



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

Digest 6/55 – 18 October 2011



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

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# Membership

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# Functions of the Committee

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

## **8A Functions with respect to Bills**

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

## **9 Functions with respect to Regulations**

- (1) The functions of the Committee with respect to regulations are:
- (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - (i) that the regulation trespasses unduly on personal rights and liberties,
    - (ii) that the regulation may have an adverse impact on the business community,
    - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
    - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- (v) that the objective of the regulation could have been achieved by alternative and more effective means,
  - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
  - (vii) that the form or intention of the regulation calls for elucidation, or
  - (viii) that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

# Guide to the Digest

## COMMENT ON BILLS

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

### Ministerial Correspondence – Bills previously considered

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

## COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest.

The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention".

The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

### Regulations for the special attention of Parliament

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

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

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

### Copies of Correspondence on Regulations

This part of the Digest contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

## APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

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

## **APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON**

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



# Conclusions

## PART ONE - BILLS

### 1. ABORIGINAL LAND RIGHTS AMENDMENT (HOUSING) BILL 2011

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

### 2. HOME BUILDING AMENDMENT BILL 2011

Unduly trespasses on individual rights and liberties: s8A(1)(b)(i) of the LRA

#### *Restricting Access to the Courts*

The Committee appreciates the policy reasons in standardising the limitation period between the statutory warranty and the home warranty insurance scheme. However, it is still incumbent upon the Committee to note when proposed legislation seeks to restrict access to the courts.

Unduly trespasses on individual rights and liberties: s8A(1)(b)(i) of the LRA

#### *Retrospectivity*

It is generally the Committee's view that provisions in Bills be drafted to ensure its application from the date the Bill becomes operative, so that all affected individuals are aware of changes made to their rights and responsibilities before they occur. However, in the circumstances provided for in the Bill, the Committee does not raise any issue with the retrospective effect of this provision.

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

#### *Commencement by Proclamation*

The Committee notes that the Bill is to commence operation on assent, exception for certain clauses which are to commence on proclamation. The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

### 3. INDUSTRIAL RELATIONS AMENDMENT (NON-OPERATIVE AWARDS) BILL 2011

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

### 4. LOCAL GOVERNMENT AMENDMENT BILL 2011

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

#### *Commencement by proclamation*

The Committee notes that the Bill delegates to the Government the power to commence Schedule 1 [14] of the Bill on whatever day it chooses or not at all. However, given the nature of the administrative processes proposed by this provision, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.

5. PLUMBING AND DRAINAGE BILL 2011

Trespass on personal rights and liberties: s8A(1)(b)(i) of the LRA

*Strict Liability Offences*

Given the public interest in ensuring that plumbing and sanitary drainage installations and systems do not threaten public health and safety, the Committee does not consider that the strict liability offences in the Bill constitute an undue trespass on personal rights and liberties.

Trespass on personal rights and liberties: s8A(1)(b)(i) of the LRA

*Entry and Inspection of Property*

Given the public interest in ensuring that plumbing and sanitary drainage installations and systems do not threaten public health and safety, and the significant safeguards provided in the Bill, the Committee does not consider that the powers of entry and inspection unduly trespass on personal rights and liberties.

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

*Commencement by Proclamation*

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

6. PROTECTION OF THE ENVIRONMENT LEGISLATION AMENDMENT BILL 2011

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

*Commencement by proclamation*

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

7. SPORTING VENUES AUTHORITIES AMENDMENT (VENUES NSW)BILL 2011

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

*Commencement by Proclamation*

The Committee will always note where commencement of an Act is delegated to the Executive, as this Bill provides.

However, on advice received from the Minister's Office, the Committee understands that appointments must still be made to the Local Venues Councils before the Act can become operative. As it is unclear when this process will be complete, the Bill has been drafted to commence on proclamation rather than on a fixed date.

8. TECHNICAL AND FURTHER EDUCATION COMMISSION AMENDMENT (STAFF EMPLOYMENT) BILL 2011

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

*Commencement by proclamation*

The Committee notes that the Bill delegates to the Government the power to commence the Act on whatever day it chooses or not at all. However, given the nature of the administrative

processes the Bill proposes, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.

#### 9. THOROUGHBRED RACING AMENDMENT BILL 2011

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

##### *Commencement by proclamation*

The Committee notes that the Bill delegates to the Government the power to commence provisions of the Act on whatever day it chooses or not at all. However, given the nature of the administrative processes the Bill proposes, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.

#### 10. UNIVERSITIES GOVERNING BODIES BILL 2011

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

##### *Act Amendment by Resolution of Governing Body and Order Made by Minister*

The Committee refers to Parliament whether allowing for Acts to be amended by resolution of a governing body and publication of an order made by the Minister is an inappropriate delegation of legislative powers.

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

##### *Procedural Fairness*

The Committee refers to Parliament whether the Bill unduly trespasses on rights and liberties by providing for removal of a Chancellor or Deputy Chancellor from office without the need to establish breach of duty, and without a requirement that the affected person be given notice of the motion of no confidence or an opportunity to respond.

### PART TWO – REGULATIONS

#### 11. INDUSTRIAL RELATIONS (GENERAL) AMENDMENT (FEES) REGULATION 2011

Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *PROPOSED COURSE OF ACTION*

The Committee concludes that the introduction of these fees is reasonable and any increases are in keeping with the general movement of the Consumer Price Index and no further action is necessary.



## Part One - Bills

# 1. Aboriginal Land Rights Amendment (Housing) Bill 2011

Date introduced	12 October 2011
House introduced	Legislative Council
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Aboriginal Affairs

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Aboriginal Land Rights Act 1983* to facilitate the entering into and management of residential tenancy agreements of less than three years, or periodic agreements, by Boards of Local Aboriginal Land Councils where the other parties to the agreements are natural persons.

### BACKGROUND

2. Aboriginal land councils have statutory functions for the acquisition, management, control and disposal of land with freehold title. Local land councils are corporate bodies whose managing boards are elected every two years by the membership of adult Aboriginal persons, largely based on residence within a local land council boundary.
3. In March 2011, the decision of the Land and Environment Court in *Woods v Gandangara Local Aboriginal Land Council* in relation to the land councils' management of its housing tenancy leases meant that all decisions concerning residential tenancy agreements would require the approval of a members' meeting.
4. The Minister introducing the Bill, the Hon. Gregory Pearce MLC, advised the House:

'This [decision] has particularly onerous ramifications for the management by local Aboriginal land councils of the approximately 2,600 houses which they manage as Aboriginal community housing stock.

First of all, it will increase the possibility of circumstances where a conflict of interest may arise – for example, in the circumstance where family members are voting on whether to increase the rent or evict a tenant who is a family member. The decision also meant that local Aboriginal land councils suffer from the imposition of time and expense of advertising and convening meetings if an extraordinary meeting is required to be called. If this anomaly is not corrected, economic viability and good governance will be jeopardised.'
5. As a result, the Aboriginal Land Council, various local Aboriginal land councils and the Registrar of the Act, made representations to the Government to effect an amendment to the Act to clarify and empower elected board members and staff of land councils to administer local Aboriginal land council housing within the legal framework. This Bill gives effect to those recommendations.

## OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.
7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
8. Schedule 1 [1] amends section 4 of the Act to define certain terms for the purposes of the Act. *Residential tenancy agreement* has the same meaning as in the *Residential Tenancies Act 2010* and a *short-term residential tenancy agreement* is defined as a fixed term agreement of less than 3 years or a periodic agreement (within the meaning of that Act), entered into by a Local Aboriginal Land Council where the only other party to the agreement is a natural person.
9. Schedule 1 [2] amends section 42E of the Act (which prevents a Local Aboriginal Land Council from dealing with land unless the land dealing has the approval of the New South Wales Aboriginal Land Council) so as to exempt land dealings in relation to short-term residential tenancy agreements from the operation of the section. Leases of less than 3 years are already exempted.
10. Schedule 1 [3] amends section 52G of the Act to provide that a resolution of the voting members of a Local Aboriginal Land Council is not required to give approval to dealings with land and land dealing approval agreements relating to short-term residential tenancy agreements
11. Schedule 1 [5] amends section 62 of the Act to confer directly on the Board of a Local Aboriginal Land Council the functions of entering into short-term residential tenancy agreements in relation to land vested in the Council and managing and terminating those agreements.
12. Schedule 1 [4] and [6] amend section 62 of the Act to make it clear that the Board of a Local Aboriginal Land Council must exercise all of its functions in accordance with the Act and the regulations and consistently with the community, land and business plan of the Council.
13. Schedule 1 [7] amends section 230 of the Act to make it clear that the section, which currently prevents an administrator for a Local Aboriginal Land Council from disposing of or otherwise dealing with land of the Council without the Council's approval given at a meeting of the Council, does not require the administrator to obtain the consent of the Council when entering into short-term residential tenancy agreements in relation to land vested in the Council or managing or terminating those agreements.
14. Schedule 1 [8] amends Schedule 4 to the Act to enable regulations to be made of a savings or transitional nature consequent on the enactment of the proposed Act.
15. Schedule 1 [9] amends Schedule 4 to the Act to ensure that the proposed amendments to sections 52G, 62 and 230 of the Act will extend to the future exercise of functions in relation to short-term residential tenancy agreements entered into before the commencement of those amendments.

