Passed 6.03.03)	No 32
Hawkers Bill 2002 (Passed 6.03.03)	No 32
Security Industry Bill 2002 (Passed 20.2.03)	
<u>Report No 25, dated February 2003</u>	
Confiscation of Criminal Assets Bill 2002 (Passed 4.3.02)	No 26
Crimes (Industrial Manslaughter) Amendment Bill 2002	
Disallowable Instrument DI2002-193 being the Supervised Drug Injection Trial Advisory Committee Appointments 2002 (No 1)...	No 32
Disallowable Instrument DI2002-194 being the Residential Tenancies - Tribunal Selections 2002	

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
Disallowable Instrument DI2002-195 being the Road Transport (General) – Declaration that the road transport legislation does not apply to certain roads and road related areas 2002 (No 7)	No 32
Disallowable Instrument DI2002-197 being the Domestic Violence Prevention Council Appointments 2002-2004.....	
<u>Report No 26, dated 27 February 2003</u>	
Consumer and Trader Tribunal Bill 2003 (Passed 1.04.03).....	
Land (Planning and Environment) (Compliance) Amendment Bill 2003.....	
Subordinate Law SL2003-1 being the Urban Services (Application of Criminal Code) Amendment Regulations 2002	No 32
Disallowable Instrument DI2002-207 being the Gambling and Racing Commission – Appointments 2002 (No 1).....	No 30
Disallowable Instrument DI2002-212 being the National Exhibition Centre Trust Appointment 2002 (No 2).....	No 30
Subordinate Law SL2002-37 being the Trade Measurement (Miscellaneous) Amendment Regulations 2002	
Disallowable Instrument DI2002-219 being the Health Professions Boards (Procedures) – Nurses Board of the ACT Appointments 2002 (No 2)	No 32
Disallowable Instrument DI2002-220 being the Water Restriction Scheme Approval 2002 (No 2)	No 32
Disallowable Instrument DI2002-223 being the Occupational Health and Safety Council – Appointment 2002 (No 3)	No 30
Disallowable Instrument DI2002-224 being the Occupational Health and Safety Council – Appointment 2002 (No 2)	No 30
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Disallowable Instrument DI2002-232 being the Road Transport (General) Revocation of Declaration for Traffic Marshals 2002 ...	No 32
Disallowable Instrument DI2003-3 being the Hotel School Appointment 2003 (No 1)	No 30
Disallowable Instrument DI2003-5 being the Tree Protection (Interim Scheme) Determination of Criteria 2002.....	No 32
<u>Report No 27, dated 11 March 2003</u>	
Bushfire Inquiry (Protection of Statements) Bill 2003 (PMB) (Passed 12.03.03)	
Bushfire Reconstruction Authority Bill 2003 (PMB)	
Charitable Collections Bill 2002 (Passed 1.04.03)	No 31
Disallowable Instrument DI2003-21 being the Plumbers, Drainers and Gasfitters Board Appointments 2003 (No 1)	
Disallowable Instrument DI2003-23 being the Occupational Health and Safety (Fees) Revocation and Determination 2003	No 32

Bills/Subordinate Legislation	Responses received – Scrutiny Report No.
<u>Report No 30, dated 31 March 2003</u>	
Agents Bill 2003 (Passed 6.05.003)	
Legislation (Statutory Interpretation) Amendment Bill 2003 Passed 3.04.03)	
<u>Report No 31, dated 11 April 2003</u>	
Animal and Plant Diseases Amendment Bill 2003	
Road Transport (Public Passenger Services) Amendment Bill 2003	No 32
Sentencing Reform Amendment Bill 2003 (PMB)	
Tertiary Accreditation and Registration Bill 2003	
Vocational Education and Training Bill 2003	
Disallowable Instrument DI2003-36 being the Public Trustee – Appointments to the Public Trustee Investment Board 2003 (No 1)	
Disallowable Instrument DI2003-27 being the Utilities (Dam Safety Code) Variation Determination 2003	No 32
<u>Report No 32, dated 15 May 2003</u>	
Bushfire Reconstruction Levy Bill 2003	
Long Service Leave (Private Sector) Bill 2003 (PMB)	
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