



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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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”.

# Contents

Membership	ii
Functions of the Committee	iii
Guide to the Digest	v
Conclusions	vii
<b>PART ONE – BILLS</b>	<b>1</b>
1. CONSTITUTION AMENDMENT (DISCLOSURES BY MEMBERS) BILL 2014*	1
2. CRIMES AMENDMENT (STRANGULATION) BILL 2014	4
3. CRIMES (SENTENCING PROCEDURE) AMENDMENT (FAMILY MEMBER VICTIM IMPACT STATEMENT) BILL 2014	6
4. HOME BUILDING AMENDMENT BILL 2014	10
5. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (MINISTERIAL CODE OF CONDUCT) BILL 2014	20
6. MARITIME AND TRANSPORT LICENSING LEGISLATION AMENDMENT BILL 2014	22
<b>PART TWO - REGULATIONS</b>	<b>25</b>
<b>APPENDIX ONE – INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS</b>	<b>26</b>
<b>APPENDIX TWO – INDEX OF CORRESPONDENCE ON REGULATIONS ON WHICH THE COMMITTEE HAS REPORTED</b>	<b>27</b>

# Membership

<b>CHAIR</b>	Mr Stephen Bromhead MP, Member for Myall Lakes
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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. CONSTITUTION AMENDMENT (DISCLOSURES BY MEMBERS) BILL 2014\*

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

#### *Right to privacy*

Given that registers of disclosures made by Members of Parliament are available to the public, the Committee considers that the amendments proposed could impact on the privacy of Members' spouses, de facto partners, relatives and children in some circumstances. The Committee notes the public interest intention of this Bill in ensuring the integrity and accountability of Members of Parliament and that other Australian Parliaments require certain third party interests to be disclosed, however, the Committee nevertheless refers this issue to Parliament for consideration.

### 2. CRIMES AMENDMENT (STRANGULATION) BILL 2014

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

### 3. CRIMES (SENTENCING PROCEDURE) AMENDMENT (FAMILY MEMBER VICTIM IMPACT STATEMENT) BILL 2014

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

#### *Inconsistent Sentencing*

The Committee notes that by enabling a court to take a family victim impact statement into account for the purposes of determining an appropriate sentence, the Bill may lead to inconsistent sentencing for otherwise comparable offences where a family victim impact statement has not been provided. The Committee refers this matter to Parliament for further consideration.

#### *Retrospectivity*

The Committee is generally concerned when legislative provisions are drafted to have retrospective effect. This is because retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. The Committee refers the matter to Parliament for further consideration.

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

#### *Commencement by Proclamation*

The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.

### 4. HOME BUILDING AMENDMENT BILL 2014

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

#### *New Offences with Significant Penalties*

The Committee notes that the penalty provisions of this Bill provide, for the first time, terms of imprisonment for offences related to unlicensed or uninsured contract work. The Committee is concerned that these strong penalties may be disproportionate to the offences committed. The Committee is also mindful that these penalties are only provided for in second or subsequent offences. The Committee makes no further comment.

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

*Commencement by Proclamation*

The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.

**5. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT  
(MINISTERIAL CODE OF CONDUCT) BILL 2014**

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

**6. MARITIME AND TRANSPORT LICENSING LEGISLATION AMENDMENT BILL 2014**

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

**PART TWO - REGULATIONS**

## Part One – Bills

### 1. Constitution Amendment (Disclosures by Members) Bill 2014\*

Date introduced	8 May 2014
House introduced	Legislative Assembly
Member responsible	Mr John Robertson MP
Portfolio	* Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. This Bill is cognate with the *Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014*.
2. The object of this Bill is to amend the *Constitution (Disclosures by Members) Regulation 1983* to require each Member of Parliament (Member) to:
  - (c) disclose certain pecuniary interests of any spouse or de facto partner of the Member and any person under the age of 18 years who is dependent on the Member for support, and
  - (d) disclose commercial arrangements that relatives of the Member have entered into, or reasonably expect to enter into, with the Government, and
  - (e) disclose the Member's annual taxable income.

#### BACKGROUND

3. Mr John Robertson MP notes that this Bill is about honest and accountable government following matters that have recently transpired before the Independent Commission Against Corruption.
4. Mr Robertson also notes that the Commission's report, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, released in October 2013, supported expanding the Register of Disclosures to include spouses, partners and dependent children to increase transparency, minimise perceptions of Members avoiding scrutiny and deal with the potential for family interests to influence decision-making.
5. Recommendation 24 of the Commission's report was as follows:

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the *Constitution (Disclosures by Members) Regulation 1983*, with a view to making third party disclosures a requirement.

6. The Commission's report also noted that many other Australian Parliaments require the disclosure of various third-party interests in a register.

