



Legislation Review Committee

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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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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*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. ELECTORAL FUNDING AMENDMENT (CASH DONATIONS) BILL 2019

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

New Offence

The Bill introduces a new offence in the *Electoral Funding Act 2018* for a person to make or accept a political donation of more than \$100 in cash. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, the Committee notes the intentions of the Bill to improve traceability and transparency of donations, promote compliance and improve the integrity of the electoral system. These intentions are consistent with the broader objects of the *Electoral Funding Act 2018*. The Committee also notes that it will only be an offence to contravene the new provision if the person was, at the time of the act, aware of the facts that result in the act being unlawful. In the circumstances, the Committee makes no further comments.

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

Commencement by proclamation

The Bill provides for the Act to commence on a day to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, to provide certainty for affected persons. This is particularly the case where the Bill in question creates a new offence with significant penalties.

While a flexible start date may assist with implementing administrative arrangements associated with the new provision, affected parties may also benefit from having certainty about when the relevant conduct will become unlawful. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.

2. ELECTORAL FUNDING AMENDMENT (LOCAL GOVERNMENT EXPENDITURE CAPS) BILL 2019

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

Implied freedom of political communication – electoral expenditure caps

The Bill alters the current expenditure caps for electoral participants in local government elections. The Committee acknowledges the burden that electoral expenditure caps place on the implied freedom of political communication. However, they can also be viewed as being a reasonable measure to prevent some political participants having a significant advantage over others.

The Committee also notes that the changes are consistent with the recommendations of the Joint Standing Committee on Electoral Matters (JSCEM) following its 2018 inquiry into the impact of expenditure caps for local government election campaigns. Further, some of the changes seek to address inequalities, namely, the large differences in the amount per elector

which can currently be spent for different local government areas. The Committee refers the Bill's expenditure caps to Parliament to assess whether the burden they create is reasonable and proportionate in the circumstances.

Implied freedom of political communication – expenditure caps for third party campaigners

As above, the Committee acknowledges the burden that electoral expenditure caps place on the implied freedom of political communication. In this regard, it notes that in making changes to expenditure caps for third party campaigners, the Bill continues to differentiate between the caps that apply to third party campaigners and higher ones that apply to candidates. Further, the Committee notes a recent case in which the High Court decided that a \$500,000 cap that applied to third party campaigners in a state election impermissibly burdened the implied freedom of political communication.

However, the Committee acknowledges that the Bill generally increases the caps that are applicable to third party campaigners and is consistent with recommendations made by the JSCEM. Further, in 2014 the Political Donations Panel of Experts commented that third party campaigners should be able to spend a reasonable amount to voice their concerns but not to the same extent as candidates and parties. The Committee refers the Bill's third party campaigner caps to Parliament to assess whether the burden they create is reasonable and proportionate in the circumstances.

3. FOOD AMENDMENT (SEAFOOD COUNTRY OF ORIGIN LABELLING) BILL 2019*

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

New Offence

The Bill introduces a new offence for selling seafood to the public for immediate consumption without including a statement about the country from which the seafood was sourced. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, the Committee acknowledges the Bill's intention to introduce a regime that allows the public to make informed choices about where their seafood is sourced. Further the maximum penalty attached to the offence is minor in nature (a \$110 fine). In the circumstances, the Committee makes no further comment.

4. GOVERNMENT INFORMATION (PUBLIC ACCESS) AMENDMENT (ELECTRONIC APPLICATIONS) BILL 2019*

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

5. MUSIC FESTIVAL BILL 2019

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

Strict Liability offences

The Bill creates strict liability offences under clauses 7, 8, 10 and 11. These offences relate to contravening the requirements for music festival safety management plans, briefing of health service providers, and keeping an incident register. Fines of up to \$11,000 apply to most of the offences, although failing to have or comply with an approved safety management plan may attract a prison sentence of up to 12 months.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee acknowledges that the offence provisions are in the interests of public safety and the burden of compliance on festival organisers is reasonably proportionate to protecting the wellbeing of festival goers. In the circumstances, the Committee makes no further comment.

6. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2019

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

Retrospectivity

The amendment to the *Workers' Compensation (Dust Diseases) Act 1942* is to be taken as having commenced on 5 August 2015 and so has retrospective application. Retrospectivity may undermine the principle that laws should operate prospectively, and may be seen as contrary to the rule of law that allows people knowledge of the laws to which they are subject at any given time.

However, the Committee acknowledges that this amendment does not create offences with retrospective application nor retrospectively remove rights. The effect of the amendment is to retrospectively increase the amount of compensation payable for funeral expenses in relation to the death of a worker resulting from dust disease. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Broad delegation of administrative powers

The proposed amendments would allow the Secretary of the Department of Customer Service to delegate any of his or her functions under named Acts to a relatively large class of persons, namely 'any person employed in the Public Service'. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given these functions are significant e.g. functions relating to investigation and enforcement powers, the Committee considers the Bill should provide more clarity about the persons to whom they can be delegated. The Committee refers to Parliament the question of whether the powers of delegation are too broad.