## ISSUES CONSIDERED BY COMMITTEE

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

## 2. Home Building Amendment Bill 2011

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

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Home Building Act 1989*, the *Home Building Regulation 2004* and the *Civil Liability Act 2002* as follows:
  - (a) To consolidate and amend provisions that deal with limitations on when a claim can be made under a policy of home warranty insurance;
  - (b) To provide a comprehensive scheme for determining when residential building work was completed;
  - (c) To align the statutory warranty period for home building work with those for home warranty insurance;
  - (d) To clarify the application of the Act to developers so as to include as a developer the owner of the land on which a developer does residential building work;
  - (e) To expand the list of persons who are not required to be beneficiaries under a contract of home warranty insurance because they are 'related' to a developer or contractor to include related entities and related parties under the *Corporations act 2001* of the Commonwealth;
  - (f) To raise the threshold for the requirements for written home building contracts from \$1,000 to \$5,000 and to introduce a written 'short form' contract requirement for work between \$1,000 and \$5,000;
  - (g) To raise the threshold for the requirement for home warranty insurance and a five-day cooling-off period for residential building work from \$12,000 to \$20,000;
  - (h) To reduce the \$500 excess for home warranty insurance claims to \$250;
  - (i) To increase the minimum home warranty insurance cover from \$300,000 to \$340,000;
  - (j) To extend the statutory dispute resolution process to enable a contractor to notify a dispute with a consumer;
  - (k) To provide for the sharing of information between NSW Fair Trading and the NSW Self Insurance Corporation in respect of functions under the Act; and



- (l) To exempt a liability arising from breach of a statutory warranty under the Act under proportionate liability under the *Civil Liability Act 2002*.

## BACKGROUND

2. This Bill provides for a suite of amendments to the *Home Building Act 1989* and associated statutory instruments in light of changed circumstances, including some court decisions which rendered the Act as operating in a manner in which it was not intended to work.

## OUTLINE OF PROVISIONS

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the amendments to be made to the proposed Act variously on the date of assent to the proposed Act or on a day to be appointed by proclamation.
5. Schedule 1 [2] and [3] extend the definition of *developer* of residential development in the Act to deem the owner of land on which residential building work is done by a developer to also be a developer in relation to the work. Schedule 1 [1], [5], [12], [16] and [28] make consequential amendments.
6. Schedules 1 [4] and 3 [9] provide for the determination of when residential building work was completed. The amendment also deals with residential building work that is completed in stages by providing that separate buildings can be regarded as complete prior to completion of the entire project. Schedule 1 [25] and [26] make consequential amendments to the start date of the period of cover under a home warranty insurance policy, so that the start date will be the date of completion of the work (without the alternative later start date of the end of the contract for the work, as at present).
7. Schedules 1 [6]–[11] and 3 [1]–[4] make the following changes to the provisions regulating the form and content of home building contracts:
  - (a) the threshold for the requirement that a home building contract be in writing will be raised from \$1,000 to \$5,000,
  - (b) a written “short form” contract will be required for work between \$1,000 and \$5,000,
  - (c) the threshold for a home building contract to include a 5-day cooling-off period will be raised from \$12,000 to \$20,000.
8. Schedule 1 [13] aligns the statutory warranty periods for home building work with those for home warranty insurance. This will provide a warranty period of 6 years for structural defects and 2 years for other defects, with an additional 6 months for a defect that does not become apparent until the last 6 months of a warranty period. The current warranty period is 7 years for all defects.
9. Schedule 1 [14] and [15] extend the provisions of the Act for dealing with building disputes notified by consumers to the Director-General to enable a contractor to notify a dispute with a consumer.

10. Schedules 1 [17]–[22] and 3 [12], [13] and [15] raise the threshold for the requirement for home warranty insurance from \$12,000 to \$20,000.
11. Schedules 1 [23] and 3 [7], [8] and [11] increase the minimum home warranty insurance cover from \$300,000 to \$340,000.
12. Schedules 1 [24] and 3 [5] reduce the \$500 maximum excess for home warranty insurance claims to \$250.
13. Schedule 1 [27] inserts new provisions that set out when a claim can be made under a policy of home warranty insurance, to provide as follows:
  - (a) For policies issued from 1 May 1997 to 30 June 2002, a claim must be made during the period of insurance, or within 6 months after the period of insurance for defects that become apparent during the last 6 months of the period of insurance.
  - (b) For policies issued on or after 1 July 2002, a claim must be made during the period of insurance, or within 6 months after the period of insurance for defects that become apparent during the last 6 months of the period of insurance. If a loss becomes apparent during the period of insurance but a claim cannot be made during that period, a claim can be made after the period of insurance but only if the loss was properly notified during the period of insurance (or within 6 months after the period of insurance for a loss that becomes apparent in the last 6 months of the period of insurance) and the claim was diligently pursued.
  - (c) For policies issued before 1 July 2010 there is an absolute bar on making a claim more than 10 years after the work insured was completed.
14. Schedule 1 [29] authorises the sharing of information in respect of functions under the Act between persons engaged in the administration of the Act and the NSW Self Insurance Corporation and members of its staff.
15. Schedule 1 [30] inserts a standard savings and transitional regulation-making power.
16. Schedule 1 [31] inserts savings and transitional provisions to extend the amendments made by the proposed Act to matters arising before the commencement of the amendments with certain exceptions for claims notified before the commencement of the amendments and a general exception for claims already made or matters the subject of pending or finalised legal proceedings.
17. Schedule 2 [1] exempts civil liability arising from breach of a statutory warranty under the *Home Building Act 1989* from the proportionate liability provisions of the *Civil Liability Act 2002*, so that joint and several liability will continue to apply in respect of any such liability in proceedings brought by a person having the benefit of the statutory warranty.
18. Schedule 2 [3] inserts a transitional provision that extends the amendment to civil liability arising before the commencement of the amendment but not so as to affect proceedings commenced before the commencement of the amendment.
19. Schedule 2 [2] inserts a standard savings and transitional regulation-making power.

20. Schedule 3 makes the following additional amendments to the *Home Building Regulation 2004*:
- (a) Schedule 3 [6] extends the list of persons who are not required to be beneficiaries under a contract of home warranty insurance to include (in addition to related companies of a developer or contractor) related entities and related parties under the *Corporations Act 2001* of the Commonwealth;
  - (b) Schedule 3 [10] makes it clear that an existing provision that deems notice of a claim to constitute notice of a related loss does not apply to the proposed new provisions that limit when a claim can be made;
  - (c) Schedule 3 [14] makes a consequential amendment.

## ISSUES CONSIDERED BY COMMITTEE

### Unduly trespasses on individual rights and liberties: s8A(1)(b)(i) of the LRA *Restricting Access to the Courts*

21. One of the provisions of the Bill seeks to reduce the time period in which builders will be liable for defective work.
22. Specifically, clause 13 of Schedule 1 of the Bill provides that proceedings for a breach of a statutory warranty must be commenced within six years of completion for a breach that results in a structural defect (as defined by the regulations) or two years in any other case. This amendment will replace the existing provision which provides that proceedings for a breach of statutory warranty may take place up to seven years from completion for a breach that results in defective work.
23. The Committee notes that the reasons for this are principally to align the statutory warranty time periods with the home warranty insurance time period. In his Agreement-in-Principle Speech, the Minister advised the House:
- 'Currently, a home owner can take action for a breach of the warranties up to seven years from completion of the work no matter how minor the defect. However, the home warranty insurance scheme warrants residential building work for six years for structural defects and two years for non-structural defects. Overwhelmingly, stakeholders on all sides have expressed support for these warranty periods to be the same – it is too confusing and inequitable to have a different warranty period.'
24. One of the potential impacts of the Bill is that an individual who can currently seek access to the courts for a breach of statutory warranty, will no longer be able to obtain that access once the Bill commences operation if those proceedings relate to defective work completed more than six years ago for structural defects, and more than two years ago in any other case.
25. In the circumstances, it is possible that some individuals - who would have otherwise brought proceedings for a breach of statutory warranty sooner - may now find they are excluded from doing so because they had relied on the seven year statutory period to bring proceedings and are presently in that seventh year.

26. The Committee appreciates the policy reasons in standardising the limitation period between the statutory warranty and the home warranty insurance scheme. However, it is still incumbent upon the Committee to note when proposed legislation seeks to restrict access to the courts as being onerous on individuals who may have relied on the existing statutory timeframes to, for example, delay proceedings.

**The Committee appreciates the policy reasons in standardising the limitation period between the statutory warranty and the home warranty insurance scheme. However, it is still incumbent upon the Committee to note when proposed legislation seeks to restrict access to the courts.**

## **Unduly trespasses on individual rights and liberties: s8A(1)(b)(i) of the LRA**

### *Retrospectivity*

27. Clause 2 of Schedule 1 provides for an alternative definition of 'developer'. These changes have been prompted by a May 2010 Court of Appeal matter in which a narrow definition of 'developer' was adopted. The Court found that in order for building work to be done on behalf of the developer, the developer must have been in contract with the builder.
28. According to the Minister in his Agreement-in-Principle Speech:
- 'This does not recognise that, in many arrangements entered into by developers, the party that owns the land – and on whose behalf he work is done – is not necessarily the party who enters into the contract with the builder. The most common example of where this happens is in joint venture arrangements where an organisation or person owns the land and the other enters into the building contract.'
29. The new definition of 'developer' proposed in the Bill will apply to building developments that have already been completed, not just those that are yet to be completed. As this applies to existing developments, and their developers, it is therefore deemed to have retrospective effect.
30. It is generally the Committee's view that provisions in bills be drafted to ensure its application from the date the bill becomes operative, so that all affected individuals are aware of changes made to their rights and responsibilities before they occur.
31. However, the Committee also notes the intent of the amendment is to restore the previously accepted definition of 'developer', as was industry understanding prior to the Court of Appeal judgement, rather than explicitly redefine the term.
32. Further, the Committee understands that the effect of this amendment is to ensure home owners have better chances of recovering their losses arising from defective or incomplete work.
33. In these circumstances, the Committee does not raise any issue with the retrospective effect of this provision.