## OUTLINE OF PROVISIONS

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

### Schedule 1 Amendment of Constitution (Disclosures by Members)

#### Regulation 1983

9. Schedule 1 [2] extends the disclosures that must be made by Members in relation to certain pecuniary interests. A Member will be required to disclose pecuniary interests of any spouse or defacto partner of the Member and any person under the age of 18 years who is wholly or mainly dependent on the Member for support. A Member will also be required to disclose commercial arrangements that relatives of the Member have entered into, or reasonably expect to enter into, with the Government.
10. Schedule 1 [3] requires a Member to disclose the Member's annual taxable income assessed under the *Income Tax Assessment Act 1936* of the Commonwealth.
11. Schedule 1 [1] and [4]–[20] make consequential amendments.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Right to privacy*

12. Proposed clause 7B of the *Constitution (Disclosures by Members) Regulation 1983* will require a Member of Parliament to disclose certain pecuniary interests of their spouse or de facto partner and any persons under the age of 18 years who are dependent on them for support. Pecuniary interests include certain interests in real property, sources of income received or reasonably expected to be received, and interests or positions held in corporations, trade unions or professional or business associations, among other things. Proposed clause 7C of the *Constitution (Disclosures by Members) Regulation 1983* will also require a Member to disclose commercial arrangements that relatives of the Member have entered into, or reasonably expect to enter into, with the Government.
13. The Committee notes that under Part 4 of the *Constitution (Disclosures by Members) Regulation 1983*, registers of Members' disclosures are kept by the Clerks of the Legislative Assembly and the Legislative Council. Such registers are made available for public inspection.

**Given that registers of disclosures made by Members of Parliament are available to the public, the Committee considers that the amendments proposed could impact on the privacy of Members' spouses, de facto partners, relatives and children in some circumstances. The Committee notes the public interest intention of this Bill in ensuring the integrity and accountability of Members of Parliament and that other Australian Parliaments require certain**

**third party interests to be disclosed, however, the Committee nevertheless refers this issue to Parliament for consideration.**

## 2. Crimes Amendment (Strangulation) Bill 2014

Date introduced	7 May 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Crimes Act 1900 (the Act) as follows:
  - (f) to create a new offence that will apply if a person intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance while being reckless as to whether the other person is rendered unconscious, insensible or incapable of resistance,
  - (g) to simplify and modernise an existing offence that applies if a person chokes, suffocates or strangles another person with intent to enable himself or herself to commit, or to assist another person to commit, another indictable offence.

### BACKGROUND

2. This Bill responds to concerns raised by the Director of Public Prosecutions (DPP) as to the adequacy of the current provision within the *Crimes Act 1900* concerning strangulation. Strangulation is a potentially fatal act and capable of causing significant trauma to victims. It is prevalent in domestic violence cases. The DPP identified numerous cases of strangulation which were dealt with as common assaults due to the inadequacy of the current provisions.
3. The new provisions create a simple offence of strangulation and retain an aggravated form of the offence.
4. Comments on the provisions were sought from the Director of Public Prosecutions, the Public Defenders Office, the NSW Police Force, and the Legal Aid Commission. All stakeholders supported the amendments.

### 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 Crimes Act 1900 No 40

7. Section 37 of the Act currently makes it an offence to attempt to choke, suffocate or strangle a person or, by means calculated to choke, suffocate or strangle, to attempt to

render any person insensible, unconscious or incapable of resistance. The mental element required is that the person intended to enable himself or herself or another person to commit, or to assist another person to commit, an indictable offence. The offence carries a maximum penalty of imprisonment for 25 years.

8. The amendment in Schedule 1 [1] repeals and replaces that offence with 2 separate offences.
9. The first offence is a new offence that will apply if a person intentionally chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance and is reckless as to rendering the other person unconscious, insensible or incapable of resistance.
10. The offence will also apply if the offender intended to render the victim unconscious, insensible or incapable of resistance because section 4A of the Act already provides that recklessness can be proved by proof of intention.
11. The new offence carries a maximum penalty of imprisonment for 10 years.
12. The second offence replaces and simplifies the existing offence under section 37 of the Act. That offence will now apply if a person:
  - (a) chokes, suffocates or strangles another person so as to render the other person unconscious, insensible or incapable of resistance, and
  - (b) does so with the intention of enabling himself or herself to commit, or assisting any other person to commit, another indictable offence.
13. Existing section 344A of the Act would apply to both offences. That section provides that a person who attempts to commit an offence under the Act for which a penalty is provided is liable to the same penalty.
14. Schedule 1 [2] is a consequential amendment.

## **Schedule 2 Amendment of other legislation**

15. Schedule 2.1 makes the new offence an offence that is to be dealt with summarily unless the prosecutor or person charged elects otherwise.
16. Schedule 2.2 and 2.3 are consequential amendments to the amendment in Schedule 1 [1].

