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Legislation Review Committee

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

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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*.

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PART ONE – BILLS

1. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (PROTECTIONS FOR DISCLOSURE OF INFORMATION) BILL 2019*

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

Immunity from liability

Schedule 1[3] of the Bill amends section 109 of the *Independent Commission Against Corruption Act 1988* to make it clear that individuals who disclose information to the Independent Commission Against Corruption (the ICAC) in compliance with the Act, or in making a voluntary disclosure, are protected from criminal or civil liability, or disciplinary action, for doing so. This may impact on the rights of others to legal redress for wrongs resulting from that disclosure. However, the Committee acknowledges the significant public interest in facilitating the detection, exposure and prevention of corrupt conduct and that a lack of protection afforded to those making disclosures may hinder this process. The Committee also notes that it is an offence under the Act to wilfully make a false statement or to mislead the ICAC. Accordingly, the Committee makes no further comment.

Confidentiality of information

Proposed section 111AA of the Bill sets out the circumstances in which information may be disclosed to a person or body that may identify a person who has made a voluntary disclosure to the ICAC. This impacts on the confidentiality that would otherwise apply regarding the identity of the person who made the voluntary disclosure. However, the Committee notes that the disclosure of such information is only permitted in limited circumstances including where it is essential to natural justice, the effective investigation of matters, or where it is in the public interest to do so. The Committee accordingly makes no further comment.

2. WATER (COMMONWEALTH POWERS) AMENDMENT (TERMINATION OF REFERENCES BILL 2019*

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PART TWO – REGULATIONS

1. CONVEYANCING (SALE OF LAND) AMENDMENT REGULATION 2019

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Additional obligations on vendors/developers

The Regulation stipulates certain obligations to be met by vendors in relation to off the plan contracts under the *Conveyancing Act 1919*. Matters dealt with by the Regulation include requirements for disclosure statements which are attached to contracts, and compensation rights for purchasers. By expanding the obligations of vendors, usually developers in the off the plan context, the Regulation could impact on this section of the business community. However, the Committee acknowledges the benefits of the Regulation including increased transparency and protection of transactions for purchasers which may also promote greater

public confidence in the real estate market. In the circumstances, the Committee makes no further comment.

2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (USE OF FORCE) REGULATION 2019

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

Use of force in detention

The Regulation permits a correctional officer to use force on an inmate to allow treatment, including any medication, to be given in accordance with section 84 of the *Mental Health Act 2007*. In some circumstances, the use of force on an inmate may impact on the right to humane treatment in detention.

However, the Committee acknowledges that there are a number of existing safeguards in relation to the use of force in circumstances such as these, including only using the degree of force that is reasonably necessary and avoiding injury to the inmate if at all possible. The Committee notes that the use of force may be necessary in some circumstances for health reasons, so the inmate receives appropriate treatment. It may also be reasonably necessary for the safety of the correctional officers or other inmates. The Committee makes no further comments.

3. DAMS SAFETY REGULATION 2019

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

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The Regulation contains numerous strict liability offences for contravening the requirements in relation to declared dams, including for operation and maintenance plans, emergency plans and safety management systems. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Some of the offences are new, thereby increasing the obligations of dam owners and subjecting them to penalties that did not formerly apply.

However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. The applicable maximum penalties are fines of $5500 or less. The Committee also acknowledges that the increased regulatory requirements for declared dams are intended to recognise dams as important resources and to protect public safety. In the circumstances, the Committee makes no further comment.

4. FORESTRY AMENDMENT (TRANSITIONAL ARRANGEMENTS) 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

Henry VIII clause

The Regulation contains a Henry VIII clause which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to extending by another year the transitional arrangements regarding bee-keeping and grazing carried out in accordance with an integrated forestry operations

approval that was in force immediately prior to 9 November 2018, the Committee makes no further comment.

5. LIQUOR AMENDMENT (SPECIAL LICENCE CONDITIONS) REGULATION (NO.3) 2019

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Special licensing conditions

The Regulation updates the list of licensed premises that are subject to special licence conditions set out in Schedule 4 to the *Liquor Act 2007*. This means that the listed premises must fulfil special requirements e.g. they cannot serve any drink in a glass or breakable plastic container after midnight and must observe a 10 minute timeout on alcohol sales every hour after midnight, or actively distribute water and/or food to patrons.

The Regulation may thereby have some adverse impact on affected members of the business community. However, it is part of a scheme to minimise harm associated with the misuse and abuse of liquor; and to encourage the responsible promotion, sale, supply, service and consumption of liquor (section 3(2) *Liquor Act 2007*). Premises are only declared where a significant number of violent incidents have occurred at them in the last 12 months. In the circumstances, the Committee considers the special licensing conditions are a proportionate response to achieve the scheme's objectives and makes no further comment.

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

Henry VIII clause

The Regulation amends Schedule 4 to the *Liquor Act 2007* to update the list of licensed premises that are subject to the special licensing conditions set out in that Schedule. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.

Nonetheless regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. Given this safeguard, and the fact that it may be more administratively efficient to proceed by regulation when updating a list of premises subject to special conditions, the Committee makes no further comment.

6. MOTOR ACCIDENTS GUIDELINES – TRANSITIONAL EXCESS PROFITS AND TRANSITIONAL EXCESS LOSSES

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Regulation of profits

By facilitating the regulation of profits that can be achieved by insurers, the guidelines may have an adverse impact on this section of the business community. However, the Guidelines are part of a regime established under the *Motor Accident Injuries Act 2017* that seeks to keep premiums affordable by ensuring that profits achieved by insurers do not exceed the amount that is sufficient to underwrite the relevant risk, and by limiting benefits payable for minor injuries. While profits are limited under the regime, there is also a reduced cost to insurers of providing compulsory third-party motor accident insurance. Further, the Guidelines also set mechanisms to ensure that the profits achieved are not inadequate. Given this balance, and

the public interest in an affordable system of compulsory third-party motor accident insurance, the Committee makes no further comment.