7. WATER SUPPLY (CRITICAL NEEDS) BILL 2019

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

Right to an effective legal remedy

The Bill exempts the State and its institutions from liability for an act or omission that is a 'critical water supply-related matter'. For example, the State would not be liable for development that has been carried out under an authorisation given under the proposed Act. Further, the Bill provides that any acts or omissions carried out under the proposed Act do not constitute a nuisance.

The Bill thereby impacts on the rights of persons to pursue an effective legal remedy. However, the Committee notes that certain safeguards apply. For example, for the exemption from

liability to apply, the acts or omissions must have been carried out in good faith and the exemption does not apply if the acts or omissions cause the personal injury or death of a person.

Further, the proposed Act is intended to facilitate the swift development of infrastructure to bring an ongoing supply of water to areas in critical need, and that have been declared as such. The exemptions would allow the State to circumvent matters that may affect these developments and thus the timely supply of water to these areas. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Broad delegation of administrative powers

The Bill would allow the Minister or Planning Secretary to delegate the exercise of any of his or her functions under the proposed Act to a large class of persons, namely 'any person employed in the Department of Planning, Industry and Environment'. Delegation is not restricted to employees with a certain level of seniority or expertise. Given the Minister and Secretary's functions under the proposed Act are significant e.g. authorising developments to counter the effects of drought, the Committee considers the Bill should provide more clarity about the persons to whom they can be delegated. The Committee refers to Parliament the question of whether the powers of delegation are too broad.

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

Henry VIII clauses

The Bill contains several Henry VIII clauses that would allow subordinate legislation to amend the Act. It thereby delegates Parliament's legislation-making power to the Executive. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight over the changes.

In the current case, the Committee acknowledges that amendment by regulation would allow swifter arrangements to be made to develop the necessary infrastructure to assist towns and localities experiencing severe drought. Further, the regulations could only be made with the concurrence of the Minister administering the *Biodiversity Conservation Act 2016*. Nonetheless, the clauses in question concern significant matters that would benefit from an appropriate level of parliamentary oversight e.g. specifying developments that will be exempt from the ordinary requirements of 'development control legislation' and modifying water sharing plans. The Committee therefore refers this matter to Parliament for consideration.

Delegation to the Minister

Under Part 3 of the Bill, the Minister can authorise a development for the purposes of a critical town or locality water supply. Certain listed developments will be exempt from 'development control legislation' if the carrying out of the development is the subject of such an authorisation. Further, an environmental planning instrument under the *Environmental Planning and Assessment Act 1979* cannot prohibit, require development consent nor restrict the carrying out of the authorised development. The Minister is thereby empowered to override the operation of various legislation. This may be an inappropriate delegation of legislative power.

However, the Committee acknowledges that the purpose of these provisions is to secure critical town or locality water supply in times of severe water shortages. They allow infrastructure to be

assessed and approved more swiftly so that they can be built in time to address problems caused by drought. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Electoral Funding Amendment (Cash Donations) Bill 2019

Date introduced	16 October 2019
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Electoral Funding Act 2018* to make it unlawful for a person to make or accept a political donation in cash that exceeds the value of \$100.

BACKGROUND

2. The Hon. Don Harwin MLC, in his Second Reading Speech, described the intention of the Bill:

Improving the traceability and transparency of donations over \$100 will make it harder to mask the source of a significant political donation. This will promote compliance with the legislative framework for political donations while also improving the integrity of the electoral system more broadly.

ISSUES CONSIDERED BY THE COMMITTEE

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

New Offence

3. Clause 3 of the Bill proposes to amend the *Electoral Funding Act 2018* to make it unlawful for a person to make or accept a political donation of more than \$100 in cash.
4. It will be an offence to contravene the proposed provision if the person was, at the time of the act, aware of the facts that result in the act being unlawful. The maximum penalty is \$44,000 and/or two years imprisonment (see section 145 of the *Electoral Funding Act 2018*).
5. The Committee notes that the broader objects of the *Electoral Funding Act 2018* are:
 - (a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,
 - (b) to facilitate public awareness of political donations,
 - (c) to help prevent corruption and undue influence in the government of the State or in local government,

- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
- (e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme (see section 3 of the Act).

The Bill introduces a new offence in the *Electoral Funding Act 2018* for a person to make or accept a political donation of more than \$100 in cash. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, the Committee notes the intentions of the Bill to improve traceability and transparency of donations, promote compliance and improve the integrity of the electoral system. These intentions are consistent with the broader objects of the *Electoral Funding Act 2018*. The Committee also notes that it will only be an offence to contravene the new provision if the person was, at the time of the act, aware of the facts that result in the act being unlawful. In the circumstances, the Committee makes no further comments.

