



## 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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# 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. BETTER REGULATION LEGISLATION AMENDMENT BILL 2019

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

##### *Right to privacy*

The Bill amends the *Residential Tenancies Act 2010* to allow landlords to enter residential premises without consent to carry out, inspect or assess the need for repairs to, or replacement of, smoke alarms. Entering premises without the tenant's consent could impact on the tenant's statutory and contractual right to privacy in their residential premises.

However, the Committee notes that a new provision under the Act will require a landlord to ensure that smoke alarms installed in residential premises are repaired or replaced, and that it will be an offence for a landlord to fail to comply. Further, there are safeguards to minimise any privacy impacts. For example, the landlord must give notice of the entry to the tenant; notify the tenant of the proposed time and day of entry, if practicable; and enter the premises between the hours of 8:00am and 8:00pm. In the circumstances, the Committee makes no further comments.

##### *New offence*

The Bill introduces a new offence in the *Residential Tenancies Act 2010* relating to a person knowingly providing a medical practitioner with false or misleading information for the purpose of the medical practitioner making a declaration that the person is in circumstances of domestic violence. The offence carries a maximum penalty of \$11,000 and/or imprisonment for two years. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, offences relating to providing false or misleading information are common in legislation and carry various maximum penalties depending on the circumstances. Further, the consequences of an individual knowingly providing false or misleading information to a medical practitioner about being in circumstances of domestic violence could be serious, wrongly implicating someone as a perpetrator. In the circumstances, the Committee makes no further comments.

##### *Search and seizure without warrant*

The Bill confers on authorised officers under the *Retail Trading Act 2008*, powers to enter premises without a warrant and to obtain documents under Divisions 1 and 2 of Part 2A of the *Fair Trading Act 1987*. This could impact on the privacy rights of affected persons and their right to be free from arbitrary interference.

However, the Committee notes that the proposed amendments to the *Retail Trading Act 2008* will draw upon powers which already exist in principal legislation. The Committee also notes that an officer will not be able to enter a dwelling house or residential premises without consent or unless some manufacture, business or trade takes place there. Similarly, the powers may only be exercised for the purposes of the *Retail Trading Act 2008* and any regulations, which is

legislation dealing with the fair regulation of shop opening hours and restricted trading days. In the circumstances, the Committee makes no further comments.

*Right against self-incrimination*

The Bill confers on an authorised officer under the *Retail Trading Act 2008* powers under the *Fair Trading Act 1987* to require persons to provide information, documents and evidence. This impacts on the right against self-incrimination because the person would not be excused from providing the information, evidence or documents on the ground that it might incriminate him or her. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her.

However, the Committee notes that evidence, information or documents obtained in these circumstances would not be admissible against the person in criminal proceedings apart from proceedings for refusing or failing to comply with a notice to provide the material; or knowingly providing false or misleading information in response to such a notice. The Committee also notes that the new provisions draw upon powers that already exist in principal legislation. 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 certain amendments to commence on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, particularly if it affects the rights and obligations of individuals.

While a flexible start date may assist with implementing administrative arrangements associated with some of the proposed amendments, affected parties may also benefit from having certainty about when the changes apply to them. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.

*Matters that should be dealt with in principal legislation*

The Bill proposes to amend the *Building and Construction Industry Security of Payment Act 1999* to significantly increase the maximum penalty that may be imposed by the regulations in relation to a failure to comply with trust account requirements for retention money. The increase is from \$22,000 to \$110,000. The Committee acknowledges that the intention behind this change is to align the maximum penalty for failure to comply with these obligations with the penalties for equivalent offences under the principal Act.

However, the Committee prefers penalty provisions to be contained in principal legislation to foster an appropriate level of parliamentary oversight. This is particularly the case where the penalties set are significant. The Committee refers this matter to Parliament for consideration.

2. CENTRAL COAST DRINKING WATER CATCHMENTS PROTECTION BILL 2019\*

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

*Retrospectivity and compensation rights*

The Bill seeks to cancel mining authorisations, petroleum titles or planning approvals granted prior to the commencement of the Bill, which may run counter to the rule of law. Retrospectivity impacts on the principle that a person has the right to know the law that is applicable to him or her at any given time so that s/he may order his or her affairs accordingly. The Committee notes

further that it is unclear whether compensation would have to be paid following the cancellations.

The Committee acknowledges that the Bill seeks to protect the Central Coast drinking water catchment and that it is proposed that the Wallarah 2 longwall coalmine be built underneath part of this catchment. However, given the potential impact on property rights, the Committee refers the retrospective application of the Bill to Parliament for consideration, and the question of whether the Bill makes appropriate provision regarding compensation.

#### *Strict liability offences*

The Bill creates a strict liability offence of taking or using any water from a water source located in a protected catchment for which the maximum penalties are substantial – more than \$5 million for a corporation, or \$1.1 million and/or two years imprisonment in the case of an individual. The Committee acknowledges the significant public interest in protecting water sources and notes that a defence is available if the person concerned is able to establish that they acted with lawful authority.

However, strict liability offences depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Further, the area which is considered to be a protected catchment area is large, extending to any land within the Central Coast local government area or land within the operations of the Central Coast Water Corporation (some exceptions do apply). Given this, and the significant nature of the applicable penalties, including imprisonment, the Committee refers these provisions to Parliament for consideration.

### 3. CHILD PROTECTION (NICOLE'S LAW) BILL 2019\*

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

##### *Privacy rights and double punishment*

The Bill would require the Police Commissioner to publish certain information about certain offenders who have committed sexual and other serious offences against children. This includes an offender's name, and any name by which they have been previously known; the offender's most recent photograph; and the suburb and postcode of his or her residential address. The Commissioner would also be required to publish the actual address of offenders who have been convicted of a 'Class 1 offence'.

The Committee acknowledges the child protection objectives of the Bill. However, it also notes that the Bill would impact on the privacy rights of affected offenders. Publishing the information covered by the Bill may also risk double punishment, that is, offenders who have served their sentence may be subject to a level of vigilante activity. The Committee refers these matters to Parliament for consideration.

##### *Retrospectivity*

The Committee notes that the Bill has retrospective application. That is, the information that the Police Commissioner would be required to publish under the Bill would include information about relevant offences of which the offender has at any time been convicted, including before the Bill came into force. The Committee generally comments on retrospectivity as it runs counter to the principle that a person should be able to know the laws to which s/he is subject at any given time. In this case the retrospectivity would operate in a manner prejudicial to those affected. Again, the Committee acknowledges the child protection objectives of the Bill and



refers to Parliament the question of whether the retrospectivity is reasonable in the circumstances.

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

*Henry VIII clause*

The Bill includes Henry VIII clauses that would allow the regulations to override or amend Schedule 1 to the proposed Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the changes. The Committee refers the matter to Parliament for consideration.

4. DESIGN AND BUILDING PRACTITIONERS BILL 2019

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

*New Offences*

The Bill introduces a scheme that places a series of new obligations on design and building practitioners with the aim of ensuring that each step of the building and construction process in NSW is well documented and complies with the National Construction Code. These new obligations are backed by a number of offence provisions, for which non-compliance would attract significant maximum monetary penalties, or imprisonment for up to two years in some cases.

The creation of new offence provisions impacts on personal rights and liberties as previously lawful conduct becomes unlawful. However, the new offences are part of a scheme to ensure safety and quality in the building and construction sector in NSW, and thereby safeguard consumer confidence. Further, the scheme forms part of the NSW Government's response to a recent national Building Confidence Report that found there was a systemic failure to expressly require documentation to demonstrate compliance with the National Construction Code. In the circumstances, the Committee considers the new offence provisions are a reasonable and proportionate measure and makes no further comment.

*Privacy*

The Bill introduces a registration system for the practitioners performing functions under the proposed Act. Clause 37 would allow the Secretary of the Department of Customer Service, in investigating an application for registration, to require information from third parties about the applicant or his/her close associates. This includes financial and other confidential information. In so doing, the Bill impacts on the privacy rights of applicants and their close associates.

However, as detailed above, the requirements are part of a new scheme that is designed to ensure safety and quality in the building and construction sector in NSW, and thereby safeguard consumer confidence. They would enable the Secretary to more closely vet applicants to ensure that they are suitably qualified to perform functions under the proposed Act. Further, the requirement to provide the information is not absolute – a person retains the option to refuse to provide it, but it will mean that the applicant may not be able to obtain registration. In the circumstances, the Committee makes no further comment.

*Privacy and freedom from arbitrary interference*

The Bill sets down an investigation and enforcement framework to promote compliance with the requirements of the proposed Act. In particular, it would allow an authorised officer to enter

any premises at which business is in progress, including building work, without a search warrant after which he or she could exercise a number of search and seizure-related powers.

The Committee notes that provisions such as these impact on affected persons' privacy rights. Further, the requirement to obtain a warrant is intended to protect people against arbitrary interference. However, the Committee acknowledges the provisions would allow investigators to respond quickly where issues arise, promoting safety and quality in the building and construction industry consistent with the objects of the proposed Act. Similarly, authorised officers could not enter residential premises without a warrant. Given this safeguard and the context of the Bill, the Committee makes no further comment.

***Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA***

*Non-reviewable decisions affecting reputational and economic rights*

The Bill would allow the Secretary to publish a notice warning persons of the risks of dealing with a specified practitioner or former practitioner who is registered under the proposed Act; or any other person the Secretary reasonably believes may have breached the proposed Act or regulations. However, there does not appear to be provision for such a decision to be reviewed by the NSW Civil and Administrative Tribunal. Therefore, the Bill may allow a non-reviewable decision to be made that may affect the reputational and economic rights of persons concerned.

The Bill does contain safeguards e.g. a warning cannot be issued without the Secretary first conducting an investigation. Further, the person concerned must generally be given the opportunity to make representations prior to the publication of a warning notice. In addition, there may be some cases where it is in the public interest for a warning notice to be published swiftly. Notwithstanding this, the Committee refers the provisions to Parliament to consider whether they are reasonable in the circumstances.

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

*Commencement by proclamation*

The Bill is to commence on proclamation. The Committee prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected. However, the Committee acknowledges the detailed administrative arrangements that will be required to set the new scheme established by the Bill into motion. A flexible start date may facilitate such a process. In the circumstances, the Committee makes no further comment.

*Matters that should be included in primary legislation*

In introducing a scheme that places a series of new obligations on design and building practitioners, the Bill would allow a number of significant details e.g. key definitions and offence provisions, to be dealt with in the regulations. The Committee acknowledges that such an approach will provide flexibility, allowing swifter implementation of the necessary arrangements to support a complex and comprehensive new scheme. However, the Committee prefers significant details such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. In the circumstances, the Committee refers this matter to Parliament for consideration.

5. DIGITAL RESTART FUND 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*.

6. ENVIRONMENT PLANNING AND ASSESSMENT AMENDMENT (TERRITORIAL LIMITS) BILL 2019

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

7. JUSTICE LEGISLATION AMENDMENT BILL (NO 2) 2019

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

*Reversal of onus of proof*

The Bill would amend section 17 of the *Child Protection (Offenders Registration) Act 2000* to clarify that registrable persons bear the onus of proving, on the balance of probabilities, that they had a reasonable excuse for failing to comply with their reporting obligations. This represents a reversal of the usual standard that requires the prosecution to prove all the elements of an offence. However, the purpose of the reporting requirements is to protect the safety of children and the registrable person is well placed to explain their omission to report. Section 17 also provides some safeguards, including taking into account a registrable person's ability to understand their obligations. In the circumstances, the Committee makes no further comment.

*Right to privacy I*

The Bill expands the information sharing arrangements under the *Crimes (Administration of Sentences) Act 1999* to allow the Commissioner of Corrective Services to share information with an Australian intelligence agency. This may impact on the right to privacy, including of inmates and others with whom they are connected. However, sharing information in relation to correctional facilities is already an established practice with law enforcement agencies and interstate corrective services agencies. In the circumstances, the Committee makes no further comment.

*Right to privacy II*

The Bill amends the *Housing Act 2001* to expand the exceptions to the prohibition on disclosing information under section 71. An exception is added 'for the purposes of law enforcement', which includes investigating an offence or finding a missing person. The disclosure of information may impact on the right to privacy. In particular, the Committee notes the potentially wide scope of disclosing information 'for the purposes of law enforcement'.

The Committee acknowledges that there are already existing exceptions to the disclosure of information under the *Housing Act*, and the addition of a law enforcement exception is consistent with provisions found in privacy legislation (e.g. the *Privacy and Personal Information Protection Act 1998*). The Committee also acknowledges the benefits to the community of solving crimes and finding missing persons. However, the Committee refers the expanded exception to Parliament to consider whether it is too vague and wide in scope.

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

*Commencement by proclamation*

Some Schedules of the Bill commence on proclamation. The Committee generally prefers legislation to commence on assent or a fixed date; otherwise there is less certainty and

Parliament has less scrutiny over the commencement date. However, the Committee acknowledges that commencement by proclamation may facilitate administrative arrangements and consultation with numerous agencies. In the circumstances, the Committee makes no further comment.

8. LIQUOR AMENDMENT (HARM REDUCTION AREAS) BILL 2019 AND LIQUOR AMENDMENT (INTOXICATION) BILL 2019\*

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

*Expanding offences and limiting defences*

The *Liquor Amendment (Intoxication) Bill 2019* may have the effect of expanding the offences that apply to a licensee under the *Liquor Act 2007* so that a licensee would be liable not only for allowing a person who is intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through other substances to do so. The Bill may also limit the defences upon which a licensee can draw if he or she is charged with permitting intoxication on the licensed premises. A licensee would now have to prove that the intoxicated person did not consume alcohol, a drug, or other intoxicating substance on the licensed premises if the licensee wishes to avail him/herself of the defence.

Where the reach of offences is expanded, or defences limited, this impacts on personal rights and liberties as previously lawful conduct becomes unlawful and a person's chance of being held liable for a penalty – in this case a significant maximum monetary penalty – increases. The Committee also notes that in holding a licensee liable for the intoxication of a patron, the licensee has more control over the service of liquor to a patron than s/he does over any drug-taking behaviour. In the circumstances, the Committee refers these matters to Parliament for consideration.

*Freedom of Movement*

As above, the *Liquor Amendment (Intoxication) Bill 2019* may have the effect of expanding the offences that apply to a licensee to prevent intoxication on licensed premises so that a licensee would be liable not only for allowing a person who is intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through drugs and other substances to do so. This may have a flow-on effect for the freedom of movement of patrons, expanding the number who are asked to leave licensed premises.

Nonetheless, the right to freedom of movement is not absolute and the Committee acknowledges that provisions such as these may assist to prevent anti-social behaviour and to promote responsible service of alcohol. In the circumstances, the Committee makes no further comment on the potential effect of the provisions on the freedom of movement of patrons.

9. PROFESSIONAL ENGINEERS REGISTRATION BILL 2019\*

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

*Strict Liability*

The Bill makes it a strict liability offence to use a title or name that suggests that the person is a professional engineer when they are not one. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence. However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen

offence provisions. It also notes the public interest in ensuring that only professional engineers carry out professional engineering services for reasons of public safety. Further, the maximum penalty whilst large does not include a term of imprisonment. Accordingly, the Committee makes no further comment.

#### *Procedural Fairness*

Proposed sections 56 and 63 provide exceptions to the requirement that a professional engineer be notified of an investigation into their conduct and that they have the opportunity to make submissions to the Board of Professional Engineers prior to disciplinary action being taken against them. This may affect their right to procedural fairness which is concerned with a person having the opportunity to present their case prior to a decision being made that adversely affects them. The Committee notes that these exceptions only apply if it is believed that giving notice would seriously prejudice the investigation or put a person at risk of harassment or intimidation, or if it is in the public interest to take immediate disciplinary action. The Committee refers the matter to Parliament for consideration as to whether the provisions are reasonable in the circumstances.

#### *Privacy and freedom from arbitrary interference*

The Bill empowers authorised officers to enter any premises whilst business is in progress, without a search warrant, after which he or she may exercise a number of search and seizure-related powers. The Committee notes that provisions such as these impact on affected persons' privacy rights. Further, the requirement to obtain a warrant is intended to protect people against arbitrary interference. However, the Committee acknowledges that these provisions are designed to ensure the robustness of the scheme. Similarly, authorised officers cannot enter residential premises without a warrant. Given this safeguard and the context of the Bill, the Committee makes no further comment.

#### ***Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA***

##### *Decisions affecting reputational and economic rights may not be reviewable*

The Bill allows the Board of Professional Engineers to publish a notice warning persons of the risks involved in dealing with a specified professional engineer, assessment entity or other person considered to have breached the proposed Act or regulations. It also allows the Board to publish a decision to caution or reprimand a professional engineer or impose a condition on their registration following an investigation. Whilst the Bill allows for the regulations to prescribe certain decisions as administratively reviewable by the Civil and Administrative Tribunal, there is no provision to this effect in the Bill in relation to these decisions.

The Bill provides such safeguards as requiring the Board to first conduct an investigation and allowing the person concerned to have an opportunity to make representations prior to the publication of a warning notice. There may be some circumstances which warrant the quick publication of a warning notice where there is an immediate risk to the public. Notwithstanding this, the Committee refers these provisions to Parliament to consider whether they are reasonable in the circumstances.

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

##### *Incorporation of external standards*

Under the Bill, the Board of Professional Engineers must make a code of practice that provides guidance of what is considered appropriate professional conduct or practice by professional engineers. The Code of Practice is to be admissible as evidence of appropriate professional conduct or practice for a professional engineer in disciplinary proceedings brought by the Board. The Committee generally prefers such matters to be included in primary or subordinate legislation to ensure an appropriate level of parliamentary oversight. However, the Committee notes that the code of practice has no effect until approved by a regulation and it must also be tabled within 14 sitting days after the regulation is notified. Accordingly, the Committee makes no further comment.

*Significant matters in delegated legislation*

The Bill allows the Regulations to prescribe decisions that are administratively reviewable by the NSW Civil and Administrative Tribunal. It accordingly impacts on the right of individuals to administrative review of decisions made under the proposed Act that may restrict their rights and liberties. The Committee generally prefers matters which affect individual rights to be contained in principal legislation to allow greater opportunity for parliamentary scrutiny and debate. The Committee refers the matter to Parliament to consider whether it would be more appropriate to locate the decisions that may be administratively reviewable in the Bill to allow for a greater level of parliamentary scrutiny.

10. REAL ESTATE SERVICES COUNCIL BILL 2019\*

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

*New offence and penalty*

The Bill introduces a new offence for the disclosure of information obtained in the administration or execution of the proposed Act. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

The Committee acknowledges that the intention of the offence is to prohibit the release of sensitive property services industry information and that it contains several qualifying provisions as exceptions to the offence. However, it is noted that the offence carries a maximum penalty of a \$2,200 fine, which is higher than the applicable penalty for similar offences contained in the other Acts – such as disclosure of information under the *Ombudsman Act 1974* which carries a maximum penalty of a \$1,100 fine. In the circumstances, the Committee refers the matter to Parliament to consider whether the penalty attached to the new offence is proportionate.

***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 Real Estate Services Council or the Commissioner to delegate any of their functions under the proposed Act to a broad class of persons, including 'any member of staff of the Council, or any person, or any class of persons, authorised for the purposes of this section by the regulations.' There are no restrictions on this power to delegate, for example restricting delegation to staff of a certain level of seniority or expertise. Given the functions of the Council include providing advice, reports or recommendations to the Minister in relation to the real estate service industry, 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 clause*

The Bill contains a Henry VIII clause 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 the regulation would allow administrative convenience for changes to savings and transitional provisions, such as in relation to changes in the Consumer Price Index. Consequently, the Committee makes no further comment in relation to this issue.

*Matters that should be set by Parliament*

The Bill would permit the regulations to prescribe the person or class of persons to whom the Council or Commissioner may delegate their functions. This means that the regulations may prescribe the persons to whom the Council or Commissioner may delegate their functions without those regulatory provisions having the same level of parliamentary scrutiny as an amending Bill. The Committee refers this issue to Parliament for consideration.