7. NATURAL RESOURCES ACCESS REGULATOR AMENDMENT REGULATION 2019

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

Privacy

The Regulation expands the categories of information that can be included on the public register of information about enforcement action taken by or on behalf of the Natural Resources Access Regulator under the *Water Management Act 2000*. For example, the register may now include the identity of any person who has been convicted of an offence under that Act; and details of monetary charges imposed by the Minister for water that has been illegally taken.

The Regulation may thereby impact on the privacy rights of affected individuals, who may have sensitive information published about them. However, the Committee considers that there is a public interest in allowing the register to include information about enforcement of the Water Management Act. In doing so, the Regulation increases accountability and transparency and advances the scheme established under the Act to ensure that the State's water resources are managed appropriately.

Further, the public register provisions of the *Privacy and Personal Information Protection Act 1998* would apply to the information and provide some privacy safeguards. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

The Regulation amends the *Natural Resources Access Regulator Act 2017* to list additional functions of the Regulator. The Committee prefers changes to an Act to be made by an amending Bill, not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. This is particularly the case given the important role of the Regulator – changes or additions to its functions should be oversighted adequately. The Committee refers this matter to Parliament for further consideration.

8. POISONS AND THERAPEUTIC GOODS AMENDMENT (CANNABIS MEDICINES) REGULATION 2019

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

Strict liability offences

The Regulation includes a number of strict liability offences relating to the supply by medical practitioners and authorised practitioners of type C unregistered drugs of addiction. The maximum penalty for the offences is a fine of $2,200. The Committee generally comments on strict liability offences because they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

However, strict liability clauses are not uncommon in regulatory settings to encourage compliance and strengthen offence provisions. Further, the Committee acknowledges the potential dangers if practitioners were to prescribe type C unregistered drugs without the

necessary authority, contrary to the regulatory framework set down by the *Poisons and Therapeutic Goods Act 1966* and the *Poisons and Therapeutic Goods Regulation 2008*. In the circumstances, the Committee makes no further comment.

9. WORK HEALTH AND SAFETY AMENDMENT (MISCELLANEOUS) REGULATION 2019

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

Confidentiality of information

The Regulation expands by 12 Acts the list of legislation that is exempt from the confidentiality requirements of section 271 of the *Work Health and Safety Act 2017*. A person exercising powers or functions under the Act who has gained certain information or access to a document is accordingly not prohibited from disclosing, giving access to or using the information or document. Consequently, personal information that was previously considered to be confidential may potentially be disclosed in certain circumstances. However, this exemption only applies where the regulator reasonably believes the disclosure, access to or use of the information or document is necessary for the administration or enforcement of the Acts listed. Accordingly, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

The Regulation expands the list of offences for which a penalty notice may be issued. Penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed. Given this, and the size of the penalties that may be issued by penalty notice – up to $1200 for an individual and $6000 for a corporation – the Committee refers the matter to Parliament for its consideration.

Part One – Bills

1. Independent Commission Against Corruption Amendment (Protections for Disclosure of Information) Bill 2019*

Date introduced	21 November 2019
House introduced	Legislative Assembly
Member responsible	Mr Jamie Parker MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—

(a) provide certain protections to persons who voluntarily give any statement of information or produce any document or thing to the Independent Commission Against Corruption (the ICAC) in connection with a complaint made to, or an investigation conducted by, the Commission about a matter that concerns or may concern corrupt conduct (a voluntary disclosure), being—

(i) protection from criminal or civil liability, and from disciplinary proceedings, in relation to making a voluntary disclosure, and

(ii) protection against self-incrimination, by providing that the statement, document or thing disclosed may not be used in any proceedings against a person (subject to certain exceptions) if the Director of Public Prosecutions, on the recommendation of the ICAC, certifies that the protection is to apply to the person, and

(b) require the ICAC to publish guidelines on its website relating to the making of voluntary disclosures, including the protections that may be available to persons who make a voluntary disclosure, and

(c) set out the limited circumstances in which information may be disclosed to a person or body that might identify or tend to identify a person who has made a voluntary disclosure.

BACKGROUND

2. A similar Bill, the *Independent Commission Against Corruption Amendment (Disclosure of Information) Bill 2016*, was previously introduced into the Legislative Assembly by Mr Jamie Parker MP in November 2016. However, the Bill lapsed in accordance with the standing orders in April 2017.

3. The NSW Parliamentary Committee on the ICAC subsequently conducted an inquiry into whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purpose of the ICAC's functions. Its report – *Protections for People who make Voluntary Disclosures to the Independent Commission against Corruption* – was published in November 2017 (the 2017 Report). The Chair's Foreword noted that the Committee's inquiry had come about because of concerns that the protections provided to people making voluntary disclosures were 'patchy and unclear'.

4. The Committee found that there was 'significant public interest in increasing the protections for people who make voluntary disclosures to the ICAC'. It accordingly recommended that the *Independent Commission Against Corruption Act 1988* (the Act) be amended so as to 'protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability, and reprisal action for doing so'.