## **ISSUES CONSIDERED BY COMMITTEE**

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.**

### 3. Crimes (Sentencing Procedure) Amendment (Family Member Victim Impact Statement) Bill 2014

Date introduced	7 May 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Attorney General and Minister for Justice

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to enable a court on the application of the prosecutor to take a family victim impact statement into account for sentencing purposes on the basis that the impact of an offence on the immediate family of a deceased victim is an aspect of harm done to the community.
2. The Bill overrules the decision in *R v Previterra* (1997) 94 A Crim R 76 that the impact of the death of a victim on the victim's family is not relevant to the determination of the offender's sentence.
3. The Bill does not affect the application of the law of evidence in connection with the use of family victim impact statements in sentencing.
4. The Bill also makes it clear that the absence of a family victim impact statement does not give rise to an inference that an offence had little or no impact on the victim's family.

#### BACKGROUND

5. In his Second Reading Speech to Parliament, the Hon Brad Hazzard MP, Attorney General and Minister for Justice, stated that the Government made a commitment before the last election to change the law to enable courts to take family victim impact statements into account in determining sentences where considered appropriate.
6. While there was little stakeholder support for the proposed changes following the election, the manslaughter of Thomas Kelly in July 2012 raised concerns that family victim impact statements appeared to carry limited or no weight. Therefore, the Government engaged in a fresh round of consultations during which homicide victims support groups demonstrated clear support for the changes.

#### 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 to be appointed by proclamation.



9. Schedule 1 [1]–[3] make the amendments described in the Purpose and Description section above.
10. Schedule 1 [4] requires the Minister to review the amendments described in the Overview 3 years after their commencement and report to Parliament on the results of the review.
11. Schedule 1 [5] enacts a transitional provision to extend the amendments described in the Overview to existing offences and proceedings (unless the court has already convicted the offender or the offender has already entered a plea of guilty).

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Inconsistent Sentencing*

12. The Committee notes that schedule 1, item 1 of the Bill enables a court, on the application of a prosecutor, to take a family victim impact statement into account in determining an appropriate sentence for an offence if the court considers it is appropriate to do so.
13. The Committee notes that where victims of crime have immediate family, and in particular, articulate family members, there will be an opportunity to express the effect that the victim's death has had on them. In contrast, where victims have no immediate family, or family who are less able to express the impact of the victim's death, there will be no such opportunity or reduced opportunity.
14. This may lead to inconsistent sentencing for similar offences e.g. a harsher sentence for an offence where a victim's family member has provided the court with a family victim impact statement that the court has taken into account, versus a more lenient sentence for a similar offence where the victim has no immediate family and thus no family victim impact statement has been provided or taken into account in sentencing.

**The Committee notes that by enabling a court to take a family victim impact statement into account for the purposes of determining an appropriate sentence, the Bill may lead to inconsistent sentencing for otherwise comparable offences where a family victim impact statement has not been provided. The Committee refers this matter to Parliament for further consideration.**

#### *Retrospectivity*

15. The Committee notes that schedule 1, item 5 of the Bill clarifies that the changes contained in the Bill (to enable a court to take a family victim impact statement into account for sentencing purposes where considered appropriate) apply to existing offences and proceedings except where the court has already convicted the offender, or the offender has already entered a plea of guilty.

**The Committee is generally concerned when legislative provisions are drafted to have retrospective effect. This is because retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. The Committee refers the matter to Parliament for further consideration.**

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

*Commencement by Proclamation*

16. Clause 2 of the Bill provides the proposed Act is to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.**

## 4. Home Building Amendment Bill 2014

Date introduced	6 May 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Matthew Mason-Cox MLC
Portfolio	Fair Trading

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Home Building Act 1989, in connection with the statutory review of that Act, to deal with the following matters
2. Penalties for unlicensed work—by increasing the maximum penalty for a second or subsequent offence by an unlicensed individual who does, or offers to do, residential building work or specialist work, or a licensee or developer who hires unlicensed persons (including imprisonment as a sentencing option),
3. Contracts to do residential building work or specialist work—including by extending the matters for which contracts must provide, regulating progress payments and increasing the cap on deposits,
4. Contracts to supply kit homes—including by extending the matters for which contracts must provide and increasing the cap on deposits,
5. Statutory warranties implied into contracts—including by requiring work to be done with due care and skill (rather than in a proper and workmanlike manner, as at present), clarifying the responsibilities of subcontractors for breaches of the warranties, imposing duties on consumers to mitigate loss and notify defects, clarifying the test of which home building defects require a greater warranty period and providing a defence for builders who rely on the instructions of a professional acting for the consumer,
6. Contractor licences, supervisor certificates and tradesperson certificates—including by broadening the grounds on which a person is disqualified from holding a licence or certificate, providing for consistent consideration for all licensing and certification decisions and consolidating licensing and certification provisions currently spread across the Act and regulations,
7. Notification of insolvency, winding up or deregistration of licence holders—by requiring the holders of contractor licences to notify their insolvency, winding up or deregistration and making a breach of that obligation an executive liability offence,
8. Owner-building—including by requiring special circumstances before an owner-builder permit can authorise work that relates to dual occupancy, requiring all owner-builder applicants to undertake safety training or other training, prohibiting joint owners of property upon which owner-builder works are being carried out from carrying out owner-building work on other properties within 5 years, broadening the grounds on which a person is disqualified from holding an owner-builder permit and consolidating permit provisions currently spread across the Act and regulations,