## 11. STATE REVENUE LEGISLATION FURTHER AMENDMENT BILL 2019

***Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA****Retrospectivity – surcharge purchaser duty and surcharge land tax – discretionary trusts*

The Bill would make amendments to the *Duties Act 1997* and *Land Tax Management Act 1956* concerning surcharge purchaser duty and surcharge land tax in relation to discretionary trusts. These amendments are to apply retrospectively to transactions that occurred prior to the commencement of the proposed sections. Retrospectivity impacts on 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 notes that the purpose of the amendments is to grant relief from liability if the terms of the trust are amended before the end of 2019 to prevent a discretionary trust inadvertently attracting liability. In the circumstances, the Committee makes no further comment.

*Retrospectivity – landholder duty*

The Bill would substitute a new section 154 into the *Duties Act 1997* which would extend liability for the duty payable by a person when the person acquires an interest in a landholder, so that the landholder will be jointly liable. Any liability of a landholder to pay such duty is a charge on their land holdings that gives the Chief Commissioner an interest in the land, allowing a caveat to be lodged until the amount of the duty has been paid. The new section 154, and therefore its requirement to pay duties, would apply retrospectively. However, the Committee notes the public interest in ensuring that duties owing are paid and so makes no further comment.

## PART TWO – REGULATIONS

## 1. FILM AND TELEVISION INDUSTRY REGULATION 2019

***The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA***

*Regulation modifying the effect of primary legislation*

The Regulation exempts certain provisions of the *Government Sector Employment Act 2013*, and certain other Acts, from applying to a member of the Film and Television Advisory Committee. The Committee would prefer provisions that modify the effect of primary legislation to be included in primary, not subordinate, legislation to foster an appropriate level of parliamentary oversight over such modifications. The Committee refers the matter to Parliament for consideration.

## 2. GAMING MACHINES REGULATION 2019

***The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA****Strict liability*

The Regulation contains numerous strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the Committee notes that the context of the offences is setting responsible standards in the gaming industry and that no custodial penalties apply – the maximum penalty that applies in each clause is never more than \$5,500. In the circumstances, the Committee makes no further comment.

*Right to silence/privilege against self-incrimination*

Clauses 124 and 126 of the Regulation impact on the privilege against self-incrimination by requiring licensees, key employees and other persons to provide information and produce documents. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. However, the Committee notes that both clauses allow a person to claim that compliance with a notice under this clause may tend to incriminate the person. If the claim is made prior to compliance, any information subsequently provided is not admissible in evidence against the person in criminal proceedings other than under the *Gaming Machines Act 2001*. The Committee refers to Parliament the question of whether the safeguards in the Regulation are adequate in the circumstances.

*Privacy*

Under the Regulation a 'key employee' may be required to consent to having his or her photograph, fingerprints and palm prints taken; and to consent to the Minister obtaining certain financial and other confidential information about him or her. This may impact on the person's privacy rights.

However, the Committee notes that this requirement is limited to 'key employees' that is, to those involved in a managerial or supervisory capacity in relation to an authorised centralised monitoring system (CMS) or linked gaming systems. The Committee acknowledges the role of employees with access to the CMS in ensuring the integrity of gaming machine operations. Further, fingerprints and palm prints must be destroyed once the person is no longer deemed a 'key employee'. In the circumstances, the Committee makes no further comment.

*Decision to terminate employment based on ill-defined criteria*

The Regulation grants the Minister the power to have the employment of a key employee terminated on the basis of their reputation or character. This raises a risk that a key employee will be terminated because of a reputation that is not based on fact.



The Committee notes that a key employee can only be terminated where the integrity or apparent integrity of a CMS or linked gaming system is likely to be seriously prejudiced by their character or reputation. It also acknowledges the role of CMS in monitoring and ensuring the integrity of gaming machine operations as well as its use in calculating gaming machine tax.

However, the Committee prefers powers affecting individual rights to be drafted with sufficient precision so that their scope and content is clear. It therefore refers the matter to Parliament to consider the appropriate balance between ensuring the integrity of the gaming systems, and the potential loss of employment on the basis of reputation or character as opposed to more concrete factors.

***The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA***

*Wide administrative power*

The Regulation grants a wide administrative power to the Independent Liquor and Gaming Authority which allows it to revoke the special approval of gaming machines for any reason it considers appropriate. However, the Regulation includes a number of safeguards in clause 120 including that special approval may not be revoked unless written notice is given of the reasons for the Authority considering such action. Opportunity must also be provided for submissions to be made as to why such action should not be taken. In the circumstances, the Committee makes no further comment.

*Wide administrative power - II*

Under the Regulation, the Minister has the power to object to a proposed relevant contract being entered into, or to the relevant contract being varied. A licensee must abide by the objection. However, the Minister is not required to give any reasons for the objection. Further, the Regulation does not include criteria to guide the decision-making process. The Committee refers the matter to Parliament to consider whether the power granted to the Minister is too wide and whether the object of the regulation would be better served by a requirement that the Minister provide reasons for an objection.

*Wide power of delegation*

The Regulation allows the delegation of administrative powers to an ill-defined class of persons, with no requirements set down as to their qualifications or attributes, nor their level of seniority. The scope of functions that may be delegated is also broad and ill-defined, and certain functions that are delegated may impact on individual rights e.g. requiring key employees to provide consent to have their fingerprints taken.

Where functions are delegated, the Committee prefers the legislation to clearly set out the specific functions that are being delegated. It also prefers the legislation to set down clear criteria regarding the class of persons to whom the functions are being delegated. This is particularly the case where the functions may affect individual rights. In the circumstances, the Committee refers the matter to Parliament for further consideration.

3. GREYHOUND RACING REGULATION 2019

***The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA***

*Strict Liability*

The Regulation contains a number of strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that *mens rea* must be proved to hold a person liable for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, while the offences in the Regulation attract significant maximum monetary penalties they do not attract custodial ones.

The highest maximum penalty provided for in the Regulation is \$11,000 for unauthorised entry into a restricted access area, however, these areas must be identified as such by a sign at each entry point. Most of the offences in the Regulation incur a maximum penalty of \$2,200.

The Committee notes further, that the Regulation is part of a wider reform process seeking to implement a number of recommendations of the Greyhound Industry Reform Panel and that facilitating enforcement of the regulatory requirements may foster positive behavioural change within the industry. In the circumstances, the Committee makes no further comment.

#### *Right to privacy*

The Regulation allows the Greyhound Welfare and Integrity Commission to share information contained in registers it keeps on registered greyhounds, racing industry participants and trial tracks. The sharing of personal information such as contact details and offences with which participants have been charged may impact on the privacy rights of the individuals involved.

However, the Committee notes that the organisations with which such information may be shared are limited to those involved in the regulation of greyhound racing, animal welfare regulators and law enforcement bodies. Further, the Regulatory Impact Statement for the Regulation identified that the sharing of such information is ‘critical to effective lifecycle tracking, identification of industry trends and national monitoring of non-complying industry participants’. The Committee also notes that the Commission may refuse a request for access to information so long as reasons are provided for the refusal. In the circumstances, the Committee makes no further comment.

#### 4. PARRAMATTA PARK TRUST REGULATION 2019

##### ***The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA***

##### *Freedom of movement*

Under clause 8 of the Regulation, a relevant authority can direct a person to leave Trust land if he or she trespasses, causes inconvenience to any person, or otherwise contravenes the Regulation. A direction may also specify a period during which a person must not return. Failing to comply with a direction is punishable by a fine of up to \$1,100. The term ‘inconvenience’ is broad and there is no guidance as to its meaning. The provision may trespass on the freedom of movement.

However, the Committee notes that these provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. Further, in specifying a period during which a person must not return to Trust land, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned. The Committee also acknowledges the benefit of the provisions for the majority of parkland users, facilitating the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.

*Freedom of assembly*

Clause 17 of the Regulation lists various activities which are prohibited on Trust land including holding a public meeting, demonstration or gathering. Contravening this provision attracts a fine of up to \$1,100. This may impact on the right to freedom of assembly. However, this provision is in line with similar regulations governing recreational spaces used by the public and managed by a trust and has benefits for the peaceful enjoyment of the parklands by other users. Further, meetings, demonstrations and gatherings may still take place with the written permission of the Trust. In the circumstances, the Committee makes no further comment.

*Strict liability*

The Regulation includes numerous offences which are of the strict liability type. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element is a necessary part of liability for an offence. However, the Committee notes that there are no custodial penalties and the maximum penalty that applies to any of the offences is \$1,100. The Committee notes further that many of the offences in the Regulation relate to interference with wildlife, vandalism, damage to Trust lands and dangerous behaviour and that similar provisions exist in comparable regulations governing recreational spaces used by the public. In addition, Parramatta Park is a World Heritage Site and the purpose of regulating some of these behaviours is to prevent the risk of damage to natural and cultural heritage assets. Such regulation may also enhance the safety of other park users and facilitate their enjoyment of the park. Accordingly, the Committee makes no further comment.

## 5. NATIONAL PARKS AND WILDLIFE REGULATION 2019

***The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA****Strict liability offences*

The Regulation contains a number of strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element is a necessary part of liability for an offence. However, the Committee notes that there are no custodial penalties and that a number of the offences list exclusions, in the nature of defences. In addition, many of the strict liability offences in the Regulation appear to encourage the protection of the environment and public health and safety within national parks and facilitate the enjoyment of national parks by those who use them. Similar provisions also exist in comparable regulations governing recreational spaces used by the public and managed by a trust or authority. In the circumstances, the Committee makes no further comment.

*Freedom of movement*

The Regulation allows the park authority to exclude a person from a park where that person has committed a second or subsequent offence under Part 2 of the Regulation. The Committee notes that the park authority has a broad discretion to exclude a repeat offender for any period of time it determines. There also does not appear to be any right for the affected person to have the decision reviewed. It is an offence for person to re-enter a park during the exclusion period. An order of this kind could impact on a person's freedom of movement by restricting their ability to be in certain places.

However, the Committee notes these provisions are in line with similar regulations governing recreational spaces used by the public. The Committee also notes that, in this Regulation, the threshold for excluding someone from a park is quite high as they need to have committed a second or subsequent offence. A person who repeatedly offends in a national park may pose a

future risk to the environment and public health and safety. The Committee also acknowledges the benefit of the provisions for the majority of park users. In the circumstances, the Committee makes no further comment.

*Entry and search powers without warrant*

The Regulation empowers an authorised officer from the Department of Planning, Industry and Environment to enter and search non-residential premises without a search warrant. This could impact on the privacy rights of affected persons and their right to be free from arbitrary interference.

However, the Committee notes that the provisions do not apply to residential premises and that an authorised officer would be required to obtain a certificate of authority to enter premises under the *Public Health Act 2010*. In exercising their powers, they would also have to comply with requirements such as giving reasonable notice to the occupier and exercising the power at a reasonable time, subject to some exceptions.

Further, the Committee acknowledges that the powers could only be used for the purposes of the *Public Health Act 2010*, an Act to control risks to public health and prevent the spread of infectious diseases, and only apply to public health matters in Kosciuszko National Park. In the circumstances, the Committee makes no further comment.

*Privilege against self-incrimination*

The Regulation allows for the appointment of certain persons to exercise the functions of an authorised officer under Part 8 of the *Public Health Act 2010*. Such officers have powers to require persons to provide documents or information or answer questions. Section 114 of that Act impacts on the right against self-incrimination by stating that a person is not excused from a direction to provide documents or information or answer questions on the ground that it might incriminate them. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her.

The Committee notes that section 114 contains some safeguards. For example, information or answers will not generally be admissible in criminal proceedings against the person if they objected that doing so might incriminate them. Similarly, under the Regulation, an authorised officer's powers will only apply in relation to public health within Kosciuszko National Park. The Regulation is also drawing upon powers which already exist in principal legislation.

However, the Committee notes in particular that a document provided by a person in compliance with a direction under the legislation will not be inadmissible as evidence against that person in criminal proceedings by reason only that it incriminates them. Provisions of this kind, which impact on the privilege against self-incrimination, also impact on the right to be presumed innocent, which is associated with the concept that the prosecution has the burden of proving a charge beyond reasonable doubt. The Committee refers clause 47 of the Regulation to Parliament for further consideration.

## Part One – Bills

### 1. Better Regulation Legislation Amendment Bill 2019

Date introduced	23 October 2019
House introduced	Legislative Council
Minister introducing	The Hon. Don Harwin MLC
Portfolio covered by the Bill	Better Regulation and Innovation

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and repeal a regulation administered by the Minister for Better Regulation and Innovation, including as follows –
  - (a) to amend the *Building and Construction Industry Security of Payment Act 1999* to increase the maximum penalty that may be imposed by the regulations under that Act in respect of a failure to comply with trust account requirements for retention money,
  - (b) to amend the *Building and Development Certifiers Act 2018* to make it clear that short sessions of training can be approved and to permit the regulations under that Act to authorise the Commissioner for Fair Trading to approve, by order published in the Gazette, training, persons to conduct training and persons to assess persons undergoing training, for the purposes of that Act,
  - (c) to amend the *Building Professionals Act 2005* to authorise the Building Professionals Board to investigate the work and activities of accredited certifiers when they are carrying out all types of certification work,
  - (d) to amend the *Charitable Fundraising Act 1991* to remove a requirement for the registered office of an applicant for an authority to conduct a fundraising appeal to be an address in New South Wales and to permit the registration under that Act to impose requirement with respect to registered offices,
  - (e) to amend the *Community Gaming Act 2018* to clarify the stated objects of that Act to recognise that some permitted gaming activities under that Act will be conducted for social purposes,
  - (f) to amend the *Fair Trading Legislation Amendment (Reform) Act 2018* for the following purposes –
    - (i) to provide for 4 year terms for certificates of registration granted under the *Property, Stock and Business Agents Act 2002*,
    - (ii) to provide that certificates of registration cannot be restored or renewed,

- (iii) to provide exceptions in respect of existing certificates of registration generally and a subset of existing certificates of registration as a stock and station salesperson,
- (g) to amend the *Harness Racing Act 2009* to allow appointed members of Harness Racing New South Wales to hold office for a total of 10 years,
- (h) to amend the *Property, Stock and Business Agents Act 2002*, for the following purposes –
  - (i) to make it a condition of all licences and certificates of registration that the holder complies with continuing professional development requirements determined by the Secretary,
  - (ii) to enable the regulations made under that Act to prescribe additional requirements relating to trust accounts in which money received by a licensee (in connection with that licensee's business as a licensee) for or on behalf of any person is to be held until it is paid to the person or disbursed as the person directs,
- (i) to amend the *Residential Tenancies Act 2010* for the following purposes –
  - (i) to provide that the provisions of that Act do not apply to short-term rental accommodation arrangements, unless the person given the right to occupy the premises under the arrangement is occupying those premises as that person's principal place of residence,
  - (ii) to provide that the regulations may prescribe circumstances in which a tenant is not liable to pay particular utility charges,
  - (iii) to provide that the regulations may prescribe circumstances in which a landlord is not liable to pay particular charges,
  - (iv) to clarify that a tenant who is the victim of a domestic violence offence, or an exempted co-tenant, is not responsible for damage caused by another tenant during the commission of the domestic violence offence,
  - (v) to permit landlords to enter residential premises without consent to carry out, inspect or assess the need for repairs to, or replacement of, a smoke alarm if they have given notice of those activities to the tenant in accordance with the regulations,
  - (vi) to clarify that a tenant may give a termination notice to terminate the tenant's tenancy only if the tenant, or a dependent child of the tenant, is the victim of domestic violence or is the person for whose protection a DVO has been made or an injunction has been granted under the *Family Law Act 1975* of the Commonwealth,
  - (vii) to clarify that a competent person may use personal information about a relevant domestic violence offender for the purposes of making a declaration to accompany a domestic violence termination notice,

- (viii) to provide that it is an offence for a person to knowingly provide false or misleading information to a competent person for the purposes of the competent person making a declaration to accompany a domestic violence termination notice,
- (ix) to extend the requirement under section 105I of the Act that the Minister review the operation of particular provisions, relating to termination of residential tenancy agreements in circumstances of domestic violence, within 3 years of the commencement of those provisions to proposed section 54A,
- (j) to amend the *Residential Tenancies Amendment (Review) Act 2018* for the following purposes –
  - (i) to make it clear that it is the landlord's obligation to ensure smoke alarms at residential premises are in working order,
  - (ii) to allow regulations to be made to specify the persons who may repair or replace a smoke alarm, the circumstances in which particular persons may or must repair or replace a smoke alarm and the time period within which a person must repair or replace a smoke alarm,
  - (iii) to enable regulations to be made to provide for the kinds of fixtures, or alterations, additions or renovations that are of a minor nature in relation to which it would be unreasonable for a landlord to withhold consent, and the circumstances in which the landlord may require the fixture to be installed, or the alteration, addition or renovation to be carried out, by an appropriately qualified person,
- (k) to amend the *Retail Trading Act 2008* for the following purposes –
  - (i) to provide that an application for an exemption from a requirements under that Act must be in the form approved by the Secretary,
  - (ii) to require the Secretary to undertake public consultation before determining an application to exempt a shop from the requirements under that Act,
  - (iii) to replace a provision applying the investigation powers of an inspector under the *Industrial Relations Act 1996* with a provision applying the investigation powers of an investigator under the *Fair Trading Act 1987*,
- (l) to amend the *Thoroughbred Racing Act 1996* to allow appointed members of Racing NSW to hold office for a total of 10 years,
- (m) to make other necessary consequential and related amendments, including savings and transitional amendments.

## BACKGROUND

2. In his Second Reading Speech, the Hon. Don Harwin MLC, Special Minister of State, explained the background to the Bill:

This bill makes a number of important miscellaneous amendments to 10 principal Acts and associated amendment Acts across the Better Regulation and Innovation portfolio.

The amendments in the bill are essential to ensure that the legislation being amended can operate as Parliament intended. It does so in the following ways: by inserting specificity into regulation-making powers; by clarifying legislative intent and reducing uncertainty; and by improving the effectiveness of the legislation and removing unnecessary red tape. This omnibus bill is an efficient and effective way to address these various matters. The individual amendments to each Act are not significant or substantial enough to warrant their own bill.

The amendments in the bill can generally be classified as mainly administrative. However, they are not of such a minor nature that they could be included in the recent Statute Law Revision Bill. The need for many of the amendments in this bill has been identified by the Parliamentary Counsel's Office. This has occurred during the implementation stage for various reforms passed by Parliament during 2018 and in the development of supporting regulations. Other amendments address feedback from consultation with stakeholders and issues raised from customer experience testing. They also arise as a consequence of being responsible stewards of the legislation we administer.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Right to privacy*

3. The Bill proposes to amend section 55 of the *Residential Tenancies Act 2010* to allow landlords to enter residential premises without consent, after giving notice to the tenant, to carry out, inspect or assess the need for repairs to, or replacement of, a smoke alarm (see Schedule 1.10[6]) of the Bill).
4. Entering a property without consent may impact on a tenant's right to privacy. In particular, it is a term of every residential tenancy agreement that the tenant is entitled to 'quiet enjoyment' of the premises without interruption by the landlord or others. It is an offence for the landlord (or their agent) to interfere with 'the reasonable peace, comfort or privacy of the tenant in using the residential premises' (see section 50 of the *Residential Tenancies Act 2010*).
5. Section 57(1) of the *Residential Tenancies Act 2010* provides that a landlord (or their agent or other person) who lawfully enters residential premises without consent must:
  - (a) enter the premises between 8:00 am and 8:00 pm
  - (b) not enter on a Sunday or public holiday
  - (c) not stay on the residential premises longer than necessary to achieve the purpose of entry
  - (d) notify the tenant of the proposed time and day of entry, if practicable.
6. The Bill also updates an amendment to the *Residential Tenancies Act 2010* which has not yet commenced. That provision places an obligation on a landlord to ensure that a smoke alarm installed in residential premises is repaired or replaced in accordance with the regulations. The maximum penalty for failure to comply with this obligation is \$2,200 (see Schedule 1.11[1] of the Bill).



The Bill amends the *Residential Tenancies Act 2010* to allow landlords to enter residential premises without consent to carry out, inspect or assess the need for repairs to, or replacement of, smoke alarms. Entering premises without the tenant's consent could impact on the tenant's statutory and contractual right to privacy in their residential premises.

However, the Committee notes that a new provision under the Act will require a landlord to ensure that smoke alarms installed in residential premises are repaired or replaced, and that it will be an offence for a landlord to fail to comply. Further, there are safeguards to minimise any privacy impacts. For example, the landlord must give notice of the entry to the tenant; notify the tenant of the proposed time and day of entry, if practicable; and enter the premises between the hours of 8:00am and 8:00pm. In the circumstances, the Committee makes no further comments.