**It is generally the Committee's view that provisions in Bills be drafted to ensure its application from the date the Bill becomes operative, so that all affected individuals are aware of changes made to their rights and responsibilities before they occur. However, in the circumstances provided for in the Bill, the**

**Committee does not raise any issue with the retrospective effect of this provision.**

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

*Commencement by Proclamation*

34. The Committee notes that the Bill is to commence operation on assent, exception for certain clauses which are to commence on proclamation. The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.

**The Committee notes that the Bill is to commence operation on assent, exception for certain clauses which are to commence on proclamation. The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.**

### 3. Industrial Relations Amendment (Non-operative Awards) Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Council
Minister responsible	The Hon. Greg Pearce
Portfolio	Finance and Services

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Industrial Relations Act 1996*:
  - (a) to enable the Industrial Relations Commission (the Commission) to rescind awards that have no current application to any employer or employee, and
  - (b) to provide that all awards declared to be non-operative awards under that Act are taken to have been rescinded by the Commission.

#### BACKGROUND

2. In January 2010 the NSW Government referred its industrial relations powers to the Commonwealth for the purpose of creating a national system. The principal effect of the referral was the removal of most private sector employers and employees from the New South Wales jurisdiction. However, State public sector employees, the local government sector and those who are deemed employees under schedule 1 to the *Industrial Relations Act 1996* were excluded from the referral.
3. In November 2010 the *Industrial Relations (Non-operative Awards) Act 2010* amended the *Industrial Relations Act 1996* by inserting provisions intending to protect awards that had no current application to any employers or employees. A new category of awards was created called non-operative awards. The Act provided the Industrial Relations Commission with the power to declare an award non-operative if it was satisfied the award had no current application. The power to rescind obsolete awards was removed. It was considered that such awards should be protected as they "play a benchmark role in the NSW industrial relations system and are the repository of years of arbitral history."<sup>1</sup>
4. The current Bill seeks to reverse the effects of the *Industrial Relations (Non-operative Awards) Act 2010*. In the Second Reading Speech the Minister stated:

Broadly speaking, the Bill is intended to reverse the effects of the earlier Industrial Relations Amendment (Non-operative Awards) Act 2010 and fully restore the

<sup>1</sup> The Hon. Paul Lynch MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 November 2010, p 27696

powers of the New South Wales Industrial Relations Commission to rescind awards that have no application.<sup>2</sup>

## OUTLINE OF PROVISIONS

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

### Schedule 1 Amendment of Industrial Relations Act 1996 No 17

7. Schedule 1 [6] enables the Commission to rescind an obsolete award or an obsolete part of an award.
8. Schedule 1 [1]–[5], [7]–[9] and [13] repeal the provisions of the Act that protect certain awards that have no current application to any employer or employee from being rescinded by the Commission and require the Commission to review and keep a register of such awards.
9. Schedule 1 [10] enables savings and transitional regulations to be made as a consequence of the proposed Act. Schedule 1 [11] and [12] contain specific transitional provisions that provide that all awards declared to be non-operative awards under the Act before the commencement of the proposed Act are taken to have been rescinded by the Commission.

## ISSUES CONSIDERED BY COMMITTEE

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

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<sup>2</sup> The Hon. Greg Pearce, New South Wales, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2010

## 4. Local Government Amendment Bill 2011

Date introduced	12 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Donald Page MP
Portfolio	Local Government

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993* as follows:
  - (a) to extend the maximum term for which a lease or licence may be granted over community land from 21 years to 30 years and require the consent of the Minister for leases or licences granted for more than 21 years;
  - (b) to convert the status of councils and county councils from their existing status as bodies politic of the State to bodies corporate;
  - (c) to provide that a councillor who has been suspended from office by the Local Government Pecuniary Interest and Disciplinary Tribunal for misbehaviour does not vacate office because of his or her absence from meetings during the period of suspension;
  - (d) to provide that the voting system in a contested election is to be preferential if only one councillor is to be elected, and proportional if two or more councillors are to be elected;
  - (e) to reduce the period for which special arrangements exist for non-senior staff of councils affected by the constitution, amalgamation or alteration of council areas;
  - (f) to make further provision with respect to disclosures of pecuniary interests and the duties of councillors with respect to matters in which they have a pecuniary interest; and
  - (g) to enact provisions of a savings or transitional nature.

### BACKGROUND

2. The NSW Department of Local Government has provided a process and a forum for local government to explore the issues facing local government under the banner "Destination 2036". More than 350 representatives from every council in New South Wales gathered in Dubbo on 17 and 18 August 2011 to address these issues.
3. In introducing the Bill, the Minister for Local Government stated that:

The Bill fulfils the Government's ongoing commitment to improve efficiency and effectiveness in local government. The Government and local government sector both agree that there is a



need to reshape the structure, governance and financing arrangements, functions and capacity of the local government sector. This agreement was unanimously endorsed recently at the historic Destination 2036 conference attended by the leaders of all 152 local councils in the State. The proposals in this Bill contribute to creating favourable conditions for councils to engage in structural reform to achieve a strong and sustainable local government sector now and in the future.<sup>3</sup>

## OUTLINE OF PROVISIONS

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act (except for Schedule 1 [14]) on the date of assent to the proposed Act. Schedule 1 [14] commences on a day to be appointed by proclamation.

### Schedule 1 Amendment of Local Government Act 1993 No 30

6. Schedule 1 [1] extends, from 21 years to 30 years, the maximum period for which a council may grant a lease or licence in respect of community land.
7. Schedule 1 [2] provides that a council must not grant a lease or licence in respect of community land for a period in excess of 21 years without the consent of the Minister.
8. Schedule 1 [4] provides that the Minister may consent to such a lease or licence only if satisfied that there are special circumstances that justify the lease or licence exceeding a period of 21 years.
9. Schedule 1 [3] makes a consequential amendment.
10. Schedule 1 [5] and [11] convert the status of councils and county councils from their existing status as bodies politic of the State to bodies corporate.
11. Schedule 1 [6] and [12] make consequential amendments.
12. Schedule 1 [7] makes it clear that a vacancy in a civic office does not occur due to the holder of the office being absent from 3 consecutive ordinary meetings of the council if the holder of the office was suspended from the office by the Pecuniary Interest and Disciplinary Tribunal for misbehaviour.
13. Schedule 1 [9] provides that the voting system in a contested election is to be optional preferential if one councillor is to be elected and is to be proportional if 2 or more councillors are to be elected. Presently the voting system is proportional voting if 3 or more councillors are to be elected and optional preferential if one or 2 councillors are to be elected.
14. Schedule 1 [8] makes a consequential amendment.
15. Schedule 1 [10] reduces, from 3 years to one year, the period for which special arrangements exist for non-senior staff of councils that are affected by the constitution, amalgamation or alteration of council areas. The special arrangements relate to forced redundancies and the appointment of persons to new positions on the staff of a council.

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<sup>3</sup> The Hon. Donald Page, Minister for Local Government, Legislative Assembly *Hansard*, 12 October 2011

16. Schedule 1 [13] makes it clear that exemption from the requirement to disclose the pecuniary interests set out in section 448 of the principal Act applies only in respect of a duty of disclosure arising under Part 2 of Chapter 14 of that Act and not in respect of a duty of disclosure under any other provision.
17. Schedule 1 [14] authorises councillors to be present, take part in a meeting and vote on a matter in which they have a pecuniary interest if the matter relates to the making, amendment or alteration of an environmental planning instrument that applies to the whole or a significant part of the council's area and they have made a special disclosure of the pecuniary interest.
18. Schedule 1 [15] enables regulations to be made in relation to the exercise of a council's functions during the 3 weeks preceding an election.
19. Schedule 1 [16] enables regulations to be made containing provisions of a savings or transitional nature as a consequence of the enactment of the proposed Act.
20. Schedule 1 [17] inserts provisions of a savings or transitional nature as a consequence of the enactment of the proposed Act.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

21. The Bill provides that Schedule 1 [14] commences on a day to be appointed by proclamation. This provides the Government with the power to commence this provision on whatever day it chooses or not at all.
22. Schedule 1 [14] of the Bill involves the insertion of two subsections in section 451 of the Act, relating to disclosure and presence in meetings. This has the effect of subsections 451 (1) and 451 (2) not applying to a councillor has a pecuniary interest in a matter that is being considered at a meeting if the matter is a proposal relating to the making or a principal environmental planning instrument or the amendment, alteration or repeal of an environmental planning instrument. Such a councillor is required to make a special disclosure under this section in relation to the interest before the commencement of the meeting, with the disclosure to be in the form prescribed by the regulations and to contain the information required by the regulations.
23. Schedule 1 [14] has been included to assist councils in implementing their area-wide standardised local environmental plans. In the Agreement in Principle speech, the Minister for Local Government noted that as at 31 July 2011, 126 of the 152 general purpose councils in New South Wales had yet to have their standardised instrument local environmental plans made, with a number of councils encountering difficulties in relation to quorum when discussing standardised local environmental plans. This is due to the requirement that councillors not be present at the meeting at any time when the matter is being considered, discussed or voted on in circumstances where they themselves, or their spouse, de factor partner, relatives or employers had a pecuniary interest in the area-wide plan.

**The Committee notes that the Bill delegates to the Government the power to commence Schedule 1 [14] of the Bill on whatever day it chooses or not at all.**

**However, given the nature of the administrative processes proposed by this provision, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.**

## 5. Plumbing and Drainage Bill 2011

Date introduced	12 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Robert MP
Portfolio	Fair Trading

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - (a) to regulate the carrying out of plumbing and drainage work, including by prescribing the standards and requirements that must be complied with in carrying out such work; and
  - (b) to provide for a single plumbing regulator to oversee the regulation of plumbing and drainage work regardless of where the work is carried out in the State.