5. The Committee noted that those making disclosures to oversight bodies had a number of concerns in common including 'being liable for defamation, being the subject of retaliation or reprisal action, and breaching confidentiality or secrecy requirements contained in legislation or employment agreements'.[1] Further, it recognised the deterrent effect of the current lack of protection and that this prevents the 'detection, exposure and prevention of corrupt conduct'.[2]

6. Mr Parker noted in his Second Reading Speech that the Bill seeks to implement the 10 recommendations made by the Committee in its 2017 Report.

ISSUES CONSIDERED BY THE COMMITTEE

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

Immunity from liability

7. Schedule 1[3] of the Bill amends section 109 of the Act to make clear that a person is not subject to any criminal or civil liability for complying with the Act. Further, no action, claim, demand or disciplinary action may be taken against the person in relation to his or her compliance. Similar protections apply to a person who makes a voluntary disclosure to the ICAC. The protections are to have effect irrespective of any duty of secrecy or confidentiality that applies to the person.

8. Providing persons with protection from liability may impact on the right of others to bring an action to enforce their legal rights, for example, a claim of defamation or breach of confidentiality. It may also conflict with the principle of the rule of law that no one is to be above the law.

9. However, the Committee on the ICAC in its 2017 report found 'There is significant public interest in increasing the protections for people who make voluntary disclosures to the

[1] Committee on the Independent Commission Against Corruption, *Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, report 4/56, Parliament of New South Wales, November 2017, p 8.

[2] Committee on the Independent Commission Against Corruption, *Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, report 4/56, Parliament of New South Wales, November 2017, p 5.

ICAC'.[3] This would have the effect of promoting integrity and accountability in public administration. Further, a lack of protection may deter 'voluntary disclosures thereby preventing the detection, exposure and prevention of corrupt conduct'.[4]

10. In addition, the Act does provide some protection against false or misleading statements. It is an offence under section 81 of the Act to wilfully make any false statement or to mislead the ICAC, attracting a maximum penalty of $2200 or imprisonment for six months.

> **Schedule 1[3] of the Bill amends section 109 of the *Independent Commission Against Corruption Act 1988* to make it clear that individuals who disclose information to the Independent Commission Against Corruption (the ICAC) in compliance with the Act, or in making a voluntary disclosure, are protected from criminal or civil liability, or disciplinary action, for doing so. This may impact on the rights of others to legal redress for wrongs resulting from that disclosure. However, the Committee acknowledges the significant public interest in facilitating the detection, exposure and prevention of corrupt conduct and that a lack of protection afforded to those making disclosures may hinder this process. The Committee also notes that it is an offence under the Act to wilfully make a false statement or to mislead the ICAC. Accordingly, the Committee makes no further comment.**

Confidentiality of information

11. Section 111 of the Act makes it an offence for an officer of the ICAC and certain other persons to make a record of any information or to divulge or communicate to any person information acquired by him or her whilst exercising functions under the Act.

12. The Bill proposes to insert section 111AA into the Act which sets out the circumstances in which such information may be disclosed to a person or body that may identify a person who has made a voluntary disclosure. These circumstances include: the person having consented to the disclosure; that it is essential that it be disclosed for reasons of natural justice; or disclosure is necessary for the effective investigation of the matter or it is in the public interest to do so. This may affect the confidentiality that would otherwise apply to voluntary disclosures.

13. The Committee on the ICAC, in its 2017 report, recommended that 'the ICAC Act be amended to protect the identity of persons who make voluntary disclosures to the ICAC, where appropriate' (recommendation 5). However, this was followed by a recommendation 'That any legislative amendment to protect the identity of people who make voluntary disclosures to the ICAC not fetter the ICAC's ability to investigate properly in the public interest, or to provide natural justice to accused persons' (recommendation 6).

14. Mr Parker argued in his Second Reading speech that proposed section 111AA:

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[3] Committee on the Independent Commission Against Corruption, *Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, report 4/56, Parliament of New South Wales, November 2017, Finding 2.

[4] Committee on the Independent Commission Against Corruption, *Inquiry into protections for people who make voluntary disclosures to the Independent Commission Against Corruption*, report 4/56, Parliament of New South Wales, November 2017, p 5.

…is intended to ensure that the identity of people who make voluntary disclosures can be protected where appropriate but that this not fetter the ICAC's ability to investigate properly in the public interest or to provide natural justice to accused persons.

Proposed section 111AA of the Bill sets out the circumstances in which information may be disclosed to a person or body that may identify a person who has made a voluntary disclosure to the ICAC. This impacts on the confidentiality that would otherwise apply regarding the identity of the person who made the voluntary disclosure. However, the Committee notes that the disclosure of such information is only permitted in limited circumstances including where it is essential to natural justice, the effective investigation of matters, or where it is in the public interest to do so. The Committee accordingly makes no further comment.

2. Water (Commonwealth Powers) Amendment (Termination of References Bill 2019*

Date introduced	21 November 2019
House introduced	Legislative Assembly
Member responsible	Mr Roy Butler MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water (Commonwealth Powers) Act 2008* to enable each House of Parliament, by resolution, to terminate certain references made under that Act for the purposes of section 51(xxxvii) of the Commonwealth Constitution.

BACKGROUND

2. At a meeting of the Council of Australian Governments in 2008, an intergovernmental agreement on Murray-Darling Basin reform was signed by the Prime Minister and the leaders of NSW, Queensland, Victoria, South Australia and the ACT. As part of that undertaking, the NSW Parliament passed the *Water (Commonwealth Powers) Act 2008* which enabled the Commonwealth Parliament to make laws about the Murray-Darling Basin.

