



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”.

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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:
- (d) 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
 - (e) 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. BAIL AMENDMENT BILL 2014

Schedule 1 Amendment of Bail Act 2013 No 26

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

Presumption of Innocence and General Right to be at Liberty

In removing a requirement that the bail authority gives regard to the presumption of innocence and the general right of liberty when making bail decisions, the Bill impacts these rights. The Committee refers these matters to Parliament for further consideration.

Retrospectivity

The Committee notes that the amendments made by the Bill extend to offences committed or alleged to have been committed, or that were charged, before the commencement of the amendments. The Committee is generally concerned where provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows people knowledge of what laws they are subject to at any given time. The Committee refers this matter to Parliament for further consideration.

Non-reviewable decisions: s8A(1)(b)(iii) of the LRA

Limited Review Rights

The Committee notes the limited rights an accused person has under the Bill to have a decision to refuse him or her bail, reviewed by the same court. Nonetheless accused persons can appeal Local or District Court bail decisions in the Supreme Court. Owing to this safeguard, 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.

2. CITY OF SYDNEY AMENDMENT (BUSINESS VOTING AND ELECTIONS) BILL 2014

The Committee has not identified any issues arising under section 8A(1) of the Legislation Review Act 1987.

3. CITY OF SYDNEY AMENDMENT (ELECTIONS) BILL 2014

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

Equality of Enfranchisement / One Vote, One Value

The Committee is concerned that in enabling corporations, ratepaying lessees and occupiers or rateable land to nominate two people to be enrolled as electors, then these electors may be granted a disproportionate influence on the election of councillors and mayor when compared to the voting rights of residential voters. The Committee refers this matter to Parliament for its further consideration.

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

Regulation-making Power

The Committee notes that the regulation-making power to designate any or all councils in NSW to be subject to the same election requirement as will exist for the City of Sydney, may be an inappropriate delegation of legislative power. Any extension of the election reforms to other councils may be more appropriately handled by a subsequent Bill to enable proper scrutiny by the Parliament. The Committee makes no further comment.

4. CONSTITUTION AMENDMENT (PARLIAMENTARY PRESIDING OFFICERS) BILL 2014

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

5. PROTECTION OF THE ENVIRONMENT LEGISLATION AMENDMENT BILL 2014

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

Oppressive official powers

The Committee notes that the Bill allows the EPA to enter premises to carry out the terms of a management order where the EPA is of the opinion that the recipient of the order has failed to do so. There is no requirement for the EPA to obtain a warrant from any third party before doing so. It appears that the land in question could include residential premises. The proposed provision may therefore promote arbitrary interference with private property rights. The Committee refers the matter to Parliament for further consideration.

Oppressive Official Powers II

The Committee notes that a person cannot withdraw or vary an undertaking made under the Bill without the consent of the EPA, even if the undertaking itself authorises withdrawal or variation without that consent. The Bill therefore gives the EPA power to enforce an undertaking that a person entered into on the understanding that compliance was voluntary. In the Committee's view, this may be an oppressive official power. The Committee refers the matter to Parliament for further consideration.

Procedural Fairness

The Bill removes a requirement for the regulatory authority to give the holder of a licence notice of its intention to suspend or revoke its licence before doing so. It thus removes an opportunity for a licence holder to rectify the matter that is causing concern thereby avoiding the threatened licence cancellation. Nonetheless, the second reading speech indicates licences are only suspended or revoked in the most serious cases e.g. where a company shows continual disregard for its environmental obligations; and that the amendment prevents delays in closing down operations that may otherwise cause continued environmental damage and unacceptable risk to the community for weeks. In the circumstances, the Committee makes no further comment.

Retrospectivity

The Committee notes that the Bill includes an amendment to allow courts to make restorative justice orders. Further, the court can make such an order in respect of proceedings that commenced prior to this amendment. The Committee is generally concerned when 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. However, in this case, the court cannot make a restorative justice order without the offender's agreement. Owing to this safeguard, the Committee makes no further comment.

Retrospectivity II

The Committee notes that the Bill includes an amendment to allow a court to make certain additional orders in respect of an offence. Further, the court can make such orders in respect of proceedings that commenced prior to this amendment. The Committee is generally concerned when provisions are drafted to have retrospective effect. Retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. In this case, offenders may be handed penalties that did not exist at the time they committed the relevant offence. The Committee refers this matter to Parliament for further consideration.

Privacy

The Committee notes the Bill includes an amendment to allow the EPA to require a person who is engaged in transport of waste to ensure that GPS tracking devices are installed on any vehicles used by the person to transport waste. While the second reading speech indicates this is to prevent illegal dumping, there is no requirement in the Bill for the person in question to have been convicted of illegal dumping offences or to be suspected of them. The amendment may therefore unduly impact on the person's right to privacy. The Committee refers this matter to Parliament for further consideration.

Undue Punishment

The Committee notes that the significant penalty increases contained in the Bill for certain offences may give rise to undue punishment. Indeed, the Minister indicated in his second reading speech that NSW has some of the highest maximum court-imposed penalties in Australia for environmental offences. Nonetheless, the penalty rises relate to maximum penalties and do not remove the discretion of the courts to impose a penalty that fits the crime on a case-by-case basis. In the circumstances, the Committee makes no further comment.

Undue Punishment II

The Committee notes the Bill would allow the court to impose monetary penalties on offenders additional to any other penalty imposed for the offence. This may give rise to undue punishment, and penalties disproportionate to the offence committed. However, the monetary penalties do not operate as mere penalties, they relate to restoring land the offender has contaminated, and paying back money the offender has obtained as a result of the offence. In the circumstances the Committee makes no further comment.

Lack of Clarity

The Committee notes that listing "any other Act that amends this Act" rather than listing each of those amending Acts limits the clarity of the schedule outlined above. The Committee prefers the name of each Act to be listed to avoid this lack of clarity. However, as the list

relates to the regulation making power for provisions of a savings or transitional nature, and as the proposed insertion ensures that the schedule is comprehensive, the Committee makes no further comment.

Non-reviewable Interim Decision

The Committee notes that the Bill contains an amendment to provide that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision. Thus, an operator who has had his or her licence cancelled must wait for the decision to be reviewed and, in the interim, close his/her operations. The second reading speech indicates licences are only suspended or revoked in the most serious cases; and the amendment may therefore prevent delays in closing operations that may otherwise cause continued environmental damage and unacceptable risk to the community. In addition, a decision to cancel a licence is still reviewable. In the circumstances, 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.

Penalties in regulations

The Committee notes that the Bill provides for certain penalties to be included in the regulations. The Committee generally prefers penalties to be included in primary, not subordinate legislation, to allow appropriate Parliamentary scrutiny. Nonetheless, all regulations must be tabled in Parliament and are subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987*. Owing to this safeguard, the Committee makes no further comment.