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

Commencement by proclamation

6. The Act would commence on a day to be appointed by proclamation (see clause 2 of the Bill).

The Bill provides for the Act to commence on a day to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, to provide certainty for affected persons. This is particularly the case where the Bill in question creates a new offence with significant penalties.

While a flexible start date may assist with implementing administrative arrangements associated with the new provision, affected parties may also benefit from having certainty about when the relevant conduct will become unlawful. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.

2. Electoral Funding Amendment (Local Government Expenditure Caps) Bill 2019

Date introduced	16 October 2019
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Electoral Funding Act 2018* to make further provision regarding the capping of electoral expenditure during local government election campaigns.
2. The Bill has been prepared in response to the report entitled *Inquiry into the impact of expenditure caps for local government election campaigns* prepared by the Joint Standing Committee on Electoral Matters (JSC EM), dated October 2018.

BACKGROUND

3. In his Second Reading Speech to Parliament regarding the Bill, the Hon. Don Harwin MLC, Special Minister of State, noted that candidates for a local government election can be expected to incur expenditure to run an election campaign, and that the *Electoral Funding Act 2018* had introduced caps for such expenditure.
4. However, the Minister noted that during the parliamentary debate on the *Electoral Funding Bill 2018*, questions were raised about whether caps should further distinguish between local government areas and wards with different population sizes. Consequently, in August 2018, the Premier made a referral to the JSC EM to inquire into and report on the impact of the current expenditure caps for local government areas and wards with different populations.
5. The JSC EM reported in October 2018 making nine recommendations to amend the current regime. The Minister told Parliament that the Government had accepted these recommendations, and that they are implemented by the Bill.

ISSUES CONSIDERED BY THE COMMITTEE

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

Implied freedom of political communication – electoral expenditure caps

6. Schedule 1[2] to the Bill substitutes section 31 (Applicable caps on electoral expenditure for local government election campaigns) of the *Electoral Funding Act 2018* to alter the expenditure caps for electoral participants in local government elections.
7. For example, proposed section 31(3) relates to the caps for candidates or groups of candidates for election as councillor. Currently, section 31 of the *Electoral Funding Act*

2018 provides a two-tiered system of caps for candidates or groups depending on whether there were 200,000 or less enrolled electors at the previous general election for the local government area or ward, or more than 200,000. The Minister told Parliament:

The main concern raised during the parliamentary committee's inquiry was that the current scheme fails to adequately distinguish between local government areas or wards of different population sizes, and results in large differences in the amount per elector which may be spent for different areas.

8. As a result, the JSCEM recommended replacing the two-tiered system with eight different bands. Proposed section 31(3) implements this recommendation, providing for eight different caps ranging from \$6000 to \$72,000, depending on the number of enrolled electors for the local government area. The Minister stated: "The changes are intended to reduce the variation in amounts a candidate is allowed to spend on a per capita basis as between local government areas of different populations".
9. On previous occasions the Legislation Review Committee has noted the burden electoral expenditure caps place on the implied freedom of political communication. Expenditure caps can be viewed as restricting people's ability to have a voice in election campaigns and participate in political debate. However, they can also be viewed as being a reasonable measure to prevent some political participants having a significant advantage over others.

The Bill alters the current expenditure caps for electoral participants in local government elections. The Committee acknowledges the burden that electoral expenditure caps place on the implied freedom of political communication. However, they can also be viewed as being a reasonable measure to prevent some political participants having a significant advantage over others.

The Committee also notes that the changes are consistent with the recommendations of the Joint Standing Committee on Electoral Matters (JSCEM) following its 2018 inquiry into the impact of expenditure caps for local government election campaigns. Further, some of the changes seek to address inequalities, namely, the large differences in the amount per elector which can currently be spent for different local government areas. The Committee refers the Bill's expenditure caps to Parliament to assess whether the burden they create is reasonable and proportionate in the circumstances.

Implied freedom of political communication – expenditure caps for third party campaigners

10. Proposed section 31(5) of the Bill makes changes to expenditure caps for third party campaigners. Third party campaigners are defined by section 4 of the *Electoral Funding Act 2018* and the Minister explained "Third party campaigners are organisations or individuals who are not contesting an election but are financing campaigns on specific issues to influence policy and elected outcomes".
11. Currently, section 31(10) of the *Electoral Funding Act 2018* provides that the cap for third party campaigners in local government elections is \$2,500 multiplied by the number of local government areas for which the third party campaigner incurs expenditure. Section 31(12) provides that the cap is also subject to an additional cap, within the overall cap, in relation to individual local government areas or wards of \$2,500.