9. Resolution of building disputes—including by making further provision for the issue of rectification orders (which are used to resolve disputes), by allowing for orders to set out stages for rectification work, by clarifying that they can require the payment of money by a consumer only when the money is due under a home building contract, by making it a breach of a licence to fail to comply with a rectification order and requiring a court or tribunal, when determining a building claim, to have regard to the principle that rectification of the defective work by the responsible party is the preferred option,
10. Disciplinary proceedings—including by changing the meaning of improper conduct, and the grounds for disciplinary action, to cover work done otherwise than with due care and skill (rather than otherwise than in a good and workmanlike manner, as at present),
11. Home warranty insurance—including by clarifying when a contractor is taken to have disappeared, requiring residential building work done under a contract to be insured in the name under which the person contracted to do the work, providing that a contract of insurance extends to the rectification of the original residential building work, preventing owner-builders from obtaining home warranty insurance, providing an increased maximum penalty for a second or subsequent offence by an individual of uninsured contracting to do residential building work or specialist work or seeking that work by or for an uninsured person, improving access to insurance in cases of insolvency and renaming home warranty insurance as insurance under the Home Building Compensation Fund,
12. Other minor, consequential or ancillary matters—including by moving definitions, and exclusions from certain definitions, from the regulations to the Act and dealing with savings and transitional matters.

## BACKGROUND

13. Following the election of the Liberal-National Government, the then Minister for Fair Trading, the Hon. Anthony Roberts MP, announced a comprehensive reform of the *Home Building Act 1989*.
14. As part of the reform process, the subsequent Minister for Fair Trading, the Hon. Stuart Ayres MP, advised Parliament that ‘issues with legislation were identified and potential solutions were developed with the assistance and involvement of all stakeholders... who had expertise and experience in the industry’.
15. The Bill proposes more than 50 amendments, to ensure that buildings laws reflect current practice, reduce unnecessary procedures, and either maintain or enhance current levels of consumer protection.

## OUTLINE OF PROVISIONS

16. Clause 1 sets out the name (also called the short title) of the proposed Act.
17. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.
18. Schedule 1 amends Part 1 of the Act (dealing with interpretation and other preliminary matters) as follows:

(a) by moving definitions in the Act to a Schedule and by moving from the regulations to the Act provisions about matters or work that are included or excluded from the definitions of dwelling and residential building work,

(b) by providing that, for the purposes of the Act and regulations and a contract of insurance under the Act, the date of completion of a new building in a strata scheme occurs on the issue of an occupation certificate for the building or on the occurrence of some other event that is prescribed by the regulations,

(c) by making it clear that the application of the Act to specialist work is not limited to specialist work that is residential building work and extends to commercial, industrial and other specialist work that is not residential building work,

(d) by excluding from the definition of residential building work, and thus from the operation of the Act's requirements about contracts and licensing:

(i) work comprising the construction of concrete tennis courts (and the like), ornamental ponds and water features and other structural ornamentation, if the work is undertaken as a stand-alone project, and

(ii) internal paintwork, if undertaken as a stand-alone project, and

(iii) off-site work to fabricate a manufactured home,

(e) by making consequential amendments.

19. Schedule 1 amends Part 2 of the Act (dealing with the regulation of residential building work and specialist work) as follows:

(a) by increasing the maximum penalty (and to include the option of imprisonment as a penalty) for a second or subsequent offence committed by an individual against provisions that prohibit unlicensed contracting and seeking work by or for an unlicensed person,

(b) by including in the Act provisions currently in the regulations that provide for the terms that must be included in contracts and that create exceptions to requirements as to the form and content of contracts, cooling-off periods for contracts and the duty to provide copies of contracts,

(c) by requiring contracts to do residential building work to include details of any progress payments payable under the contract and a statement about how the contract can be terminated,

(d) by extending an existing offence about compliance with contract requirements to cover non-compliance with requirements of the regulations as to the terms and other matter that must or must not be included in contracts,

(e) by providing that the maximum deposit for residential building work is 10% of the contract price, regardless of the contract price (up from 5% when the contract price is more than \$20,000),

(f) by imposing restrictions on the progress payments that can be required under a contract to do residential building work with a value more than a prescribed amount (currently \$20,000),

(g) by inserting notes as aids to interpretation of provisions relating to exemptions.