3. The NSW Act was necessary due to section 51(xxxvii) of the Constitution which provides that the Commonwealth Parliament shall make laws with respect to "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States…"

4. The current Bill proposes to insert a provision (section 5A) into the *Water (Commonwealth Powers) Act 2008* to enable the NSW Parliament to terminate the references under the Act. Mr Roy Butler MP stated in the Second Reading Speech for the Bill:

> It is time that we in this place as representatives of the people of New South Wales act to take our power back. I am not saying we do not want cooperation across the basin—there are good reasons for all States to work together. However, today no-one would be of the view that the basin plan is working well.
>
> The basin plan has devastated communities, ruined industries, forced some intergenerational farmers to leave the land and it has put up a barrier to new people entering farming. It has consumed communities, turned agriculture on its head and damaged environments it was supposed to support and protect.

5. The proposed amendment under clause 5A does not start termination proceedings on the Murray-Darling Basin Agreement. Rather, a motion for a termination resolution is

required from either House and must set out the reasons for the resolution. As Mr Butler explained, the motion "would commence a debate that has to focus on a nominated issue". If the resolution is passed, it effectively "would place the Commonwealth on six months' notice" as the termination takes effect six months after the day the resolution was passed: clause 5A(2).

6. Currently, there is a termination provision in the *Water (Commonwealth Powers) Act 2008* (section 5) which provides that the Governor may, by proclamation published on the NSW legislation website, fix a day on which the references terminate. Comparing the current termination mechanism with the procedure proposed in the Bill, Mr Butler stated:

> This is a significant improvement over the current arrangement whereby the Premier, without consultation with the Parliament, can terminate the Murray-Darling Basin Agreement without showing any cause and in the short time it takes the New South Wales Governor to proclaim that termination. The Premier could act without consulting with the people of New South Wales. To me that is an unacceptable arrangement … By introducing a condition that requires nominated reasons for termination, we introduce rigour.

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*.

Part Two – Regulations

1. Conveyancing (Sale of Land) Amendment Regulation 2019

Date tabled	12 November 2019
Disallowance date	LA: 24 March 2020 LC: 5 May 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make further provision in relation to off the plan contracts for the sale of residential land as a consequence of the amendments made by the *Conveyancing Legislation Amendment Act 2018*. The Regulation also makes minor amendments of a law revision nature consequent on the *Environmental Planning and Assessment Amendment Act 2017*.

2. This Regulation is made under the *Conveyancing Act 1919*, including sections 52A, 66X, 66ZL(1) (the definition of "material particular"), 66ZM(2) and 202 (the general regulation-making power) and clause 1(1) of Schedule 9.

3. A Discussion Paper, *Off the plan contracts: Conveyancing (Sale of Land) Amendment Regulation 2019*, was published by the Office of the Registrar General in June 2019, and a public consultation draft of the Regulation was released.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation may have an adverse impact on the business community: s9(1)(b)(ii) of the LRA

Additional obligations on vendors/developers

4. An off the plan contract is defined by the *Conveyancing Act 1919* as "a contract for the sale of a residential lot … that has not been created at the time the contract is entered into": section 66ZL. The vendors of residences which are sold off the plan are usually developers.[5]

5. The Regulation sets down obligations of vendors with regard to off the plan contracts. Under section 66ZM of the *Conveyancing Act 1919*, before an off the plan contract is signed by the purchaser, the vendor must attach a disclosure statement to the contract.

[5] In the Office of the Registrar General's Discussion Paper, the terms "vendor", "developer" and "vendor/developer" are used interchangeably.

Clause 4A of the Regulation outlines the information that must be included in a disclosure statement, with the effect that developers are required to supply a prescribed set of documents to purchasers. For example, where the contract relates to a strata scheme, the prescribed documents include the draft by-laws and the draft floor plan of the lot in the strata scheme.

6. Further, where changes to the property have rendered the disclosure statement inaccurate as to a material particular, clause 6B of the Regulation makes compensation available to purchasers as an alternative remedy to rescinding the contract. Compensation of up to 2 per cent of the purchase price of the property may be claimed from the vendor. In addition, clause 19A of the Regulation adds to the matters listed under section 66ZL of the Act as a "material particular" and excludes other matters that do not qualify.

7. The Discussion Paper discussed the rationale for reform (at Appendix 3, p 14):

> Off-the-plan sales represent more than 11% of the residential sale market, with this percentage expected to grow as NSW moves to higher density housing and strata development increases in popularity.
>
> Purchasers who buy off-the-plan are particularly vulnerable to the actions of the vendor/developer, yet regulation has not kept pace with changes in the residential property market.
>
> NSW has a comprehensive vendor disclosure regime for the sale of residential property but there are no specific requirements for developments sold off-the-plan. Off-the-plan buyers are not generally able to physically inspect the property before purchase and will not have access to registered documents, like by-laws, that may restrict the way the land can be used. Contract terms and the level of disclosure vary widely. Reports have come to light of developers substantially altering development plans after contracts have been exchanged, to the detriment of purchasers.

8. By increasing the obligations of developers for off the plan residences, the Regulation may impact on this section of the business community. In its submission to the Discussion Paper, the Property Council of Australia stated that it was not aware of any significant costs associated with supplying the required documents to accompany off the plan contracts.[6] However, the Property Council expressed concern about the compensation mechanism and how the definition of "material particular" would be interpreted. The Council stated that "consumer protection needs to be balanced with the need to be able to enforce legally binding contracts" or "developers will find it difficult to secure funding for new projects and enforce settlements on completion."[7]

> **The Regulation stipulates certain obligations to be met by vendors in relation to off the plan contracts under the *Conveyancing Act 1919*. Matters dealt with by the Regulation include requirements for disclosure statements which are attached to contracts, and compensation rights for purchasers. By expanding the obligations of vendors, usually developers in the off the plan context, the Regulation could impact on this section of the business community. However, the Committee acknowledges the benefits of the Regulation including increased**

[6] Property Council of Australia, Submission, *Discussion Paper – Off the plan contracts*, 26 July 2019, Q10, p 4.