#### *New offence*

7. Under section 105B of the *Residential Tenancies Act 2010* a tenant or co-tenant for a residential tenancy agreement may give an early termination notice to a landlord if he or she is in circumstances of domestic violence. In such situations, there will be no requirement to pay compensation to the landlord for the early termination (section 105D). Under section 105C, the termination notice must have annexed to it a piece of supporting documentation and one of these pieces of documentation is a declaration by a medical practitioner concerning the domestic violence.
8. The Bill creates a new offence in the *Residential Tenancies Act 2010* relating to these requirements. In particular, a person must not give a medical practitioner information for the purposes of a section 105C declaration that the person knows, at the time of providing the information, is false or misleading in a material particular. The new offence carries a maximum penalty of \$11,000 and/or imprisonment for 2 years (see Schedule 1.10[12] of the Bill).

The Bill introduces a new offence in the *Residential Tenancies Act 2010* relating to a person knowingly providing a medical practitioner with false or misleading information for the purpose of the medical practitioner making a declaration that the person is in circumstances of domestic violence. The offence carries a maximum penalty of \$11,000 and/or imprisonment for two years. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.

However, offences relating to providing false or misleading information are common in legislation and carry various maximum penalties depending on the circumstances. Further, the consequences of an individual knowingly providing false or misleading information to a medical practitioner about being in circumstances of domestic violence could be serious, wrongly implicating someone as a perpetrator. In the circumstances, the Committee makes no further comments.

*Search and seizure without warrant*

9. The Bill confers on an 'authorised officer' under the *Retail Trading Act 2008* powers to enter premises and to obtain information and documents under Divisions 1 and 2 of Part 2A of the *Fair Trading Act 1987* (see Schedule 1.12[4] of the Bill).
10. The new powers would only be able to be exercised for the purposes of the *Retail Trading Act 2008* and the regulations (see Schedule 1.12[4]). The *Retail Trading Act 2008* deals with the 'fair regulation of shop opening hours and restricted trading days'.<sup>1</sup>
11. As a consequence, where an authorised officer believes on reasonable grounds that there are on any premises documents evidencing conduct in contravention of the *Retail Trading Act 2008* or the regulations, he or she will be able to enter the premises without a warrant and:
  - inspect any document,
  - make a copy of, or take an extract from, any document,
  - seize any document, if the authorised officer believes on reasonable grounds that it is necessary to prevent it being interfered with or to prevent its concealment, loss deterioration or destruction (see section 19(4) of the *Fair Trading Act 1987*).
12. However, the authorised officer will not be able to enter a place that is a dwelling house or other residential premises unless the occupier consents; or some manufacture, trade or business is carried on there (see section 19(2) of the *Fair Trading Act 1987*).

**The Bill confers on authorised officers under the *Retail Trading Act 2008*, powers to enter premises without a warrant and to obtain documents under Divisions 1 and 2 of Part 2A of the *Fair Trading Act 1987*. This could impact on the privacy rights of affected persons and their right to be free from arbitrary interference.**

**However, the Committee notes that the proposed amendments to the *Retail Trading Act 2008* will draw upon powers which already exist in principal legislation. The Committee also notes that an officer will not be able to enter a dwelling house or residential premises without consent or unless some manufacture, business or trade takes place there. Similarly, the powers may only be exercised for the purposes of the *Retail Trading Act 2008* and any regulations, which is legislation dealing with the fair regulation of shop opening hours and restricted trading days. In the circumstances, the Committee makes no further comments.**

*Right against self-incrimination*

13. As above, the Bill confers on an 'authorised officer' under the *Retail Trading Act 2008* powers to enter premises and to obtain information and documents under Divisions 1 and 2 of Part 2A of the *Fair Trading Act 1987* (see Schedule 1.12[4] of the Bill).

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<sup>1</sup> See long title to the *Retail Trading Act 2008*.

14. As a consequence, where the Secretary<sup>2</sup> believes on reasonable grounds that a person can give information, evidence or produce documents about a possible contravention of the *Retail Trading Act 2008* or the regulations, an authorised officer will be able to issue that person with a written notice, requiring him or her to produce that information, evidence or those documents. Further, the person would not be excused from giving the information, evidence, or producing the documents on the ground that it may tend to incriminate the person. However, any evidence, information or documents obtained from a person in response to a notice would be inadmissible against the person in criminal proceedings other than proceedings for:
- (a) refusing or failing to comply with a notice to provide information, documents or evidence, or
  - (b) knowingly giving false or misleading information, documents or evidence in response to a notice.
15. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For example, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*. Similarly, article 14 of the International Covenant on Civil and Political Rights provides that, in criminal proceedings, a person has a right 'not to be compelled to testify against himself or to confess guilt'.

**The Bill confers on an authorised officer under the *Retail Trading Act 2008* powers under the *Fair Trading Act 1987* to require persons to provide information, documents and evidence. This impacts on the right against self-incrimination because the person would not be excused from providing the information, evidence or documents on the ground that it might incriminate him or her. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her.**

**However, the Committee notes that evidence, information or documents obtained in these circumstances would not be admissible against the person in criminal proceedings apart from proceedings for refusing or failing to comply with a notice to provide the material; or knowingly providing false or misleading information in response to such a notice. The Committee also notes that the new provisions draw upon powers that already exist in principal legislation. The Committee makes no further comments.**

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

#### *Commencement by proclamation*

16. The changes proposed by the Bill to the following Acts commence on a day or days to be appointed by proclamation:
- (a) *Charitable Fundraising Act 1991*: The changes remove a requirement for the registered office of an applicant for an authority to conduct a fundraising appeal to

<sup>2</sup> The Secretary is defined as the Commissioner for Fair Trading, Department of Finance, Services and Innovation; or if there is no person appointed as Commissioner then the Secretary of the Department of Finance, Services and Innovation, see *Fair Trading Act 1987*, s4.

be an address in NSW. The amendments also enable the regulations to impose requirements relating to registered offices.

- (b) Amendments to sections 20 and 86 of the *Property, Stock and Business Agents Act 2002*: The changes make it a condition of all licences and certificates of registration that the holder complies with continuing professional development requirements. They will also enable the regulations to prescribe additional requirements relating to trust accounts in which money received by a licensee for or on behalf of any person is to be held until it is paid to the person or disbursed as the person directs.
  - (c) Amendment to section 8 of the *Residential Tenancies Act 2010*: The change will provide that the *Residential Tenancies Act 2010* does not apply to short-term rental accommodation arrangements as defined by the *Fair Trading Act 1987* unless the person given the right to occupy the premises under the arrangements is occupying those premises as that person's principal place of residence (see clause 2 of the Bill).
17. Changes to section 17 of the *Property, Stock and Business Agents Act 2002* may also commence by proclamation as they are stated to commence when Schedule 2.12 to the *Fair Trading Legislation Amendment (Reform) Act 2018* commences. Schedule 2.12 of the *Fair Trading Legislation Amendment (Reform) Act 2018* commences on 1 July 2020 or an earlier day to be appointed by proclamation (see section 2 of the *Fair Trading Legislation Amendment (Reform) Act 2018*). The changes to section 17 of the *Property, Stock and Business Agents Act 2002* are consequent on proposed amendments to the *Fair Trading Legislation Amendment (Reform) Act 2018* in the Bill.

**The Bill provides for certain amendments to commence on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, particularly if it affects the rights and obligations of individuals.**

**While a flexible start date may assist with implementing administrative arrangements associated with some of the proposed amendments, affected parties may also benefit from having certainty about when the changes apply to them. The Committee refers this matter to Parliament to consider whether a flexible start date is reasonable in the circumstances.**

#### *Matters that should be dealt with in principal legislation*

18. The Bill proposes to amend section 12A of the *Building and Construction Industry Security of Payment Act 1999* to increase the maximum penalty that may be imposed by the regulations in relation to a failure to comply with trust account requirements for retention money. The increase is from \$22,000 to \$110,000 (see Schedule 1.1 of the Bill).
19. In the Second Reading Speech, the Minister explained the background to this change:

In 2018 the Government passed important reforms to the Building and Construction Security of Payment Act 1999. This followed a comprehensive review of the Act that involved significant industry and community consultation. One of the issues raised during the review was that the penalties in the legislation were insufficient and did not adequately deter noncompliance. The review recommended that the penalties be increased and this was done for offences in the Act as part of the 2018 amendments. A number of the penalties were increased from 200 penalty units to 1,000 penalty units as part of this process.

The bill will amend section 12A of the Act to increase the maximum penalty that may be imposed by the regulations for failure to comply with trust account requirements for retention money. This is an important obligation on head contractors and the maximum penalty should be equivalent to other similar types of offences under the Act. Making this amendment now will enable the regulations to be amended to increase the penalty amount as soon as possible. This will complement the increased penalties in the Act which commenced on 21 October 2019. It is important for the legislation to provide a robust enforcement mechanism to ensure compliance with requirements. Enabling an increase in the penalties for offences under the regulation will send a direct and immediate signal about the importance of ensuring security of payment for subcontractors in the building and construction industry.

**The Bill proposes to amend the *Building and Construction Industry Security of Payment Act 1999* to significantly increase the maximum penalty that may be imposed by the regulations in relation to a failure to comply with trust account requirements for retention money. The increase is from \$22,000 to \$110,000. The Committee acknowledges that the intention behind this change is to align the maximum penalty for failure to comply with these obligations with the penalties for equivalent offences under the principal Act.**

**However, the Committee prefers penalty provisions to be contained in principal legislation to foster an appropriate level of parliamentary oversight. This is particularly the case where the penalties set are significant. The Committee refers this matter to Parliament for consideration.**

## 2. Central Coast Drinking Water Catchments Protection Bill 2019\*

Date introduced	24 October 2019
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are—
  - (a) to protect the Central Coast drinking water catchments from mining and mining-related activities, and
  - (b) to prohibit interference with water in those drinking water catchment areas.

### BACKGROUND

2. In the Second Reading speech for the Bill, Ms Abigail Boyd MLC noted that:
 

The bill seeks to protect the Central Coast drinking water catchment by cancelling any mining authorisation granted in relation to land in a protected catchment and by prohibiting any granting, renewal or modification of titles and permits for exploration for and mining of minerals, including coal, petroleum and coal seam gas, in the drinking water catchment areas. It further seeks to prohibit interference – including polluting and taking water from – with the drinking water catchment areas.
3. The Bill proposes to cancel mining authorisations concerning land in the areas classified as protected catchment areas by the Bill. This would include cancellation of the mining authorisation granted to the Wallarah 2 coalmine in relation to land in protected catchment areas. According to the Second Reading speech, the Wallarah 2 longwall coalmine is to be built underneath an important water catchment in the Central Coast, raising community concerns that there are no special protections in place for the drinking water catchment.
4. Ms Boyd referred to the findings of an Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining (IESC) and stated that it:
 

...confirmed that risks posed by the current Wallarah 2 proposal would include conventional and non conventional subsidence to Jilliby Jilliby Creek and tributaries, non-conventional subsidence to Wyong River, changes to water quality and quantity in Wallarah Creek, and changes to water quality at the site of treated water discharge back into the Central Coast water supply catchment. Other risks confirmed by the IESC included potential impacts to groundwater dependent ecosystems, water-dependent species and cumulative groundwater impacts.

## ISSUES CONSIDERED BY THE COMMITTEE

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

5. Proposed sections 5 and 6 of the Bill provide that any mining authorisation or petroleum title granted in relation to land in a protected catchment area is cancelled. Further, the Bill cancels any planning approval for prospecting or mining for any mineral, or for petroleum prospecting and mining operations, in a protected catchment area given or granted prior to the commencement of the Bill. The Bill does not indicate whether compensation would be provided in the event of a cancellation of a mining authorisation, petroleum title or planning approval.

**The Bill seeks to cancel mining authorisations, petroleum titles or planning approvals granted prior to the commencement of the Bill, which may run counter to the rule of law. Retrospectivity impacts on the principle that a person has the right to know the law that is applicable to him or her at any given time so that s/he may order his or her affairs accordingly. The Committee notes further that it is unclear whether compensation would have to be paid following the cancellations.**

**The Committee acknowledges that the Bill seeks to protect the Central Coast drinking water catchment and that it is proposed that the Wallarah 2 longwall coalmine be built underneath part of this catchment. However, given the potential impact on property rights, the Committee refers the retrospective application of the Bill to Parliament for consideration, and the question of whether the Bill makes appropriate provision regarding compensation.**

*Strict liability offences*

6. It is an offence under the Bill to take or use any water from a water source located on land in a protected catchment area: proposed section 8. It is also an offence to construct or use a water supply work, drainage work or flood work or to carry out an aquifer interference activity on such land. The definition of 'protected catchment area' in proposed section 3 is broad in scope and includes, amongst other things, land within the Central Coast local government area as well as land within the operations of the Central Coast Water Corporation. However, it does not include land within a part of the State or water source to which Parts 2 or 3 of Chapter 3 of the *Water Management Act 2000* applies.
7. These are strict liability offences and so derogate from the common law principle that the mental element of an offence is relevant to the imposition of liability. The maximum penalty that applies for either offence is more than \$5 million for a corporation, and in the case of an individual \$1.1 million and/or two years imprisonment. These penalties correspond with those for similar offences under the *Water Management Act 2000*.
8. However, proposed section 8(3) of the Bill provides a defence so that a person is not guilty of such an offence if they are able to establish that they were acting with lawful authority.

**The Bill creates a strict liability offence of taking or using any water from a water source located in a protected catchment for which the maximum penalties are substantial – more than \$5 million for a corporation, or \$1.1 million and/or two**

**years imprisonment in the case of an individual. The Committee acknowledges the significant public interest in protecting water sources and notes that a defence is available if the person concerned is able to establish that they acted with lawful authority.**

**However, strict liability offences depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Further, the area which is considered to be a protected catchment area is large, extending to any land within the Central Coast local government area or land within the operations of the Central Coast Water Corporation (some exceptions do apply). Given this, and the significant nature of the applicable penalties, including imprisonment, the Committee refers these provisions to Parliament for consideration.**



### 3. Child Protection (Nicole's Law) Bill 2019\*

Date introduced	24 October 2019
House introduced	Legislative Council
Member responsible	Reverend the Hon. Fred Nile MLC
	*Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are—
  - (a) to require the Commissioner of Police to publish certain information contained in the Child Protection Register established under section 19 of the *Child Protection (Offenders Registration) Act 2000*, and
  - (b) to ensure that the publishing of information does not enable the identity of victims of registrable offences to be ascertained.

#### BACKGROUND

2. In the Second Reading Speech, Revd the Hon. Fred Nile MLC stated that the Bill would require information to be published so that members of the public can identify persons living among them who have been convicted of child sexual assault. Revd Nile told Parliament:

The Child Protection (Nicole's Law) Bill 2009 is a simple, straightforward bill, which aims to protect the most vulnerable members of our community, namely children. I have included a girl's name, Nicole, in the title of the bill because Nicole was sexually abused by a neighbour who was a convicted sex offender but the people in that location had no knowledge of his identity.

3. Revd Nile further noted the sex offender registries that exist in other jurisdictions including the United Kingdom and Wales, South Korea and a number of states in the United States of America. Revd Nile stated:

There is no reason why New South Wales should not establish a similar register to protect the community. Data from the United States suggests that where there is a register, it has a general deterrent effect—no further child sexual abuse cases.

4. Revd Nile also spoke about his motivations for introducing the Bill:

My motivation behind the bill is the commonsense approach to child protection. If the impact of such a register can at the very least prevent such crimes reoccurring, then that is enough in my eyes to support such a scheme. A community has a right to be notified of any dangerous individual who comes to live among it. Such notification allows members of the community to take measures to protect their children.

## ISSUES CONSIDERED BY THE COMMITTEE

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

5. The *Child Protection (Offenders Registration) Act 2000* sets out registration and reporting requirements for certain offenders who have committed sexual and other serious offences against children.
6. Under section 3A of that Act, a 'registrable person' within the meaning of the Act is a person whom a court has, at any time (whether before, on or after the commencement of the section) sentenced in respect of a 'registrable offence'. A 'registrable offence' is:
  - a 'class 1 offence' – including murder of a child and certain cases of sexual intercourse with a child; or
  - a 'class 2 offence' including manslaughter of a child and an offence that involves sexual touching or a sexual act against or in respect of a child; or
  - an offence that results in the making of a child protection registration order (see section 3 of the Act).
7. Clause 3 of the Bill provides that the Act is to be construed with, and as if it formed part of, the *Child Protection (Offenders Registration) Act 2000*.
8. Clause 5 of the Bill provides that the Commissioner of Police would be required to publish certain information in respect of each 'registrable person' which would have to be made available on the NSW Police Force website, and available for viewing at each police station, free of charge, during ordinary office hours. Information required to be published would include:
  - (a) the person's name, together with any other name by which the person is or has previously been known,
  - (b) in respect of each name other than the person's current name, the period during which the person was known by that other name,
  - (c) the person's date of birth,
  - (d) a physical description of the person including the person's gender and race,
  - (e) the person's most recent photograph,
  - (f) the suburb and postcode of the residential address of the person,
  - (g) for a registrable person found guilty of a Class 1 offence, the person's full residential address,
  - (h) details of each Class 1 or Class 2 offence of which the person has been found guilty or with which the person has been charged,
  - (i) details of each offence of which the person has been found guilty that resulted in the making of a child protection registration order,

- (j) the date on which the person was sentenced for any registrable offence,
- (k) the date on which the person ceased to be in government custody in respect of a registrable offence, or entered or ceased to be in government custody in respect of any offence during the person's reporting period.

**The Bill would require the Police Commissioner to publish certain information about certain offenders who have committed sexual and other serious offences against children. This includes an offender's name, and any name by which they have been previously known; the offender's most recent photograph; and the suburb and postcode of his or her residential address. The Commissioner would also be required to publish the actual address of offenders who have been convicted of a 'Class 1 offence'.**

**The Committee acknowledges the child protection objectives of the Bill. However, it also notes that the Bill would impact on the privacy rights of affected offenders. Publishing the information covered by the Bill may also risk double punishment, that is, offenders who have served their sentence may be subject to a level of vigilante activity. The Committee refers these matters to Parliament for consideration.**

#### *Retrospectivity*

- 9. As above, clause 5 of the Bill would require the Police Commissioner to publish certain information about a 'registrable person'.
- 10. As is also noted above, section 3A of the *Child Protection (Offenders Registration) Act 2000*, contains the applicable definition of a 'registrable person' providing that a 'registrable person' is a person whom a court has, at any time (whether before, on or after the commencement of the section) sentenced in respect of a 'registrable offence'.
- 11. The Bill therefore has retrospective application – the information that the Police Commissioner would be required to publish under the Bill would include information related to offences committed before the Bill came into force and indeed before section 3A of the *Child Protection (Offenders Registration) Act 2000* came into force.

**The Committee notes that the Bill has retrospective application. That is, the information that the Police Commissioner would be required to publish under the Bill would include information about relevant offences of which the offender has at any time been convicted, including before the Bill came into force. The Committee generally comments on retrospectivity as it runs counter to the principle that a person should be able to know the laws to which s/he is subject at any given time. In this case the retrospectivity would operate in a manner prejudicial to those affected. Again, the Committee acknowledges the child protection objectives of the Bill and refers to Parliament the question of whether the retrospectivity is reasonable in the circumstances.**

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

#### *Henry VIII clause*

12. Schedule 1, item 1(1) of the Bill provides that the regulations may contain provisions of a savings or transitional nature consequent on the enactment of the Act or any Act that amends the Act.
13. Item 1(2)(a) to the Schedule further provides that any such provision has effect despite anything to the contrary in the Schedule. In addition, item 1(4) provides that regulations may amend the Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

**The Bill includes Henry VIII clauses that would allow the regulations to override or amend Schedule 1 to the proposed Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the changes. The Committee refers the matter to Parliament for consideration.**

## 4. Design and Building Practitioners Bill 2019

Date introduced	23 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

### PURPOSE AND DESCRIPTION

1. The objects of the Bill are as follows –

- (a) to require compliance declarations for regulated designs to be provided by registered design practitioners and principal design practitioners who provide designs for certain building work (***applicable building work***),
- (b) to impose obligations on registered building practitioners who carry out applicable building work to take all reasonable steps to provide building compliance declarations and to obtain compliance declarations for regulated designs,
- (c) to impose on building practitioners who do applicable building work an obligation not to carry out the work unless regulated designs have been obtained and compliance declarations provided,
- (d) to impose on building practitioners who do applicable building work an obligation to take all reasonable steps to comply with the applicable requirements of the *Building Code of Australia*,
- (e) to establish a duty of care owed to persons who carry out construction work relating to certain buildings to take reasonable care to avoid economic loss caused by defects arising from the work,
- (f) to establish a registration scheme for design practitioners, principal design practitioners and building practitioners who are subject to compliance declaration requirements and to establish insurance requirements for registered practitioners,
- (g) to provide for enforcement of the requirements of the proposed Act,
- (h) to establish a register of practitioners registered under the proposed Act,
- (i) to enact other minor and consequential provisions and provisions of a savings and transitional nature,
- (j) to make consequential amendments to other Acts.