### BACKGROUND

2. In introducing this Bill, the Minister for Fair Trading stated that it is intended to simplify 'what is currently a complex and fragmented system that is confusing and costly for industry.' He explained:

At present more than 100 separate bodies are responsible for regulating on-site plumbing and drainage work in New South Wales and each of these regulators requires compliance with its own local standards. The Bill will establish a new regulatory framework with a single regulator and a single set of nationally consistent technical standards.<sup>4</sup>

### OUTLINE OF PROVISIONS

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
5. Clause 3 defines certain words and expressions used in the proposed Act. In particular, the term plumbing regulator is defined. The plumbing regulator is the Commissioner for Fair Trading.
6. Clause 4 defines the term plumbing and drainage work for the purposes of the proposed Act. Plumbing and drainage work includes the following:
  - (a) the construction of, or work on, certain plumbing installations,

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<sup>4</sup> Mr Anthony Roberts, Minister for Fair Trading, Agreement in Principle, NSW Legislative Assembly, 12 October 2011.

- (b) the construction of, or work on, sanitary plumbing systems,
- (c) the construction of, or work on, sanitary drainage systems,
- (d) any other type of construction or work prescribed by the regulations.

There are several exclusions from the definition, and power to make regulations providing for further exclusions.

7. Clause 5 defines the responsible person for plumbing and drainage work. The responsible person is:
  - (a) in the case of work carried out or proposed to be carried out by the holder of an endorsed contractor licence or a supervisor certificate under the *Home Building Act 1989* authorising the holder to do the work, the holder of that licence or certificate; or
  - (b) in the case of work carried out or proposed to be carried out under the immediate or general supervision of the holder of an endorsed contractor licence or a supervisor certificate under the *Home Building Act 1989* authorising the holder to supervise the work, the holder of the endorsed contractor licence or supervisor certificate.

## Part 2 Plumbing and drainage work

### *Division 1 General requirements for plumbing and drainage work*

8. Clause 6 makes it an offence for a person to do any kind of plumbing and drainage work unless the person:
  - (a) holds an endorsed contractor licence or a supervisor certificate in force under the *Home Building Act 1989* authorising the holder to do that kind of work; or
  - (b) does the work under the immediate supervision of the holder of such a licence or certificate; or
  - (c) holds a tradesperson certificate in force under the *Home Building Act 1989* authorising the holder to do that work under supervision and does that work under the general supervision of the holder of a licence or certificate referred to in paragraph (a).

This offence is similar to existing offences relating to plumbing and drainage work that connects to public infrastructure.

9. Clause 7 provides that the responsible person for plumbing and drainage work must ensure the work complies with the Plumbing Code of Australia and other prescribed standards and requirements. Work done in accordance with this provision is code compliant.
10. Clause 8 provides that the responsible person for plumbing and drainage work must ensure the fittings used in the work are fittings that have been authorised by the plumbing regulator.

*Division 2 Notice of plumbing and drainage work*

11. Clause 9 provides that the responsible person for plumbing and drainage work must ensure that no plumbing and drainage work is carried out by, or under the supervision of, the responsible person unless:

- (a) the responsible person has given the plumbing regulator a notice of work; and
- (b) the work carried out corresponds to the specifications in the notice of work.

Work notified in accordance with this requirement is work that has been pre-notified.

12. Clause 10 exempts certain emergency work from the requirement that plumbing and drainage work be pre-notified.
13. Clause 11 requires the responsible person for plumbing and drainage work carried out on land to give notice of any defective installation or system on the land discovered in the course of carrying out the work to the owner of the land and the occupier of the land. If the defective installation or system poses an imminent risk to public health or safety the responsible person must also notify the plumbing regulator.

*Division 3 Inspection of plumbing and drainage work*

14. Clause 12 gives the plumbing regulator power to inspect any plumbing and drainage work for the purpose of monitoring compliance with the proposed Act.
15. Clause 13 provides for the inspection of plumbing and drainage work by the plumbing regulator. Before, or as soon as practicable after, completing plumbing and drainage work the responsible person for the work must notify the plumbing regulator when the work will be ready for inspection. The plumbing regulator then advises the responsible person of a period during which the work must be available for inspection and the responsible person must ensure the work is ready for inspection during that period and be present, or ensure that a suitably qualified person is present, for the inspection during that period.
16. Clause 14 provides that the plumbing regulator may issue directions to the responsible person for plumbing and drainage work requiring the responsible person to fix any defects in the work.

*Division 4 Obligation to supply certificates and plans*

17. Clause 15 provides that the responsible person for plumbing and drainage work must, after completing the work, give a certificate of compliance for the work to the plumbing regulator and the person for whom the work was carried out. The certificate certifies that the plumbing and drainage work is code compliant. A person who contracts with another person for the other person to carry out plumbing and drainage work and who is not the owner of the premises on which the work is carried out must provide a copy of the certificate of compliance to the owner of the premises.
18. Clause 16 provides that after completing work on a sanitary drainage system, the responsible person for the work must supply a plan of the work to the owner of the land and the plumbing regulator.

*Division 5 Miscellaneous*

19. Clause 17 requires an owner or occupier of land who has control of a plumbing installation or sanitary drainage system to take all reasonable steps to ensure the installation or system does not threaten public health or safety.
20. Clause 18 enables the regulations to provide for exemptions from Part 2 of the proposed Act.

**Part 3 Plumbing regulator**

21. Clause 19 provides for the general functions of the plumbing regulator under the proposed Act.
22. Clause 20 gives the plumbing regulator power to give directions as to the fittings that may be used in plumbing and drainage work.
23. Clause 21 provides that the plumbing regulator may delegate any of the regulator's functions to a local council or to any other person whom the regulator considers has the necessary skills, knowledge or experience to exercise the function. A council may subdelegate a function delegated to the council to the general manager of the council or to a person engaged as a contractor by the council.

**Part 4 Inspection and enforcement powers**

*Division 1 Appointment of inspectors and enforcement officers*

24. Clause 22 provides for the appointment by the plumbing regulator of inspectors under the proposed Act. Inspectors are authorised persons for the purposes of the proposed Act.
25. Clause 23 provides for the appointment by the plumbing regulator of enforcement officers for the purposes of the proposed Act. A person is eligible for appointment as an enforcement officer only if the person is a member of the Government Service, an officer or employee of a local council or an investigator under the *Fair Trading Act 1987*. Enforcement officers are also authorised persons for the purposes of the proposed Act.
26. Clause 24 requires authorised persons to be issued with identification cards.
27. Clause 25 makes it clear that a power conferred on an authorised person under the proposed Act can only be exercised for purposes connected with the proposed Act.

*Division 2 Powers of inspectors*

28. Clause 26 gives inspectors power to enter premises with the consent of the occupier of the premises.
29. Clause 27 provides for the powers an inspector may exercise on premises. The powers are in the nature of general inspection powers.
30. Clause 28 makes it an offence to hinder or obstruct an inspector in the exercise of a function under the proposed Act.

*Division 3 Powers of enforcement officers*

31. Clause 29 gives enforcement officers the power to enter premises at a reasonable hour without the consent of the occupier.
32. Clause 30 provides that the power to enter premises does not apply to any part of the premises being used for residential purposes unless the occupier of that part of the premises has given consent to enter or the entry is authorised by a search warrant.
33. Clause 31 provides that the power to enter premises may not be exercised by an enforcement officer unless the owner or occupier of the premises has been given written notice of an intention to enter the premises. This restriction does not apply if the premises are entered under a search warrant, with consent of the occupier or in certain other limited circumstances.
34. Clause 32 provides that an enforcement officer may use reasonable force to enter premises, if authorised to do so by the plumbing regulator.
35. Clause 33 provides that if an enforcement officer uses force to enter premises or enters the premises in an emergency, the enforcement officer must advise the plumbing regulator of that fact.
36. Clause 34 provides for the powers that an enforcement officer may exercise after entering premises, including, for example, inspecting any article, matter or thing on the premises related to plumbing and drainage work, taking samples and measurements and requiring any person at the premises to give the enforcement officer reasonable help or to answer questions or otherwise furnish information.
37. Clause 35 provides for the application for, and issuing of, search warrants to enter premises and search for evidence of a contravention of the proposed Act or regulations made under that Act.
38. Clause 36 makes it an offence for a person to hinder or obstruct an enforcement officer in exercising the enforcement officer's functions.

*Division 4 General*

39. Clause 37 provides that an authorised person must do as little damage as possible in exercising a function under the proposed Part.
40. Clause 38 provides for the plumbing regulator to recover the costs of entering and inspecting premises from the owner or occupier of the premises, or the responsible person for the plumbing and drainage work that is the subject of the inspection, in certain circumstances.

**Part 5 Criminal and other proceedings**

41. Clause 39 provides for appeals to the Land and Environment Court against a decision of the plumbing regulator to issue a defect notice for plumbing and drainage work.
42. Clause 40 provides power for the Land and Environment Court to grant an injunction restraining a person from engaging in plumbing or drainage work that constitutes or may constitute a serious risk to public health or safety or a serious risk to the public.



43. Clause 41 provides for the issuing of penalty notices for offences under the proposed Act or the regulations.
44. Clause 42 provides that proceedings for an offence under the proposed Act are to be dealt with summarily before the Local Court or the Land and Environment Court.
45. Clause 43 provides that the prosecution or conviction of a person for an offence does not prevent the plumbing regulator from taking civil proceedings in relation to the same matter.