[7] Property Council of Australia, Submission, *Discussion Paper – Off the plan contracts*, 26 July 2019, p 2.

transparency and protection of transactions for purchasers which may also promote greater public confidence in the real estate market. In the circumstances, the Committee makes no further comment.

2. Crimes (Administration of Sentences) Amendment (Use of Force) Regulation 2019

Date tabled	12 November 2019
Disallowance date	LA: 24 March 2020 LC: 5 May 2020
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to authorise a correctional officer to use force to allow mental health treatment to be given to an inmate in accordance with the *Mental Health Act 2007.*

ISSUES CONSIDERED BY THE COMMITTEE

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

Use of force in detention

2. The Regulation amends clause 131 of the *Crimes (Administration of Sentences) Regulation 2014* to permit a correctional officer to use force on an inmate to allow treatment, including any medication, to be given to the inmate in accordance with section 84 of the *Mental Health Act 2007*.

3. In particular, section 84 of the *Mental Health Act 2007* permits an authorised medical officer of a mental health facility to give, or authorise the giving of, any treatment (including medication) the officer thinks fit to an involuntary patient or assessable person detained in the facility.

4. Clause 131 of the *Crimes (Administration of Sentences) Regulation 2014* contains the following general limits to the circumstances in which force may be used and the extent of the force:

    - a correctional officer may use no more force than is reasonably necessary in the circumstances
    - the infliction of injury to the inmate is to be avoided if at all possible
    - the nature and extent of the force that may be used are to be dictated by the circumstances, but must not exceed the force that is necessary for control and protection, having regard to the personal safety of correctional officers and others

- if an inmate is satisfactorily restrained, the only force that may be used is that which is necessary to maintain the restraint.

The Regulation permits a correctional officer to use force on an inmate to allow treatment, including any medication, to be given in accordance with section 84 of the *Mental Health Act 2007*. In some circumstances, the use of force on an inmate may impact on the right to humane treatment in detention.

However, the Committee acknowledges that there are a number of existing safeguards in relation to the use of force in circumstances such as these, including only using the degree of force that is reasonably necessary and avoiding injury to the inmate if at all possible. The Committee notes that the use of force may be necessary in some circumstances for health reasons, so the inmate receives appropriate treatment. It may also be reasonably necessary for the safety of the correctional officers or other inmates. The Committee makes no further comments.

3. Dams Safety Regulation 2019

Date tabled	22 October 2019
Disallowance date	LA: 3 March 2020 LC: 31 March 2020
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Dams Safety Act 2015* —

   (a) the declaration of dams,

   (b) the consequence category of declared dams,

   (c) operation and maintenance plans and emergency plans for declared dams,

   (d) dam safety management systems for declared dams,

   (e) other safety requirements for declared dams,

   (f) the provision of dams safety standards reports to Dams Safety NSW,

   (g) the keeping of records,

   (h) the appointment of authorised officers,

   (i) savings and transitional provisions consequent on the commencement of the *Dams Safety Act 2015*.

2. This Regulation is made under the *Dams Safety Act 2015*, including sections 5(2), 14, 15(3), 16(1) and (3), 17(1) and (3), 25(1)(c), 46 and 53 (the general regulation-making power) and clause 1 of Schedule 2.

ISSUES CONSIDERED BY THE COMMITTEE

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

New and strict liability offences

3. The Regulation contains numerous strict liability offences, which are offences that do not require proof of criminal intent. The offences include the failure of a dam owner to:

   - comply with a direction to conduct a preliminary assessment of a dam to determine whether it may be a declared dam (under section 5(2) of the Act): clause 5;

- comply with requirements relating to operation and maintenance plans (under section 16 of the Act): clause 9;
- comply with requirements relating to emergency plans (under section 17 of the Act): clause 10;
- establish and implement a dam safety management system: clauses 12-13;
- establish a risk management framework and fulfil related requirements: clauses 14-15;
- maintain the dam safety management system and ensure it is reviewed annually: clauses 16-17;
- comply with other safety requirements such as reporting incidents to Dams Safety NSW and undertaking safety reviews: clauses 19-24.

4. The maximum penalty for these offences is $5500, with the exception of failing to provide a copy of an emergency plan to Dams Safety NSW and the State Emergency Service, which carries a maximum penalty of $1100: clause 10(8). Also, five offences under the Regulation may be dealt with by issuing a penalty notice, with lesser monetary penalties.[8]

5. A number of the offences provided for in the Regulation are new, such as failing to comply with a direction to conduct a preliminary assessment of a dam: clause 5.[9]

6. The importance of protecting the community is a relevant factor behind the offences. The objects of the *Dams Safety Act 2015* (section 3) include "to ensure that any risks that may arise in relation to dams (including any risks to public safety and to environmental and economic assets) are of a level that is acceptable to the community".[10]

The Regulation contains numerous strict liability offences for contravening the requirements in relation to declared dams, including for operation and maintenance plans, emergency plans and safety management systems. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Some of the offences are new, thereby increasing the obligations of dam owners and subjecting them to penalties that did not formerly apply.