6. TECHNICAL AND FURTHER EDUCATION COMMISSION AMENDMENT (FEES) 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

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

Part One - Bills

1. Bail Amendment Bill 2014

Date introduced	13 August 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 amend the Bail Act 2013 (the principal Act) as follows:
 - (a) to provide for a preamble to the principal Act,
 - (b) to require bail for certain serious offences to be refused unless the accused person shows cause why his or her detention is not justified,
 - (c) to convert the current 2-step unacceptable risk assessment process that applies to all bail decisions into a one-step risk assessment, so that:
 - i the bail conditions that could reasonably be imposed to address bail concerns are considered as part of an unacceptable risk assessment, and
 - ii bail must be refused if there are any unacceptable risks,
 - (d) to require additional matters to be considered by a bail authority in applying the unacceptable risk test,
 - (e) to make other miscellaneous changes.

BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon Brad Hazzard MP, Attorney General and Minister for Justice, indicated that the Bill gives effect to the recommendations made by former Attorney General John Hatzistergos in his review of the Bail Act 2013. The new Act commenced on 20 May 2014 and Mr Hazzard stated that a number of bail decisions made it have caused concern in the community. This prompted the Government to initiate the Hatzistergos review.
3. Mr Hazzard further stated that in conducting the review, Mr Hatzistergos consulted with key stakeholders from across the justice system and considered a number of bail decisions made under the new Act; as well as drawing on the work of law reform commissions around Australia in relation to bail.

OUTLINE OF PROVISIONS

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

5. Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Bail Act 2013 No 26

Preamble

6. Schedule 1 [1] inserts a preamble into the principal Act that sets out the underlying principles that the Parliament has regard to in enacting the Act. Those principles are:
 - (a) the need to ensure the safety of victims of crime, individuals and the community, and
 - (b) the need to ensure the integrity of the justice system, and
 - (c) the common law presumption of innocence and the general right to be at liberty.

Show cause requirement

7. Schedule 1 [6] requires a bail authority making a bail decision for a show cause offence to refuse bail unless the accused person shows cause why his or her detention is not justified.
8. Bail must be refused on this basis whether or not there is an unacceptable risk. If the bail authority decides not to refuse bail on this basis, the unacceptable risk test still applies.
9. Show cause offences are certain serious offences set out in proposed section 16B. The offences include offences punishable by imprisonment for life, child sex offences, serious personal violence offences, certain offences involving drugs, firearms or prohibited weapons, and serious offences committed by an accused person while on bail, on parole or subject to a supervision order.
10. Schedule 1 [5] inserts a new flow chart that sets out how the show cause requirement applies to show cause offences.
11. Schedule 1 [10] provides that the show cause requirement is displaced if the offence is one for which the accused person must establish special and exceptional circumstances for a decision to grant bail or dispense with bail. This special requirement applies if the accused person has been convicted on indictment and an appeal in relation to the conviction or sentence is pending. The unacceptable risk test will continue to apply to such an offence.
12. Schedule 1 [19] makes it clear that the power of a court to grant bail of its own motion does not apply if the offence is a show cause offence.

Unacceptable risk test—all offences

13. Schedule 1 [8] replaces the existing 2-step unacceptable risk assessment process that must be carried out by a bail authority before making a bail decision with a one-step assessment.
14. Currently, the principal Act requires the bail authority to identify whether there is any unacceptable risk that the accused person, if released from custody, will:
 - (a) fail to appear at any proceedings for the offence, or

- (b) commit a serious offence, or
 - (c) endanger the safety of victims, individuals or the community, or
 - (d) interfere with witnesses or evidence.
15. If there is an unacceptable risk, the bail authority must then consider whether bail conditions can be imposed to sufficiently mitigate that risk. If not, bail can be refused.
 16. The amendments will require the bail authority to assess any bail concerns before making a bail decision. The bail authority will be required, as part of its assessment, to consider the bail conditions that could reasonably be imposed to address those concerns.
 17. If the bail authority is satisfied, after making that assessment, that there is an unacceptable risk, the bail authority must refuse bail.
 18. If there is no unacceptable risk, a release decision must be made (and bail conditions may be imposed to address bail concerns).
 19. Accordingly, an unacceptable risk will always require bail to be refused.
 20. In addition, the bail authority may impose bail conditions as a way of addressing bail concerns only if there are reasonable grounds to believe that those bail conditions will be complied with by the accused person.
 21. Schedule 1 [5] inserts a flow chart that sets out the new unacceptable risk test.
 22. Schedule 1 [11] and [12] repeal matters that are now provided for by Schedule 1 [8].
 23. Schedule 1 [4], [7], [13]–[15] and [21] are consequential amendments.
 24. Schedule 1 [9] makes it clear that the unacceptable risk test also applies to bail decisions for offences for which there is a right to release. However, it will continue to be the case that bail cannot be refused for right to release offences.

Additional matters to be considered in risk assessment

25. Schedule 1 [8] (proposed section 18) sets out the matters to be considered by a bail authority in assessing bail concerns. Those matters replicate existing section 17 (3) of the principal Act, with the following changes and additions:
 - (a) the bail authority must consider whether the accused person has a history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds (not a pattern of non-compliance),
 - (b) the bail authority must consider whether the accused person has any criminal associations,
 - (c) the bail authority must consider the conduct of the accused person towards the victim of the offence, or any family member of the victim, after the offence,

- (d) if the offence is a serious offence, the bail authority must consider the views of the victim of the offence, or any family member of the victim, if available, to the extent relevant to a concern about the safety of the victim, individuals or the community,
- (e) as mentioned above, the bail authority must consider the conditions that could reasonably be imposed to address bail concerns.

Miscellaneous amendments

- 26. Schedule 1 [2] removes a requirement that the bail authority have regard to the presumption of innocence and the general right to be at liberty when making bail decisions.
- 27. Schedule 1 [16] limits the circumstances in which a senior police officer is required, at the request of an accused person, to review a bail decision of another police officer. The review will now be required only if the accused person was refused bail or bail was granted subject to a pre-release requirement and the accused person is unable to comply with the pre-release requirement. A pre-release requirement is a requirement of a bail condition that must be complied with before a person is released on bail, such as a requirement to provide security or a character acknowledgment.
- 28. Schedule 1 [17] is a consequential amendment.
- 29. Schedule 1 [18] permits a review by a senior police officer of a decision by another police officer to refuse bail or to grant bail subject to conditions to be carried out by a senior police officer who is not present at the police station if no senior police officer is available at the police station to carry out the review.
- 30. Schedule 1 [20] limits the grounds on which a further release application or detention application can be made to a court that has already heard an application. The amendment will permit a further application to be made when new information relevant to the grant of bail is available only if that information is material information.
- 31. Schedule 1 [22] provides that the enactment of the principal Act is not a change in circumstances for the purposes of a release application or a detention application. This means that the enactment of the principal Act does not provide grounds for the making of a further bail application to a court if an application has already been heard by the relevant court.
- 32. Schedule 1 [23] provides for savings and transitional matters.
- 33. Schedule 1 [3] defines expressions used in the proposed amendments.