## **Part 6 Miscellaneous**

46. Clause 44 provides that a person who aids or abets a person to commit an offence is guilty of the same offence and liable to be punished accordingly.
47. Clause 45 makes it an offence for a person to provide false or misleading documents under the proposed Act.
48. Clause 46 provides that a person must not disclose information obtained in connection with the administration or execution of the proposed Act except in certain circumstances.
49. Clause 47 allows the plumbing regulator to share information with local councils, network utility operators and the Ministry of Health.
50. Clause 48 provides that persons exercising functions under the proposed Act do not incur personal liability for acts done or omitted to be done in good faith under that Act.
51. Clause 49 provides for the continuing effect of directions given under the proposed Act or regulations made under that Act.
52. Clause 50 makes a certificate signed by the plumbing regulator prima facie evidence of the matters stated in it.
53. Clause 51 provides for the service of notices and directions under the proposed Act.
54. Clause 52 enables the Governor to make regulations for the purposes of the proposed Act.
55. Clause 53 provides for the review of the proposed Act in 2 years.

## **Schedule 1 Savings, transitional and other provisions**

56. Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. These include provisions that:
  - (a) provide for the staged commencement of the proposed Act in certain parts of the State; and
  - (b) apply the provisions of the proposed Act to work started, but not completed, before the commencement of the provision concerned; and
  - (c) recognise permits for plumbing and drainage work issued by network utility operators before the commencement of the new provisions.

## Schedule 2 Amendments to legislation

### *Home Building Act 1989*

57. The amendments to the *Home Building Act 1989* extend the definition of plumbing work for the purposes of that Act. The effect of the amendment is that all plumbing and drainage work within the meaning of the proposed Act will be specialist work under that Act and accordingly will be regulated by that Act.
58. The amendments to the *Home Building Act 1989* also ensure that contravention of the proposed Act is misconduct by an authority holder under the *Home Building Act 1989* and that officers under that Act can take proceedings for offences under the proposed Act.

### *Land and Environment Court Act 1979*

59. The amendments to the *Land and Environment Court Act 1979* are consequential on the provisions of the proposed Act that provide for the making of appeals to, and the grant of injunctions by, the Land and Environment Court.

### *Law Enforcement (Powers and Responsibilities) Act 2002*

60. The amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002* is consequential on the provisions of the proposed Act that provide for the issue of search warrants to enforcement officers.

### *Other Acts and regulations*

61. The amendments to the other Acts and regulations specified in Schedule 2 are generally consequential on the fact that most plumbing and drainage work will now be regulated under the proposed Act, rather than under the laws relating to various network utility operators (such as Sydney Water Corporation and Hunter Water Corporation) or under local government laws. The amendments remove and update provisions that will be superseded by the proposed Act, including by replacing references to the Plumbing and Drainage Code of Practice.
62. The amendments, together with the amendments in Schedule 3, preserve the right of local councils and network utility operators to regulate plumbing and drainage work that does not fall within the ambit of the proposed Act. A key example of such work is stormwater drainage work. The amendments also make it clear that the standards for plumbing and drainage work set by the proposed Act prevail over any other standards set by other Acts for the same work.

## Schedule 3 Additional amendments to legislation

63. Schedule 3 amends the Acts and regulations specified in the Schedule. The amendments are set out in a separate Schedule to accommodate the staged commencement of the principal provisions of the proposed Act. It is anticipated that the proposed Act will commence in 2 stages. In the first stage, the requirement that plumbing and drainage work be code compliant and use only fittings authorised by the plumbing regulator will commence. In the second stage, the plumbing regulator will take over all regulatory functions with respect to plumbing and drainage work currently exercised by local councils and other network utility operators.

## ISSUES CONSIDERED BY COMMITTEE

### Trespass on personal rights and liberties: s8A(1)(b)(i) of the LRA

#### *Strict Liability Offences*

64. The Bill contains a number of strict liability offences, including: prohibiting an unlicensed person from carrying out plumbing and drainage works [cl 6]; ensuring that the work complies with certain standards [cl 7]; and a requirement that any fitting used in plumbing and drainage work is an authorised fitting [cl 8]. These offences contain maximum penalties of 100 penalty units (currently \$11,000).
65. While the Committee is generally concerned about strict liability offences, in some instances, where there are strong public policy reasons, they may be appropriate.

**Given the public interest in ensuring that plumbing and sanitary drainage installations and systems do not threaten public health and safety, the Committee does not consider that the strict liability offences in the Bill constitute an undue trespass on personal rights and liberties.**

### Trespass on personal rights and liberties: s8A(1)(b)(i) of the LRA

#### *Entry and Inspection of Property*

66. The Committee notes that the Bill provides for an enforcement officer to enter any premises 'at any reasonable hour in the daytime, or at an hour during which business is in progress or is usually carried on at the premises' [cl 29]. For the purposes of an inspection, an enforcement officer can 'open any ground, remove any flooring and take such measures as are necessary to ascertain the character and condition of the premises and of any pipe, sewer, drain or fitting', and 'require the opening, cutting into or pulling down of any work if the enforcement officer has reason to believe or suspect that anything on the premises has been done in contravention of this Act or the regulations' [cl 34(b)].
67. While the Bill provides these broad powers for enforcement officers to impinge on private property rights, it also contains a number of safeguards, including:
- for residential properties, entry must be with the consent of the owner or under the authority of a search warrant [cl 30];
  - except in urgent circumstances or where there is a search warrant, written notice must be given to the owner or occupier of the premises prior to the inspection, specifying the day on which the inspection will take place [cl 31];
  - reasonable force may be used to enter the premises, but only with the written consent of the plumbing regulator (The Commissioner for Fair Trading) [cl 32];
  - the enforcement officer must do 'as little damage as is possible' and if 'any pit, trench, hole or bore is made', it must be kept secure and filled up or sufficiently sloped down without unnecessary delay [cl 37(5)].

**Given the public interest in ensuring that plumbing and sanitary drainage installations and systems do not threaten public health and safety, and the**

**significant safeguards provided in the Bill, the Committee does not consider that the powers of entry and inspection unduly trespass on personal rights and liberties.**

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

*Commencement by Proclamation*

68. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.

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

## 6. Protection of the Environment Legislation Amendment Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Robyn Parker MP
Portfolio	Environment

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are to:
  - (a) Provide for the appointment of a Chairperson of the Environment Protection Authority who will have the function of managing and controlling the affairs of the EPA, as well as reconstituting the board of the EPA;
  - (b) Expand the list of government authorities that must be notified when a 'pollution incident' occurs and to ensure they are notified immediately rather than 'as soon as practicable', as is currently required;
  - (c) Double the maximum penalty for the offence of failing to immediately give notice of pollution incidents to \$2,000,000 (for corporations) and \$500,000 (for individuals);
  - (d) Impose a duty on all holders of environment protection licences, and on certain other persons, to prepare and implement pollution incident response management plans;
  - (e) To add to the circumstances in which a mandatory environmental audit may be required;
  - (f) To require public access to be given to certain monitoring data required to be recorded by the holders of environment protection licences; and
  - (g) To require further details to be recorded in the public register kept by regulatory authorities.

### BACKGROUND

2. This Bill has been introduced as a direct response to the 8 August 2011 Kooragang Island incident, in which there was a leak of a carcinogenic substance at an ammonium nitrate production plant near Newcastle. Specifically, concern had been raised about the time lapse – 16 hours – between the production plant being made aware of the leak and its notification of that leak to the relevant regulatory authorities.
3. In response to this incident, the Government commissioned an inquiry headed by Mr Brendan O'Reilly in which he made nine recommendations designed to ensure that future incidents are handled in a more timely and appropriate manner.

4. This Bill gives legislative effect to those recommendations.
5. In her Agreement-in-Principle Speech, the Minister advised the House that:

The suite of initiatives I have outlined to the House not only responds to the recommendations of the O'Reilly review in a comprehensive way, it goes beyond those recommendations to make sure that the needs of communities and the people of New South Wales are at the heart of environment protection in this State.

6. This Bill also follows the Greens' Bill that had been introduced in the Legislative Council concerning the Kooragang Island incident, and provisions in that Bill have partially been incorporated by this Bill.

## OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.
8. Clause 2 provides for the commencement of the proposed Act on a day or days appointed by proclamation.
9. Schedule 1 [4] reconstitutes the Board of the EPA by reducing it from 10 members to 5 members and changing the expertise that the part-time members of the Board must have to be eligible for appointment by the Governor.
10. Schedule 1 [10] makes a consequential amendment to a provision specifying the quorum of the Board.
11. Schedule 1 [5] adds to the functions of the Board the function of overseeing the effective, efficient and economical management of the EPA.
12. Schedule 1 [6] also requires the Board to provide an annual statement to the Minister on the success of the EPA in reducing pollution risks.
13. Schedule 1 [8] provides for the appointment by the Governor of a Chairperson of the EPA. The Chairperson will assume most of the functions of the Director-General of the Department of Premier and Cabinet under the environment protection legislation (including managing and controlling the affairs of the EPA). The employment of the Chairperson is subject to Part 3.1 of the *Public Sector Employment and Management Act 2002* (which means it is an SES position). The amendment also provides for the appointment of an Acting Chairperson.
14. Schedule 1 [1]–[3] and [7] make consequential amendments.
15. Schedule 1 [11] provides that the Chairperson is to preside at meetings of the Board.
16. Schedule 1 [9] makes consequential amendments.
17. Schedule 1 [12] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.
18. Schedule 1 [13] provides that a person who, immediately before the commencement of