### BACKGROUND

2. In the Second Reading Speech, the Hon. Kevin Anderson MP, Minister for Better Regulation and Innovation stated that the Bill would “introduce a suite of new obligations

on design and building practitioners to ensure that each step of construction is well documented and compliant”.

3. The Minister explained that the Bill formed part of the Government’s response to the report of Professor Peter Shergold AC and Ms Bronwyn Weir, *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (the ‘Building Confidence Report’). The Minister stated that the Building Confidence Report found that the accountabilities of various parties in the construction process were unclear and that there were insufficient controls regarding the accuracy of documentation. Further, it found that there was a systemic failure, especially for design practitioners, to expressly require documentation to demonstrate compliance with the National Construction Code.
4. The Minister told Parliament that in its response to the Building Confidence Report, the Government had committed to improve the quality and quantity of plans relied on for building work. Therefore, the Bill introduces a number of new requirements to “ensure that key practitioners are held accountable for their work across the planning, design and construction stages”.
5. The Bill focuses on three categories of practitioner: design practitioners, principal design practitioners and building practitioners, upon whom a series of new obligations would be placed, and who the Minister said would “play a critical role for prescribed classes of buildings under the legislation”. The Minister detailed how these key practitioners would be held accountable under the Bill:

This bill...introduce[s] prescribed categories of regulated designs and a requirement for registered design practitioners who prepare regulated designs to issue a compliance declaration stating compliance with the Building Code of Australia. The bill makes it a requirement that major variations to designs must be declared as compliant before being provided to the builder, and that registered building practitioners must obtain, rely upon and build in accordance with these declared designs and issue a compliance declaration stating that the final building, including any variation, complies with the Building Code of Australia.

6. In addition, the Minister stated that the Bill would require any practitioner who makes a compliance declaration to be registered and qualified to do so. Further it provides that a duty of care is owed for construction work to certain categories of owner. On this aspect of the Bill, the Minister noted:

Although the reforms relating to design and building practitioners are critical, the bill goes a step further and introduces specific protection for consumers...The House would be aware of the recent devastation caused by defective buildings, such as the Mascot and Opal Towers. These incidents, coupled with a number of legal cases, have reduced consumer confidence and provided uncertainty about the extent of protections available for financial damages or pure economic loss. Part 3 of the bill establishes key reforms that will significantly improve the redress available to consumers for building defects. For the first time in New South Wales, clause 30 establishes a statutory duty of care that eradicates any uncertainty that may exist in the common law that a duty is owed to the end user and in respect to liability for defective building work.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *New Offences*

7. As above, the Bill introduces a scheme that places a series of new obligations on design and building practitioners with the aim of ensuring that each step of construction is well documented and compliant. These new obligations are backed by a number of corresponding offence provisions to ensure compliance.
8. For example, the Bill places new obligations on 'design practitioners' who are defined as persons who prepare 'regulated designs' (Clause 3). 'Regulated designs' are defined as a design prescribed by the regulations that is prepared for:
  - (a) building work (including a 'building element'), or
  - (b) a 'performance solution' for building work, including a building element (Clause 5).
9. 'Building work' is defined as work involved in, or involved in coordinating or supervising work involved in, one or more of the following:
  - (a) The construction of a building of a class or type prescribed by the regulations;
  - (b) The making of alterations or additions to a building of that class or type;
  - (c) The repair, renovation or protective treatment of a building of that class or type (Clause 4).
10. Further, 'building elements' are defined as:
  - (a) The fire safety systems for a building, as prescribed by the regulations;
  - (b) Waterproofing;
  - (c) An internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it;
  - (d) A component of a building that is part of the building enclosure;
  - (e) Other things prescribed by the regulations (Clause 6).
11. Finally, a 'performance solution' is defined in the Building Code of Australia (see Clause 3 of the Bill) and the Minister explained in the Second Reading Speech that a performance solution for building work is "one of two pathways of achieving compliance with the Building Code of Australia, which is the national mandatory compliance level that all buildings in Australia must meet".
12. With regard to the new obligations that the Bill places on design practitioners, under Clause 9, a design practitioner must prepare a design compliance declaration for any 'regulated designs'. The declaration must state whether or not the regulated design for the building work complies with the requirements of the Building Code of Australia or any

other applicable requirements prescribed by the regulations (Clause 8). The Minister explained what this means in practice:

Various reports have identified issues with compliance and quality of design documentation prepared for the building approvals process. Inadequate design documentation increases the potential for disputes and non-compliance which can impact on the quality of the final building. In response to this issue, the bill imposes a new obligation on any practitioner who prepares a regulated design for building work, including a plan, specification or report detailing a design, to lawfully declare that the design complies with the Building Code of Australia. For example, this would include architects, engineers and others involved in the design process.

13. The Minister also stated that design compliance declarations would mean that “for the first time in New South Wales, design practitioners will have responsibility for the compliance of their designs that are ultimately relied upon for building work”. Further, Clause 10 of the Bill provides that only design practitioners who are registered could issue a design compliance declaration.
14. As above, these new obligations on design practitioners are backed by offence provisions. Specifically:
  - A design practitioner who fails to make a design compliance declaration, or who makes such a declaration without being registered is liable to a maximum penalty of \$165,000 as a body corporate, or \$55,000 in any other case.
  - A person who makes a design compliance declaration that the person knows to be false or misleading in a material particular is liable to a maximum penalty of \$220,000 or imprisonment for two years, or both.
15. The Bill also places new obligations on ‘building practitioners’ defined as a person who agrees under contract or other arrangement to do building work; or if more than one person agrees to do building work, a person who is the principal contractor for the work (Clause 7). Again, these new obligations are backed by offence provisions. For example:
  - Clause 16 requires a registered building practitioner to provide a building compliance declaration and other required documentation to the person for whom the building work has been done prior to making an application for an occupation certificate for the building work. Failure to do so attracts a maximum penalty of a \$165,000 fine, or \$55,000 in any other case. False or misleading building compliance declarations would attract a maximum penalty of \$220,000 or imprisonment for two years, or both.
  - Clause 18 provides that a building practitioner must not, except with reasonable excuse, carry out any building work for which a regulated design is to be used unless they have a design for the work that is from a registered design practitioner and it is accompanied by a design compliance declaration. The maximum penalty for non-compliance is a \$165,000 fine for a body corporate, or \$55,000 in any other case.
16. A number of further provisions throughout the Bill create new offences to back up the new obligations that the Bill places on design and building practitioners, and these too would attract significant maximum monetary penalties, and in some cases terms of



imprisonment (see for example Clause 27 – use of undue influence in providing compliance declarations; Clause 48 – failure of a registered practitioner to comply with a condition of registration; or Clause 59 – requirement for a director of a registered body corporate to report suspected conduct that is grounds for disciplinary action).

**The Bill introduces a scheme that places a series of new obligations on design and building practitioners with the aim of ensuring that each step of the building and construction process in NSW is well documented and complies with the National Construction Code. These new obligations are backed by a number of offence provisions, for which non-compliance would attract significant maximum monetary penalties, or imprisonment for up to two years in some cases.**

**The creation of new offence provisions impacts on personal rights and liberties as previously lawful conduct becomes unlawful. However, the new offences are part of a scheme to ensure safety and quality in the building and construction sector in NSW, and thereby safeguard consumer confidence. Further, the scheme forms part of the NSW Government's response to a recent national Building Confidence Report that found there was a systemic failure to expressly require documentation to demonstrate compliance with the National Construction Code. In the circumstances, the Committee considers the new offence provisions are a reasonable and proportionate measure and makes no further comment.**

#### *Privacy*

17. Part 4 of the Bill includes provisions for a registration system for practitioners. In the Second Reading Speech, the Minister explained:

The Government response to the [Building Confidence] report committed to extending regulation to design practitioners and other unlicensed categories of builder. This bill delivers on that promise and introduces a comprehensive registration system that will ensure that only persons who are competent, suitably qualified and properly insured will be able to perform the declaration functions proposed by this new scheme.

18. Clause 37 provides that in investigating an application for registration under the proposed Act, the Secretary of the Department of Customer Service ('the Secretary') can require information from third parties about the applicant or his/her close associates. This includes financial and other confidential information. A 'close associate' includes:
  - a business partner, employee or agent of the applicant;
  - a spouse, former spouse, existing or former de facto partner, child, grandchild, sibling, parent or grandparent of the applicant (see Clause 3 of the Bill and Schedule 1 of the *Home Building Act 1989*).
19. If the required information is not provided, the Secretary can refuse to consider the application until it is. In discussing the clause, the Minister stated that it would "assist the secretary in more closely scrutinising applicants and makes clear that only individuals who are fit to undertake the role will be able to do so".

**The Bill introduces a registration system for the practitioners performing functions under the proposed Act. Clause 37 would allow the Secretary of the Department of Customer Service, in investigating an application for registration,**

**to require information from third parties about the applicant or his/her close associates. This includes financial and other confidential information. In so doing, the Bill impacts on the privacy rights of applicants and their close associates.**

**However, as detailed above, the requirements are part of a new scheme that is designed to ensure safety and quality in the building and construction sector in NSW, and thereby safeguard consumer confidence. They would enable the Secretary to more closely vet applicants to ensure that they are suitably qualified to perform functions under the proposed Act. Further, the requirement to provide the information is not absolute – a person retains the option to refuse to provide it, but it will mean that the applicant may not be able to obtain registration. In the circumstances, the Committee makes no further comment.**

*Privacy and freedom from arbitrary interference*

20. Parts 6 and 7 of the Bill set down an investigation and enforcement framework to promote compliance with the requirements of the proposed Act. In particular, clause 72 of the Bill would allow an ‘authorised officer’ to enter any premises at which business is in progress, including building work, without a search warrant. This does not apply to residential premises for which the consent of the occupier, or a search warrant, would be necessary. It does however apply to entry onto common property under a strata scheme (clause 73). An ‘authorised officer’ is defined as a police officer or a person appointed by the Secretary, being an employee of the Department, an investigator within the meaning of the *Fair Trading Act 1987*, or a person belonging to a class of persons prescribed by the regulations (clauses 63 and 65).
21. Under clause 76, an authorised officer could exercise a number of powers on the premises including:
  - (a) examining and inspecting any thing;
  - (b) taking and removing samples of a thing;
  - (c) taking photographs or other recordings that the authorised officer considers necessary;
  - (d) seizing a thing that the authorised officer has reasonable grounds for believing is connected with an offence under the Act or the regulations.

**The Bill sets down an investigation and enforcement framework to promote compliance with the requirements of the proposed Act. In particular, it would allow an authorised officer to enter any premises at which business is in progress, including building work, without a search warrant after which he or she could exercise a number of search and seizure-related powers.**

**The Committee notes that provisions such as these impact on affected persons’ privacy rights. Further, the requirement to obtain a warrant is intended to protect people against arbitrary interference. However, the Committee acknowledges the provisions would allow investigators to respond quickly where issues arise, promoting safety and quality in the building and construction industry consistent with the objects of the proposed Act. Similarly, authorised**

**officers could not enter residential premises without a warrant. Given this safeguard and the context of the Bill, the Committee makes no further comment.**

**Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA**

*Non-reviewable decisions affecting reputational and economic rights*

22. Under clause 91 of the Bill, the Secretary may authorise publication of a warning notice that warns persons of the risks in dealing with:
- (a) a specified registered practitioner or former registered practitioner, or
  - (b) any other person that the Secretary reasonably believes may have breached the proposed Act or regulations.
23. However, the Secretary would have to conduct an investigation before authorising the publication and would have to give the person concerned at least two business days to make representations to the Secretary about publication of the warning notice unless the Secretary cannot contact the person, the person refuses to make any representations, or there is an immediate risk to the public.
24. The Bill provides for review of certain decisions of the Secretary by the NSW Civil and Administrative Tribunal (see clauses 55 and 60). However, there does not appear to be provision for the Secretary's decision to publish a warning notice to be reviewed.

**The Bill would allow the Secretary to publish a notice warning persons of the risks of dealing with a specified practitioner or former practitioner who is registered under the proposed Act; or any other person the Secretary reasonably believes may have breached the proposed Act or regulations. However, there does not appear to be provision for such a decision to be reviewed by the NSW Civil and Administrative Tribunal. Therefore, the Bill may allow a non-reviewable decision to be made that may affect the reputational and economic rights of persons concerned.**

**The Bill does contain safeguards e.g. a warning cannot be issued without the Secretary first conducting an investigation. Further, the person concerned must generally be given the opportunity to make representations prior to the publication of a warning notice. In addition, there may be some cases where it is in the public interest for a warning notice to be published swiftly. Notwithstanding this, the Committee refers the provisions to Parliament to consider whether they are reasonable in the circumstances.**

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

*Commencement by proclamation*

25. Clause 2 of the Bill provides that the Bill commences on a day or days to be appointed by proclamation.

**The Bill is to commence on proclamation. The Committee prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected. However, the Committee acknowledges the detailed**

**administrative arrangements that will be required to set the new scheme established by the Bill into motion. A flexible start date may facilitate such a process. In the circumstances, the Committee makes no further comment.**

*Matters that should be included in primary legislation*

26. As above, the Bill introduces a scheme that places a series of new obligations on design and building practitioners with the aim of ensuring that each step of construction is well documented and compliant. In establishing this scheme, the Bill would allow a number of significant details to be dealt with in the regulations.
27. For example, clause 4 of the Bill would allow the regulations to prescribe the classes or types of building to which the new scheme will apply. This clause would also allow the regulations to expand or limit the types of building work to which the scheme will apply.
28. Similarly, Clause 6 of the Bill defines certain things as ‘building elements’ that will be covered by the proposed Act (like fire safety systems and waterproofing), at the same time as allowing the regulations to broaden this definition. In discussing building elements the Minister told Parliament:

These designs are considered important as they are more likely to have greater impact on the safety and proper construction of a building. To futureproof the new legislation, the bill enables the regulations to broaden the types of elements in the future. As part of further consultation with stakeholders, consideration will also be given to including hydraulic, electrical and mechanical systems as building elements under the legislation. This recognises that these types of elements may also have a significant safety impact if poorly designed. This also responds to some concerns raised by stakeholders that these building elements should be included as part of the scheme.

29. In addition, Clause 25 provides a broad regulation-making power to prohibit the issue of certificates under relevant legislation (e.g. complying development certificates or strata certificates) unless compliance declarations and/or regulated designs have been provided to the issuer of the certificate.
30. Further, Clause 35 of the Bill deals with registration of practitioners under the new scheme and allows the regulations to make provision for or with respect to classes of registration. The Minister stated in respect of this clause:

While this detail will be prescribed by the regulations, at minimum architects, engineers, draftspersons and various designers will need to be registered as design practitioners. This recognises that these practitioners would provide the types of plans that would need to be declared as compliant with the Building Code of Australia.

**In introducing a scheme that places a series of new obligations on design and building practitioners, the Bill would allow a number of significant details e.g. key definitions and offence provisions, to be dealt with in the regulations. The Committee acknowledges that such an approach will provide flexibility, allowing swifter implementation of the necessary arrangements to support a complex and comprehensive new scheme. However, the Committee prefers significant details such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. In the circumstances, the Committee refers this matter to Parliament for consideration.**

## 5. Digital Restart Fund Bill 2019

Date introduced	22 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish the Digital Restart Fund for the purpose of providing funding for digital and information and communications technology initiatives across the government sector.

### BACKGROUND

2. In his Second Reading Speech to Parliament, the Hon. Victor Dominello MP, Minister for Customer Service, stated that one of the biggest enablers of customer service is the digital and information and communications technology (ICT) systems that run the agencies and services used by customers and staff. The Minister told Parliament:

These systems are our digital infrastructure and the backbone of our service delivery. Whether taking payments, issuing licences or providing information to help citizens find the right place to go, this infrastructure is crucial to the day-to-day running of government.

3. The Minister further noted recent advances in technology and stated that it is necessary to change the way in which technology is delivered so as to provide services in line with customers' needs:

The apps and online services used by citizens and businesses every day are delivered not through enormous Information Technology projects, but by starting small with seed investments, then growing, changing and improving over time in response to customer demand and real-time feedback.

4. However, the Minister told Parliament that for such a delivery approach to work, changes to technology investment would also be needed:

...it necessitates a new approach to technology investment such as starting with seed funding for prototypes to test if an idea will actually meet customers' needs and, if it does, growing it gradually over time rather than having a big-bang release. It necessitates a holistic view of investment across government so we can solve problems like taking payments [or] issuing licences...across the whole of government, rather than solving them multiple times over, cluster by cluster.... It also necessitates a strategic view on the future of our legacy systems such as the technology platforms that are more than a decade old and that are ripe for renewal...

5. Therefore, the Bill establishes the Digital Restart Fund, which will have initial funding of \$100 million over two years. The Minister explained:

It will fund initiatives that deliver on whole-of-government citizen journeys and life events, shared capabilities that create cost savings and consistent user experiences for our customers, modernisation of our aging systems to reduce the risk of failure and overhead costs to maintain them and initiatives that grow the digital capabilities of the New South Wales Government. The bill will establish the fund in the Special Deposits Account and release funding for projects that promote these purposes.

6. The Minister further stated that the Fund would change how information and communications technologies and digital investments are planned, implemented and operated:

The fund moves away from the approach of funding large capital projects where benefits may not be realised for many years. Instead, the fund is designed to draw focus to smaller, iterative solutions linked to the life events and customer experiences that matter to people. The fund will assist in generating benefits more quickly, reducing duplication in investment, and eliminating inefficient legacy systems.

7. In addition, the Minister stated that “All clusters have contributed to the fund, ensuring that it is truly a whole-of-government initiative”.

#### 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*.**

## 6. Environment Planning and Assessment Amendment (Territorial Limits) Bill 2019

Date introduced	24 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to prohibit the imposition of conditions of a development consent that purport to regulate any impact of the development occurring outside Australia or any impact of development carried out outside Australia.

### BACKGROUND

2. In the Second Reading Speech, the Hon. Rob Stokes MP, Minister for Planning and Public Spaces stated that the scope of development consent under the *Environmental Planning and Assessment Act 1979* has come under scrutiny as a result of some recent case law regarding the United Wambo open-cut coal mine.
3. In that case, the issue stemmed from the development consent for the coal mine which carried the condition of directing the proponent to prepare and comply with an export management plan. That plan required the proponent to ensure that the extracted coal was only exported to countries that are signatories to the Paris Agreement within the United Nations Framework Convention on Climate Change, or that are signed off by the Secretary of the Department of Planning, Industry and Environment as having similar policies.
4. The Minister noted that this highlighted a technical and jurisdictional issue with the Act as it does not deal with extraterritorial impacts of development and stated:

The New South Wales planning system currently contains requirements to consider greenhouse gas emissions, which is absolutely appropriate. Such requirements have always focused on the impacts of development that can reasonably be controlled by the applicant. By contrast, there are no applicable State or national policies requiring New South Wales coal projects to minimise or offset downstream emissions that occur overseas. As the secretary of the planning department correctly highlighted in his letter to the Independent Planning Commission in relation to the United Wambo proposal, it is not the Government's policy to regulate—either directly or indirectly—matters of international trade. They are matters for the Commonwealth Government. ... It is therefore important that we clarify the limitations of the New South Wales planning system to control the impacts of development that occurs overseas.

5. This Bill clarifies the limitations of the New South Wales planning system to control the impact of development that occurs overseas. Principally, the Bill clarifies that

development consent conditions can only be imposed if they relate to impacts occurring within Australia or its external territories.