ISSUES CONSIDERED BY COMMITTEE

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

Presumption of Innocence and General Right to be at Liberty

- 34. Schedule 1, item 6 of the Bill requires a bail authority making a bail decision for a 'show cause' offence to refuse bail unless the accused person shows cause why his or her detention is not justified. Bail must be refused on this basis whether or not there is an unacceptable risk. Similarly, schedule 1, item 2 of the Bill removes a requirement that

the bail authority have regard to the presumption of innocence and the general right to be at liberty when making bail decisions.

In removing a requirement that the bail authority gives regard to the presumption of innocence and the general right of liberty when making bail decisions, the Bill impacts these rights. The Committee refers these matters to Parliament for further consideration.

Retrospectivity

35. Schedule 1, item 23 of the Bill provides that the amendments made by the Bill extend to offences committed or alleged to have been committed, or charged, before the commencement of the amendments.

The Committee notes that the amendments made by the Bill extend to offences committed or alleged to have been committed, or that were charged, before the commencement of the amendments. The Committee is generally concerned where provisions are drafted to have retrospective effect. This is because such provisions are contrary to the rule of law which allows people knowledge of what laws they are subject to at any given time. The Committee refers this matter to Parliament for further consideration.

Non-reviewable decisions: s8A(1)(b)(iii) of the LRA

Limited Review Rights

36. Schedule 1, item 20 of the Bill further limits the grounds on which a further release application or detention application can be made to a court that has already heard an application. The amendment will permit a further application to be made when new information relevant to the grant of bail is available only if that information is material information.

The Committee notes the limited rights an accused person has under the Bill to have a decision to refuse him or her bail, reviewed by the same court. Nonetheless accused persons can appeal Local or District Court bail decisions in the Supreme Court. Owing to this safeguard, the Committee makes no further comment.

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

Commencement by Proclamation

37. 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.

2. City of Sydney Amendment (Business Voting and Elections) Bill 2014

Date introduced	14 August 2014
House introduced	Legislative Assembly
Member responsible	Mr Alex Greenwich MP
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *City of Sydney Act 1988* as follows:
 - (a) to require the Electoral Commissioner to keep voluntary registers of non-resident owners and occupiers and ratepaying lessees who are entitled to vote in City of Sydney elections;
 - (b) to require the electoral rolls for those categories of electors to be prepared on the basis of the registers, subject to confirmation details;
 - (c) to provide for non-resident owners, occupiers and ratepaying lessees to be treated as postal voters, subject to the right to elect to vote instead of in person; and
 - (d) to make the Electoral Commissioner responsible for the administration of elections, council polls and constitutional referendums for the City of Sydney.

BACKGROUND

2. According to Mr Alex Greenwich MP, the Member responsible, this Bill is about:

Making the process easier to increase business participation in local government elections... The current situation is excessively bureaucratic because non-residential electoral rolls are abolished after each local government election, requiring businesses and owners to re-enrol each term.

3. In the development of this Bill, consideration was given to comments made by various stakeholders who had appeared before a hearing of the Joint Standing Committee on Electoral Matters on its recent Inquiry into the *2012 Local Government Elections*. The Committee's subsequent report made various recommendations with respect to increasing business participation in local government elections.

OUTLINE OF PROVISIONS

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

6. Schedule 1 [2] inserts a note explaining that the owners of businesses are, if all requirements are met, entitled to vote as non-resident owners, occupiers or ratepaying lessees.
7. Schedule 1 [3] requires the Electoral Commissioner to keep a non-resident owners register comprising persons who are entitled to be enrolled as electors as owners of rateable land in the City of Sydney and an occupiers and ratepaying lessees register comprising persons who are entitled to be enrolled as electors as occupiers of rateable land or ratepaying lessees in the City of Sydney. The registers are to contain the names of persons who are so entitled who make a claim to the Commissioner for listing on the registers. The registers are to be used as the basis for the roll for elections of non-resident owners of rateable land and the roll of occupiers and ratepaying lessees. The registers are also to be made publicly available by both the Commissioner and the general manager of the Council of the City of Sydney. Schedule 1 [1], [4] and [5] make consequential amendments.
8. Schedule 1 [7] replaces the current requirement for an enrolment letter to be sent out by the Electoral Commissioner 90 days before the closing date of an election with a requirement for the Commissioner to contact persons on the non-resident owners register or the occupiers and ratepaying lessees register to confirm particulars for inclusion on the roll. When contacted for this purpose, a person may also elect not to be included on a roll for an election or to vote in person rather than by postal vote. The Electoral Commissioner is prohibited from including a person on a roll of non-resident owners or occupiers and ratepaying lessees if the person has elected not to be included, has otherwise indicated that the person does not wish to be so included or fails to respond to a request to confirm particulars. Schedule 1 [6] makes a consequential amendment.
9. Schedule 1 [8] provides for persons who are on the roll of non-resident owners of rateable land or the roll of occupiers and ratepaying lessees to be treated as postal voters, subject to an election to vote in person.
10. Schedule 1 [9] provides for the Electoral Commissioner to administer elections, council polls and constitutional referendums for the City of Sydney.

ISSUES CONSIDERED BY THE COMMITTEE

The Committee has not identified any issues arising under section 8A(1) of the Legislation Review Act 1987.

3. City of Sydney Amendment (Elections) Bill 2014

Date introduced	14 August 2014
House introduced	Legislative Council
Member responsible	The Hon. Robert Borsak MLC
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:

- (a) to require the general manager of the Council of the City of Sydney (the general manager) to keep and maintain a register of all persons entitled to be enrolled (including persons who may be taken to be entitled to be enrolled) on the roll of non-resident owners of rateable land or the roll of occupiers and ratepaying lessees (the non-residential rolls) under the *City of Sydney Act 1988*, and
- (b) to revise and update provisions relating to entitlement to enrolment on those non-residential rolls, and
- (c) to provide for the general manager to automatically enrol persons onto those non-residential rolls, and
- (d) to provide that if a corporation is the owner, ratepaying lessee or occupier of rateable land in the City of Sydney, the corporation may nominate two natural persons to be enrolled as electors, instead of the corporation, and
- (e) to provide that if a corporation fails to make such a nomination at least 28 days before the closing date for an election, the first two company secretaries or directors of the corporation (taken alphabetically) are to be deemed to have been so nominated and are to be enrolled as electors instead of the corporation; and
- (f) to provide that no more than two owners, two ratepaying lessees or two occupiers are entitled to be enrolled as electors in respect of any one parcel of rateable land, and
- (g) to provide that if it appears to the general manager that there are more than two owners, two ratepaying lessees or two occupiers of any one parcel of rateable land, the general manager is to enrol:
 - (i) two of those owners, ratepaying lessees or occupiers in accordance with a written nomination signed by the majority of those owners, ratepaying lessees or occupiers submitted to the general manager at least 28 days before the closing date for an election, or

- (ii) if no such nomination is made, the first two persons for a list of those owners, ratepaying lessees or occupiers (taken alphabetically), and
- (h) to provide that regulations made under the *Local Government Act 1993* may apply one of more of the provisions of Part 3 (Elections) of the *City of Sydney Act 1988* (with any specified modifications) to elections for such other local government areas as may be specified in those regulations.