12. Proposed section 31(5) of the Bill would change this to provide that for a local government election, the applicable cap for a third party campaigner would be one-third of the cap for a candidate for councillor for the local government area or ward election concerned.
13. The Minister told Parliament that some stakeholders had raised concerns, during the JSCEM inquiry, that the current caps for third party campaigners were too low:

In its report the committee acknowledged some stakeholders' concerns that the current cap may not adequately allow for the type of campaigning done by third-party campaigners. It considered the cap to be unreasonably low, particularly in larger areas. As recommended by the committee, the bill replaces the current caps for third-party campaigners and provides that for a local government election, the cap for a third-party campaigner is one-third of the cap for a candidate for council for the local government area or ward election concerned. Generally, the proposed caps are higher than the current regime.
14. As above, electoral expenditure caps impact on the implied freedom of political communication and the Committee notes that the Bill continues to differentiate between the caps that apply to third party campaigners and those that apply to candidates.
15. The Committee notes further that in the context of state elections, the Expert Panel – Political Donations, in its 2014 report, commented that third party campaigners should be able to spend a reasonable amount to voice their concerns but not to the same extent as candidates and parties "drown[ing] out the voice of the direct election contestants".¹ The Committee also acknowledges that on 29 January 2019, the High Court decided that a \$500,000 cap that applied to third party campaigners in the lead-up to state elections, under section 29(10) of the *Electoral Funding Act 2018* impermissibly burdened the implied freedom of political communication.²

As above, the Committee acknowledges the burden that electoral expenditure caps place on the implied freedom of political communication. In this regard, it notes that in making changes to expenditure caps for third party campaigners, the Bill continues to differentiate between the caps that apply to third party campaigners and higher ones that apply to candidates. Further, the Committee notes a recent case in which the High Court decided that a \$500,000 cap that applied to third party campaigners in a state election impermissibly burdened the implied freedom of political communication.

However, the Committee acknowledges that the Bill generally increases the caps that are applicable to third party campaigners and is consistent with recommendations made by the JSCEM. Further, in 2014 the Political Donations Panel of Experts commented that third party campaigners should be able to spend a reasonable amount to voice their concerns but not to the same extent as candidates and parties. The Committee refers the Bill's third party campaigner caps to Parliament to assess whether the burden they create is reasonable and proportionate in the circumstances.

¹ Panel of Experts, *Political Donations Final Report – Volume 1*, December 2014, pp8 and 29 at https://www.dpc.nsw.gov.au/assets/media-news/95/attachments/611c3861d7/Volume_1_-_Final_Report.pdf.

² *Unions NSW v New South Wales* [2019] HCA 1.

3. Food Amendment (Seafood Country of Origin Labelling) Bill 2019*

Date introduced	17 October 2019
House introduced	Legislative Assembly
Member responsible	Mr David Mehan MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to require persons who sell seafood to the public for immediate consumption (including at a restaurant or take-away food shop) to display a statement about the country of origin of that seafood.

BACKGROUND

2. In his Second Reading Speech regarding the Bill, Mr David Mehan MP stated that most of the barramundi consumed in NSW and Australia is imported. Mr Mehan noted further: "Most of our seafood imports come from countries where labour costs and standards are lower than those that apply here and from countries with significant incidences of forced labour and child labour."
3. Mr Mehan stated that while country of origin labelling is mandatory in Australia in retail shops, it is not mandatory in restaurants, clubs and takeaway food shops. Mr Mehan continued:

The bill will plug this very big hole in the information supplied to consumers. The Food Amendment (Seafood Country of Origin Labelling) Bill 2019, if enacted by this Parliament, will ensure that when we order barramundi from a restaurant or at our local fish and chip shop we will do so knowing whether it is imported or sourced from Australian waters. In so doing, consumers will know whether they are supporting the professional fishing men and women of this State and this country.

4. Mr Mehan also quoted the Seafood Industry Australia CEO, Jane Lovell:

...if consumers are concerned by the research and want to be 100 per cent sure their seafood has been caught in a sustainable way, free from forced labour then they should seek out Australian seafood.
5. Mr Mehan noted further that the Bill would also "satisfy the recommendations of the Legislative Council General Purpose Standing Committee No. 5 inquiry". That Committee's Inquiry into Commercial Fishing in NSW, which reported in 2017, recommended that the NSW Government:
 - Complete its consultation on a country of origin labelling scheme for seafood sold for immediate consumption and commence implementation of a labelling scheme with any necessary funding by December 2017; and

- Consider the creation of a NSW seafood label as part of the planned community awareness program.³

ISSUES CONSIDERED BY THE COMMITTEE

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

New Offence

6. Proposed section 20A of the Bill provides that a person must not sell seafood to the public for immediate consumption (including, but not limited to, selling seafood at a restaurant or take-away food shop) unless the seafood is accompanied by whichever of the following statements applies to the seafood—
 - (a) in the case of seafood wholly sourced from Australia—“This seafood is sourced from Australia” (or similar words identifying Australia, or a specified State or locality in Australia, as the source of the seafood),
 - (b) in the case of seafood that is not sourced from Australia—“This seafood is imported” (or similar words identifying the country from which the seafood is sourced),
 - (c) in the case of a product containing both seafood sourced from Australia and from other countries—“This seafood may include seafood sourced from Australia and imported seafood” (or similar words identifying the country from which the seafood is sourced).
7. The maximum penalty for doing so would be a \$110 fine.