6. The proposed section 4.17A of the Bill identifies prohibited conditions that have no effect if they are part of a development consent granted under Part 4 of the Act.
7. Schedule 2 of the Bill amends that *State Environment Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* to align with the Bill's new restriction on development consent conditions by omitting reference to downstream greenhouse gas emissions.

#### ISSUES CONSIDERED BY THE COMMITTEE

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



## 7. Justice Legislation Amendment Bill (No 2) 2019

Date introduced	23 October 2019
House introduced	Legislative Council
Minister introducing	The Hon. Don Harwin MLC
Portfolio covered by the Bill	Communities and Justice

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend various Acts and regulations relating to courts, crimes and other matters in the Communities and Justice portfolio, including as follows—
  - (a) to amend the *Crimes Act 1900*, including—
    - (i) to clarify that a person may commit an offence involving participation in a criminal group whether or not the person is a member of the criminal group, and
    - (ii) to extend the application of certain offences relating to the theft of motor vehicles and vessels to trailers, and
    - (iii) to provide that access to or modification of computer data, or impairment of electronic communications, that is caused by a law enforcement officer does not constitute an offence if it is for certain law enforcement purposes,
  - (b) to amend the *Criminal Procedure Act 1986*, including—
    - (i) to remove a requirement for a Magistrate to give an accused person an oral explanation of the committal process in proceedings for indictable offences if the accused person is legally represented, and
    - (ii) to provide that female genital mutilation offences and the offence of concealing a serious indictable offence, if the concealed offence is a prescribed sexual offence, are prescribed sexual offences, and
    - (iii) to provide for a suitable person to consent to the disclosure or the adducing of evidence disclosing a protected confidence in proceedings if the principal protected confider is under 14 years of age, and
    - (iv) to provide that the indictable offences of bestiality and supplying a prohibited drug on an ongoing basis are to be dealt with summarily unless the prosecutor or person charged elects to have the offence dealt with on indictment,
  - (c) to amend the *Crimes (Administration of Sentences) Act 1999* as follows—
    - (i) to enable the Commissioner of Corrective Services to enter into an information sharing arrangement with an intelligence agency,

- (ii) to extend the powers of correctional officers in certain circumstances to enable officers to stop, detain, search and arrest a person suspected of committing an offence under the *Crimes (Administration of Sentences) Act 1999* or the regulations,
- (d) to amend the *Bail Act 2013* as follows—
  - (i) to enable a police officer to make a bail decision in relation to a witness who is arrested for failing to appear before a court or failing to comply with a subpoena,
  - (ii) to enable a court to issue a warrant to apprehend a person who fails to appear before the court in accordance with the person's bail acknowledgment,
- (e) to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* as follows—
  - (i) to authorise police officers to use dogs for general drug detection without a warrant when entering premises that are subject to a declaration under the *Restricted Premises Act 1943*,
  - (ii) to require the owner of stock subject to a stock mustering order to give a copy of the order to the police officer in charge of the police station closest to the land to which the order relates,
- (f) to amend the *Criminal Appeal Act 1912* to enable the Attorney General or the Director of Public Prosecutions to appeal to the Court of Criminal Appeal against certain sentences imposed by the Supreme Court or District Court in respect of summary offences that are back up offences in relation to indictable offences,
- (g) to amend the *Parole Orders (Transfer) Act 1983* to provide that on the registration in New South Wales of a parole order made under the law of another State or Territory, the NSW standard parole conditions apply and replace the conditions imposed under that other law,
- (h) to amend the *Children (Detention Centres) Act 1987* to provide that the parole of certain juvenile offenders is to be dealt with under the *Crimes (Administration of Sentences) Act 1999* once they reach the age of 18 years,
- (i) to amend the uncommenced *Crimes Legislation Amendment Act 2018* to amend proposed sections of the *Crimes (Domestic and Personal Violence) Act 2007*, including to enable a court to determine the duration of an apprehended domestic violence order,
- (j) to amend the *Sheriff Act 2005* to permit a sheriff's officer executing an arrest warrant to search the person for items that present a danger to a person,
- (k) to amend the *Child Protection (Offenders Registration) Act 2000* to make it clear that the onus of proving a reasonable excuse as a defence to the offence of failing to comply with reporting obligations lies with the registrable person on the balance of probabilities,

- (l) to amend the *Witness Protection Act 1995* to provide for a person who is, or who has been, a participant in a witness protection program to give evidence by audio visual link,
- (m) to amend the *Legal Aid Commission Act 1979* to enable the Legal Aid Commission of New South Wales to engage law practices, rather than private legal practitioners, for the provision of legal aid,
- (n) to amend the *Court Security Act 2005* to provide that a security officer may require a person at court premises to submit to a personal search if the person has submitted to a scanner search and the officer considers a personal search is appropriate,
- (o) to amend the *Firearms Act 1996* and *Weapons Prohibition Act 1998* and the regulations under those Acts, including to update references to good behaviour bonds as a consequence of changes to community-based sentencing options made by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*,
- (p) to amend the *Surveillance Devices Act 2007* as follows—
  - (i) to extend the information required to be included in a notice served on the Attorney General in relation to an application for a surveillance device warrant or retrieval warrant to include the grounds on which the warrant is sought,
  - (ii) to allow information obtained from the use of body-worn video by police officers to be used in connection with the education and training of students of policing,
- (q) to amend the *Housing Act 2001* to allow information obtained in connection with the administration or execution of the Act to be disclosed to a law enforcement agency for law enforcement purposes,
- (r) to amend the *NSW Trustee and Guardian Act 2009* as follows—
  - (i) to include the preparation of instruments that create enduring guardianship appointments and powers of attorney as functions of the NSW Trustee and Guardian,
  - (ii) to enable the NSW Trustee and Guardian to charge the cost of any property repairs when acting in a trust or protective capacity,
- (s) to amend the *Coroners Act 2009* to provide that one Deputy Chief Magistrate is to be appointed to the Domestic Violence Death Review Team on the recommendation of the Chief Magistrate,
- (t) to amend the *Scrap Metal Industry Act 2016* to allow a scrap metal dealer to buy an unidentified motor vehicle for scrap metal if authorised by a police officer,
- (u) to amend the *Legal Profession Uniform Law Application Act 2014* to validate decisions and other actions taken under the authority of a delegation purportedly

given in 2015 to the New South Wales Bar Association and Law Society of New South Wales by the Legal Services Commissioner,

- (v) to amend the *Trustee Act 1925* to abolish a rule of equity (known as the rule in *Hardoon v Belilios*) under which a trust beneficiary could be held liable in certain circumstances to indemnify or make other payments in respect of acts, defaults, obligations or liabilities of the trustee,
- (w) to amend the *Workplace Injury Management and Workers Compensation Act 1998* to provide for the pension entitlements of a Judge of the Land and Environment Court or the District Court who concurrently holds the office of President of the Workers Compensation Commission,
- (x) to make other minor, consequential and law revision amendments.

## BACKGROUND

2. In the Second Reading Speech, the Hon. Natalie Ward MLC (on behalf of the Hon. Don Harwin MLC) stated that the Bill:

...introduces a number of miscellaneous amendments to address developments in case law, support procedural improvements and close gaps in the law that have become apparent. In particular, these amendments will strengthen our community through, firstly, improving justice system responses to domestic violence, and, secondly, improving criminal procedure and court processes.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Reversal of onus of proof*

3. The *Child Protection (Offenders Registration) Act 2000* imposes reporting obligations on offenders who have committed sexual and other serious offences against children. Section 17 provides that it is an offence for a registrable person to fail to comply with their reporting obligations under the Act without reasonable excuse. It is currently not clear whether the registrable person bears the onus of proving a reasonable excuse, or whether the prosecution bears the onus to disprove a reasonable excuse (or to prove beyond reasonable doubt that there was no reasonable excuse).
4. The Bill would amend section 17 to clarify that registrable persons bear the onus of proving, on the balance of probabilities, that they had a reasonable excuse for failing to comply with their reporting obligations (Schedule 1, item 1.2). This is a reversal of the ordinary requirement for the prosecution to prove all the elements of an offence. The Second Reading Speech gave the following explanation for reversing the onus in this situation:

It is appropriate for the registrable person, in the context of an offence that relates to a failure to comply with their reporting obligations, to bear the onus, given that they will often be uniquely placed to be aware of any such reasonable excuse and will be able to demonstrate the facts supporting any excuse for a failure to comply with their reporting requirements.

5. Further, section 17 of the Act lists factors that the court is to have regard to in determining whether a registrable person had a reasonable excuse, including any disability that affects the person's ability to understand or comply with their obligations. Section 17 also provides a defence if the person had not received notice or was otherwise unaware of the reporting obligations.

**The Bill would amend section 17 of the *Child Protection (Offenders Registration) Act 2000* to clarify that registrable persons bear the onus of proving, on the balance of probabilities, that they had a reasonable excuse for failing to comply with their reporting obligations. This represents a reversal of the usual standard that requires the prosecution to prove all the elements of an offence. However, the purpose of the reporting requirements is to protect the safety of children and the registrable person is well placed to explain their omission to report. Section 17 also provides some safeguards, including taking into account a registrable person's ability to understand their obligations. In the circumstances, the Committee makes no further comment.**

#### *Right to privacy I*

6. The Bill would amend the Crimes (Administration of Sentences) Act 1999 to allow the Commissioner of Corrective Services to enter into an information sharing arrangement with an Australian intelligence agency (Schedule 1, item 1.7[5]). This provision may impact on the right to privacy, including of inmates and potentially anyone with whom they are connected.
7. However, the amendment expands an existing provision of the Act (section 257A) which already authorised the Commissioner to share information with a law enforcement agency or an interstate government corrective services agency. It is therefore an established practice for authorities to obtain and share information in the context of correctional facilities. Section 257A(7) also confirms that the power to disclose, request or receive information applies despite the Privacy and Personal Information Protection Act 1998 and the Health Records and Information Privacy Act 2002.

**The Bill expands the information sharing arrangements under the *Crimes (Administration of Sentences) Act 1999* to allow the Commissioner of Corrective Services to share information with an Australian intelligence agency. This may impact on the right to privacy, including of inmates and others with whom they are connected. However, sharing information in relation to correctional facilities is already an established practice with law enforcement agencies and interstate corrective services agencies. In the circumstances, the Committee makes no further comment.**

#### *Right to privacy II*

8. The Housing Act 2001 governs public housing owned or leased by the NSW Land and Housing Corporation and managed by the Department of Family and Community Services. The Bill (Schedule 1, item 1.13[1]) amends section 71 of the Act to insert subsection (d1), to create an exception to the prohibition on disclosing information, where the disclosure is made:

to a law enforcement agency for the purposes of law enforcement (including in connection with the investigation of an offence) or ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person...

9. This amendment may impact on the right to privacy. In particular, the Committee notes the potentially wide scope of disclosing information 'for the purposes of law enforcement'.
10. However, exceptions to privacy are already provided under section 71, including if consent is obtained, or for the purposes of legal proceedings, or 'with other lawful excuse'. Some of these grounds for disclosure of information are also quite broad (e.g. 'in connection with the administration or execution of this Act (or any such other Act)'). In addition, there are benefits to the community in disclosing information for law enforcement purposes, including solving crimes and finding missing persons.
11. Further, the Second Reading Speech noted that the amendment is consistent with disclosure provisions in the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.<sup>3</sup>

**The Bill amends the *Housing Act 2001* to expand the exceptions to the prohibition on disclosing information under section 71. An exception is added 'for the purposes of law enforcement', which includes investigating an offence or finding a missing person. The disclosure of information may impact on the right to privacy. In particular, the Committee notes the potentially wide scope of disclosing information 'for the purposes of law enforcement'.**

**The Committee acknowledges that there are already existing exceptions to the disclosure of information under the *Housing Act*, and the addition of a law enforcement exception is consistent with provisions found in privacy legislation (e.g. the *Privacy and Personal Information Protection Act 1998*). The Committee also acknowledges the benefits to the community of solving crimes and finding missing persons. However, the Committee refers the expanded exception to Parliament to consider whether it is too vague and wide in scope.**

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

### *Commencement by proclamation*

12. Clause 2 of the Bill states that the Act commences on assent, except for certain amendments relating to: the *Bail Act 2013* (Schedule 1.1 of the Bill); the *Criminal Procedure Act 1986* (Schedule 1.10[15]-[16]); the *Firearms Act 1996* and *Firearms Regulation 2017* (Schedules 1.11, 1.12); the *Legal Aid Commission Act 1979* (Schedule 1.15); the *Sheriff Act 2005* (Schedule 1.21); the *Weapons Prohibition Act 1998* and *Weapons Prohibition Regulation 2017* (Schedules 1.24, 1.25). These amendments involve administrative arrangements with numerous agencies in the NSW justice system including the Police Force, Office of the Director of Public Prosecutions, Legal Aid Commission, Office of the Sheriffs, and the courts.

**Some Schedules of the Bill commence on proclamation. The Committee generally prefers legislation to commence on assent or a fixed date; otherwise there is less**

<sup>3</sup> 'Specific exemptions' are found in the *Privacy and Personal Information Protection Act 1998* under Part 2, Division 3, and under section 17 of the *Health Records and Information Privacy Act 2002*.

**certainty and Parliament has less scrutiny over the commencement date. However, the Committee acknowledges that commencement by proclamation may facilitate administrative arrangements and consultation with numerous agencies. In the circumstances, the Committee makes no further comment.**

## 8. Liquor Amendment (Harm Reduction Areas) Bill 2019 and Liquor Amendment (Intoxication) Bill 2019\*

Date introduced	24 October 2019
House introduced	Legislative Council
Member responsible	The Hon. Rod Roberts MLC
	* Private Member's Bill

### PURPOSE AND DESCRIPTION

- The objects of the *Liquor Amendment (Harm Reduction Areas) Bill 2019* are—
  - to enable an intoxicated person to remain on licensed premises so that the person can be safely supervised in an area where liquor is not available, and
  - to provide that the licensee does not commit an offence under section 73(1)(a) of the *Liquor Act 2007* because of the presence of the intoxicated person on the premises.
- The object of the *Liquor Amendment (Intoxication) Bill 2019* is to extend the application of provisions of the *Liquor Act 2007* about intoxication from liquor, to intoxication from drugs and other intoxicating substances.

### BACKGROUND

- The *Liquor Amendment (Harm Reduction Areas) Bill 2019* and the *Liquor Amendment (Intoxication) Bill 2019* are cognate Bills.
- In the Second Reading Speech to Parliament, the Hon. Rod Roberts MLC dealt first with the *Liquor Amendment (Intoxication) Bill 2019*. Mr Roberts noted the offences in the *Liquor Act 2007* that apply to a licensee to prevent intoxication on licensed premises. For example, section 73(1)(a) provides that a licensee must not permit intoxication on the licensed premises and that the maximum penalty for doing so is a \$11,000 fine.
- Section 73(4) further provides certain defences to such offences. For example, under section 73(4)(b), if an intoxicated person is on licensed premises, the licensee is taken to have permitted intoxication on the licensed premises unless the licensee proves that the intoxicated person did not consume alcohol on the licensed premises.
- Mr Roberts also noted that section 5(1) of the *Liquor Act 2007* provides that a person is 'intoxicated' for the purposes of the Act if:
  - the person's speech, balance, co-ordination or behaviour is noticeably affected, and
  - it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of liquor.



7. The *Liquor Amendment (Intoxication) Bill 2019* would make amendments so that the abovementioned offences and defences relating to a licensee permitting intoxication from *liquor* on licensed premises also apply to intoxication from *drugs and other intoxicating substances*. Mr Roberts told Parliament:

Licensees require the ability to remove intoxicated persons from their premises without the need to determine what substance has caused the intoxication. In some instances people on licensed premises whose speech, balance, coordination and behaviour are affected are clearly intoxicated even though they have not consumed any alcohol at all...A licensee should not be required to differentiate between intoxication by alcohol or a combination of other substances when determining if a person is intoxicated on licensed premises...

8. Moving onto the *Liquor Amendment (Harm Reduction Areas) Bill 2019*, Mr Roberts stated that it would insert a new section into the *Liquor Act 2007* to provide for the creation of a 'harm reduction area' inside licensed premises.
9. A 'harm reduction area' would be defined as an area on licensed premises where intoxicated persons are safely supervised by the licensee or his/her employees or agents, and liquor is not sold or supplied to, or consumed by intoxicated persons. The Bill would also provide that a licensee does not commit an offence under section 73(1)(a) of the Act, by allowing an intoxicated person to remain on the licensed premises, if the licensee proves that the person was moved to the 'harm reduction area'. Mr Roberts stated:

The amendment does not make it mandatory to provide or use a harm reduction area. It gives the licensee the ability to rely on good humanitarian reasons and not turn out intoxicated persons. Those reasons may include but are not limited to whether the patron would be vulnerable if removed from the premises, personal knowledge of the patron, the time the intoxication was identified – for example, at 2:00am – and the availability of public transport or otherwise.

10. Mr Roberts further stated that "Some licensees are currently risking prosecution by...taking steps to ensure [their patrons'] safety and on occasions having them remain on licensed premises" and that the *Liquor Amendment (Harm Reduction Areas) Bill 2019* was intended to "allow the licensee to act in a responsible manner to reduce and minimise harm".

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Expanding offences and limiting defences*

11. As above, the *Liquor Act 2007* contains certain offences that apply to a licensee to prevent intoxication on licensed premises. For example, section 73(1)(a) provides that a licensee must not permit intoxication on the licensed premises, the maximum penalty for which is an \$11,000 fine.
12. The *Liquor Amendment (Intoxication) Bill 2019* would make amendments so that these offences, and the defences to them, would apply not only in respect of intoxication from liquor but also in respect of intoxication from drugs and other intoxicating substances.

13. Specifically, the Bill would amend section 5(1) of the Act to provide that for the purposes of the Act, a person is 'intoxicated' if:
  - (a) the person's speech, balance, co-ordination or behaviour is noticeably affected, and
  - (b) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of liquor, *a drug or other intoxicating substance*.
14. Further, the Bill would amend section 73(4)(b) of the Act to provide that if an intoxicated person is on licensed premises, the licensee is taken to have permitted intoxication on the licensed premises unless the licensee proves that the intoxicated person did not consume alcohol, *a drug or other intoxicating substance* on the licensed premises.
15. In short, the Bill may have the effect of expanding the offences that apply to a licensee to prevent intoxication on licensed premises so that a licensee would be liable not only for allowing a person who is intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through drugs and other substances to do so.
16. Likewise, the Bill may have the effect of limiting the defences upon which a licensee can draw if he or she is charged with permitting intoxication on the licensed premises. Currently, under section 73(4) a licensee is taken to have permitted the intoxication unless he or she proves that the intoxicated person did not consume alcohol on the licensed premises. As a result of the Bill, a licensee would now have the burden of proving that the intoxicated person did not consume alcohol, *a drug or other intoxicating substance* on the licensed premises, if the licensee wishes to avail him/herself of the defence.

**The *Liquor Amendment (Intoxication) Bill 2019* may have the effect of expanding the offences that apply to a licensee under the *Liquor Act 2007* so that a licensee would be liable not only for allowing a person who is intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through other substances to do so. The Bill may also limit the defences upon which a licensee can draw if he or she is charged with permitting intoxication on the licensed premises. A licensee would now have to prove that the intoxicated person did not consume alcohol, *a drug, or other intoxicating substance* on the licensed premises if the licensee wishes to avail him/herself of the defence.**

**Where the reach of offences is expanded, or defences limited, this impacts on personal rights and liberties as previously lawful conduct becomes unlawful and a person's chance of being held liable for a penalty – in this case a significant maximum monetary penalty – increases. The Committee also notes that in holding a licensee liable for the intoxication of a patron, the licensee has more control over the service of liquor to a patron than s/he does over any drug-taking behaviour. In the circumstances, the Committee refers these matters to Parliament for consideration.**

#### *Freedom of Movement*

17. As above, the *Liquor Amendment (Intoxication) Bill 2019* Bill may have the effect of expanding the offences that apply to a licensee to prevent intoxication on licensed premises so that a licensee would be liable not only for allowing a person who is

intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through drugs and other substances to do so.

18. This may have a flow-on effect for the freedom of movement of patrons, expanding the number who are asked to leave licensed premises.