[8] The five offences are under clause 5(3), with a fine of $1000 for a corporation or $250 for an individual; clause 9(5) with a fine of $500 for a corporation or $200 for an individual; clause 10(7) with a fine of $1000 or $250; clause 10(8) with a fine of $500 or $200; and clause 15(7) with a fine of $1000 or $250.

[9] No Regulation existed under the previous Act, the *Dam Safety Act 1978*. The Act itself had a general offence provision (section 30) which stated: "A person who contravenes or fails to comply with any provision of this Act or a notice given by the Committee under this Act shall be guilty of an offence and liable to a penalty not exceeding 10 penalty units [$1100]." In terms of the type of conduct penalised by the 1978 Act, the Dams Safety Committee under Part 3 had powers of entry, inspection and testing. It could require dam owners to furnish information and not obstruct authorised persons.

[10] The Second Reading Speech for the *Dams Safety Bill* confirmed "the number one objective remains protecting the community from the risk of dam failure": *Parliamentary Debates*, Legislative Assembly, 26 August 2015.

However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. The applicable maximum penalties are fines of $5500 or less. The Committee also acknowledges that the increased regulatory requirements for declared dams are intended to recognise dams as important resources and to protect public safety. In the circumstances, the Committee makes no further comment.

4. Forestry Amendment (Transitional Arrangements) Regulation 2019

Date tabled	15 October 2019
Disallowance date	LA: 25 February 2020 LC: 24 March 2020
Minister responsible	The Hon. John Barilaro MP
Portfolio	Regional New South Wales, Industry and Trade

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to extend, until 9 November 2020, the transitional arrangements under clause 17A of Schedule 3 to the *Forestry Act 2012* relating to bee-keeping and grazing carried out in accordance with the provisions of an integrated forestry operations approval in force immediately before 9 November 2018. On 9 November 2018, bee-keeping and grazing ceased to be matters for which an integrated forestry operations approval may provide.

2. This Regulation is made under the *Forestry Act 2012*, including section 92 (the general regulation-making power) and clause 1 of Schedule 3.

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

Henry VIII clause

3. Clause 3 of the Regulation amends clause 17A(2) of Schedule 3 to the *Forestry Act 2012* to extend the transitional arrangements concerning bee-keeping and grazing carried out in accordance with the provisions of an integrated forestry operations approval in force immediately before 9 November 2018 (when bee-keeping and grazing were no longer deemed matters for which an integrated forestry operations approval may provide). The arrangements have been extended to 9 November 2020 rather than 9 November 2019.

> **The Regulation contains a Henry VIII clause which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to extending by another year the transitional arrangements regarding bee-keeping and grazing carried out in accordance with an integrated forestry operations approval that was in force immediately prior to 9 November 2018, the Committee makes no further comment.**

5. Liquor Amendment (Special Licence Conditions) Regulation (No.3) 2019

Date tabled	LA: 4 February 2020
Disallowance date	LA: 5 May 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to change the list of licensed premises that are subject to the special licence conditions set out in Schedule 4 to the *Liquor Act 2007*. This Regulation is made under the *Liquor Act 2007*, including sections 11(1A) and 159 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Special licensing conditions

2. Under the NSW Violent Venues Scheme, licensed premises with a particular level of alcohol-related violent incidents, as recorded in the latest 12 months of data collected by the NSW Bureau of Crime Statistics and Research, are listed as 'declared premises' in Schedule 4 to the *Liquor Act 2007* and subject to certain special licensing conditions set down therein.

3. There is a hierarchy of conditions according to the number of incidents. That is, to be declared a 'Level 1' premises, there must generally have been 19 or more incidents, and these premises attract a greater number of special conditions than 'level 2' declared premises, for which there must generally have been 12-18 incidents.[11]

4. Clause 3 of the Regulation updates the list of licensed premises that are to be subject to the special licence conditions set out in Schedule 4. All those listed by Clause 3 are 'level 2' declared premises. This means that the listed premises are subject to a number of special requirements including:

    - They cannot serve any drink in a glass or breakable plastic container during a restricted service period (Schedule 4, Clause 4, *Liquor Act 2007*);

[11] Liquor & Gaming NSW, *Fact sheet FS3006 – Violent venues scheme*: https://www.liquorandgaming.nsw.gov.au/__data/assets/pdf_file/0020/202961/fs3006-violent-venues-scheme.pdf.

- They must cease selling or supplying liquor for a continuous period of 10 minutes during each hour of a restricted service period, or actively distribute water and/or food to patrons (Schedule 4, Clause 6, *Liquor Act 2007*);

- They must cease selling or supplying liquor on the premises 30 minutes before the premises are required to cease trading (Schedule 4, Clause 7, *Liquor Act 2007*);

- They must maintain an incident register recording the details of violent or anti-social behaviour occurring on the licensed premises (Schedule 4, Clause 7A, *Liquor Act 2007*).

5. A restricted service period means the period between midnight and such later time (if any) at which the premises are required to cease trading, or, in the case of relevant premises that are not required to cease trading at any time after midnight, the period between midnight and 5am (Schedule 4, Clause 1, *Liquor Act 2007*).

The Regulation updates the list of licensed premises that are subject to special licence conditions set out in Schedule 4 to the *Liquor Act 2007*. This means that the listed premises must fulfil special requirements e.g. they cannot serve any drink in a glass or breakable plastic container after midnight and must observe a 10 minute timeout on alcohol sales every hour after midnight, or actively distribute water and/or food to patrons.