BACKGROUND

- 2. In the 2012 City of Sydney Council election, only 1,700 business votes were registered for a base of potentially 80,000 eligible business votes.
- 3. In its 2014 report on its Inquiry into the *2012 Local Government Elections*, the Joint Standing Committee on Electoral Matters made numerous recommendations with respect to the enrolment of non-residential electors on the electoral roll, and overall voting rate of non-residential electors.
- 4. This Bill draws on some of the recommendations from that report.

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 a day or days to be appointed by proclamation.
- 7. Schedule 1 [10] inserts proposed section 18D into the CoS Act to give effect to object (a) set out in the Overview. The proposed section:
 - (a) requires the general manager to keep and maintain a register of all persons entitled to be enrolled (including persons who may be taken to be entitled to be enrolled) on the roll of non-resident owners of rateable land or the roll of occupiers and ratepaying lessees under the CoS Act, and
 - (b) sets out what information is to be included on that register, and
 - (c) allows the register to be kept in an electronic form, and
 - (d) requires the general manager to maintain and regularly revise the register to ensure that it is accurate, and
 - (e) requires the general manager to ensure that the register is not available for public inspection, and
 - (f) empowers the general manager, or a member of staff of the Council of the City of Sydney who is authorised by the general manager, to require certain persons to answer questions regarding the enrolment of persons under the CoS Act and provides that a refusal or failure to answer such a question (or giving an answer to such a question that the person knows is false or misleading in a material particular) is an offence, and

- (g) enables the general manager to request the assistance of the Electoral Commissioner, and requires the Electoral Commissioner to provide that assistance, in ascertaining certain information concerning a person who the general manager believes is entitled to be enrolled as an elector for the City of Sydney.
- 8. Schedule 1 [2] substitutes the definitions of ratepaying lessee and occupier in section 14 (1) of the CoS Act to give effect to object (b) set out in the Overview. These provisions define which persons are ratepaying lessees and occupiers for the purposes of enrolment under the CoS Act. The substituted definitions remove the requirement that the person be liable to pay annual rent and local government rates (in relation to a ratepaying lessee) or annual rent (in relation to an occupier) of at least \$5,000.
- 9. Schedule 1 [3] updates a reference in the definition of rateable land in section 14 (1) of the CoS Act. The amendment makes it clear that rateable land does not include a utility lot within the meaning of the Strata Schemes Management Act 1996, which is a lot designed to be used primarily for storage or accommodation of boats, motor vehicles or goods and not for human occupation as a residence, office, shop or the like.
- 10. Schedule 1 [5] substitutes section 14 (2) of the CoS Act to provide that a person is not an owner, ratepaying lessee or occupier of rateable land, for the purposes of the enrolment provisions of that Act, merely because the person owns, holds or occupies:
 - (a) a parcel of land designed, constructed or used solely or principally for the parking of no more than 2 motor vehicles, or
 - (b) a self-storage unit used for the storage of boats, motor vehicles or goods.
- 11. Schedule 1 [5] also removes the requirement that, in order to be enrolled, a ratepaying lessee or occupier of rateable land must have his or her primary place of residence within New South Wales. It is noted that section 15 (2) of the CoS Act provides that a person is not entitled to be enrolled unless the person is entitled to vote at an election of members of the Legislative Assembly or an election of members of the Commonwealth House of Representatives.
- 12. Schedule 1 [10] inserts proposed sections 18A–18C into the CoS Act to give effect to object (c) set out in the Overview.
- 13. Proposed section 18A (which is substituted for current section 18A) provides that not later than the closing date for an election, the general manager is to prepare the following rolls for the election:
 - (a) the roll of non-resident owners of rateable land, being a roll of persons who are entitled to be enrolled as electors as owners of rateable land in the City of Sydney,
 - (b) the roll of occupiers and ratepaying lessees, being a roll of persons who are entitled to be enrolled as electors as ratepaying lessees or occupiers of rateable land in the City of Sydney. An owner, ratepaying lessee or occupier is not required to make an application for enrolment to be included on those rolls.
- 14. Proposed section 18B provides that, as soon as practicable after the closing date for an election for the City of Sydney, the Electoral Commissioner is to review those rolls and notify the general manager of any necessary corrections.

15. Proposed section 18C provides that as soon as practicable after correcting the roll of non-resident owners of rateable land and the roll of occupiers and ratepaying lessees (if required), the general manager is to confirm the rolls for the purpose of the election.
16. Schedule 1 [4] makes a consequential amendment.
17. Schedule 1 [8] inserts proposed sections 16AA–16AC into the CoS Act to give effect to objects (d) and (e) set out in the Overview.
18. Proposed section 16AA provides that if a corporation is the owner, ratepaying lessee or occupier of any rateable land, the corporation may submit a nomination in writing to the general manager of the names of 2 natural persons to be enrolled as electors instead of the corporation. The provision also provides that if the joint owners, ratepaying lessees or occupiers of any rateable land consist of corporations or a combination of persons and corporations (of at least one person and one corporation), the joint owners, ratepaying lessees or occupiers may submit a nomination in writing to the general manager of the names of 2 natural persons to be enrolled as electors instead of the joint owners, ratepaying lessees or occupiers.
19. Proposed section 16AB contains provisions regarding the making and revocation of those nominations. A person may not be nominated under proposed section 16AA unless the person, at the time of the nomination:
 - (a) is a director or company secretary of the corporation (or if the joint owners, ratepaying lessees or occupiers of any rateable land consist of a combination of corporations and natural persons, is a director or company secretary of the corporations or one of those natural persons), and
 - (b) has reached 18 years of age or will attain the age of 18 years on or before the date of the next ordinary election of councillors, and
 - (c) has consented in writing to be nominated, and
 - (d) is entitled to vote at an election of members of the Legislative Assembly or an election of members of the Commonwealth House of Representatives, and
 - (e) is not for any other reason already entitled to be enrolled as an elector for the City of Sydney.
20. Proposed section 16AC provides that if a corporation is the sole owner, ratepaying lessee or occupier of any rateable land in the City of Sydney and the general manager has not at least 28 days before the closing date for an election received a nomination in writing made by the corporation of 2 natural persons who are to be enrolled as an elector instead of the corporation, the first 2 of the following persons are taken to have been nominated by the corporation:
 - (a) the company secretaries (however styled) of the corporation (taken alphabetically),
 - (b) the directors (however styled) of the corporation (taken alphabetically).
21. (Proposed section 16AC (2) deals with the situation where a corporation validly nominates only one person.)