19. Schedule 1 [4] to the proposed Act, held office as a member of the Board ceases to hold that office and is not entitled to any remuneration or compensation because of the loss of that office.
20. Schedule 2 [1] provides that, if an environment protection licence contains a condition that requires the monitoring by the holder of the licence of the activity or work authorised, required or controlled by the licence, the holder of the licence is required to make the monitoring results that relate to pollution publicly available on the internet. If the licence holder does not have a website, the amendment requires the licence holder to provide a copy of the monitoring results to any person who requests a copy of them. The amendment also makes it an offence to provide monitoring data that is false or misleading in a material respect.
21. Schedule 2 [2] provides that pollution incidents causing or threatening material harm to the environment that are required to be notified must be notified immediately, rather than as soon as practicable, as is currently the case.
22. Schedule 2 [4] adds to the government authorities that are required to be notified of pollution incidents. A person will be required to notify the pollution incident to the appropriate regulatory authority, to the EPA (whether or not it is the appropriate regulatory authority), to the local authority for each area in which the pollution incident occurs (if the EPA is the appropriate regulatory authority) and to the Ministry of Health, the WorkCover Authority and Fire and Rescue NSW.
23. Schedule 2 [3] and [9] are consequential amendments.
24. Schedule 2 [6] and [7] provide that certain information must only be provided if it is known.
25. Schedule 2 [8] provides that the information about a pollution incident that is required to be notified to the expanded list of government authorities is the information known when the report is made (immediately after the pollution incident occurs) and that, if further information later becomes known, it must be immediately notified.
26. Schedule 2 [10] provides that the EPA may direct a person who is the occupier of premises where a pollution incident has occurred, so that material harm to the environment is caused or threatened, to notify such other persons of the incident as the EPA requires.
27. Schedule 2 [5] makes consequential amendments.
28. Schedule 2 [11] doubles the maximum penalty for offences concerning the notification of pollution incidents from \$1,000,000 (for a corporation) and \$250,000 (for an individual) to \$2,000,000 and \$500,000 respectively.
29. Schedule 2 [12] inserts a new Part imposing duties to prepare and implement pollution incident response management plans, as follows: Proposed section 153A requires the holder of an environment protection licence to prepare a pollution incident response management plan in relation to the activity to which the licence relates. (The amendment made by

30. Schedule 2 [23] gives existing licence holders 6 months to prepare their plans.) Proposed section 153B provides that the EPA may, in accordance with the regulations, require the occupier of premises at which industry is carried out, but that is not licensed, to prepare a pollution incident response management plan in relation to activities at the premises. Proposed section 153C specifies some of the information that must be included in a pollution incident response management plan and provides for the regulations to prescribe further information. Proposed section 153D requires a pollution incident response management plan to be kept at the premises to which it relates. Proposed section 153E requires the testing of a pollution incident response management plan. Proposed section 153F requires a pollution incident response management plan to be implemented in the event of a pollution incident that causes or threatens material harm to the environment.
31. Schedule 2 [13] provides that conditions requiring the undertaking of a mandatory environmental audit can be imposed on an environment protection licence if the appropriate regulatory authority reasonably suspects that an activity has been or is being carried out in an environmentally unsatisfactory manner.
32. Schedule 2 [14] provides that, in any proceedings for an offence arising under the Act or the regulations that are brought in the Local Court, the maximum monetary penalty that the Court may impose for the offence is 1,000 penalty units (currently \$110,000), rather than the 200 penalty unit (\$22,000) maximum that currently applies.
33. Schedule 2 [15]–[18] and [24] make amendments that are consequential on the amendments made by Schedule 1.
34. Schedule 2 [19] makes provision for the conduct of an analysis by the Chief Health Officer of the Ministry of Health of the human health risk of a pollution incident, and for analysis by the EPA of the environmental risk caused by a pollution incident, and provides for those responsible for the relevant pollution incident to be given a notice requiring them to pay for the reasonable costs and expenses of those analyses. The new Part includes the following sections: Proposed section 295ZB defines *relevant person*. Proposed section 295ZC provides for the conduct by the Chief Health Officer of the Ministry of Health of an analysis of the risk created by a pollution incident to human health and for the recovery of the reasonable costs and expenses of that analysis from the occupier of the premises at or from which the pollution incident occurred or any person reasonably suspected of having caused the pollution incident. Proposed section 295ZD provides for the conduct by the EPA of an analysis of the environmental risk created by a pollution incident and for the recovery of the reasonable costs and expenses of that analysis from the occupier of the premises at or from which the pollution incident occurred or any person reasonably suspected of having caused the pollution incident. Proposed section 295ZE provides for the recovery of the cost of analysis as a debt in a court of competent jurisdiction and provides that the costs are not recoverable if it is established that the nature and extent of the analysis conducted was not reasonably necessary to respond to the potential public health or environmental concerns arising out of the pollution incident or was not otherwise in the public interest. Proposed section 295ZF provides that if the person given a notice requiring payment under the proposed Part was not the person who caused the pollution incident, the amount of the payment may be recovered by the person who complied with the notice as a debt from the person who caused the pollution incident. Proposed section 295ZG clarifies that a notice may be issued under the proposed Part



whether or not the EPA is the appropriate regulatory authority with respect to the pollution incident and whether or not a clean-up notice has been given under Part 4.2 of the *Protection of the Environment Operations Act 1997* with respect to the pollution incident.

35. Schedule 2 [20] requires that details be recorded in the public register kept by a regulatory authority of each mandatory environmental audit undertaken in relation to a licence issued by that authority, each pollution study required by a condition of a licence issued by the authority and each pollution reduction program required by a condition of a licence issued by the authority.
36. Schedule 2 [21] requires details of each penalty notice issued by a regulatory authority to be recorded in the public register kept by the regulatory authority.
37. Schedule 2 [22] empowers the making of savings and transitional provisions consequent on the enactment of the proposed Act.
38. Schedule 2 [23] inserts savings and transitional provisions consequent on the enactment of the proposed Schedule. Those provisions delay the operation of the amendments imposing an obligation to publish results of monitoring for 3 months, and obligations of existing licence holders to prepare and implement pollution incident response management plans by 6 months, and provide that the obligations to publish monitoring results and to include certain matters in the public register do not include past results or matters.
39. Schedule 3.1–3.3, 3.4 [1] and 3.5–3.8 amend various Acts and regulations as a consequence of the creation of the statutory office of Chairperson of the EPA.
40. Schedule 3.4 [2] provides that, when a pollution incident is required to be notified under section 148 of the *Protection of the Environment Operations Act 1997*, the incident is required to be notified verbally to each relevant authority referred to in that section and is to be followed by notification in writing within 7 days of the date on which the incident occurred.
41. Schedule 3.4 [3] prescribes the new offences relating to the publishing of monitoring results (created by Schedule 2 [1] to the proposed Act) as offences that can be dealt with by penalty notice and fixes the relevant penalty amounts.
42. Schedule 3.4 [4] increases the penalty for an offence under section 152 of the *Protection of the Environment Operations Act 1997* (which is about failure to notify a pollution incident immediately) when it is dealt with by penalty notice. The penalty notice offence is increased from \$1,500 (for a corporation) and \$750 (for an individual) to \$5,000 and \$1,500, respectively. The amendment also prescribes the new offences relating to pollution incident response management plans (created by Schedule 2 [12] to the proposed Act) as offences that can be dealt with by penalty notice and fixes the relevant penalty amounts.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

43. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation. The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature.

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

## 7. Sporting Venues Authorities Amendment (Venues NSW) Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Council
Minister responsible	The Hon. Michael Gallacher MLC
Portfolio	Sports

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish a new authority – Venues NSW – to replace the Parramatta Stadium Trust and existing regional sporting venues authorities.
2. The Bill also facilitates the transfer of assets, rights and liabilities of those bodies to Venues NSW.

### BACKGROUND

3. Venues NSW is a proposed new authority which will consolidate the responsibilities and operations of the Illawarra Venues Authority, Parramatta Stadium Trust and the Hunter Region Sporting Venues Authority into one authority managed through one governing board.
4. In his Second Reading Speech, the Minister said of this new authority:  

'The implementation of Venues NSW will increase the alignment and integration of the venues with the strategic priorities and objectives of government by providing an opportunity to boost regional tourism, events, access and participation.'
5. In 2010, an independent review by KPMG for the Department of Premier and Cabinet concerning governance and structure arrangements recommended that regional sporting venue responsibilities and operations be combined. In particular, KPMG noted that the similarities involved in managing the venues would allow benefits to be gained from sharing experience and combining resources.
6. A separate 2010 independent review completed by Ernst and Young for Treasury concerning the identification of efficiency opportunities also recommended a consolidation measure as a way of increasing revenue.
7. The changes proposed in the Bill are supported by arrangements in Queensland and Western Australia where a statewide approach to venues management already exists.

### OUTLINE OF PROVISIONS

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

10. Clause 3 repeals the *Parramatta Stadium Trust Act 1988* and the *Parramatta Stadium Trust By-law 2010*.
11. Schedule 1 [13] establishes Venues NSW as a regional sporting venues authority that is to replace the existing regional sporting venues authorities.
12. Schedule 1 [16] dissolves those existing regional sporting venues authorities and the Parramatta Stadium Trust and transfers the assets, rights and liabilities of those bodies to Venues NSW.
13. Schedule 1 [9] makes a consequential amendment.
14. Schedule 1 [4] provides for the appointment of members of a board of management of a regional sporting venues authority to be made by the Minister for Sport and Recreation (*the Minister*) rather than the Governor and enables up to 11 members to be appointed.
15. Schedule 1 [5] permits the regulations to provide for the circumstances in which the functions of a board of management may be exercised by the State Sporting Venues Authority or by some other person or body.
16. Schedule 1 [14] limits the maximum term of an appointment to a board of management to 3 years.
17. Schedule 1 [6] gives additional functions to regional sporting venues authorities relating to establishing and managing community facilities and establishing and managing facilities for community and recreational purposes.
18. Schedule 1 [7] provides that this function may be exercised on land that is not the authority's land, but only if the Minister has given consent.
19. Schedule 1 [8] permits advisory committees to be established by a sporting venues authority for the purpose of providing advice to the authority or enabling the authority to exercise its functions. The Minister may also establish advisory committees to provide advice to the Minister or an authority or to enable an authority to exercise its functions.
20. Schedule 1 [3] makes a consequential amendment.
21. Schedule 1 [16] establishes 3 advisory committees, the Hunter Local Venues Council, the Illawarra Local Venues Council and the Western Sydney Local Venues Council to provide advice to Venues NSW about venues in those areas.
22. Schedule 1 [11] and [12] enable the regulations to provide for conditions of entry relating to the admission of persons on to land vested in or managed by a sporting venues authority and for the removal of persons from the land if those persons fail to comply with the conditions of entry or cause inconvenience to other persons.
23. Schedule 1 [1] updates the long title of the *Sporting Venues Authorities Act 2008* to make it consistent with that Act as amended by the proposed Act.
24. Schedule 1 [2] inserts definitions of *function* and *exercise a function*.
25. Schedule 1 [10] updates a reference to a Department.