The Regulation may thereby have some adverse impact on affected members of the business community. However, it is part of a scheme to minimise harm associated with the misuse and abuse of liquor; and to encourage the responsible promotion, sale, supply, service and consumption of liquor (section 3(2) *Liquor Act 2007*). Premises are only declared where a significant number of violent incidents have occurred at them in the last 12 months. In the circumstances, the Committee considers the special licensing conditions are a proportionate response to achieve the scheme's objectives and makes no further comment.

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

Henry VIII clause

6. The Regulation amends Schedule 4 to the *Liquor Act 2007* to update the list of licensed premises that are subject to the special licensing conditions set out in that Schedule.

The Regulation amends Schedule 4 to the *Liquor Act 2007* to update the list of licensed premises that are subject to the special licensing conditions set out in that Schedule. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.

Nonetheless regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. Given this safeguard, and the fact that it may be more administratively efficient to proceed by regulation

when updating a list of premises subject to special conditions, the Committee makes no further comment.

6. Motor Accidents Guidelines – Transitional excess profits and transitional excess losses

Date tabled	15 October 2019
Disallowance date	LA: 25 February 2020 LC: 24 March 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The *Motor Accident Injuries Act 2017 (NSW)* (the Act) establishes a scheme of compulsory third-party insurance and the provision of benefits and support relating to the death of, or injury to, people injured as a consequence of motor accidents in NSW on or after 1 December 2017.

2. A key object of the Act, as described in section 1.3(2)(d) is:

    - keep premiums for third-party policies affordable by ensuring that profits achieved by insurers do not exceed the amount that is sufficient to underwrite the relevant risk and by limiting benefits payable for minor injuries.

3. The Guidelines are made under Schedule 4, clause 2(4) of the Act and apply during the transition period. The object of Schedule 4, clause 2 is to ensure that the underwriting profits achieved by insurers during the transition period are not excessive or inadequate, having regard to the reduction in the cost to insurers of providing compulsory third-party insurance in relation to motor accidents as a consequence of the Act.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Regulation of profits

4. The Guidelines set mechanisms to ensure that the underwriting profits achieved by insurers providing compulsory third-party insurance in relation to motor accidents in NSW are not excessive or inadequate.

> **By facilitating the regulation of profits that can be achieved by insurers, the guidelines may have an adverse impact on this section of the business community. However, the Guidelines are part of a regime established under the *Motor Accident Injuries Act 2017* that seeks to keep premiums affordable by ensuring that profits achieved by insurers do not exceed the amount that is sufficient to underwrite the relevant risk, and by limiting benefits payable for minor injuries. While profits are limited under the regime, there is also a reduced cost to insurers of providing compulsory third-party motor accident**

insurance. Further, the Guidelines also set mechanisms to ensure that the profits achieved are not inadequate. Given this balance, and the public interest in an affordable system of compulsory third-party motor accident insurance, the Committee makes no further comment.

7. Natural Resources Access Regulator Amendment Regulation 2019

Date tabled	24 September 2019
Disallowance date	LA: 4 February 2020 LC: 25 February 2020
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows –

   (a) to prescribe additional information that may be included in the register of information about enforcement actions taken by the Natural Resources Access Regulator,

   (b) to amend the *Natural Resources Access Regulator Act 2017* to specify as additional functions of the Natural Resources Access Regulator certain enforcement functions of the Minister for Water, Property and Housing under the *Water Management Act 2000* (and to make consequential amendments to the *Natural Resources Access Regulator Regulation 2018*).

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy

2. Schedule 2, clause 6 of the Regulation expands the categories of information that can be included on the register of information about enforcement action taken by or on behalf of the Natural Resources Access Regulator (the Regulator) under the *Water Management Act 2000*.

3. The *Water Management Act 2000* is an Act to provide for the protection, conservation and ecologically sustainable development of the water sources of the State. It sets out a system of access licences which entitle the holder to specified shares in the available water within a specified water management area (section 56). It also sets out a series of offences including:

   - Contravention of the terms and conditions of an access licence (section 60B);
   - Taking water for which there is no, or insufficient, water allocation (section 60C);
   - Taking water otherwise than by or from a water supply work or extraction point nominated in an access licence (section 60D).

4. In addition, the Act sets out various enforcement action that can be taken against persons who fail to comply with the Act's requirements including:

    - The Minister may charge for water illegally taken (section 60G);
    - The Minister may suspend or cancel an access licence (section 78);
    - The Minister may issue certain directions to landholders and other persons, such as a direction to stop taking water from a specified water source for a specified period (see Chapter 7, Divisions 1-5). The Minister can also apply to the Land and Environment Court for an injunction directing any person to whom a direction has been given to comply with it (section 335).

5. As noted above, there is currently a register of information about enforcement action taken by or on behalf of the Regulator under the *Water Management Act 2000*. This register is set up under section 12A of the *Natural Resources Access Regulator Act 2017*. Section 12A also provides that the register can contain certain information including:

    (a) The identity of any person who has been convicted of an offence under the Water Management Act;
    (b) The particulars of any charge imposed or order made under section 60G of the Water Management Act;
    (c) The particulars of any injunction granted under section 335 of the Water Management Act.

6. Section 12A(4) of the *Natural Resources Access Regulator Act 2017* authorises information to be disclosed from the register in accordance with a Regulation made under that Act. Such disclosure can be made despite any prohibition in, or the need to comply with a requirement of any Act or law (in particular, the *Privacy and Personal Information Protection Act 1998*, except Part 6 of that Act).