**As above, the *Liquor Amendment (Intoxication) Bill 2019* may have the effect of expanding the offences that apply to a licensee to prevent intoxication on licensed premises so that a licensee would be liable not only for allowing a person who is intoxicated through liquor to be on his/her premises, but for allowing a person who is intoxicated through drugs and other substances to do so. This may have a flow-on effect for the freedom of movement of patrons, expanding the number who are asked to leave licensed premises.**

**Nonetheless, the right to freedom of movement is not absolute and the Committee acknowledges that provisions such as these may assist to prevent anti-social behaviour and to promote responsible service of alcohol. In the circumstances, the Committee makes no further comment on the potential effect of the provisions on the freedom of movement of patrons.**

## 9. Professional Engineers Registration Bill 2019\*

Date introduced	24 October 2019
House introduced	Legislative Assembly
Member responsible	Ms Yasmin Catley MP
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The Bill establishes a scheme for the registration and regulation of professional engineers. Its objects are to:
  - (a) protect the public by ensuring professional engineering services are provided by a professional engineer in a professional and competent way, and
  - (b) maintain public confidence in the standard of services provided by professional engineers, and
  - (c) uphold the standards of practice of professional engineers, and
  - (d) provide mechanisms to monitor and enforce compliance with this Act.

### BACKGROUND

2. In February 2018, Peter Shergold and Bronwyn Weir published their report *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*. The Report was in response to a request that the authors undertake an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. The first recommendation of the Report was that each jurisdiction require the registration of certain building practitioners involved in the design, construction and maintenance of buildings.<sup>4</sup> Engineers were one of the categories specified in this recommendation.
3. Residents of the Opal Tower, a high rise residential building in Sydney Olympic Park, were evacuated for safety reasons on Christmas Eve 2018 following reports of a loud noise thought to be of internal origin and associated with the structure of the building. Subsequent investigations revealed cracking of concrete structural members in the building. In February 2019, the *Opal Tower Investigation: Final Report* was published. The advice in the report included that a government registered engineers database be

<sup>4</sup> P Shergold and B Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p 15.

developed in partnership with an appropriate professional body as one of the measures recommended to avoid this type of incident occurring in the future.<sup>5</sup>

4. The Association of Professional Engineers Australia in their campaign 'Engineering a Better Future' has argued that 'The over-reliance on non-engineers in project management and decision-making leads to poor project scope, design and delivery, which is devaluing the profession'.<sup>6</sup> The campaign highlighted that engineers are currently one of the only professions without any form of mandatory registration. One of the campaign platforms is the need for an engineers registration scheme in every state and territory which guarantees that only professional engineers do engineering work.
5. Engineers Australia has similarly voiced that its members overwhelmingly support the compulsory registration of all engineers in NSW.<sup>7</sup>

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Strict Liability*

6. Proposed section 8 prohibits a person from using a title or name that in its context suggests that the person is a professional engineer when they are not.
7. It is a strict liability offence which derogates from the common law principle that the mental element of an offence is a necessary part of liability. The maximum penalty that applies is \$110,000.

**The Bill makes it a strict liability offence to use a title or name that suggests that the person is a professional engineer when they are not one. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mens rea or mental element is a necessary part of liability for an offence. However, the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. It also notes the public interest in ensuring that only professional engineers carry out professional engineering services for reasons of public safety. Further, the maximum penalty whilst large does not include a term of imprisonment. Accordingly, the Committee makes no further comment.**

#### *Procedural Fairness*

8. Division 3 of Part 5 of the Bill provides for the Board of Professional Engineers to conduct an investigation into the conduct of a professional engineer if: a complaint has been made about them; the Board believes there may be ground for suspending or cancelling the engineer's registration; or if the Board suspects that an offence has been committed against the proposed Act.

<sup>5</sup> Unisearch Expert Opinion Services, *Opal Tower Investigation: Final Report. Independent Advice to NSW Minister for Planning and Housing*, 19 February 2019, p 2.

<sup>6</sup> Association of Professional Engineers Australia, [Engineering a Better Future](#), viewed 29 October 2019.

<sup>7</sup> Engineers Australia, [Following the introduction of the Design and Building Practitioners Bill 2019 to NSW Parliament last night](#), media release, 24 October 2019, viewed 29 October 2019.

9. Proposed section 56 requires the Board to give the person concerned notice of an investigation into their conduct or if they are suspected of an offence against the proposed Act. The Board may take a number of disciplinary actions against the professional engineer following a report being made including: cautions or reprimands; the imposition of a condition on their registration; or the suspension or cancellation of their registration: proposed section 62.
10. However, the Board does not need to give notice of an investigation if they reasonably believe giving notice may seriously prejudice the investigation or place the complainant or another person at risk of harassment or intimidation.
11. Proposed section 63 generally requires that a written notice to show cause must be served on a professional engineer and consideration given to any of their submissions before the Board may determine whether or not to take disciplinary action in response to a report. However, the Board may take immediate disciplinary action if it believes it is in the public interest to do so.
12. These exceptions may impact upon the right of the professional engineer concerned to procedural fairness. This common law principle requires that a person have the opportunity to present their case before a decision is made that adversely affects their interests.

**Proposed sections 56 and 63 provide exceptions to the requirement that a professional engineer be notified of an investigation into their conduct and that they have the opportunity to make submissions to the Board of Professional Engineers prior to disciplinary action being taken against them. This may affect their right to procedural fairness which is concerned with a person having the opportunity to present their case prior to a decision being made that adversely affects them. The Committee notes that these exceptions only apply if it is believed that giving notice would seriously prejudice the investigation or put a person at risk of harassment or intimidation, or if it is in the public interest to take immediate disciplinary action. The Committee refers the matter to Parliament for consideration as to whether the provisions are reasonable in the circumstances.**

#### *Privacy and freedom from arbitrary interference*

13. Proposed section 78 empowers an authorised officer to enter any premises at any reasonable hour in the day or during a time in which business is in progress, with or without a search warrant. The authorised officer may: examine and inspect any thing; take and remove samples; make any examinations, inquiries, measurements or tests considered necessary; take photos; inspect and copy records; or seize anything reasonably believed to be connected with an offence against the proposed Act: proposed section 82.
14. These powers may impact on the right of individuals to privacy and the security of premises. Ms Catley argued in the Second Reading speech that these powers are necessary to “ensure the scheme is robust and people can remain confident that there are adequate checks and balances in place”.

15. The Committee notes that there are some limitations to the powers of entry. Proposed section 79 provides that entry to residential premises is only permitted if the occupier has granted permission or if the authorised officer has a search warrant.

**The Bill empowers authorised officers to enter any premises whilst business is in progress, without a search warrant, after which he or she may exercise a number of search and seizure-related powers. The Committee notes that provisions such as these impact on affected persons' privacy rights. Further, the requirement to obtain a warrant is intended to protect people against arbitrary interference. However, the Committee acknowledges that these provisions are designed to ensure the robustness of the scheme. Similarly, authorised officers cannot enter residential premises without a warrant. Given this safeguard and the context of the Bill, the Committee makes no further comment.**

### **Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA**

*Decisions affecting reputational and economic rights may not be reviewable*

16. Proposed section 67 allows the Board of Professional Engineers to publish a decision to caution or reprimand a professional engineer or impose a condition on their registration following an investigation. The decision and the reasons for it may be published on the Board's website. However, the Board must give the professional engineer notice of the decision to caution or reprimand them.
17. Further, proposed section 102 allows the Board of Professional Engineers to authorise the publication of a warning notice that alerts people to the risks involved in dealing with a specified professional engineer, assessment entity or any other person the Board reasonably believes to have breached the proposed Act or regulations. The Board must conduct an investigation prior to authorising the publication of a warning notice. The person concerned must also have at least two business days to make representations to the Board. However, an opportunity to make representations does not need to be provided if there is an immediate risk to the public.
18. These decisions have the potential to substantially affect the reputation and business of those concerned. The Bill in its current form does not provide for review of decisions of the Board by the NSW Civil and Administrative Tribunal. Proposed section 101 does permit the regulations to provide for applications to be made to the Tribunal for administrative review. However, it is not currently known whether the publication of warning notices and decisions following the investigation of a professional engineer will be included in the regulations as decisions that may be the subject of an application for administrative review by the NSW Civil and Administrative Tribunal.

**The Bill allows the Board of Professional Engineers to publish a notice warning persons of the risks involved in dealing with a specified professional engineer, assessment entity or other person considered to have breached the proposed Act or regulations. It also allows the Board to publish a decision to caution or reprimand a professional engineer or impose a condition on their registration following an investigation. Whilst the Bill allows for the regulations to prescribe certain decisions as administratively reviewable by the Civil and Administrative Tribunal, there is no provision to this effect in the Bill in relation to these decisions.**

**The Bill provides such safeguards as requiring the Board to first conduct an investigation and allowing the person concerned to have an opportunity to make representations prior to the publication of a warning notice. There may be some circumstances which warrant the quick publication of a warning notice where there is an immediate risk to the public. Notwithstanding this, the Committee refers these provisions to Parliament to consider whether they are reasonable in the circumstances.**

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

#### *Incorporation of external standards*

19. Proposed section 41 requires the Board of Professional Engineers established under the Bill to make a code of practice within nine months of the Bill's commencement to provide guidance as to the appropriate professional conduct or practice for professional engineers. The code of practice may be admissible as evidence in the disciplinary proceedings brought by the Board against a professional engineer: proposed section 45.
20. The Committee notes that provisions in a Bill that allow the incorporation of external standards as they exist from time to time may insufficiently subject the exercise of legislative power to parliamentary scrutiny. Unlike regulations, there is usually no requirement that they be tabled in Parliament and subject to disallowance under the Interpretation Act 1987.
21. However, the Bill contains a number of safeguards to improve the level of parliamentary scrutiny of any code of practice or its amendments. Proposed section 42 stipulates that the code of practice has no effect until approved by a regulation and it must also be tabled with 14 sitting days after the regulation is notified. Further, the Board of Professional Engineers must promptly notify professional engineers of the approval of a code of practice or its amendment: proposed section 44.

**Under the Bill, the Board of Professional Engineers must make a code of practice that provides guidance of what is considered appropriate professional conduct or practice by professional engineers. The Code of Practice is to be admissible as evidence of appropriate professional conduct or practice for a professional engineer in disciplinary proceedings brought by the Board. The Committee generally prefers such matters to be included in primary or subordinate legislation to ensure an appropriate level of parliamentary oversight. However, the Committee notes that the code of practice has no effect until approved by a regulation and it must also be tabled within 14 sitting days after the regulation is notified. Accordingly, the Committee makes no further comment.**

#### *Significant matters in delegated legislation*

22. Proposed section 101 provides that the regulations may prescribe decisions that are administratively reviewable by the NSW Civil and Administrative Tribunal. The issue of the right to administrative review of decisions is thus deferred to subordinate legislation. Decisions that may be made under the Act include matters concerning the registration of professional engineers, complaints and investigations into the conduct of professional engineers, the powers of authorised powers as they relate to information gathering and entry to premises, and assessment entities and schemes, amongst other things. These



decisions may potentially have a significant impact on the rights and liberties of affected persons.

23. The Committee generally prefers substantive matters that significantly affect rights to be located in primary legislation to allow for better parliamentary scrutiny.

**The Bill allows the Regulations to prescribe decisions that are administratively reviewable by the NSW Civil and Administrative Tribunal. It accordingly impacts on the right of individuals to administrative review of decisions made under the proposed Act that may restrict their rights and liberties. The Committee generally prefers matters which affect individual rights to be contained in principal legislation to allow greater opportunity for parliamentary scrutiny and debate. The Committee refers the matter to Parliament to consider whether it would be more appropriate to locate the decisions that may be administratively reviewable in the Bill to allow for a greater level of parliamentary scrutiny.**

## 9. Real Estate Services Council Bill 2019\*

Date introduced	24 October 2019
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to establish and confer functions on the Real Estate Services Council for New South Wales.

### BACKGROUND

2. In his second reading speech, The Hon. Mark Banasiak MLC noted the importance of the property services industry to real estate consumers and that this Bill aims to assist the activities of the industry and its consumers.
3. The Bill establishes the Real Estate Services Council, which consists of consumer and industry representatives and an industry regulator. The Bill provides that the Council may advise the Minister on consumer protection, real estate agent education and training, amendments to the applicable regulatory framework and public information programs.
4. The Bill also establishes the office of the Real Estate Services Commissioner to be responsible for the day to day management of the affairs of the Council in accordance with the policies and general directions of the board. Mr Banasiak stated that the Commissioner "will have deep industry knowledge and be exclusively focused on the regulatory control for the property services industry as set out in the *Property, Stock and Business Agents Act 2002*."

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *New offence and penalty*

5. Clause 17 of the Bill creates a new offence for the disclosure of information obtained in the administration or execution of the Act, except in certain circumstances. These exceptions include if the disclosure was made:
  - (a) with the consent of the person from whom the information was obtained, or
  - (b) in connection with the administration or execution of this Act (or any such other Act), or
  - (c) for the purposes of any legal proceedings arising out of this Act (or any such other Act) or of any report of any such proceedings, or
  - (d) in accordance with a requirement imposed under the Ombudsman Act 1974, or

(e) with other lawful excuse.

6. The maximum penalty for this offence is a \$2,200 fine.

**The Bill introduces a new offence for the disclosure of information obtained in the administration or execution of the proposed Act. The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful.**

**The Committee acknowledges that the intention of the offence is to prohibit the release of sensitive property services industry information and that it contains several qualifying provisions as exceptions to the offence. However, it is noted that the offence carries a maximum penalty of a \$2,200 fine, which is higher than the applicable penalty for similar offences contained in the other Acts – such as disclosure of information under the *Ombudsman Act 1974* which carries a maximum penalty of a \$1,100 fine. In the circumstances, the Committee refers the matter to Parliament to consider whether the penalty attached to the new offence is proportionate.**

**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*

7. Clause 16(1) of the Bill permits the Council to delegate the exercise of any function of the Council (other than the power of delegation) to any member of staff of the Council, or any person, or class of persons, authorised for the purposes of this section by the regulations.
8. Clause 16(2) similarly permits the Commissioner to delegate the exercise of any function of the Commissioner under the Act to any member of staff of the Council or any person, or class of persons, authorised for the purposes of this section by the regulations.
9. The functions of the Council are listed under clause 12 of the Bill and include:
- (a) to provide advice, reports or recommendations to the Minister relating to the following—
- (i) the business of agents,
- (ii) the education, training and continuing professional development of agents,
- (iii) consumer protection,
- (iv) any other matter requested by the Minister,
- (b) to provide public information and guidance programs,
- (c) other functions as are conferred or imposed on it by or under this or any other Act.

**The Bill would allow the Real Estate Services Council or the Commissioner to delegate any of their functions under the proposed Act to a broad class of persons, including 'any member of staff of the Council, or any person, or any class**

of persons, authorised for the purposes of this section by the regulations.' There are no restrictions on this power to delegate, for example restricting delegation to staff of a certain level of seniority or expertise. Given the functions of the Council include providing advice, reports or recommendations to the Minister in relation to the real estate service industry, 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 clause*

10. Schedule 1 outlines savings, transitional and other provisions. Clause 4 under Schedule 1 provides that regulations for the purposes of this clause may amend the Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

**The Bill contains a Henry VIII clause 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 the regulation would allow administrative convenience for changes to savings and transitional provisions, such as in relation to changes in the Consumer Price Index. Consequently, the Committee makes no further comment in relation to this issue.**

#### *Matters that should be set by Parliament*

11. Proposed clause 16(2)(b) provides that the Commissioner may delegate the exercise of any function of the Commissioner under the Act to any person, or any class of persons, authorised for the purposes of this section by the regulation.

**The Bill would permit the regulations to prescribe the person or class of persons to whom the Council or Commissioner may delegate their functions. This means that the regulations may prescribe the persons to whom the Council or Commissioner may delegate their functions without those regulatory provisions having the same level of parliamentary scrutiny as an amending Bill. The Committee refers this issue to Parliament for consideration.**

# 11. State Revenue Legislation Further Amendment Bill 2019

Date introduced	22 October 2019
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

## PURPOSE AND DESCRIPTION

1. The purpose of the Bill is to make amendments to the *Duties Act 1997*, the *Land Tax Act 1956* and the *Land Tax Management Act 1956* for the following purposes:
  - a. To provide for exemption from and refunds of surcharge purchaser duty and surcharge land tax payable in respect of residential land by the trustee of a discretionary trust if the trust prevents a foreign person from being a beneficiary of the trust (so as to prevent a discretionary trust from inadvertently attracting liability for surcharge duty and tax payable by a foreign trustee);
  - b. To make it clear that the Chief Commissioner of State Revenue can approve a manner of stamping or endorsement of the payment of transfer duty and surcharge purchaser duty that removes the need for separate stamping or endorsement for each kind of duty;
  - c. To extend provisions that treat an assignment to a third person of an option to purchase dutiable property as a transfer of the property for duty purposes so as to include an arrangement for the relinquishment of the option with an agreement to sell to the third person;
  - d. To change the method of determining the value of the land holdings of a landholder for the purposes of the threshold for provisions that impose duty on the acquisition of an interest in a landholder so that unencumbered value is used instead of unimproved value (for consistency with the use of unencumbered value in calculating the duty payable on the acquisition of such an interest);
  - e. to provide that, for the purposes of duty payable on the acquisition of an interest in a landholder, land includes anything (whether or not a fixture) that is fixed to land;
  - f. to make a landholder jointly liable for the duty payable by a person when the person acquires an interest in the landholder and to provide for the liability of the landholder to be a charge on the land for which a caveat can be registered;
  - g. to enact consequential savings and transitional provisions (including provisions relating to the indexation of dutiable value thresholds consequent on the

enactment of the State Revenue and Other Legislation Amendment Act 2019) and to make miscellaneous minor amendments.

2. The Bill also makes consequential amendments to the *Aboriginal Land Rights Regulation 2014*.

## BACKGROUND

3. The Minister noted in his Second Reading speech that the Bill has three key purposes:

Firstly, to avoid discretionary trusts becoming subject to surcharge purchaser duty or surcharge land tax where there is no intention that income or assets in the trust be distributed to foreign persons; secondly, to enhance the landholder duty provision to address inequities and anomalies in their application, bring them into closer alignment with other jurisdictions and fortify them against avoidance through the use of foreign acquisition vehicles; and, thirdly, to ensure consistency between recent changes to provide for the indexation of stamp duty thresholds and stamp duty concession provided under the First Home Buyers Assistance Scheme.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Retrospectivity – surcharge purchaser duty and surcharge land tax – discretionary trusts*

4. Surcharge purchaser duty applies to acquisitions of NSW residential land by foreign persons. Surcharge land tax applies to foreign persons who are owners of residential land in NSW. One of the purposes of the Bill is to avoid discretionary trusts being subject to surcharge purchaser duty or surcharge land tax where there is no intention that trust income or assets be distributed to foreign persons.
5. Schedule 1 of the Bill inserts proposed section 104JA into the *Duties Act 1997* which sets out special provisions applying to discretionary trusts, including that the trustee of a discretionary trust is taken to be a foreign trustee unless the trust prevents a foreign person being a beneficiary. Schedule 1[8] of the Bill extends application of proposed section 104JA to a surcharge duty transaction that occurred before the commencement of the section. It accordingly applies retrospectively.
6. Retrospectivity runs counter to the rule of law principle that people should be able to determine the laws to which they are subject at any given time.
7. However, the Bill makes allowances for trustees of a discretionary trust found liable as foreign trustees for surcharge purchaser duty in relation to a property transfer that occurred before the commencement of proposed section 104JA or before the end of 2019. It extends an exemption from the duty (or a refund if it has already been paid) to the trustee if the terms of the trust are amended before the end of 2019 to prevent a foreign person being a beneficiary. Further, it provides that the trustee of a discretionary trust arising under a will is not a foreign trustee if the deceased dies before or within two years of the section commencing, even if the trust does not prevent a foreign person being a beneficiary, so long as the deceased was not a foreign person.
8. The Minister noted in the Second Reading speech for the Bill:

The transitional provision has retrospective effect to the commencement of surcharge purchaser duty on 21 June 2016 so that trustees who may have incurred liability prior to the commencement of this bill have an opportunity to obtain relief. However, since March 2017, Revenue NSW, through revenue rulings, client education activities and engagement with the Law Society of New South Wales and other stakeholder groups, has been advising taxpayers of the potential liability for surcharge purchaser duty that can arise under discretionary trusts and the possible need to make amendments to trust deeds.