20. Schedule 1 amends Part 2A of the Act (dealing with the regulation of the supply of kit homes) as follows:

(a) by transferring from the regulations to the Act the terms that a contract for the supply of a kit home must include,

(b) by extending an existing offence about compliance with contract requirements to cover non-compliance with requirements of the regulations as to the terms and other matter that must or must not be included in contracts,

(c) by providing that the maximum amount of a deposit for the supply of a kit home is 10% of the contract price (up from 5% where the contract price is \$20,000 or less).

21. Schedule 1 amends Part 2C of the Act (dealing with statutory warranties) to clarify the rights and obligations of licensees and consumers under the statutory warranties (which imply minimum standards of work into a contract to do residential building work), as follows:

(a) by providing for a warranty to be implied into every contract to do residential building work that the work will be done with due care and skill (rather than in a proper and workmanlike manner, as at present), so as to modernise the Act's terminology and make it more consistent with the Australian Consumer Law (NSW),

(b) by providing that, although the principal contractor is primarily responsible to the consumer for a breach of a statutory warranty (even when the breach relates to work undertaken by a subcontractor) subcontractors are also responsible for statutory warranties,

(c) by setting out the duties of a person who has the benefit of a statutory warranty (a consumer), as follows:

(i) by imposing a duty on the consumer to mitigate loss arising from a breach of the warranty,

(ii) by introducing a defect notification period, requiring the consumer to notify the licensee of a defect in the residential building work within 6 months of when the consumer became aware or ought reasonably to have become aware of the defect,

(iii) by requiring consumers to allow the licensee reasonable access to the site, so that the licensee can rectify the work,

(iv) by allowing a court or tribunal to take any failure to mitigate loss or give notice of a defect into account in proceedings concerning a breach of statutory warranty and by providing that a court or tribunal must take into account any failure to comply with the duty to allow reasonable access,

(d) by changing the kind of defect that attracts a 6-year statutory warranty period from structural defect (as defined in the regulations) to a major defect in a major element of the building,

(e) by providing for a defence in proceedings for a breach of a statutory warranty for licensed builders who rely on the instructions of a professional acting for the person for whom the work was contracted (and who is independent of the builder). Contractor licences, supervisor certificates, tradesperson certificates and owner-builder permits.

22. Schedule 1 amends Part 3 of the Act (dealing with the issue, cancellation and suspension of contractor licences, supervisor certificates, tradesperson certificates and owner-builder permits) as follows:

(a) by transferring from the regulations to the Act provisions dealing with the grounds on which a person is disqualified from applying for or holding a contractor licence, supervisor certificate and tradesperson certificate and amending those provisions as follows:

(i) by providing that a provision that currently prevents a licence or certificate from being issued to a person who is or was a director or a person involved in the management of a corporation that is under external administration at the time of making the decision extends to disqualify those with such involvement in corporations that have already been wound up,

(ii) by amending the exemptions from the grounds on which a licence or certificate can be refused relating to an applicant who is or was a director or concerned in the management of an externally-administered body corporate, to provide for a members' voluntary winding up only to be exempt and for any other voluntary winding up (such as by creditors) to be a ground to refuse a licence or a certificate,

(iii) by preventing the issue of a licence or certificate to a person involved in a home building entity that has been the subject of an unreasonably large number of complaints, cautions, penalty notices or home warranty insurance claims under the Act, the Australian Consumer Law (NSW) or other relevant legislation,

(iv) by making the fit and proper person test mandatory, so that an application must be refused if it is considered that the applicant, or a close associate of the applicant who exercises a significant influence over the applicant or the operation and management of the applicant's business, would not be a fit and proper person to hold an authority (whereas this is currently merely an optional consideration),

(b) by providing for consistent considerations for all licensing and certification decisions (that is, for their issue, renewal, restoration and cancellation), including by requiring the cancellation of a contractor licence if an application for a licence by the person would be required to be refused and making similar provision relating to renewal,

(c) by requiring cancelled contractor licences, supervisor certificates and tradesperson certificates, or statements about them, to be lodged with the head of the government agency that administers the Act (the Chief Executive) rather than at an office of that agency, and also requiring such lodgment when licences or certificates are suspended because of failure to insure or the appointment of a controller or administrator,

(d) by requiring the holder of a contractor licence to notify certain events or circumstances (including insolvency, winding up or deregistration), which would allow reliance on an existing power to suspend the licence if there was a risk to the public that the licensee would be unable to complete building contracts,

(e) by providing that an offence involving failure to notify issues relating to the solvency and registration of the holder of a contractor licence is an executive liability offence, for which a director of the corporation or an individual who is involved in the management of the corporation, and who is in a position to influence the conduct of the corporation in relation to the commission of the offence, may be liable,

(f) by specifying the matters that must be considered before a provisional supervisor certificate can be issued,