22. Proposed section 16AC (4) provides that if a person is:
 - (a) otherwise entitled to be enrolled, or
 - (b) not entitled to vote at an election of members of the Legislative Assembly or an election of members of the Commonwealth House of Representatives, that person is to be disregarded for the purposes of deeming a nomination under this proposed section.
23. The general manager must advise the corporation in writing of any person who has been enrolled as a nominee of the corporation under this proposed section.
24. Schedule 1 [6] and [7] make consequential amendments.
25. Schedule 1 [9] inserts proposed section 16B into the CoS Act to give effect to objects (f) and (g) set out in the Overview.
26. Proposed section 16B provides that no more than 2 owners, 2 ratepaying lessees and 2 occupiers are entitled to be enrolled as electors in respect of any one parcel of rateable land.
27. The proposed section provides that if there are more than 2 owners, ratepaying lessees or occupiers of any one parcel of rateable land, the general manager is to enrol:
 - (a) of those owners, ratepaying lessees or occupiers in accordance with a written nomination made by the majority of those owners, ratepaying lessees or occupiers, or
 - (b) if no such nomination is made—the first 2 persons from an alphabetical list of the names of the owners, ratepaying lessees or occupiers.
28. The proposed section also contains provisions dealing with the making and revocation of nominations.
29. Schedule 1 [5] also makes a consequential amendment by omitting current section 14 (1A)–(3) of the CoS Act which dealt with multiple ratepaying lessees and occupiers by determining an elector entitlement based on the amount of annual rent and local government rates (in relation to a ratepaying lessees) or annual rent (in relation to occupiers) divided by \$5,000.
30. Schedule 1 [11] inserts proposed section 25 into the CoS Act to give effect to object (h) set out in the Overview. The proposed section provides that regulations may be made under the Local Government Act 1993 to apply one or more of the provisions of Part 3 (Elections) of the CoS Act, and any regulations made under that Part, (with any specified modifications) to elections for such other local government areas as may be specified in those regulations.
31. Schedule 1 [1], [12] and [14] provide a definition of general manager for the purposes of the CoS Act and make consequential amendments.
32. Schedule 1 [10] also inserts proposed section 18E into the CoS Act to provide that the general manager must, at least 90 days before the closing date for an election for the

City of Sydney, send enrolment letters to each person who the general manager believes is entitled to be enrolled (and each corporation that the general manager believes, if it were a natural person, would be entitled

33. to be enrolled) under the CoS Act. The letters are required to contain information about the election and the enrolment of the person (or nominees for the corporation) for the purposes of the election.
34. Schedule 1 [13] inserts provisions into section 58 (Regulations) of the CoS Act to enable regulations to be made for or with respect to elections for the City of Sydney generally and, more specifically, postal voting by electors enrolled on the non-residential rolls at those elections.

ISSUES CONSIDERED BY COMMITTEE

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

Equality of Enfranchisement / One Vote, One Value

35. Proposed section 16AA(1) provides that for corporations, two natural persons are to be enrolled as electors. Similarly, under proposed section 16B(1), no more than two owners, two ratepaying lessees or two occupiers are entitled to be enrolled as electors in respect of any one parcel of rateable land.
36. Proposed section 16AA(1) will replace existing section 16(1) which currently provides that only one natural person is entitled to be enrolled as an elector in the case of an owner of a corporation, ratepaying lessee, or occupier of rateable land.
37. The Committee is concerned that this may give corporations, ratepaying lessees and occupiers of rateable land a disproportionate influence on the election of councillors to the City of Sydney – including the election of mayor – in comparison to residential voters who will only retain one vote each.

The Committee is concerned that in enabling corporations, ratepaying lessees and occupiers of rateable land to nominate two people to be enrolled as electors, then these electors may be granted a disproportionate influence on the election of councillors and mayor when compared to the voting rights of residential voters. The Committee refers this matter to Parliament for its further consideration.

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

Regulation-making Power

38. Proposed section 25 provides that under the *Local Government Act 1993*, a regulation can be made to specify that other local government areas are to be subject to the rules pertaining to elections that are to exist under the *City of Sydney Act 1988*. This would include the voting rights granted to corporations, ratepaying lessees and owners of rateable land.

The Committee notes that the regulation-making power to designate any or all councils in NSW to be subject to the same election requirement as will exist for the City of Sydney, may be an inappropriate delegation of legislative power. Any extension of the election reforms to other councils may be more

appropriately handled by a subsequent Bill to enable proper scrutiny by the Parliament. The Committee makes no further comment.

4. Constitution Amendment (Parliamentary Presiding Officers) Bill 2014

Date introduced	13 August 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Mike Baird MP
Portfolio	Minister for Infrastructure, and Minister for Western Sydney

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Constitution Act 1902* to ensure that both the President of the Legislative Council and the Speaker of the Legislative Assembly (and deputies acting when they are unavailable) may exercise the functions of Parliamentary presiding officers relating to the administration of Parliament and the employment of Parliamentary staff during a State general election period when the Legislative Assembly is dissolved and the Legislative Council is suspended.
2. The Bill also makes a consequential amendment to the *Parliamentary Remuneration Act 1989* to ensure that Parliamentary presiding officers (and their deputies) continue to receive their usual remuneration during that State general election period.

BACKGROUND

1. The Bill provides for consistency for the roles of the presiding officers in continuing their administrative duties during the election period, thereby providing certainty and stability to the administration of the Parliament and the employment of parliamentary staff. The presiding officers administer the executive functions of the Parliament, including during the period when Parliament is dissolved ahead of an election and until the Parliament assembles after an election.
2. In accordance with longstanding practice, the Constitution Act permits the Speaker to remain in office until the assembly of a new Parliament following a State general election. However, there is currently no power for the President to exercise administrative functions once he or she ceases to be a member of the Legislative Council. The Bill amends the *Constitution Act 1902* to expressly provide that the President of the Legislative Council remains in office until the Legislative Council assembles for its first meeting after a State general election.
3. The Bill amends the *Constitution Act 1902* in relation to the Speaker to align the provisions in relation to both presiding officers. Similar amendments are made for their deputies when the presiding officers are unavailable. The Bill also removes redundant provisions in relation to the procedures for electing the presiding officers, which existed before such procedures were determined by the standing orders of the particular House

of Parliament and makes some consequential amendments to the *Parliamentary Remuneration Act 1989*.

OUTLINE OF PROVISIONS

1. Clause 1 sets out the name (also called the short title) of the proposed Act.
2. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.
3. Schedule 1 [1]–[4] amend section 22G relating to the office of the President of the Legislative Council and the Deputy President and Chair of Committees of the Legislative Council.
4. Schedule 1 [1] provides that a President who ceases to be a member of the Legislative Council (because his or her term of office ends at the beginning of the State general election period) does not cease to be President if continued in office as President by the amendment made by Schedule 1 [3].
5. Schedule 1 [3] continues in office the President (and the Deputy President and Chair of Committees) for the period from the suspension of the Legislative Council when the Legislative Assembly is dissolved for a general election until the first meeting of the Legislative Council after the general election.
6. Schedule 1 [4] replaces the existing provision relating to the authority of the Deputy President and Chair of Committees to act for the President when he or she is out of the State with a provision that authorises the Deputy President and Chair of Committees to act whenever the President is unavailable (which is defined to include a vacancy in the office of President or if the President is absent from the State or otherwise unavailable to exercise the powers and functions of the President). Schedule 1 [2] makes a statute law revision amendment to remove provisions relating to the procedure for electing a President that applied before Standing Rules and Orders were made for that purpose.
7. Schedule 1 [5]–[7] amend sections 31, 31A and 31B relating to the office of the Speaker of the Legislative Assembly and the Deputy Speaker of the Legislative Assembly to make similar amendments to those made by Schedule 1 [1]–[4].