The Bill introduces a new offence for selling seafood to the public for immediate consumption without including a statement about the country from which the seafood was sourced. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, the Committee acknowledges the Bill's intention to introduce a regime that allows the public to make informed choices about where their seafood is sourced. Further the maximum penalty attached to the offence is minor in nature (a \$110 fine). In the circumstances, the Committee makes no further comment.

³ Legislative Council General Purpose Standing Committee No.5, *Commercial Fishing in NSW*, 24 February 2017, recommendation 18 at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2425/Final%20Report%20-%20Commercial%20fishing%20in%20NSW.pdf>.

4. Government Information (Public Access) Amendment (Electronic Applications) Bill 2019*

Date introduced	17 October 2019
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Government Information (Public Access) Act 2009* to:
 - (a) allow for access applications to be made electronically, and
 - (b) allow for the electronic payment of fees and charges if an access application is made electronically.

BACKGROUND

2. Mr Paul Lynch MP, in his Second Reading Speech, explained the rationale for the Bill:

Since the introduction of the principal Act, the use of electronic communication has steadily and markedly increased. For many citizens it is now their preferred way of communication – including communicating with government.

...

Not accepting applications and payments electronically creates just one more barrier to prevent residents exercising their rights to obtain government information. It is also quicker and more efficient.

ISSUES CONSIDERED BY THE COMMITTEE

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

5. Music Festival Bill 2019

Date introduced	16 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
 - (a) to provide that the Independent Liquor and Gaming Authority (ILGA) may direct music festival organisers for high-risk festivals to prepare a safety management plan for the proposed festivals for approval by ILGA,
 - (b) to make it an offence for music festival organisers for high-risk festivals to hold the festival unless there is an approved safety management plan for the festival,
 - (c) to impose other obligations on music festival organisers for high-risk festivals, including to provide briefings for health service providers, to keep records relating to incidents that occur at festivals or in their vicinity and to make the approved safety management plan available to police officers and other persons if requested to do so,
 - (d) to provide for the enforcement of the proposed Act,
 - (e) to provide for other related matters.

BACKGROUND

2. The proposed scheme is limited to 'high-risk' music festivals, defined by clause 3 of the Bill as those that 'ILGA decides would be more appropriately delivered with an approved safety management plan'. In making this decision, the factors to be taken into account by ILGA include whether a death has occurred at the music festival within the last three years and any submissions made to ILGA by the music festival organiser: clause 5.
3. In the Second Reading Speech, the Hon. Victor Dominello MP, Minister for Customer Service, noted that more than 90 music festivals are held in NSW every year and ILGA has identified 11 festivals as high-risk for the 'coming season' (summer).
4. The Minister explained the intentions behind the Bill:

The scheme ensures that the Government is able to allocate public resources effectively and without having to divert emergency services away from their normal duties because of under planning by individual operators. It holds festival operators accountable for running safer events. It makes sure that there are adequate medical personnel on site so that we can avoid the tragedies experienced at some festivals last summer.

The bill gives festival patrons and their families the comfort that there are adequate measures in place to deal with possible risks associated with these events and that we as a Government have done all that is necessary to ensure people get home safely.

5. The Minister also referred in the Second Reading Speech to the Legislative Council disallowing previous regulations which addressed high-risk music festivals. These were the *Liquor Amendment (Music Festivals) Regulation 2019* and the *Gaming and Liquor Administration Amendment (Music Festivals) Regulation 2019*. The Legislative Council Regulation Committee also conducted an inquiry into those regulations.⁴

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict Liability offences

6. If ILGA has issued a direction to the operator of a high-risk music festival, the operator must prepare a safety management plan that addresses the matters under clause 6. The requirements listed include information about proposed health services and harm reduction initiatives to be provided for the festival, and how these are consistent with the NSW Health music festival guidelines.⁵
7. Strict liability offences are created for failing to have or comply with an approved safety management plan (clause 7: maximum penalty of \$11,000 and/or 12 months imprisonment) and failing to keep a copy of the safety management plan at the venue (clause 8: maximum penalty of \$11,000).
8. Other strict liability offences apply to music festival organisers who contravene the requirements for holding a briefing for health service providers if requested (clause 10) and keeping an incident register (clause 11). These offences attract maximum penalties of \$11,000.
9. A strict liability offence does not require proof of criminal intent and therefore departs from the common law principle that the mental element of an offence is relevant to the imposition of liability.