(g) by broadening the definition of owner-builder work to include residential building work on a secondary dwelling on land,

(h) by providing that an owner-builder permit must not authorise its holder to do residential building work that relates to a dual occupancy unless there are special circumstances,

(i) by requiring all applicants for owner-builder permits to undertake education or training, or hold qualifications, required by the Chief Executive or the regulations (which are intended to include a requirement to obtain a construction induction card (a “white card”) under the Work Health and Safety Act 2011),

(j) by extending the 5-year limitation that currently applies to the holder of an owner-builder permit carrying out owner-builder work on other properties, so that the limitation applies to all persons with a registered interest in land upon which owner-builder work was undertaken, rather than just the person to whom the owner-builder permit was issued,

(k) by setting out in a Schedule to the Act some of the conditions of authorities presently in the regulations,

(l) by requiring cancelled authorities or statements about them to be lodged with the Chief Executive rather than at an office of the relevant government agency.

23. Schedule 1 amends Part 3A of the Act (relating to the current powers of inspectors to make rectification orders after completing an investigation of a building dispute) as follows:

(a) by making it clear that a condition of a rectification order requiring the payment of money by the complainant under a building claim relates only to money payable under the contract,

(b) by allowing for staged rectification orders, so that a rectification order may set out stages for compliance with the requirements of the order,

(c) by providing that a rectification order may be amended by a further order,



(d) by making it a condition of every contractor licence that the contractor must comply with the requirements of a rectification order (which will make a builder's non-compliance with a rectification order grounds for the taking of disciplinary action),

(e) by requiring a court or tribunal, when determining a building claim involving an allegation of defective residential building work or specialist work, to have regard to the principle that rectification of the defective work by the responsible party is the preferred option,

(f) by providing that the Tribunal can make an order to resolve a building dispute even if it is not the order that the applicant asked for.

24. Schedule 1 amends Part 4 of the Act (relating to provisions about improper conduct and disciplinary proceeding) as follows:

(a) by changing one of the grounds for a finding of improper conduct by or for disciplinary action against a licence or certificate holder so that references to work having to be done in a good and workmanlike manner will become references to work having to be done with due care and skill (for consistency with changes to the statutory warranty changes as to standard of work),

(b) by requiring the return of an authority that is suspended, varied or cancelled as a result of disciplinary proceedings to the Chief Executive rather than at an office of the relevant government agency.

25. Schedule 1 amends Part 6 of the Act (relating to insurance of residential building work), as follows:

(a) by clarifying that a reference to the disappearance of a contractor, supplier or owner-builder is a reference to disappearance from Australia,

(b) by requiring that residential building work done under a contract must be insured in the name under which the person contracted to do the work (rather than in the name of the person who contracted to do the work),

(c) by providing an increased maximum penalty for a second or subsequent offence by an individual of uninsured contracting for residential building work or specialist work,

(d) by providing that a contract of insurance in relation to residential building work done by a person (whether or not under contract) extends to any residential building work done by the same person by way of rectification of the same original work (and thus that a separate contract of insurance is not required in relation to the rectification work),

(e) by omitting a provision that provides that if the holder of a contractor licence enters into a contract to do residential building work and a contract of insurance is in force in relation to the work, the contract of insurance is taken to extend to any residential building work under the contract at the address stated in the certificate of insurance,

(f) by making it clear that the requirement for contract work to be insured extends to residential building work that is owner-builder work when the work is done under a contract between the person who contracts to do the work and the owner-builder,

(g) by removing the current requirement for an owner-builder to take out home warranty insurance for owner-builder work and preventing home warranty insurance from being taken out by an owner-builder in future (without affecting the current requirement that work done by a contractor to an owner-builder must have home warranty insurance),

(h) by requiring contracts for the sale of land on which owner-builder work has been carried out to contain a consumer warning stating that work done under an owner-builder permit is not required to be insured under the Act unless done by a contractor to the owner-builder,

(i) by imposing obligations on sellers of houses and units used for commercial purposes (which are excluded from the definition of dwelling in the Act) to include a warning in a contract for the sale of the relevant land that the property does not have the protection of the Act,

(j) by improving access to home warranty insurance in cases of insolvency to ensure that consumers can make claims for work done by a partnership where one member is insolvent and the licence has been cancelled,

(k) by clarifying the meaning of building claim order in a provision providing that a contract of insurance in relation to residential building work must include provision that deems the suspension of a contractor's licence to constitute the insolvency of the contractor for the purposes of the application of the policy to any loss that is the subject of a building claim order made against the contractor that remains unsatisfied, so that an insurance policy must cover loss that is the subject of an outstanding order by a court or the Tribunal in relation to a building claim,

(l) by providing for the keeping of a register of insurance particulars that can be accessed by beneficiaries or potential purchasers of property (including details of the builder, the site and any successful claims on the insurance and the amount of those claims),

(m) by providing for the period of cover of an insurance contract to be referable to the occurrence of a major defect (as defined in the statutory warranty provisions of the Act) in residential building work, rather than a structural defect, after completion of work,

(n) by renaming home warranty insurance as insurance under the Home Building Compensation Fund,

(o) by renaming the Home Warranty Insurance Scheme Board as the Home Building Compensation Fund Board,

(p) by providing that a claim for non-completion of work can be made as a delayed claim to allow beneficiaries to continue to pursue a contractor for breach of statutory warranties that involve a claim for defective work as well as a non-completion claim beyond 12 months after the work ceased.