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.

5. Protection of the Environment Legislation Amendment Bill 2014

Date introduced	12 August 2014
House introduced	Legislative Assembly
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Minister for the Environment, Minister for Heritage

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:

(a) to amend the Contaminated Land Management Act 1997:

- i to increase the penalties for certain offences against the Act, and
- ii to enable the Environment Protection Authority (the EPA) to require a person to whom a management order is directed to provide financial assurance to secure or guarantee funding for or towards the carrying out of an action required by or under the order, and
- iii to enable certain court orders to be made against a convicted offender in connection with the offence against the Act that the offender committed (including an order for the payment of an additional penalty based on a monetary benefit derived by the offender), and
- iv to enable the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period, and
- v to provide for the liability of offenders for continuing offences and the continuing effect of notices, orders and conditions under the Act and the regulations under the Act, and

(b) to amend the Protection of the Environment Operations Act 1997:

- i to enable clean-up notices to be given to owners of premises as well as occupiers, and
- ii to clarify the obligations of occupiers of premises from which point source emissions or non-point source emissions occur in connection with the prevention or minimisation of such emissions, and

- iii to enable certain court orders to be made in connection with offences requiring the offender to undertake restorative justice activities agreed to by the offender and to enable the EPA to accept undertakings to carry out such activities, and
 - iv to enable the EPA to require persons who transport waste to ensure that approved GPS tracking devices are installed, used and maintained on motor vehicles used to transport their waste, and
 - v to provide that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision, and
 - vi to remove the requirement to provide a person with a notice of intention to suspend or revoke a licence and remove certain other outdated provisions of the Act, and
- (c) to amend the Radiation Control Act 1990:
- i to enable certain court orders to be made against a convicted offender in connection with the offence against the Act that the offender committed (including an order for the payment of an additional penalty based on a monetary benefit derived by the offender), and
 - ii to enable the EPA to accept undertakings to carry out restorative justice activities, and
 - iii to enable the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period, and
 - iv to enable persons to apply for orders from the Supreme Court to remedy or restrain a breach of the Act or the regulations under the Act, and
- (d) to amend the Protection of the Environment Administration Act 1991 to provide for certain fees and charges under legislation administered by the EPA to be paid into the Environment Protection Authority Fund, and
- (e) to make consequential amendments to the Land and Environment Court Act 1979 and Protection of the Environment Operations (General) Regulation 2009.

BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon. Rob Stokes MP, Minister for the Environment, indicated that the Bill 'is the next instalment in this Government's plan to reinforce the Environment Protection Authority as a strong environmental regulator for NSW'.

OUTLINE OF PROVISIONS

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

Schedule 1 Amendments concerning contaminated land management

1.1 Contaminated Land Management Act 1997 No 140

Financial assurances for actions required by management orders

5. Schedule 1.1 [2] amends the Contaminated Land Management Act 1997 to enable the EPA to require a person to whom a management order is directed to provide financial assurance to secure or guarantee funding for or towards the carrying out of an action required by or under the order.
6. Schedule 1.1 [4] inserts provisions based on Part 9.4 (Financial assurances) of the Protection of the Environment Operations Act 1997 concerning the procedure to be followed in connection with requiring such assurances.

Penalty increases

7. Schedule 1.1 [3], [5]–[10] and [16] increase the maximum penalties for certain offences against sections 14, 48, 57, 60, 89 and 103 of the Contaminated Land Management Act 1997.
8. Schedule 1.1 [3] also clarifies the circumstances in which a person will be treated as failing to comply with a management order.
9. Schedule 1.1 [11] enables the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period.

Court orders in connection with offences (including for restorative justice)

10. Schedule 1.1 [12] inserts provisions that:
 - (a) enable the Land and Environment Court to order an offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence, and
 - (b) enable court orders to be made requiring an offender:
 - i to publicise the offence and its consequences, or
 - ii to notify persons of the offence and its consequences, or
 - iii to carry out a project for the restoration or enhancement of the environment, or
 - iv to provide a financial assurance in proceedings to which the EPA is a party.
11. Schedule 1.1 [12] also enables the Land and Environment Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. A restorative justice activity is a social or community activity for the benefit of the community or persons that are adversely affected by the offence. Schedule 1.1 [1] makes a consequential amendment.

Enforcement of undertakings

12. Schedule 1.1 [14] enables the EPA to accept and enforce a written undertaking given by a person for the purposes of the proposed section in connection with a matter in relation to which the EPA has a function under the Act, including undertakings to carry out restorative justice activities. The provision is based on section 253A of the Protection of the Environment Operations Act 1997.
13. Schedule 1.1 [13] makes a consequential amendment.

Continuing offences

14. Schedule 1.1 [15] provides for the liability of offenders for continuing offences. The provision is based on section 242 of the Protection of the Environment Operations Act 1997.

Notices, orders and conditions

15. Schedule 1.1 [17] provides for the continuing effect of notices, orders and conditions under the Act and the regulations under the Act. The provision is based on section 319A of the Protection of the Environment Operations Act 1997.

Savings and transitional provisions

16. Schedule 1.1 [18] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the Contaminated Land Management Act 1997, including the proposed Act.
17. Schedule 1.1 [19] omits a reference to an obsolete set of guidelines.
18. Schedule 1.1 [20] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

1.2 Land and Environment Court Act 1979 No 204

19. Schedule 1.2 [1] and [2] amend the Land and Environment Court Act 1979 to allocate the following kinds of proceedings in exercise of new jurisdiction to be conferred by Schedule 1.1 to Class 4 of the jurisdiction of the Land and Environment Court:
 - (a) proceedings to resolve disputes about claiming on or realising financial assurances under the Contaminated Land Management Act 1997,
 - (b) proceedings for the enforcement of undertakings under the Contaminated Land Management Act 1997.
20. Schedule 1.2 [3] makes a consequential amendment.

Schedule 2 Amendments concerning protection of environment operations*2.1 Protection of the Environment Operations Act 1997 No 156**Removal of outdated procedural provisions*

21. Schedule 2.1 [1] amends the Protection of the Environment Operations Act 1997 to provide that the appropriate regulatory authority is not required (as is currently the case) to give the holder of a licence notice of the authority's intention to suspend or

revoke the licence (whether with or without conditions) before giving a notice of that suspension or revocation.

22. Schedule 2.1 [6] and [7] remove the exception for odours from certain requirements to report pollution incidents.
23. Schedule 2.1 [8] removes certain requirements concerning the affixing of labels on vehicles about the giving of notices.

Clean-up notices to owners

24. Schedule 2.1 [2] enables an appropriate regulatory authority to give the owner of premises (as well as the occupier of premises) a clean-up notice under section 91 of the Protection of the Environment Operations Act 1997.