Many trust deeds have now been amended and no surcharge duty incurred as a result. With this in mind, the Government considers that the end of 2019 allows sufficient time for any remaining trustees and their advisers to make necessary changes to trust deeds.

9. In addition, Schedule 2 of the Bill inserts proposed section 5D (surcharge land tax – discretionary trusts) into the *Land Tax Act 1956*. Schedule 3 of the Bill amends Schedule 2 of the *Land Tax Management Act 1956* so that section 5D of the *Land Tax Act 1956* applies to the assessment of land tax liability for the 2017 land tax year and subsequent years. The amendments accordingly apply retrospectively to the assessment of land tax liability for 2017 onwards.
10. However, the Bill makes allowances for trustees of a discretionary trust found liable as a foreign person for surcharge land tax in 2017, 2018 and 2019. They will be exempt from the land tax if the terms of the trust are amended before the end of 2019 to prevent a foreign person being a beneficiary. It also allows for a refund of land tax that has already been paid if the terms of the trust are so amended prior to the end of 2019. Further, the trustee of an Australian testamentary trust is not to be considered a foreign person if the deceased (who was not a foreign person) died before or within two years of the commencement of proposed section 5D.

**The Bill would make amendments to the *Duties Act 1997* and *Land Tax Management Act 1956* concerning surcharge purchaser duty and surcharge land tax in relation to discretionary trusts. These amendments are to apply retrospectively to transactions that occurred prior to the commencement of the proposed sections. Retrospectivity impacts on 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 notes that the purpose of the amendments is to grant relief from liability if the terms of the trust are amended before the end of 2019 to prevent a discretionary trust inadvertently attracting liability. In the circumstances, the Committee makes no further comment.**

#### *Retrospectivity – landholder duty*

11. Schedule 1[7] of the Bill proposes to substitute a new section 154 into Chapter 4 of the *Duties Act 1997* which is concerned with the charging of duty on acquisitions of interests in landholders. Landholders are defined in section 146 of the *Duties Act 1997* (as amended by the Bill) to include a unit trust scheme, a private company or a listed company that has land holdings of an unencumbered value of \$2,000,000 or more.
12. Section 154 of the *Duties Act 1997* as it currently stands provides that duty chargeable on acquisitions of interests in landholders is payable by the person/s who made the acquisition. Proposed section 154 provides that the following persons are jointly and severally liable to pay duty: the person/s making the relevant acquisition; and the

landholder or its trustee. That is, the Bill would extend liability for the duty payable by a person when the person acquires an interest in a landholder so that the landholder will be jointly liable. Any liability of a landholder to pay such duty is a charge on their land holdings that gives the Chief Commissioner an interest in the land, allowing a caveat to be lodged until the amount of the duty has been paid.

13. Schedule 1[8] of the Bill provides that proposed section 154 is to apply to duty chargeable prior to the substitution of the section and so operates retrospectively.

**The Bill would substitute a new section 154 into the *Duties Act 1997* which would extend liability for the duty payable by a person when the person acquires an interest in a landholder, so that the landholder will be jointly liable. Any liability of a landholder to pay such duty is a charge on their land holdings that gives the Chief Commissioner an interest in the land, allowing a caveat to be lodged until the amount of the duty has been paid. The new section 154, and therefore its requirement to pay duties, would apply retrospectively. However, the Committee notes the public interest in ensuring that duties owing are paid and so makes no further comment.**



## Part Two – Regulations

### 1. Film and Television Industry Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State, Public Service and Employee Relations, Aboriginal Affairs and the Arts

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, without any significant changes, the provisions of the *Film and Television Industry (Advisory Committee) Regulation 2014*, which is to be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. This Regulation:
  - a. provides for the composition of the Film and Television Industry Advisory Committee established under section 5(1) of the *Film and Television Industry Act 1988* (the Advisory Committee);
  - b. specifies the terms of office and remuneration arrangements for members of the Advisory Committee; and
  - c. provides for the procedure of the Advisory Committee, and (d) prescribes certain functions of the Advisory Committee.
3. This Regulation is made under the *Film and Television Industry Act 1988*, including sections 5 and 12 (the general regulation-making power).

#### ISSUES CONSIDERED BY THE COMMITTEE

**The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA**

*Regulation modifying the effect of primary legislation*

4. Clause 13(1) of the Regulation stipulates that the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to a member of the Film and Television Industry Advisory Committee.
5. Further, clause 13(2) extends to *any* Act that requires a person to devote the whole of his or her time to the duties of a specified office or that prohibits him or her from outside employment. The Regulation provides that in this situation, the provision does not

disqualify the person from holding that office and the office of a member of the Advisory Committee, nor from accepting any remuneration under the Regulation.

6. The Committee would prefer that provisions that modify the effect of primary legislation be included in primary, not subordinate, legislation to foster an appropriate level of parliamentary oversight over such modifications. Unlike primary legislation, subordinate legislation is not passed by Parliament nor does Parliament control its commencement. Consequently, while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have operated for some time before disallowance.<sup>8</sup>

**The Regulation exempts certain provisions of the *Government Sector Employment Act 2013*, and certain other Acts, from applying to a member of the Film and Television Advisory Committee. The Committee would prefer provisions that modify the effect of primary legislation to be included in primary, not subordinate, legislation to foster an appropriate level of parliamentary oversight over such modifications. The Committee refers the matter to Parliament for consideration.**

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<sup>8</sup> See discussion of the limits to parliamentary oversight of subordinate legislation in ACT Standing Committee on Justice and Community Safety, 'Henry VIII FactSheet' November 2011 pp2-3 at [https://www.parliament.act.gov.au/\\_data/assets/pdf\\_file/0005/434345/HenryVIII-Fact-Sheet.pdf](https://www.parliament.act.gov.au/_data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

## 2. Gaming Machines Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor changes, the Gaming Machines Regulation 2010, which was repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*. This Regulation makes provision with respect to the following:
  - (a) the general regulation and management of gaming machines in hotels and clubs,
  - (b) requirements relating to responsible gambling practices in hotels and clubs and other harm minimisation measures, including requirements for staff to undertake responsible gambling training courses,
  - (c) requirements relating to gaming machine threshold increase applications (including details relating to the provision of local impact assessments by venues seeking to increase their gaming machine numbers),
  - (d) requirements relating to gaming-related licences (such as gaming machine dealers' licences),
  - (e) the regulation of intra-venue progressive gaming machines and systems,
  - (f) the regulation of player cards and accounts,
  - (g) gaming machine tickets issued by venues,
  - (h) the operation of the centralised monitoring system and the operation of inter-venue linked gaming systems,
  - (i) the fees applicable to gaming-relating licences and work permits and the transfer of poker machine entitlements and the indexation of those fees,
  - (j) other matters of a procedural or administrative nature (including specifying the offences under the *Gaming Machines Act 2001* and this Regulation that may be dealt with by way of penalty notice).
2. This Regulation is made under the *Gaming Machines Act 2001*, including section 210 (the general regulation-making power) and the various sections of the Act that are referred to in this Regulation.

## ISSUES CONSIDERED BY THE COMMITTEE

### **The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA**

#### *Strict liability*

3. Numerous clauses throughout the Regulation impose strict liability for a failure to comply with its requirements. These offences relate to:
  - the regulation and management of gaming machines: Part 2;
  - responsible gambling practices and harm minimisation measures: Part 3;
  - gaming-related licences: Part 4;
  - intra-venue progressive gaming machines: Part 5; and
  - authorised Centralised monitoring system (CMS) and linked gaming systems: Part 8. The CMS is the regulatory tool that connects all gaming machines in all venues in NSW.
4. In addition, clause 91 stipulates that a hotelier or registered club must comply with the requirements of Part 6 (player cards and accounts) or risk a maximum penalty of \$5,500. Similarly, a hotelier or registered club will be guilty of an offence for failing to comply with any of the requirements of Part 7 regarding gaming machine tickets, with a maximum penalty of \$5,500.

**The Regulation contains numerous strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, the Committee notes that the context of the offences is setting responsible standards in the gaming industry and that no custodial penalties apply – the maximum penalty that applies in each clause is never more than \$5,500. In the circumstances, the Committee makes no further comment.**

#### *Right to silence/privilege against self-incrimination*

5. Clause 124 of the Regulation enables the Minister to require a licensee, party or contractor, or a person associated (directly or indirectly) with them to: provide certain information; produce documents; or be examined and answer any questions asked. Failure to comply is an offence. A person may not be excused from compliance on the ground that doing so would incriminate the person.
6. Clause 126 of the Regulation empowers the Minister to require a 'key employee', as defined by clause 121, to provide information or produce documents. A key employee is not exempt from this requirement on grounds that it may incriminate him or her. A key employee's failure to provide information may result in the Minister directing that his or her employment be terminated: clause 127.

7. Breaches of clauses 124 and 126 are punishable by a maximum penalty of \$5,500.
8. The clauses encroach on the privilege against self-incrimination and right to silence which would otherwise allow a person to refuse to answer a question or produce a document if doing so would expose him or her to conviction. The privilege against self-incrimination seeks to maintain a balance between the power of the State and the rights and interests of individuals, and to preserve the presumption of innocence.<sup>9</sup>
9. The Regulation does include some safeguards. Both clauses 124 and 126 provide that if the employee claims, prior to compliance with the notice, that doing so may incriminate them, any information subsequently provided is not to be admissible in evidence against them in any criminal proceedings other than under the *Gaming Machines Act 2001*.

**Clauses 124 and 126 of the Regulation impact on the privilege against self-incrimination by requiring licensees, key employees and other persons to provide information and produce documents. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. However, the Committee notes that both clauses allow a person to claim that compliance with a notice under this clause may tend to incriminate the person. If the claim is made prior to compliance, any information subsequently provided is not admissible in evidence against the person in criminal proceedings other than under the *Gaming Machines Act 2001*. The Committee refers to Parliament the question of whether the safeguards in the Regulation are adequate in the circumstances.**

#### *Privacy*

10. Clause 126 of the Regulation empowers the Minister to require a key employee to consent to having their photograph, fingerprints and palm prints taken. They may also be required to provide any consent necessary to enable the Minister to obtain further information from other persons and institutions, including financial and other confidential information. This intrudes on the privacy rights of the key employee. Privacy rights are concerned with protection against the unlawful or arbitrary interference with a person's privacy, family, home or correspondence.
11. However, fingerprints and palm prints are to be destroyed as soon as the key employee is no longer a key employee: clause 129.
12. A 'key employee' is defined in clause 121 to include:
  - a person employed by a CMS licensee or contractor in a managerial or supervisory capacity in relation to the operation of an authorised CMS;
  - a person employed in a managerial or supervisory capacity in relation to the operation of an authorised linked gaming system; or
  - persons concerned or engaged in the operation of an authorised CMS or an authorised linked gaming system.

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<sup>9</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129, 2016, p 310.

13. As above, the CMS is the regulatory tool that connects all gaming machines in all venues in NSW. It monitors the operation and performance of gaming machines and facilitates the calculation and collection of the gaming machine tax of a venue: *Gaming Machines Act 2001*, section 4. The CMS thus helps ensure the integrity of gaming machine operations.

**Under the Regulation a ‘key employee’ may be required to consent to having his or her photograph, fingerprints and palm prints taken; and to consent to the Minister obtaining certain financial and other confidential information about him or her. This may impact on the person’s privacy rights.**

**However, the Committee notes that this requirement is limited to ‘key employees’ that is, to those involved in a managerial or supervisory capacity in relation to an authorised centralised monitoring system (CMS) or linked gaming systems. The Committee acknowledges the role of employees with access to the CMS in ensuring the integrity of gaming machine operations. Further, fingerprints and palm prints must be destroyed once the person is no longer deemed a ‘key employee’. In the circumstances, the Committee makes no further comment.**

*Decision to terminate employment based on ill-defined criteria*

14. Clause 133 of the Regulation empowers the Minister to direct that the employment of a ‘key employee’ as defined by clause 121, be terminated. The Minister can do this if he or she believes that the integrity or apparent integrity of an authorised CMS or linked gaming system is likely to be seriously prejudiced because of the key employee’s criminal record, character or reputation.
15. This raises the potential for a key employee to have his or her employment terminated because of a reputation not based on fact. Both the employer and the State are protected from any liability as a result of the termination: clause 128.

**The Regulation grants the Minister the power to have the employment of a key employee terminated on the basis of their reputation or character. This raises a risk that a key employee will be terminated because of a reputation that is not based on fact.**

**The Committee notes that a key employee can only be terminated where the integrity or apparent integrity of a CMS or linked gaming system is likely to be seriously prejudiced by their character or reputation. It also acknowledges the role of CMS in monitoring and ensuring the integrity of gaming machine operations as well as its use in calculating gaming machine tax.**

**However, the Committee prefers powers affecting individual rights to be drafted with sufficient precision so that their scope and content is clear. It therefore refers the matter to Parliament to consider the appropriate balance between ensuring the integrity of the gaming systems, and the potential loss of employment on the basis of reputation or character as opposed to more concrete factors.**

**The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA**

*Wide administrative power*

16. The Independent Liquor and Gaming Authority may approve a class of gaming machines as specially approved gaming machines for the purposes of Part 10 (linked gaming systems) of the *Gaming Machines Act 2001*: clause 116. The Authority has the power to revoke the special approval of a class of approved gaming machines for reasons of public interest or if they have been modified without approval: clause 119. However, the Authority may also revoke the special approval for any other reason it thinks appropriate. This grants a wide administrative power to the Independent Liquor and Gaming Authority.

**The Regulation grants a wide administrative power to the Independent Liquor and Gaming Authority which allows it to revoke the special approval of gaming machines for any reason it considers appropriate. However, the Regulation includes a number of safeguards in clause 120 including that special approval may not be revoked unless written notice is given of the reasons for the Authority considering such action. Opportunity must also be provided for submissions to be made as to why such action should not be taken. In the circumstances, the Committee makes no further comment.**

*Wide administrative power - II*

17. The conditions of some CMS licences or links licences may require notice of certain proposed relevant contracts or variation of the terms of such contracts to be given to the Minister. Clause 121 of the Regulation defines 'relevant contracts' to include any kind of agreement or arrangement relating to the supply of goods or services regarding the operation of an authorised CMS or linked gaming system. To be classified as a 'relevant contract', the agreement or arrangement must also relate to:
- the purchase or servicing of any device or equipment or security arrangements regarding their operation;
  - a contract worth more than \$1,000,000; or
  - be of a type specified in the licence conditions as involving the public interest.
18. The Minister must be notified of the details of a proposed 'relevant contract' or its variation: clause 134. The Minister may object to the proposed contract or variation of contract and is not required to give reasons for the objection. The licensee may not enter into a relevant contract or vary its terms if the Minister objects.

**Under the Regulation, the Minister has the power to object to a proposed relevant contract being entered into, or to the relevant contract being varied. A licensee must abide by the objection. However, the Minister is not required to give any reasons for the objection. Further, the Regulation does not include criteria to guide the decision-making process. The Committee refers the matter to Parliament to consider whether the power granted to the Minister is too wide and whether the object of the regulation would be better served by a requirement that the Minister provide reasons for an objection.**

*Wide power of delegation*

19. Under Clause 137 of the Regulation, the Minister can appoint a person to investigate and report on matters and circumstances relating to:
  - the operation of an authorised CMS or linked gaming system;
  - a licensee or an associate of him or her; or
  - a specified person or class of persons who could affect the operation, or exercise direct or indirect control over a licensee, of an authorised CMS or linked gaming system.
20. The Regulation does not restrict the sort of person who may be appointed, nor does it specify any necessary qualifications or skills.
21. A person appointed to carry out an investigation may exercise the powers given to the Minister by clause 126 which include requiring key employees to provide:
  - consent to having their photograph, fingerprints and palm prints taken;
  - certain information and documents; and
  - consent to the obtaining of further financial and confidential information from other persons and institutions. This includes requiring persons to provide information that may incriminate them.
22. Clause 137(2)(b) provides that the person appointed to carry out an investigation may also exercise any other functions of the Minister specified in the instrument of appointment.

**The Regulation allows the delegation of administrative powers to an ill-defined class of persons, with no requirements set down as to their qualifications or attributes, nor their level of seniority. The scope of functions that may be delegated is also broad and ill-defined, and certain functions that are delegated may impact on individual rights e.g. requiring key employees to provide consent to have their fingerprints taken.**

**Where functions are delegated, the Committee prefers the legislation to clearly set out the specific functions that are being delegated. It also prefers the legislation to set down clear criteria regarding the class of persons to whom the functions are being delegated. This is particularly the case where the functions may affect individual rights. In the circumstances, the Committee refers the matter to Parliament for further consideration.**



### 3. Greyhound Racing Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make provision with respect to the following:
  - (a) the persons, in addition to those specified in the *Greyhound Racing Act 2017*, who are required to be registered as greyhound racing industry participants,
  - (b) the registration of greyhounds, greyhound racing industry participants, greyhound racing clubs and greyhound trial tracks (including the payment of registration fees),
  - (c) the registers required to be retained by the Greyhound Welfare and Integrity Commission,
  - (d) the delegation of the functions of the Commission and the Minister,
  - (e) the reporting requirements of the Commission and GRNSW,
  - (f) offences in respect of which penalty notices may be issued,
  - (g) matters to which a certificate of evidence may relate,
  - (h) matters of a savings and transitional nature.
2. This Regulation repeals and replaces the *Greyhound Racing Regulation 2018*.
3. Serious breaches of animal welfare and industry corruption in the NSW greyhound industry were the subject of media attention in February 2015. A Special Commission of Inquiry into the Greyhound Racing Industry in NSW (conducted by the former High Court Judge the Hon Michael McHugh) was subsequently established by the NSW Government. The Inquiry raised serious concerns about the management and governance of the greyhound industry, publishing its final report in July 2016.
4. The Greyhound Industry Reform Panel was established by the NSW Government in October 2016 to provide recommendations on potential new animal welfare and governance arrangements to reform the industry. Its report was submitted in February 2017 and included 122 recommendations.<sup>10</sup> Reforms recommended by the Panel included: a governance framework that separated the commercial and regulatory functions of the greyhound industry; a comprehensive and best practice animal welfare

<sup>10</sup> [Recommendations of the Greyhound Industry Reform Panel](#) (February 2017).

plan; registration and accreditation requirements for industry participants; and new offences and stronger penalties for animal cruelty. The Panel noted that its recommendations were 'designed to support cultural change in the industry. They reset expectations about how greyhounds are cared for throughout their whole life, introduce new licensing and education requirements for industry participants and impose tough penalties for those who do the wrong thing'.

5. A key recommendation of the Reform Panel was to separate the commercial and regulatory functions of Greyhound Racing NSW. The Greyhound Welfare and Integrity Commission was thus established under the *Greyhound Racing Act 2017* to: promote and protect the welfare of greyhounds; safeguard the integrity of greyhound racing and betting; and maintain public confidence in the greyhound racing industry.<sup>11</sup> The Commission controls and regulates greyhound racing, administers the Greyhound Racing Rules, registers greyhounds and industry participants, investigates animal welfare and integrity concerns, and employs race stewards, inspectors, investigators and veterinary officers.

## ISSUES CONSIDERED BY THE COMMITTEE

### **The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA**

#### *Strict Liability*

6. Clause 10 of the Regulation requires a greyhound racing industry participant to provide certain information relating to the whelping, change of ownership or insemination of a greyhound to the Greyhound Welfare and Integrity Commission within 14 days. The timeframe reduces to three days if it concerns a change of premises where the greyhound is ordinarily kept or two days for notification of the death of a greyhound. Failure to do so attracts a maximum penalty of \$2,200.
7. Registered greyhound racing participants must notify the Commission of any change in their details within 14 days or within 7 days if they have been charged with an animal cruelty offence or any indictable offence: clause 15. Failure to do so risks a maximum penalty of \$2,200.
8. Proprietors of a registered greyhound trial track must notify the Commission of any change in their details within 14 days or, if they have been charged with an animal cruelty offence or any indictable offence, within 7 days of being charged: clause 18. Failure to do so may incur a penalty of \$2,200.
9. Clause 23 of the Regulation prohibits a person from entering a restricted access area at a licensed racecourse or greyhound trial track unless they are an industry participant or their entry is authorised by the licensee or proprietor. Unauthorised entry attracts a maximum penalty of \$11,000. However, the Regulation requires that signs at each point of entry to the restricted access area must identify it as such.
10. Failure to comply with any of these clauses is a strict liability offence. Strict liability offences derogate from the common law principle that mens rea (the mental element of an offence) must be proved to impose liability.