26. Schedule 1 [15] permits the regulations to contain provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by Proclamation*

27. The Committee notes that the proposed Act is to commence on a day or days to be appointed by proclamation, rather than on a fixed date or on assent. The Committee will always note where commencement of an Act is delegated to the Executive, once passed by the Legislature.
28. However, on advice received from the Minister's Office, the Committee understands that appointments must still be made to the Local Venues Councils before the Act can become operative. As it is unclear when this process will be complete, the Bill has been drafted to commence on proclamation rather than on a fixed date.

**The Committee will always note where commencement of an Act is delegated to the Executive, as this Bill provides.**

**However, on advice received from the Minister's Office, the Committee understands that appointments must still be made to the Local Venues Councils before the Act can become operative. As it is unclear when this process will be complete, the Bill has been drafted to commence on proclamation rather than on a fixed date.**

## 8. Technical and Further Education Commission Amendment (Staff Employment) Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Adrian Piccoli
Portfolio	Education

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- (a) to provide that the Technical and Further Education Commission may employ its own staff; and
- (b) to transfer to the employment of the Commission staff currently employed in the TAFE Commission Division of the Government Service and in the Department of Education and Communities to assist the Commission in the exercise of its functions.

The Bill also makes consequential amendments to other Acts.

### BACKGROUND

2. From 1990 until 2006, TAFE NSW, through the Technical and Further Education Commission ("the Commission") was the employer of its staff.
3. In 2006, staff of TAFE NSW were employed under the *Public Sector Employment and Management Act 2002*.
4. This Bill has the effect of restoring to the Commission the exclusive power to employ TAFE NSW staff. Staff members will once again become TAFE NSW employees. Employment arrangements for members of TAFE NSW staff will be subject to the *Fair Work Act 2009* (Commonwealth).
5. The Minister for Education has noted:

TAFE NSW will remain part of the New South Wales public sector and will continue to be subject to New South Wales Government policy. TAFE NSW staff will be covered by the *Fair Work Act 2009* (Commonwealth), as are the staffs of other New South Wales owned corporations, such as RailCorp and Sydney Water.<sup>5</sup>

<sup>5</sup> The Hon. Adrian Piccoli, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 October 2011

## OUTLINE OF PROVISIONS

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

### **Schedule 1 Amendment of Technical and Further Education Commission Act 1990 No 118**

8. Schedule 1 [3] amends section 5 of the Act to remove a prohibition on the Commission employing staff.
9. Schedule 1 [4] inserts sections 15 and 16 into the Act which specifically enable the Commission to employ staff to assist it in the exercise of its functions and to fix the salary, wages and conditions of employment of its staff to the extent that they are not otherwise fixed by law. Existing section 17 of the Act, which enables regulations to be made in relation to conditions of employment of the Commission's staff, is substituted to update references and extend the regulation-making power to the discipline of staff. The regulations have effect subject to relevant awards and industrial agreements.
10. Schedule 1 [13] and [14] amend Schedule 4 to the Act to include provisions of a savings and transitional nature consequent on the enactment of the proposed Act. In particular, persons employed in the TAFE Commission of the Government Service and persons employed in the Department of Education and Communities to assist the Commission in the exercise of its functions (other than persons employed in the executive service) are transferred to the employment of the Commission. The TAFE Commission is to take such measures as are available to it to ensure that the terms and conditions applying to those persons in their previous employment will continue to apply to them for 12 months after the transfer or until they are covered by an enterprise agreement under the *Fair Work Act 2009* of the Commonwealth.
11. Section 22 of the Act is preserved which retains the current scheme for extended or long service leave in relation to employees of the Commission. The amendments also provide that the Industrial Relations Commission has no jurisdiction to determine any industrial matter in relation to those transferred employees if the *Fair Work Act 2009* of the Commonwealth has excluded the application of State industrial laws to the matter or the matter relates to promotion appeals and disciplinary appeals.
12. Schedule 1 [1], [2] and [5]–[12] make consequential amendments, including repealing Parts 6A (Management of conduct and performance) and 6B (Termination of employment of prohibited persons) of the Act.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

13. The Bill provides that most of the provisions in the Act are to commence on a day or days to be appointed by proclamation. This provides the Government with the power to commence those provisions on whatever day it chooses or not at all.

14. The purpose of the Bill is twofold: to make amendments to facilitate the transfer of employments arrangements from the TAFE Commission Division of the Government Service to the Commission itself; and to make amendments to enable the Commission to employ its own staff.

**The Committee notes that the Bill delegates to the Government the power to commence the Act on whatever day it chooses or not at all. However, given the nature of the administrative processes the Bill proposes, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.**



## 9. Thoroughbred Racing Amendment Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. George Souris
Portfolio	Tourism, Major Events, Hospitality and Racing

### PURPOSE AND DESCRIPTION

1. The *Thoroughbred Racing Amendment Bill 2011* passed both Houses of Parliament on 12 October 2011. Under s 8A(2) of the Legislation Review Act 1987 the Committee is not precluded from reporting on a Bill that has been passed by Parliament or has become an Act.
2. The object of this Bill is to amend the *Thoroughbred Racing Act 1996*:
  - (c) to provide for the Minister to appoint 7 members of Racing New South Wales (also known as Racing NSW) based on selections made from lists of persons recommended for appointment that have been provided to the Minister by a specially established panel (the Selection Panel); and
  - (d) to provide that the Minister must select persons to fill casual vacancies in the membership of Racing NSW from lists of persons recommended for appointment provided by Racing NSW; and
  - (e) to provide that a person is not eligible to be appointed as a member of Racing NSW if the person is currently, or during the previous 12 months has been, either an employee or member of a governing body of a race club, racing association or eligible industry body; and
  - (f) to provide that the Selection Panel cannot include a person in a list of persons recommended for appointment as members of Racing NSW if the Panel is satisfied that a relevant pecuniary conflict of interest will result; and
  - (g) to provide for the Chairperson and Deputy Chairperson of Racing NSW to be appointed by the Minister based on selections made from a list of persons recommended for appointment provided by the Selection Panel; and
  - (h) to require the members of Racing NSW not to participate in the making of decisions in which they have a pecuniary conflict of interest and to enable the Minister to remove a member who participates in the making of a decision where he or she has such a conflict of interest or has a relevant continuing conflict of interest; and
  - (i) to enact provisions of a savings or transitional nature and make an amendment in the nature of statute law revision.

## BACKGROUND

3. Racing NSW is an independent body corporate established by the *Thoroughbred Racing Act 1996* (the Act) and is responsible for the control, supervision and regulation of horse racing in NSW. Its current structure consists of a Chief Executive and 5 appointed members. This Bill seeks to amend the Act in relation to the appointment procedures, eligibility requirements and the number of appointed members to Racing NSW.
4. In the Agreement in Principle speech the Minister commented:

There are a number of pressing challenges facing the racing industry, such as the ongoing race fields information usage fee issue, the major redevelopment of Randwick and Rosehill racecourses and the unprecedented competition for the entertainment dollar. It is questionable whether the current racing New South Wales board membership of five is sufficient in terms of size and range of skills to manage the workload and to undertake the many reforms necessary to ensure the future viability and sustainable economic development of the thoroughbred racing industry.<sup>6</sup>

## OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.
6. Clause 2 provides for the commencement of the proposed Act.

### Schedule 1 Amendment of Thoroughbred Racing Act 1996 No 37

7. Schedule 1 [1] enables the Minister to appoint 7 members of Racing NSW selected from lists of persons recommended for appointment provided by the Selection Panel or, in relation to casual vacancies, from lists of persons recommended for appointment by Racing NSW.
8. Schedule 1 [2] provides that a person is not eligible to be appointed as a member of Racing NSW if the person is currently, or during the previous 12 months has been, either an employee or member of a governing body of a race club, racing association or eligible industry body.
9. Schedule 1 [3] provides for the Minister to establish the Selection Panel. The principal functions of the Panel will be to prepare lists of persons recommended for appointment as members of Racing NSW or as the Chairperson or Deputy Chairperson of Racing NSW.
10. Currently, the Selection Panel is limited to recommending appointments for the precise number of vacancies concerned. Under the new provisions, the Selection Panel will be required to provide a list of recommendations that exceeds the number of vacancies so as to enable the Minister to make a selection.
11. Also, the new provisions prevent the Selection Panel from including a person in a list of persons recommended for appointment as members if the Panel is satisfied that the person has a direct or indirect pecuniary interest in any matter that gives rise (or is likely to give rise) to a conflict of interest of a nature that is incompatible with membership of Racing NSW.

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<sup>6</sup> The Hon. George Souris MP, NSWPD (*Legislative Assembly*), 11 October 2011.