The Bill creates strict liability offences under clauses 7, 8, 10 and 11. These offences relate to contravening the requirements for music festival safety management plans, briefing of health service providers, and keeping an incident register. Fines of up to \$11,000 apply to most of the offences, although failing to have or comply with an approved safety management plan may attract a prison sentence of up to 12 months.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee acknowledges that the offence provisions are in the interests of public safety and the burden of compliance on festival organisers is reasonably proportionate to protecting the wellbeing of festival goers. In the circumstances, the Committee makes no further comment.

⁴ The Regulation Committee released a [report](#) in August 2019.

⁵ NSW Health, [Guidelines for Music Festival Event Organisers: Music Festival Harm Reduction](#), September 2019.

6. Statute Law (Miscellaneous Provisions) Bill (No 2) 2019

Date introduced	15 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

1. The objects of the Bill are to:
 - (a) make minor amendments to various Acts and instruments;
 - (b) amend certain other Acts and instruments for the purpose of effecting statute law revision; and
 - (c) make other provisions of a consequential or ancillary nature.

BACKGROUND

2. A statute law revision program has been in place for more than 30 years in NSW. The Bill is designed to implement policy changes of a minor and uncontroversial nature, as well as make small technical changes to legislation. As noted in the Second Reading speech for the Bill:

Statute law bills have featured in most sessions of Parliament since 1984. They are an effective method for making minor policy changes and maintaining the quality of the New South Wales statute book.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity

3. Schedules 1.26 and 1.27 of the Bill propose to amend the *Workers Compensation Act 1987* and the *Workers' Compensation (Dust Diseases) Act 1942* so that the amount of funeral expenses compensation payable under the Acts increases from \$9,000 to \$15,000. According to the Second Reading speech, this is to ensure that the amount of compensation is in keeping with funeral expenses compensation payable for workers generally, a change recommended by the Legislative Council Standing Committee on Law and Justice's Review of the Dust Diseases Scheme in 2018.
4. The amendments are to apply retrospectively to deaths occurring on or after 5 August 2015.

The amendment to the *Workers' Compensation (Dust Diseases) Act 1942* is to be taken as having commenced on 5 August 2015 and so has retrospective

application. Retrospectivity may undermine the principle that laws should operate prospectively, and may be seen as contrary to the rule of law that allows people knowledge of the laws to which they are subject at any given time.

However, the Committee acknowledges that this amendment does not create offences with retrospective application nor retrospectively remove rights. The effect of the amendment is to retrospectively increase the amount of compensation payable for funeral expenses in relation to the death of a worker resulting from dust disease. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Broad delegation of administrative powers

5. Schedule 1.1 of the Bill proposes to amend section 34 of the *Betting and Racing Act 1998* to allow the Secretary of the Department of Customer Service to delegate any of his or her functions to any person employed in the Public Service. This includes delegation of the functions relating to bookmakers' returns, the appointment of inspectors, and related investigation and enforcement powers.
6. Similarly, Schedule 1.16[1] of the Bill proposes to amend the *Public Lotteries Act 1996* to allow the Secretary of the Department of Customer Service to delegate any function to any person employed in the Public Service. This would allow the Secretary to delegate the functions of appointing inspectors for the purposes of the Act and related investigation and enforcement powers.
7. Schedule 1.23[1] proposes to amend section 115 of the *Totalizator Act 1997* to enable the Secretary of the Department of Customer Service to delegate any of his or her functions to any person employed in the Public Service. This is would allow the Secretary to delegate the function of appointing inspectors for the purposes of the Act and related investigation and enforcement powers.
8. Whilst the Second Reading speech stated that these amendments would allow the Secretary of the Department of Customer Service to delegate certain functions to 'appropriately qualified public service employees', the wording of the proposed amendments is wider and includes 'any person employed in the Public Service'. Accordingly, it allows for the broad delegation of administrative powers.

The proposed amendments would allow the Secretary of the Department of Customer Service to delegate any of his or her functions under named Acts to a relatively large class of persons, namely 'any person employed in the Public Service'. There are no restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. Given these functions are significant e.g. functions relating to investigation and enforcement powers, the Committee considers the Bill should provide more clarity about the persons to whom they can be delegated. The Committee refers to Parliament the question of whether the powers of delegation are too broad.

7. Water Supply (Critical Needs) Bill 2019

Date introduced	16 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of this Bill is to facilitate the delivery of water supplies to certain towns and localities to meet critical human water needs and to declare certain development relating to dams to be critical State significant infrastructure.