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<sup>11</sup> Section 11 *Greyhound Racing Act 2017*.

The Regulation contains a number of strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that mens rea must be proved to hold a person liable for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. Further, while the offences in the Regulation attract significant maximum monetary penalties they do not attract custodial ones.

The highest maximum penalty provided for in the Regulation is \$11,000 for unauthorised entry into a restricted access area, however, these areas must be identified as such by a sign at each entry point. Most of the offences in the Regulation incur a maximum penalty of \$2,200.

The Committee notes further, that the Regulation is part of a wider reform process seeking to implement a number of recommendations of the Greyhound Industry Reform Panel and that facilitating enforcement of the regulatory requirements may foster positive behavioural change within the industry. In the circumstances, the Committee makes no further comment.

#### *Right to privacy*

11. The Greyhound Welfare and Integrity Commission is required to keep registers of registered greyhounds, racing industry participants and trial tracks. Clause 20 of the Regulation enables the Commission to share information contained in these registers with: Greyhound Racing NSW; the RSPCA NSW; the Animal Welfare League NSW; local councils; the police; bodies responsible for the control or management of the racing of animals; and the Department of Planning, Industry and Environment.
12. The registers may contain whatever information the Commission considers appropriate. Information kept in the registers may include the personal details of a registered greyhound racing industry participant. The sharing of such information may accordingly impact on the right to privacy.

The Regulation allows the Greyhound Welfare and Integrity Commission to share information contained in registers it keeps on registered greyhounds, racing industry participants and trial tracks. The sharing of personal information such as contact details and offences with which participants have been charged may impact on the privacy rights of the individuals involved.

However, the Committee notes that the organisations with which such information may be shared are limited to those involved in the regulation of greyhound racing, animal welfare regulators and law enforcement bodies. Further, the Regulatory Impact Statement for the Regulation identified that the sharing of such information is 'critical to effective lifecycle tracking, identification of industry trends and national monitoring of non-complying industry participants'. The Committee also notes that the Commission may refuse a request for access to information so long as reasons are provided for the refusal. In the circumstances, the Committee makes no further comment.

## 4. Parramatta Park Trust Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Robert Stokes MP
Portfolio	Planning and Public Spaces

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to replace, with amendments, *the Parramatta Park Trust Regulation 2012*, which will be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*. This Regulation deals with the management, use and regulation of the land vested in the Parramatta Park Trust (trust lands), including:
  - a. the entry of persons onto the trust lands;
  - b. the driving and parking of vehicles;
  - c. commercial activities;
  - d. recreational activities;
  - e. offensive and dangerous conduct;
  - f. the bringing of animals onto the trust lands; and
  - g. the offences under this Regulation for which penalty notices may be issued and the amount of the penalty payable.

### ISSUES CONSIDERED BY THE COMMITTEE

#### **The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA**

##### *Freedom of movement*

2. Part 2 of the Regulation contains various powers limiting entry onto Trust land, enforced by a 'relevant authority' which is defined as the Trust, the Director of the Trust, or an 'authorised officer' (being a person so appointed by the Director – clause 3). Clause 8 provides that a person must leave the land if directed to do so by a relevant authority, if the person trespasses, causes inconvenience to any person or otherwise contravenes the Regulation. A person who fails to comply with such a direction may be removed from the land (clause 8(4)).
3. A direction may also specify a period during which the person must not return (clause 8(2)). However, in specifying such a period, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned (clause 8(3)).

4. The maximum penalty for remaining on, entering, or returning to the land in contravention of a direction is a \$1,100 fine.
5. The powers under clause 8 may impact on a person's freedom of movement. The right to liberty of movement within the territory of a State is recognised by Article 12 of the International Covenant on Civil and Political Rights (ICCPR).
6. However, powers directing a person to leave or restricting activities appear to be commonplace in relation to similar parklands or facilities used by the public and managed by a trust or authority, including Centennial Park, the Western Sydney Parklands, Sydney Olympic Park, and sporting venues generally.<sup>12</sup>

**Under clause 8 of the Regulation, a relevant authority can direct a person to leave Trust land if he or she trespasses, causes inconvenience to any person, or otherwise contravenes the Regulation. A direction may also specify a period during which a person must not return. Failing to comply with a direction is punishable by a fine of up to \$1,100. The term 'inconvenience' is broad and there is no guidance as to its meaning. The provision may trespass on the freedom of movement.**

**However, the Committee notes that these provisions are in line with similar regulations governing recreational spaces used by the public, where the site is managed by a trust or authority. Further, in specifying a period during which a person must not return to Trust land, the relevant authority must take into consideration the seriousness and persistence of the conduct concerned. The Committee also acknowledges the benefit of the provisions for the majority of parkland users, facilitating the peaceful enjoyment of the environment and amenities, and discouraging anti-social behaviour. In the circumstances, the Committee makes no further comment.**

#### *Freedom of assembly*

7. Clause 17 of the Regulation prohibits various activities on Trust land including holding a public meeting, gathering or demonstration. This may impact on the freedom of assembly. To gather in peaceful protest is a right under Article 21 of the ICCPR.
8. However, clause 17 does allow for the prospect of a public meeting, gathering or demonstration, as an exception to the prohibition, 'with the written permission of, and in the manner approved by, the Trust'. In addition, as noted above, powers restricting

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<sup>12</sup> The *Centennial Park and Moore Park Trust Regulation 2014* provides that a person who trespasses, causes nuisance or inconvenience to any person, or breaches the Regulation must leave if requested, and failure to comply is an offence (clause 27). The *Western Sydney Parklands Regulation 2019* provides that a person who trespasses, causes inconvenience to any person or contravenes the Regulation must leave if directed, and failure to comply is an offence (clause 8). The *Sydney Olympic Park Authority Regulation 2018* contains powers to: prohibit categories of persons from entering the facility (clause 4); ban persons for up to 6 months (clause 11); and direct persons to leave for causing inconvenience to others (clause 25). The *Sporting Venues Authorities Regulation 2019* provides for directing a person to leave a venue for causing a nuisance or inconvenience (clause 5) and banning entry of persons for up to 12 months (clause 6).

activities appear to be commonplace in relation to similar parklands or facilities used by the public and managed by a trust or authority in NSW.<sup>13</sup>

**Clause 17 of the Regulation lists various activities which are prohibited on Trust land including holding a public meeting, demonstration or gathering. Contravening this provision attracts a fine of up to \$1,100. This may impact on the right to freedom of assembly. However, this provision is in line with similar regulations governing recreational spaces used by the public and managed by a trust and has benefits for the peaceful enjoyment of the parklands by other users. Further, meetings, demonstrations and gatherings may still take place with the written permission of the Trust. In the circumstances, the Committee makes no further comment.**

#### *Strict liability*

9. The Regulation contains numerous offences throughout Parts 2 to 8 which relate to the use of vehicles on trust lands; the conduct of commercial, public and recreational activities on trust lands; offensive and dangerous conduct; and animals on trust lands.
10. The following are some examples of offences under the Regulation:
  - recreational activities such as playing golf, fishing or swimming other than in areas designated for that purpose: clause 20;
  - the riding of bicycles or rollerblades alongside two or more persons: clause 21;
  - operating a radio or playing a musical instrument if it is likely to cause a nuisance, disturbance or annoyance to others: clause 25;
  - the climbing of trees and fences, and damaging or uprooting trees and other vegetation: clause 26; and
  - destroying, capturing, injuring or annoying an animal or destroying or interfering with their habitat: clause 33.
11. These offences are of a strict liability nature which derogate from the common law principle that mens re, or the mental element, is a necessary part of liability for an offence. However, the Committee notes that similar provisions exist in other regulations governing recreational spaces used by the public and managed by a trust or authority, including Centennial Park and the Western Sydney Parklands.<sup>14</sup>

**The Regulation includes numerous offences which are of the strict liability type. The Committee generally comments on strict liability offences as they derogate**

<sup>13</sup> The *Centennial Park and Moore Park Trust Regulation 2014* and *Western Sydney Parklands Regulation 2019* provide that a person must not, without the approval of the Trust, organise or participate in a public gathering, meeting or demonstration (clauses 13 and 17 respectively).

<sup>14</sup> For example, clause 20 of the *Western Sydney Parklands Regulation 2019* prohibits a number of recreational activities including the operation of a radio or playing a musical instrument where it may annoy others or interfere with the amenity of the land. Clause 21 prohibits the riding of bicycles or rollerblades alongside two or more persons. Clause 16 of the *Centennial Park and Moore Park Trust Regulation 2014* prohibits a number of activities that may damage trust lands such as the climbing of trees and destroying or interfering with the habitat of an animal. Recreational activities such as swimming and the playing of golf are prohibited under clause 18.

from the common law principle that the mental element is a necessary part of liability for an offence. However, the Committee notes that there are no custodial penalties and the maximum penalty that applies to any of the offences is \$1,100. The Committee notes further that many of the offences in the Regulation relate to interference with wildlife, vandalism, damage to Trust lands and dangerous behaviour and that similar provisions exist in comparable regulations governing recreational spaces used by the public. In addition, Parramatta Park is a World Heritage Site and the purpose of regulating some of these behaviours is to prevent the risk of damage to natural and cultural heritage assets. Such regulation may also enhance the safety of other park users and facilitate their enjoyment of the park. Accordingly, the Committee makes no further comment.

## 5. National Parks and Wildlife Regulation 2019

Date tabled	17 September 2019
Disallowance date	19 November 2019
Minister responsible	The Hon. Matthew Kean MP
Portfolio	Energy and Environment

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to remake, with minor modifications, the *National Parks and Wildlife Regulation 2009*, which is to be repealed on 1 September 2019 by section 10(2) of the *Subordinate Legislation Act 1989*.
2. The Regulation makes provision for or with respect to the following –
  - (a) the regulation of the use of national parks and other areas (Part 2),
  - (b) the preservation of public health in Kosciuszko National Park (Part 3),
  - (c) the enforcement of obligations of the Snowy Hydro Company (Part 4),
  - (d) the management of Aboriginal land, objects and places and exemptions for Aboriginal people from prohibitions under the *National Parks and Wildlife Act 1974* (the Act) (Part 5),
  - (e) advisory committees constituted under the Act (Part 6),
  - (f) trustees of state conservation areas and regional parks (Part 7),
  - (g) other matters of a minor, consequential or ancillary nature (Parts 1 and 8).

### ISSUES CONSIDERED BY THE COMMITTEE

#### **The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA**

##### *Strict liability offences*

3. The Regulation contains a number of strict liability offences, which relate to various matters such as the regulation of traffic and conduct in national parks and requirements relating to mooring vessels within Ku-ring-gai Chase National Park.
4. The following are some examples of offences under the Regulation:
  - driving a vehicle otherwise than on a road leading into or traversing a park (clause 9)



- taking and keeping of animals from a park (clause 11)
  - littering and damaging a park (clause 13)
  - engaging in certain sporting, recreational or other activities within a park (clause 25)
  - unlawfully mooring vessels within Ku-ring-gai Chase National Park (clause 32).
5. The maximum penalty for these offences is a monetary penalty and for most offences that maximum is \$3,300 (see for example Part 2, Divisions 2, 3 and 4 and Part 3 of the Regulation).
  6. Many of the offence provisions also list exclusions, which are in the nature of defences, as they specify circumstances in which the offence will not have been committed.
  7. These offences are of a strict liability nature which derogates from the common law principle that mens rea, or the mental element, is a necessary part of liability for an offence. However, the Committee notes that similar provisions exist in other regulations governing recreational spaces used by the public, and managed by a trust or authority, such as Centennial Park and the Western Sydney Parklands.<sup>15</sup>

**The Regulation contains a number of strict liability offences. The Committee generally comments on strict liability offences as they derogate from the common law principle that the mental element is a necessary part of liability for an offence. However, the Committee notes that there are no custodial penalties and that a number of the offences list exclusions, in the nature of defences. In addition, many of the strict liability offences in the Regulation appear to encourage the protection of the environment and public health and safety within national parks and facilitate the enjoyment of national parks by those who use them. Similar provisions also exist in comparable regulations governing recreational spaces used by the public and managed by a trust or authority. In the circumstances, the Committee makes no further comment.**

#### *Freedom of movement*

8. The Regulation authorises the park authority to exclude a person who commits a second or subsequent offence under Part 2 of the Regulation from a national park for any period of time the park authority determines.
9. A person is taken to have committed (or to be guilty of) an offence if:
  - (a) a court convicts the person of the offence, or

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<sup>15</sup> For example, clause 20 of the *Western Sydney Parklands Regulation 2019* prohibits a number of recreational activities including the operation of a radio or playing a musical instrument where it may annoy others or interfere with the amenity of the land. Clause 21 prohibits the riding of bicycles or rollerblades alongside two or more persons. Clause 16 of the *Centennial Park and Moore Park Trust Regulation 2014* prohibits a number of activities that may damage trust lands such as the climbing of trees and destroying or interfering with the habitat of an animal. Recreational activities such as swimming and the playing of golf are prohibited under clause 18.

- (b) a court makes an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999* or section 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* in respect of the person in relation to the offence, or
  - (c) a penalty notice has been issued and paid in respect of an offence.
10. A person who is excluded from a park will commit an offence if they re-enter the park during the exclusion period. The maximum penalty is \$3,300 (see clause 37 of the Regulation).
  11. The powers under clause 37 may impact on a person's freedom of movement. The right to liberty of movement within the territory of a State is recognised by Article 12 of the International Covenant on Civil and Political Rights (ICCPR).
  12. However, powers directing a person to leave or restricting activities appear to be commonplace in relation to parks or facilities used by the public such as Centennial Park, Sydney Olympic Park, and sporting venues generally.<sup>16</sup>

**The Regulation allows the park authority to exclude a person from a park where that person has committed a second or subsequent offence under Part 2 of the Regulation. The Committee notes that the park authority has a broad discretion to exclude a repeat offender for any period of time it determines. There also does not appear to be any right for the affected person to have the decision reviewed. It is an offence for person to re-enter a park during the exclusion period. An order of this kind could impact on a person's freedom of movement by restricting their ability to be in certain places.**

**However, the Committee notes these provisions are in line with similar regulations governing recreational spaces used by the public. The Committee also notes that, in this Regulation, the threshold for excluding someone from a park is quite high as they need to have committed a second or subsequent offence. A person who repeatedly offends in a national park may pose a future risk to the environment and public health and safety. The Committee also acknowledges the benefit of the provisions for the majority of park users. In the circumstances, the Committee makes no further comment.**

#### *Entry and search powers without warrant*

13. Clause 47 of the Regulation provides that the Chief Executive may appoint a member of staff of the Department of Planning, Industry and Environment to exercise the functions of an authorised officer under Part 8 of the *Public Health Act 2010*. This power only applies in relation to public health matters in Kosciuszko National Park.
14. The *Public Health Act 2010* is an Act to promote, protect and improve public health, to control risks to public health, and to prevent the spread of infectious diseases (see section

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<sup>16</sup> The *Centennial Park and Moore Park Trust Regulation 2014* provides that a person who trespasses, causes nuisance or inconvenience to any person, or breaches the Regulation must leave if requested, and failure to comply is an offence (clause 27). The *Sydney Olympic Park Authority Regulation 2018* contains powers to: prohibit categories of persons from entering the facility (clause 4); ban persons for up to 6 months (clause 11); and direct persons to leave for causing inconvenience to others (clause 25). The *Sporting Venues Authorities Regulation 2019* provides for directing a person to leave a venue for causing a nuisance or inconvenience (clause 5) and banning entry of persons for up to 12 months (clause 6).

3). Part 8, section 108, confers powers on authorised officers, for the purposes of the *Public Health Act 2010*, to enter premises and take various actions including to: inspect and take copies of documents; take samples of substances; and take photographs, films, audio and video.

15. An authorised officer is only permitted to enter any part of premises used solely for residential purposes with the consent of the occupier or under the authority of a search warrant. However, the provision is silent about non-residential properties. This suggests that an authorised officer would be permitted to enter non-residential premises without a search warrant but with a certificate of authority. A certificate of authority is issued by the person who appoints the authorised officer and contains the following information:
  - (a) a statement that it is issued under the *Public Health Act 2010*
  - (b) the name of the person to whom it is issued
  - (c) the nature of the powers conferred and the source of those powers
  - (d) the expiry date, if any
  - (e) the kinds of premises to which the power extends.
  - (f) the signature of the person by whom it is issued and the capacity in which they are acting in issuing the certificate.
16. If an authorised officer were entering and searching premises with a certificate of authority, they would need to comply with the following requirements:
  - (a) have in their possession the certificate of authority identifying them as an authorised officer and produce it to the occupier if required to do so
  - (b) give reasonable notice to the occupier of the intention to exercise the power, unless it would defeat the purpose intended
  - (c) exercise the power at a reasonable time, unless it is an emergency (see section 108 of the *Public Health Act 2010* and clause 47 of the Regulation).

**The Regulation empowers an authorised officer from the Department of Planning, Industry and Environment to enter and search non-residential premises without a search warrant. This could impact on the privacy rights of affected persons and their right to be free from arbitrary interference.**

However, the Committee notes that the provisions do not apply to residential premises and that an authorised officer would be required to obtain a certificate of authority to enter premises under the *Public Health Act 2010*. In exercising their powers, they would also have to comply with requirements such as giving reasonable notice to the occupier and exercising the power at a reasonable time, subject to some exceptions.

Further, the Committee acknowledges that the powers could only be used for the purposes of the *Public Health Act 2010*, an Act to control risks to public health and prevent the spread of infectious diseases, and only apply to public health

**matters in Kosciuszko National Park. In the circumstances, the Committee makes no further comment.**

*Privilege against self-incrimination*

17. As above, clause 47 of the Regulation provides for the appointment of certain persons to exercise the functions of an authorised officer under Part 8 of the *Public Health Act 2010*. Part 8 provides authorised officers with powers to require persons to provide documents and information or answer questions. These powers only apply to public health matters in relation to Kosciuszko National Park.
18. Section 114 of the *Public Health Act 2010* provides that a person is not excused from a direction to provide documents or information or answer questions on the ground that it might incriminate him or her or make him or her liable to a penalty.
19. Information or answers given by a person will not be admissible in evidence against them in criminal proceedings (except proceedings for an offence for failure to comply with a direction) if:
  - (a) the person objected that doing so might incriminate them, or
  - (b) the person was not warned that they could object to providing the information or giving the answer on the ground that it might incriminate them.
20. A document provided by a person in compliance with a direction under the provisions is not inadmissible in evidence against the person in criminal proceedings by reason only that it incriminates them.
21. Further information obtained as a result of a document or information provided or an answer given is also not inadmissible by reason only:
  - (a) that the document, information or answer had to be provided, or
  - (b) that the document, information or answer incriminates the person.
22. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For example, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*. Similarly, article 14 of the International Covenant on Civil and Political Rights provides that, in criminal proceedings, a person has a right 'not to be compelled to testify against himself or confess guilt'.

**The Regulation allows for the appointment of certain persons to exercise the functions of an authorised officer under Part 8 of the *Public Health Act 2010*. Such officers have powers to require persons to provide documents or information or answer questions. Section 114 of that Act impacts on the right against self-incrimination by stating that a person is not excused from a direction to provide documents or information or answer questions on the ground that it might incriminate them. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her.**

The Committee notes that section 114 contains some safeguards. For example, information or answers will not generally be admissible in criminal proceedings against the person if they objected that doing so might incriminate them. Similarly, under the Regulation, an authorised officer's powers will only apply in relation to public health within Kosciuszko National Park. The Regulation is also drawing upon powers which already exist in principal legislation.

However, the Committee notes in particular that a document provided by a person in compliance with a direction under the legislation will not be inadmissible as evidence against that person in criminal proceedings by reason only that it incriminates them. Provisions of this kind, which impact on the privilege against self-incrimination, also impact on the right to be presumed innocent, which is associated with the concept that the prosecution has the burden of proving a charge beyond reasonable doubt. The Committee refers clause 47 of the Regulation to Parliament for further consideration.

## 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.