Pollution mitigation obligations for point source and non-point source emissions

25. Schedule 2.1 [3] and [4] seek to clarify the operation of section 128 (Standards of air impurities not to be exceeded) of the Protection of the Environment Operations Act 1997 following the decision of the Land and Environment Court in *Environment Protection Authority v Ravensworth Operations Pty Ltd* [2013] NSWLEC 92.
26. In that case, the Land and Environment Court held that concentration standards prescribed under section 128 could extend to non-point source emissions (such as emissions of dust from mining) as well as to point source emissions (such as emissions from chimneys, pipes and vents).
27. However, concentrations of non-point source emissions cannot be measured by currently available methodologies.
28. The result of the decision is that section 128 cannot be used to deal with non-point source emissions because it is not currently possible to prescribe concentration standards or emission rates for them.
29. The amendments made by Schedule 2.1 [3] and [4] confirm that:
 - (a) concentration standards and emission rates prescribed under section 128 apply only to point source emissions, and
 - (b) the occupier of premises emitting non-point source emissions must carry on any activity, or operate any plant, in or on the premises by such practicable means as may be necessary to prevent or minimise air pollution from such emissions.

Approved GPS tracking devices for waste transportation vehicles

30. Schedule 2.1 [5] enables the EPA, by notice in writing, to require a person who is engaged in the transportation of waste to ensure that:
 - (a) approved GPS tracking devices are installed, used and maintained, in the manner specified in the notice, on any motor vehicles that are used by the person (or an employee, subcontractor or agent of the person) to transport waste, and
 - (b) such devices are not tampered with.

31. A failure to comply with such a notice will be an offence with a maximum penalty of 200 penalty units (currently, \$22,000) for a corporation and 100 penalty units (currently, \$11,000) for an individual.

32. Schedule 2.1 [12] makes a consequential amendment.

Restorative justice activities

33. Schedule 2.1 [9] enables the Land and Environment Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. Schedule 2.1 [14] makes a consequential amendment.

34. Schedule 2.1 [10] enables the EPA to accept a written undertaking to carry out restorative justice activities.

Appeals against decisions to suspend or revoke licences

35. Schedule 2.1 [11] provides that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision.

Savings and transitional provisions

36. Schedule 2.1 [13] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

2.2 Protection of the Environment Operations (General) Regulation 2009

37. Schedule 2.2 makes amendments to the Protection of the Environment Operations (General) Regulation 2009 concerning penalty notices that are consequential on the amendments made to the Protection of the Environment Operations Act 1997.

Schedule 3 Amendment of Radiation Control Act 1990 No 13

Court orders in connection with offences (including for restorative justice)

38. Schedule 3 [2] amends the Radiation Control Act 1990 to insert provisions that:

(a) enable the Supreme Court to order an offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount that represents the amount of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence, and

(b) enable court orders to be made requiring an offender:

- i to publicise the offence and its consequences, or
- ii to notify persons of the offence and its consequences, or
- iii to carry out a project for the restoration or enhancement of the environment, or
- iv to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other course, or
- v to establish training courses for employees and contractors, or
- vi to provide a financial assurance in proceedings to which the EPA is a party.

39. Schedule 3 [2] also enables the Supreme Court to require an offender to carry out a restorative justice activity that the offender has agreed to carry out. Schedule 3 [1] makes a consequential amendment.

Enforcement provisions

40. Schedule 3 [3] enables the EPA to accept a written undertaking to carry out restorative justice activities.
41. Schedule 3 [4] enables the regulations under the Radiation Control Act 1990 to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period.
42. Schedule 3 [5] enables persons to apply for orders from the Supreme Court to remedy or restrain a breach of the Act or the regulations under the Act. The provision is based on section 253 of the Protection of the Environment Operations Act 1997, which confers a corresponding jurisdiction on the Land and Environment Court.

Savings and transitional provisions

43. Schedule 3 [6] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the Radiation Control Act 1990, including the proposed Act.
44. Schedule 3 [7] inserts savings and transitional provisions consequent on the enactment of the proposed Act.

Schedule 4 Amendment of Protection of the Environment Administration Act 1991 No 60

45. Schedule 4 [1] amends the Protection of the Environment Administration Act 1991 to provide for certain fees and charges under legislation administered by the EPA to be paid into the Environment Protection Authority Fund.
46. Schedule 4 [2] enables the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the Protection of the Environment Administration Act 1991, including the proposed Act.

ISSUES CONSIDERED BY COMMITTEE

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

Oppressive official powers

47. The Committee notes that under schedule 1.1 item 4 of the Bill, the Environment Protection Authority (EPA) may enter premises to carry out action covered by a management order where the EPA is of the opinion that the person to whom the order is directed has not carried out that action appropriately. There is no requirement to obtain a warrant from a judicial officer to obtain entry.

The Committee notes that the Bill allows the EPA to enter premises to carry out the terms of a management order where the EPA is of the opinion that the recipient of the order has failed to do so. There is no requirement for the EPA to obtain a warrant from any third party before doing so. It appears that the

land in question could include residential premises. The proposed provision may therefore promote arbitrary interference with private property rights. The Committee refers the matter to Parliament for further consideration.

Oppressive Official Powers II

48. The Committee notes that under schedule 1.1 item 14 of the Bill, a person may withdraw or vary a written undertaking made under the Bill, but only with the written consent of the EPA. The consent of the EPA is required even if the undertaking itself authorises withdrawal or variation of the undertaking without that consent.

The Committee notes that a person cannot withdraw or vary an undertaking made under the Bill without the consent of the EPA, even if the undertaking itself authorises withdrawal or variation without that consent. The Bill therefore gives the EPA power to enforce an undertaking that a person entered into on the understanding that compliance was voluntary. In the Committee's view, this may be an oppressive official power. The Committee refers the matter to Parliament for further consideration.

Procedural Fairness

49. The Committee notes that schedule 2.1 item 1 of the Bill, removes a requirement for the appropriate regulatory authority to give the holder of a licence notice of its intention to suspend or revoke its licence before doing so.

The Bill removes a requirement for the regulatory authority to give the holder of a licence notice of its intention to suspend or revoke its licence before doing so. It thus removes an opportunity for a licence holder to rectify the matter that is causing concern thereby avoiding the threatened licence cancellation. Nonetheless, the second reading speech indicates licences are only suspended or revoked in the most serious cases e.g. where a company shows continual disregard for its environmental obligations; and that the amendment prevents delays in closing down operations that may otherwise cause continued environmental damage and unacceptable risk to the community for weeks. In the circumstances, the Committee makes no further comment.

Retrospectivity

50. The Committee notes that schedule 2.1 item 9 of the Bill provides that a court may make a restorative justice order where an offender agrees. Further, schedule 2.1 item 13 of the Bill provides that a court can make such a restorative justice order including in respect of proceedings that commenced prior to the amendment allowing the court to make such an order.