BACKGROUND

2. In her Second Reading Speech to Parliament regarding the Bill, the Hon. Melinda Pavey MP, Minister for Water, Property and Housing stated that NSW is currently experiencing unprecedented drought conditions. The Minister told Parliament that regional centres such as Tamworth, Dubbo, Orange and Bathurst have less than 12 months of town water supply remaining while other regional towns such as Cobar, Tenterfield, Nyngan and Bourke have less than six months of town water supply.
3. The Minister stated that:

In these cases, the time required for the assessment and approval of additional infrastructure that would secure the water supply of these towns and surrounding localities, plus the time to then construct that infrastructure is longer than the remaining supplies...Legislative action is required to accelerate the assessment and approval times for these emergency projects so that water can be delivered to these areas before town water supplies are exhausted.
4. In this vein, the Minister stated that the Bill would "allow urgently required infrastructure to be assessed and approved through streamlined processes so that it can be built in time to save these towns". The Minister explained that the Bill would "declare certain regional towns and localities that are in critical need of water and specify the development required to bring an ongoing supply of water to those areas".
5. In particular, Schedule 2 of the Bill lists three emergency water development projects and the various towns and localities that they will service. For example, the Burrendong Dam access point relocation project will serve the locality that includes Dubbo, Wellington, Warren, Nyngan and Cobar.
6. Clause 7 of the Bill also provides that any development listed in Schedule 2 will be exempt from 'development control legislation' if the carrying out of the development is the subject of an authorisation of the Minister. Clause 6 defines 'development control legislation' to be the provisions of or legislation made under the *Environmental Planning and Assessment Act 1979* (the 'EPA Act') or any other Act that would prohibit the carrying out of the development, or that would require the approval of any person or body before the development is carried out; except the *Water Management Act 2000* which is dealt

with elsewhere in the Bill. The Minister stated that "The exemption of development control legislation is an essential aspect of the bill that is needed to accelerate the assessment and approval time frames of these emergency projects".

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to an effective legal remedy

7. Part 6 of the Bill contains several provisions that exempt the State and its institutions from certain liability.
8. Clause 17(1) provides that compensation is not payable by or on behalf of:
 - the State;
 - a public authority;
 - a local council or an officer, employee or agent of the State, a public authority or local councilfor an act or omission that is a 'critical water supply-related matter' or that arises (directly or indirectly) from a 'critical water supply-related matter'.
9. However, clause 17(2) provides that this exemption from liability only applies in respect of acts done or omitted to be done in good faith, and does not apply to acts or omissions that cause personal injury or the death of a person.
10. A 'critical water supply-related matter' is defined by section 17(3) to mean:
 - development carried out, works conducted or other things done under an authorisation given under this Act or the regulations,
 - the administration or purported administration of the *Water Supply (Critical Needs) Act 2019*,
 - the exercise or purported exercise of functions under the Act.
11. Further, clause 18 provides that anything done or omitted to be done by any person in the exercise of functions under the *Water Supply (Critical Needs) Act 2019* or its regulations; or pursuant to any of the provisions of that Act or its regulations does not constitute a nuisance.

The Bill exempts the State and its institutions from liability for an act or omission that is a 'critical water supply-related matter'. For example, the State would not be liable for development that has been carried out under an authorisation given under the proposed Act. Further, the Bill provides that any acts or omissions carried out under the proposed Act do not constitute a nuisance.

The Bill thereby impacts on the rights of persons to pursue an effective legal remedy. However, the Committee notes that certain safeguards apply. For example, for the exemption from liability to apply, the acts or omissions must

have been carried out in good faith and the exemption does not apply if the acts or omissions cause the personal injury or death of a person.

Further, the proposed Act is intended to facilitate the swift development of infrastructure to bring an ongoing supply of water to areas in critical need, and that have been declared as such. The exemptions would allow the State to circumvent matters that may affect these developments and thus the timely supply of water to these areas. In the circumstances, the Committee makes no further comment.

Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: s 8A(1)(b)(ii) of the LRA

Broad delegation of administrative powers

11. Clause 16 of the Bill provides that the Minister or Planning Secretary may delegate the exercise of any function of the Minister or Planning Secretary under the proposed Act to:
 - any person employed in the Department of Planning, Industry and Environment, or
 - any person or class of persons, authorised by the Regulations.
12. Clause 16 also provides that the Planning Secretary may subdelegate any function delegated to the Planning Secretary by the Minister if authorised to do so by the Minister in writing.