26. Schedule 1 also makes amendments dealing with miscellaneous matters, as follows:

(a) by including an executive liability provision in the Act for directors and persons involved in the management of a corporation that commits the offence of failing to

notify the occurrence of an insolvency event that provides grounds for the cancellation of a licence,

(b) by extending a provision about the limitation of personal liability that currently applies to the Chief Executive so that it also applies to members of the Home Building Compensation Fund Board and the Home Building Advisory Council,

(c) by clarifying the obligation of the Chief Executive to keep a register of particulars of licences, certificates and owner-builder permits and other matters,

(d) by providing for service of notices and documents under the Act by email and fax,

(e) by updating references to the government agency that administers the Act and the head of that agency and by requiring lodgment of certain documents with the Chief Executive rather than at an office of that agency,

(f) by providing for the making of savings and transitional regulations,

(g) by inserting savings and transitional provisions,

(h) by renumbering existing Schedules about the membership of the Home Building Compensation Fund Board and the Home Building Advisory Council.

27. Schedule 2 amends the NSW Self Insurance Corporation Act 2004 as a consequence of the change of terminology from “home warranty insurance” to “insurance under the Home Building Compensation Fund”.
28. Schedule 3 repeals Acts that contain only uncommenced provisions that amend the Home Building Act 1989.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *New Offences with Significant Penalties*

29. The Bill provides for some additional offences with maximum penalties of 12 months imprisonment, as well as increasing penalties for certain current offences to 12 months imprisonment.

**The Committee notes that the penalty provisions of this Bill provide, for the first time, terms of imprisonment for offences related to unlicensed or uninsured contract work. The Committee is concerned that these strong penalties may be disproportionate to the offences committed. The Committee is also mindful that these penalties are only provided for in second or subsequent offences. The Committee makes no further comment.**

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

#### *Commencement by Proclamation*

30. Clause 2 of the Bill provides the proposed Act is to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation of this kind, which impacts on rights and liberties, to commence on a fixed date or on assent, not by proclamation.**

## 5. Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014

Date introduced	8 May 2014
House introduced	Legislative Assembly
Member responsible	Mr John Robertson MP
Portfolio	Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to prescribe a ministerial code of conduct for the purposes of the *Independent Commission Against Corruption Act 1988*. Under that Act, conduct of a Minister of the Crown could constitute or involve a substantial breach of a ministerial code of conduct prescribed or adopted by the regulations.

### BACKGROUND

2. At present, section 9(1) of the *Independent Commission Against Corruption 1988* provides that conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence, reasonable grounds for dismissal, or – in the case of a Minister of the Crown – a substantial breach of an applicable code of conduct.
3. According to the Member, currently in New South Wales, only the Code of Conduct for Members has been adopted as an ‘applicable code of conduct’ for the purposes of section 9. This Bill will amend section 9 of the Act to provide that Ministers may also be found guilty of corrupt conduct under the Act where they substantially breach the Ministerial Code of Conduct set out in schedule 1, item 2 of the Bill.
4. In its report of October 2013, the Independent Commission Against Corruption stated that that code of conduct for Ministers provides:

... a useful yardstick against which the conduct of ministers may be judged for the purposes of establishing the boundaries of corrupt conduct. For this reason, it should be an applicable under section 9 of the ICAC Act.

### 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.
7. Schedule 1 [1] provides that the ministerial code of conduct set out in Schedule 1 to the Regulation is prescribed as a ministerial code of conduct for the purposes of the

definition of applicable code of conduct in section 9 (3) of the Independent Commission Against Corruption Act 1988.

8. Schedule 1 [2] sets out the ministerial code of conduct. It is substantially the same as the Code of Conduct for Ministers of the Crown published by the Department of Premier and Cabinet in the New South Wales Government Ministerial Handbook (see Premier's Memorandum M2011-09) and includes additional provisions about the keeping of public diaries relating to contact with lobbyists.