12. The Selection Panel will be able to make recommendations concerning the term of office for which a person included in a list of recommended persons should hold office if appointed. However, the recommendation will not be binding on the Minister. Schedule 1 [4] makes a consequential amendment.
13. Schedule 1 [5] omits a spent review provision.
14. Schedule 1 [8] enables the Minister to appoint the Chairperson and Deputy Chairperson of Racing NSW based on selections made from a list of persons recommended for appointment provided by the Selection Panel. Currently, the Chairperson and Deputy Chairperson are selected by the members of Racing NSW.
15. Schedule 1 [9] and [10] require the members of Racing NSW not to participate in the making of decisions in which they have a pecuniary conflict of interest.
16. Schedule 1 [6] and [7] enable the Minister to remove an appointed member if satisfied that the member has:
  - (a) contravened requirements concerning the disclosure of such pecuniary conflicts of interest; or
  - (b) a direct or indirect pecuniary interest in any matter that gives rise (or is likely to give rise) to a conflict of interest of a nature that is incompatible with continued membership of Racing NSW.
17. The Minister will not be able to remove a member on any of these grounds unless the member has been given an opportunity to show cause as to why he or she should not be removed.
18. Schedule 1 [11] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of the proposed Act.
19. Schedule 1 [12] makes transitional arrangements. These arrangements include the following:
  - (c) to provide for the establishment of the Selection Panel, pending the commencement of the new provisions to be inserted by the proposed Act, to enable it to prepare lists of persons recommended for appointment as the new members of Racing NSW and as the new Chairperson and new Deputy Chairperson of Racing NSW;
  - (d) to provide for existing members of Racing NSW and the existing Chairperson and Deputy Chairperson to cease to hold office when the appointments of the new members take effect;
  - (e) to recognise that existing members are eligible to be reappointed (or to be appointed or reappointed as the new Chairperson or Deputy Chairperson) if the Selection Panel includes them in the list of persons recommended for appointment.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Commencement by proclamation*

20. The Bill provides that most of the provisions in the Act are to commence on a day or days to be appointed by proclamation. This provides the Government with the power to commence those provisions on whatever day it chooses or not at all.
21. The purpose of the Bill is to make amendments in relation to the appointment procedures, eligibility requirements and the number of appointed members to Racing NSW. The Bill provides for the termination of the appointments of existing members and the commencement of a new selection process. It is reasonable to consider that such a process may require a flexible completion date.

**The Committee notes that the Bill delegates to the Government the power to commence provisions of the Act on whatever day it chooses or not at all. However, given the nature of the administrative processes the Bill proposes, the Committee considers that in these circumstances there has been no inappropriate delegation of legislative powers.**

## 10. Universities Governing Bodies Bill 2011

Date introduced	11 October 2011
House introduced	Legislative Assembly
Minister responsible	The Hon. Adrian Piccoli
Portfolio	Education

### PURPOSE AND DESCRIPTION

1. The object of this Bill are as follows:
  - (a) to enable the governing bodies of universities to progressively adopt standard governing body provisions allowing greater flexibility in their size and composition;
  - (b) to establish a procedure to enable the governing bodies of universities that have lost confidence in the Chancellors or Deputy Chancellors of the universities to remove them from office;
  - (c) to enable the governing bodies of universities to provide for the remuneration (if any) of their members by a resolution passed by at least two-thirds of the members of the governing body; and
  - (d) to enable meetings of governing bodies of universities to be called or held using any technology consented to by all the members of the governing bodies.

### BACKGROUND

2. In introducing the Bill, the Minister for Education stated that the Bill aims to 'bring the governance arrangements of New South Wales Universities in line with contemporary practice' and 'give effect to key recommendations of the 2009 report of the Legislative Council General Purpose Standing Committee No.2 entitled "Governance of NSW Universities"'.<sup>7</sup>

### OUTLINE OF PROVISIONS

3. Clause 1 sets out the name (also called the short title) of the proposed Act.
4. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
5. Clause 3 defines certain words and expressions used in the proposed Act, including standard governing body provisions and University Act.
6. Clause 4 enables the governing body of a University to adopt the standard governing body provisions set out in Schedule 1 to the proposed Act by a resolution passed by at least two-thirds of its members. The resolution will take effect on the date of publication of an order (or a later date specified in, or determined in accordance with, the order)

<sup>7</sup> Mr Adrian Piccoli, Minister for Education, Legislative Assembly, Agreement in Principle, 11 October 2011, p.41.

giving notice of its making and setting out the resultant amendments to the University Act concerned and subordinate legislation made under it published on the NSW legislation website. The proposed section authorises the University Act affected by such an order to be automatically amended uniformly with the standard governing body provisions (except for necessary renumbering and alteration of nomenclature relating to the name of the governing body concerned and description of non-academic staff) and for the amendments to be incorporated in the official versions of the legislation on the NSW legislation website.

7. Clause 5 enables the Governor to make regulations for the purposes of the proposed Act.
8. Clause 6 provides for the review of the proposed Act in 5 years.

### **Schedule 1 Standard governing body provisions**

9. Schedule 1 sets out the standard governing body provisions. The standard governing body provisions require the governing body of a University to consist of a minimum of 11, and a maximum of 22, members. The size is to be determined from time to time by a resolution passed by at least two-thirds of the members of the governing body. The governing body is to include official members, elected members, governing body appointed members and Ministerially appointed members. Subject to some minimum requirements specified for representation in each category, the numbers in each category are to be prescribed by rules made by the governing body by a resolution passed by at least two-thirds of the members of the governing body. The majority of members must be external persons and no one category can constitute a majority of the total number of members.
10. The standard governing body provisions also ensure that a person is not ineligible to be elected, or to remain in office, as a student member of a governing body of a University merely because the student is employed otherwise than in a full-time capacity as a member of staff of the University (or on such other basis as may be prescribed by the by-laws).

### **Schedule 2 Savings, transitional and other provisions**

11. Schedule 2 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. Clause 1 enables the making of savings and transitional regulations as a consequence of a governing body resolution made under the proposed Act.

### **Schedule 3 Amendment of Acts and by-laws**

12. Schedule 3 amends the University Acts specified in the Schedule to achieve the objects set out in paragraphs (b), (c) and (d) of the Overview to the Bill.

## **ISSUES CONSIDERED BY COMMITTEE**

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

#### *Act Amendment by Resolution of Governing Body and Order Made by Minister*

13. The constitution and functions of each of the ten state universities are included in various Acts of Parliament, for instance, the *University of New South Wales Act 1989* and

the *University of Wollongong Act 1989*. The Committee notes that the Bill allows for these Acts to be amended when the governing body of a university adopts the standard governing body provisions in Schedule 1, by a resolution of two-thirds of its members [cl 4(1)]. The governing body of the university is to give the Education Minister written notice of the terms of the governing body resolution [cl 4(2)]. The resolution takes effect on the date of publication of an order made by the Education Minister on the NSW legislation website giving notice of its making and setting out the resultant amendments to the University Act concerned and subordinate legislation made under it [cl 4(3)]. On the day on which the governing body resolution takes effect, the University Act is amended as set out in the order made by the Minister [cl 4(4)].

14. As stated in the Agreement in Principle speech, 'the Bill is an opt-in model that allows each university to decide for itself whether and when to introduce changes to its governance structure'.<sup>8</sup>

**The Committee refers to Parliament whether allowing for Acts to be amended by resolution of a governing body and publication of an order made by the Minister is an inappropriate delegation of legislative powers.**

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

### *Procedural Fairness*

15. The Bill allows for the removal from office of the Chancellor or Deputy Chancellor by the governing body. This removal can only be effected if the no confidence motion is supported by a two-thirds majority of the total number of members of the governing body at two consecutive ordinary meetings. The Bill further provides that the Chancellor and Deputy Chancellor may be removed from office without the need to establish any breach of duty [Schedule 3]. There is also no requirement to give the affected person notice of the no confidence motion, or an opportunity to reply to the motion.

**The Committee refers to Parliament whether the Bill unduly trespasses on rights and liberties by providing for removal of a Chancellor or Deputy Chancellor from office without the need to establish breach of duty, and without a requirement that the affected person be given notice of the motion of no confidence or an opportunity to respond.**

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<sup>8</sup> Mr Adrian Piccoli, Minister for Education, Legislative Assembly, Agreement in Principle, 11 October 2011, p.41.

## Part Two – Regulations

# 11. Industrial Relations (General) Amendment (Fees) Regulation 2011

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Industrial Relations (General) Regulation 2001*:
  - (f) to increase certain fees charged by the Industrial Relations Commission, and
  - (g) to introduce new fees relating to:
    - i filing a notice of leave to appeal to the Full Bench of the Industrial Court, and
    - ii filing a notice of motion in proceedings on an appeal to the Full Bench of the Industrial Court, under section 197B of the *Industrial Relations Act 1996* or section 23A of the *Transport Appeal Boards Act 1980* against any decision on a question of law.
2. This Regulation is made under the *Industrial Relations Act 1996*, including sections 183 and 407 (the general regulation-making power).

### ISSUES CONSIDERED BY THE COMMITTEE

#### Trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

3. The Committee notes that the introduction of certain fees may trespass on personal rights or liberties.
4. However, advice received from NSW Industrial Relations informed the Committee that over the last six years there has been a policy to seek annual increases in the fees prescribed under Schedule 1 of the Regulation to maintain parity with fees imposed by other courts and tribunals.
5. This policy is underpinned by cost recovery and user pays principles and is intended to cover public sector wage increases and salary increases of judicial officers.
6. The Committee notes that with the exception of fees relating to the provision of transcripts, the *Industrial Relations (General) Amendment (Fees) Regulation 2011* increased the fees in Schedule 1 by 2.5%. The percentage increase was in line with the Government's wages policy.

### PROPOSED COURSE OF ACTION

**The Committee concludes that the introduction of these fees is reasonable and any increases are in keeping with the general movement of the Consumer Price Index and no further action is necessary.**



# Appendix One – Index of Ministerial correspondence on Bills

The Committee currently has no ministerial correspondence on Bills.

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

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