The Bill would allow the Minister or Planning Secretary to delegate the exercise of any of his or her functions under the proposed Act to a large class of persons, namely 'any person employed in the Department of Planning, Industry and Environment'. Delegation is not restricted to employees with a certain level of seniority or expertise. Given the Minister and Secretary's functions under the proposed Act are significant e.g. authorising developments to counter the effects of drought, the Committee considers the Bill should provide more clarity about the persons to whom they can be delegated. The Committee refers to Parliament the question of whether the powers of delegation are too broad.

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

Henry VIII clauses

13. The Bill contains several Henry VIII clauses.
14. The first relates to declarations. As above, the Bill would declare certain regional towns and localities that are in critical need of water. Clause 5(1) provides that certain named localities are 'critical town or locality water supplies' as are 'any water supply for a town or locality described in Schedule 1'.
15. Further, clause 5(2) of the Bill provides that the regulations may amend Schedule 1 to insert, alter or omit a description of a town or locality. This is a Henry VIII clause that allows subordinate legislation to amend primary legislation and whereby Parliament

consequently delegates its legislation-making power to the Executive. The Minister told Parliament:

This is needed to ensure that other towns or localities in regional New South Wales can have the benefit of this legislation if the drought worsens and water supply levels in other areas of the State reach critical levels. The concurrence of the Minister administering the Biodiversity Conservation Act 2016 is required before a regulation can be made to declare additional towns or localities.

16. The second example relates to emergency water development projects. As above, the Bill would also specify the development required to bring an ongoing supply of water to the declared regional towns and localities, and Schedule 2 lists three emergency water development projects and the various towns and localities that they will service.
17. Clause 7(2) of the Bill provides that the Regulations may amend Schedule 2 to insert, alter or omit a description of development for the purposes of a critical town or locality water supply. As above, such developments would be exempt from 'development control legislation' if the subject of an authorisation by the Minister. The Minister stated:

Importantly, before a regulation can be made to add or amend critical town or locality water supply development in schedule 2, the concurrence of the Ministers administering the Biodiversity Conversation Act 2016 is required, and consultation with the Ministers responsible for the Environmental Planning and Assessment Act 1979, the Fisheries Management Act 1994 and the Heritage Act 1977 must be undertaken.

18. The final Henry VIII clause provides that the Regulations can disapply or modify the provisions of the *Water Management Act 2000* or any regulations and other instruments made under that Act in relation to critical town or locality water supplies. The Minister explained:

Proposed section 11 allows regulations to be made to disapply or modify the Water Management Act 2000 or any regulations and other instruments made under that Act, including water sharing plans with respect to those towns or localities that are declared to have critical water supplies. Such regulations can only be made with the concurrence of the Minister administering the Biodiversity Conservation Act 2016. For example, this enables regulations to be made to modify rules in a water sharing plan and the Water Management Act 2000 to enable and streamline the granting of any necessary water supply work approval or water licence. This will accelerate implementation of developments listed in schedule 2 where needed in the context of extreme drought.

The Bill contains several Henry VIII clauses that would allow subordinate legislation to amend the Act. It thereby delegates Parliament's legislation-making power to the Executive. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight over the changes.

In the current case, the Committee acknowledges that amendment by regulation would allow swifter arrangements to be made to develop the necessary infrastructure to assist towns and localities experiencing severe drought. Further, the regulations could only be made with the concurrence of the Minister administering the *Biodiversity Conservation Act 2016*. Nonetheless, the clauses in question concern significant matters that would benefit from an appropriate

level of parliamentary oversight e.g. specifying developments that will be exempt from the ordinary requirements of 'development control legislation' and modifying water sharing plans. The Committee therefore refers this matter to Parliament for consideration.

Delegation to the Minister

19. Part 3 of the Bill contains provisions so that the Minister can authorise a development for the purposes of a critical town or locality water supply.
20. As mentioned earlier, Clause 7 of the Bill provides that any development listed in Schedule 2 will be exempt from 'development control legislation' if the carrying out of the development is the subject of an authorisation of the Minister.
21. Further, clause 9(2) provides that an environmental planning instrument under the EPA Act cannot prohibit, require development consent for or otherwise restrict the carrying out of the authorised development. The Minister is thereby empowered to override the operation of certain legislation.

Under Part 3 of the Bill, the Minister can authorise a development for the purposes of a critical town or locality water supply. Certain listed developments will be exempt from 'development control legislation' if the carrying out of the development is the subject of such an authorisation. Further, an environmental planning instrument under the *Environmental Planning and Assessment Act 1979* cannot prohibit, require development consent nor restrict the carrying out of the authorised development. The Minister is thereby empowered to override the operation of various legislation. This may be an inappropriate delegation of legislative power.

However, the Committee acknowledges that the purpose of these provisions is to secure critical town or locality water supply in times of severe water shortages. They allow infrastructure to be assessed and approved more swiftly so that they can be built in time to address problems caused by drought. In the circumstances, the Committee makes no further comment.

Appendix One – 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.