## ISSUES CONSIDERED BY COMMITTEE

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.**

## 6. Maritime and Transport Licensing Legislation Amendment Bill 2014

Date introduced	7 May 2014
House introduced	Legislative Council
Minister responsible	The Hon. Duncan Gay MLC
Portfolio	Minister for Roads and Freight

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - (c) to amend the *Marine Safety Act 1998* and the *Marine Safety (General) Regulation 2009* to transfer the functions of the Minister for Roads and Freight (the Minister) with respect to boat driving licensing and vessel registration to Roads and Maritime Services (RMS), and
  - (d) to amend the *Road Transport Act 2013* and the *Marine Safety Act 1998* to enable RMS to grant driver licences that include boat driving licences as an alternative to issuing separate boat driving licence documentation, and
  - (e) to amend the *Road Transport Act 2013* to facilitate the taking and use of photographs in connection with the granting of marine safety licences under the *Marine Safety Act 1998* and the identification of applicants and licence holders, and
  - (f) to amend the *Ports and Maritime Administration Act 1995* to enable the regulations under that Act to make provision for the management of dangerous goods in ports and to make a consequential amendment to the *Work Health and Safety Regulation 2011*.

### BACKGROUND

2. In 2012, the Maritime Stakeholder Forum called on the NSW Government to reduce the regulatory burden on industry and the community with respect to maritime licences. In August 2012, the Minister launched the Maritime Policy Agenda and announced a number of boating customer reforms. A key element of those reforms is a combined driver and boat driving licence for eligible customers of Roads and Maritime Services. The Bill, among other things, implements this reform.

### 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.

## Schedule 1 Amendments concerning harmonisation of licensing and registration requirements

### *Transfer of boat driving licensing and vessel registration functions to RMS*

5. Schedule 1.1 [1] amends the *Marine Safety Act 1998* to provide that the responsible licensing official, in relation to a marine safety licence, is:
  - (g) RMS, in the case of any of the following kinds of licences:
    - ix a boat driving licence—being a marine safety licence to operate a power-driven recreational vessel that is required by Division 5 of Part 5 of the Act,
    - x a vessel registration certificate—being a marine safety licence for a vessel that is required by Division 2 of Part 5 of the Act, and
  - (h) the Minister, in any other case.
6. Schedule 1.1 [2] and [5]–[13] make consequential amendments to the Act to ensure that various functions in relation to marine safety licences that are currently exercisable by the Minister are exercised by the responsible licensing official for the type of marine safety licence concerned.
7. Schedule 1.1 [14] transfers all pending applications for boat driving licences and vessel registration certificates, and any rights and liabilities of the Minister in connection with such licences and certifications (including applications for them), to RMS on the day it becomes the responsible licensing official for boat driving licences and vessel registration certificates.
8. Schedule 1.2 makes amendments to the *Marine Safety (General) Regulation 2009* that are consequential on the transfer of licensing and registration functions from the Minister to RMS.

### *Grant of driver licences that include boat driving licences*

9. Schedule 1.3 amends the *Road Transport Act 2013*:
  - (i) to enable the statutory rules under that Act to make provision for or with respect to the granting of driver licences that include boat driving licences under the *Marine Safety Act 1998* (combined licences), and
  - (j) to provide for the legal effect of combined licences in connection with certain requirements under legislation with respect to the carrying, production, delivery, surrender or confiscation of driver licences and boat driving licences, and
  - (k) to provide for the continued efficacy of a driver licence or boat driving licence if the other licence included on a combined licence is varied, suspended, cancelled, surrendered, confiscated or downgraded, and
  - (l) to facilitate the taking and use of photographs in connection with the granting of such driver licences or marine safety licences under the *Marine Safety Act 1998* and the identification of applicants and licence holders.



10. Schedule 1.1 [3] amends the *Marine Safety Act 1998* to note that boat driving licences may be included on combined licences as an alternative to issuing separate boat driving licence documentation.
11. Schedule 1.1 [4] amends the *Marine Safety Act 1998* to enable RMS to alter the period during which a boat driving licence is in force so as to align it with the period during which a driver licence on a combined licence is in force.

### **Schedule 2 Amendments concerning dangerous goods in ports**

12. Schedule 2.1 amends the *Ports and Maritime Administration Act 1995*:
  - (m) to enable the regulations under that Act to make provision for or with respect to the management of dangerous goods in ports, and
  - (n) to enable regulations made for this purpose to create offences punishable by a penalty not exceeding 300 penalty units (currently, \$33,000).
13. Schedule 2.2 amends the *Work Health and Safety Regulation 2011*, which currently continues in effect certain provisions under repealed legislation concerning dangerous goods in ports, to provide for those provisions to cease to have effect on a day declared by regulations made under the *Ports and Maritime Administration Act 1995*.

### **ISSUES CONSIDERED BY COMMITTEE**

**The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.**

## Part Two - Regulations

**The Committee did not report on any Regulations in this Digest.**

# Appendix One – Index of Ministerial Correspondence on Bills

**The Committee has not received any Ministerial Correspondence on Bills in this Digest.**

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

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