The Committee notes that the Bill includes an amendment to allow courts to make restorative justice orders. Further, the court can make such an order in respect of proceedings that commenced prior to this amendment. The Committee is generally concerned when 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. However, in this case, the court cannot make a restorative justice order without the offender's agreement. Owing to this safeguard, the Committee makes no further comment.

Retrospectivity II

51. The Committee notes that schedule 3 item 2 of the Bill allows the Court to make additional orders in respect of an offence, for example, requiring an offender to publicise the offence and its consequences. Further, schedule 3 item 7 of the Bill allows the court to make such additional orders in respect of proceedings initiated prior to the amendment allowing the court to make such orders.

The Committee notes that the Bill includes an amendment to allow a court to make certain additional orders in respect of an offence. Further, the court can make such orders in respect of proceedings that commenced prior to this amendment. The Committee is generally concerned when provisions are drafted to have retrospective effect. Retrospectivity is contrary to the rule of law which allows people to order their affairs according to what the law is. In this case, offenders may be handed penalties that did not exist at the time they committed the relevant offence. The Committee refers this matter to Parliament for further consideration.

Privacy

52. Schedule 2.1 item 5 of the Bill allows the EPA, by notice in writing, to require a person who is engaged in transport of waste to ensure that GPS tracking devices are installed on any motor vehicles that are used by the person to transport waste.

The Committee notes the Bill includes an amendment to allow the EPA to require a person who is engaged in transport of waste to ensure that GPS tracking devices are installed on any vehicles used by the person to transport waste. While the second reading speech indicates this is to prevent illegal dumping, there is no requirement in the Bill for the person in question to have been convicted of illegal dumping offences or to be suspected of them. The amendment may therefore unduly impact on the person's right to privacy. The Committee refers this matter to Parliament for further consideration.

Undue Punishment

53. The Committee notes that schedule 1.1 items 3, 5-10 and 16 significantly increase penalties for certain offences. For example, under schedule 1.1 item 9 of the Bill, the maximum penalty for an individual who fails to report contamination rises from a \$77,000 fine to a \$250,000 fine.

The Committee notes that the significant penalty increases contained in the Bill for certain offences may give rise to undue punishment. Indeed, the Minister indicated in his second reading speech that NSW has some of the highest maximum court-imposed penalties in Australia for environmental offences. Nonetheless, the penalty rises relate to maximum penalties and do not remove the discretion of the courts to impose a penalty that fits the crime on a case-by-case basis. In the circumstances, the Committee makes no further comment.

Undue Punishment II

54. The Committee notes that various proposed sections of the Bill, including schedule 1 items 4 and 12, schedule 2.1 item 9, and schedule 3 item 2, allow the court to impose monetary penalties on offenders additional to any other penalty imposed on them for an offence. For example, schedule 1 item 4 of the Bill provides that the court can order

an offender to provide a financial assurance to cover the cost of restoring contaminated land. It further provides that such an assurance has no effect on any other penalty handed down to the offender for the same offence.

The Committee notes the Bill would allow the court to impose monetary penalties on offenders additional to any other penalty imposed for the offence. This may give rise to undue punishment, and penalties disproportionate to the offence committed. However, the monetary penalties do not operate as mere penalties, they relate to restoring land the offender has contaminated, and paying back money the offender has obtained as a result of the offence. In the circumstances the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s8A(1)(b)(ii) of the LRA

Lack of Clarity

55. Schedule 1.1, item 18 of the Bill allows the Governor to make regulations of a savings or transitional nature consequent on the enactment of any Act that amends the *Contaminated Land Management Act 1997*.

The Committee notes that listing “any other Act that amends this Act” rather than listing each of those amending Acts limits the clarity of the schedule outlined above. The Committee prefers the name of each Act to be listed to avoid this lack of clarity. However, as the list relates to the regulation making power for provisions of a savings or transitional nature, and as the proposed insertion ensures that the schedule is comprehensive, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s8A(1) (b) (iii) of the LRA

Non-reviewable Interim Decision

56. Schedule 2.1 item 11 of the Bill provides that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision.

The Committee notes that the Bill contains an amendment to provide that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision. Thus, an operator who has had his or her licence cancelled must wait for the decision to be reviewed and, in the interim, close his/her operations. The second reading speech indicates licences are only suspended or revoked in the most serious cases; and the amendment may therefore prevent delays in closing operations that may otherwise cause continued environmental damage and unacceptable risk to the community. In addition, a decision to cancel a licence is still reviewable. In the circumstances, the Committee makes no further comment.

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

Commencement by Proclamation

57. 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.

Penalties in regulations

58. The Committee notes that schedule 1 item 11, schedule 2.2 item 1 and schedule 3 item 4 of the Bill provide for penalties to be included in the regulations.

The Committee notes that the Bill provides for certain penalties to be included in the regulations. The Committee generally prefers penalties to be included in primary, not subordinate legislation, to allow appropriate Parliamentary scrutiny. Nonetheless, all regulations must be tabled in Parliament and are subject to disallowance under sections 40 and 41 of the *Interpretation Act 1987*. Owing to this safeguard, the Committee makes no further comment.

6. Technical and Further Education Commission Amendment (Fees) Bill 2014

Date introduced	14 August 2014
House introduced	Legislative Assembly
Minister responsible	Mr John Robertson, MP
Portfolio	N/A

PURPOSE AND DESCRIPTION

1. The object of this Bill is to freeze at their 2014 level the maximum fees chargeable by the Technical and Further Education Commission (the TAFE Commission) for its courses (subject to indexation for inflation) and to preserve existing fee waivers, exemptions and concessions.

BACKGROUND

2. In his Second Reading Speech to Parliament, Mr John Robertson, Leader of the Opposition, stated that this Bill “is designed to protect our precious TAFE system and ensure that the tens of thousands of people who rely on TAFE continue to have a bright future”. Mr Robertson further stated that “The Baird Government is unleashing disastrous cuts to TAFE. In just three years it has cut \$800 million from the system” and that “The Bill that I introduce today is a determined attempt to stop that destructive agenda in its tracks”.

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.

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

5. Schedule 1 [1] makes it clear that the powers of the TAFE Commission to charge fees are subject to proposed Part 7A (Maximum fees payable for courses).
6. Schedule 1 [2] limits the ability of the TAFE Commission to increase its fees after 2014, as follows:
 - (a) maximum fees for courses are frozen at the 2014 level, subject to indexation for inflation,

- (b) maximum fees payable by apprentices, trainees and government benefits recipients are frozen at the 2014 level, subject to indexation for inflation,
 - (c) the complete exemption for Aboriginal and Torres Strait Islander students and students with a disability that applied in 2014 is preserved,
 - (d) the complete exemption for special access courses that applied in 2014 is preserved,
 - (e) provision is made for the indexation of fees, where applicable, having regard to changes in the Sydney Education Group Index recorded by the Australian Statistician.
7. Schedule 1 [3] provides for the making of savings and transitional regulations consequent on the enactment of the proposed Act.

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 does not report on any Regulations in this Digest.

Appendix One – Index of Ministerial Correspondence on Bills

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

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

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