7. For example, an agency would not need to comply with the Information Protection Principles in section 18 of the *Privacy and Personal Information Protection Act 1998* that places limits on the disclosure of personal information. However, Part 6 of the *Privacy and Personal Information Protection Act 1998* would apply and provide some privacy protections regarding the information:

    (a) It prevents an agency responsible for a public register from disclosing any personal information kept in the register unless the agency is satisfied that it is to be used for a purpose relating to the register or the Act under which it is kept.
    (b) It gives an agency the option to require a person to make a statutory declaration as to the intended use of any information the person has applied to access from the register. This can be for the purpose of complying with the agency's responsibilities referred to above.
    (c) The agency can suppress personal information on the register by request. The agency must suppress the information if satisfied that the safety or well-being of any person would be affected unless the agency is of the opinion that the public interest in maintaining access to the information outweighs any individual interest in suppressing it.

The Regulation expands the categories of information that can be included on the public register of information about enforcement action taken by or on behalf of the Natural Resources Access Regulator under the *Water Management Act 2000*. For example, the register may now include the identity of any person who has been convicted of an offence under that Act; and details of monetary charges imposed by the Minister for water that has been illegally taken.

The Regulation may thereby impact on the privacy rights of affected individuals, who may have sensitive information published about them. However, the Committee considers that there is a public interest in allowing the register to include information about enforcement of the Water Management Act. In doing so, the Regulation increases accountability and transparency and advances the scheme established under the Act to ensure that the State's water resources are managed appropriately.

Further, the public register provisions of the *Privacy and Personal Information Protection Act 1998* would apply to the information and provide some privacy safeguards. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

8. The Regulation amends the *Natural Resources Access Regulator Act 2017* to list additional functions of the Regulator in Schedule 2 of that Act. This is made possible by a Henry VIII clause in the Act (see section 11(3)). A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation.

9. The Committee prefers changes to an Act to be made by an amending Bill, not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. The Committee notes that the Regulator plays an important role:

   (a) Ensuring effective, efficient, transparent and accountable compliance and performance measures for the State's natural resources management legislation (including the *Water Management Act 2000*); and

   (b) Maintaining public confidence in the enforcement of the State's natural resources management legislation (see section 10, *Natural Resources Access Regulator Act 2017*).

10. Given this important role, any changes or additions to the Regulator's functions are an appropriate matter for primary legislation. Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that 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 already been in operation for some time before disallowance occurs.[12]

The Regulation amends the *Natural Resources Access Regulator Act 2017* to list additional functions of the Regulator. The Committee prefers changes to an Act to be made by an amending Bill, not through subordinate legislation. This is to foster appropriate parliamentary oversight of the changes. This is particularly the case given the important role of the Regulator – changes or additions to its functions should be oversighted adequately. The Committee refers this matter to Parliament for further consideration.

[12] See discussion of Henry VIII clauses in ACT Standing Committee on Justice and Community Safety, 'Henry VIII clauses fact sheet' November 2011 at https://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf.

8. Poisons and Therapeutic Goods Amendment (Cannabis Medicines) Regulation 2019

Date tabled	15 October 2019
Disallowance date	LA: 25 February 2020 LC: 24 March 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows—

(a) to regulate cannabis and tetrahydrocannabinols (when included in Schedule 8 of the Poisons List), nabiximols and unregistered drugs of addiction that are not extemporaneously compounded for a particular person for therapeutic application to that person as type C drugs of addiction,

(b) to require medical practitioners to obtain an authority under Part 8 of the Poisons and Therapeutic Goods Regulation 2008 prior to supplying or prescribing certain specified unregistered drugs of addiction for the purposes of a clinical trial,

(c) to make it clear that nurses and midwives, dentists and veterinarians are not permitted to supply or prescribe those specified unregistered drugs of addiction for the purposes of a clinical trial.

This Regulation is made under the *Poisons and Therapeutic Goods Act 1966*, including sections 24 and 45C (the general regulation-making power).

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

2. The Regulation includes a number of strict liability offences relating to the supply by medical practitioners and authorised practitioners of type C unregistered drugs of addiction. For example, proposed clause 84A provides that a medical practitioner must not issue a prescription for a type C unregistered drug of addiction unless:

(a) The medical practitioner holds an authority under Division 4 of Part 8 of the Regulation that authorises the practitioner to issue a prescription for that type C unregistered drug of addiction for the purposes of a clinical trial, and

(b) The prescription is issued in accordance with the authority.

3. The maximum penalty for each of the strict liability offences is a $2,200 fine.

4. A strict liability offence does not require proof of criminal intent and therefore departs from the common law principle that the mens rea (the mental element of an offence) must be proved to hold a person liable.

The Regulation includes a number of strict liability offences relating to the supply by medical practitioners and authorised practitioners of type C unregistered drugs of addiction. The maximum penalty for the offences is a fine of $2,200. The Committee generally comments on strict liability offences because they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

However, strict liability clauses are not uncommon in regulatory settings to encourage compliance and strengthen offence provisions. Further, the Committee acknowledges the potential dangers if practitioners were to prescribe type C unregistered drugs without the necessary authority, contrary to the regulatory framework set down by the *Poisons and Therapeutic Goods Act 1966* and the *Poisons and Therapeutic Goods Regulation 2008*. In the circumstances, the Committee makes no further comment.

9. Work Health and Safety Amendment (Miscellaneous) Regulation 2019

Date tabled	19 November 2019
Disallowance date	LA: 31 March 2020 LC: 12 May 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Work Health and Safety Regulation 2017* for the following purposes—

   (a) to provide that the disclosure or use of information or documents for the administration or enforcement of particular NSW and Commonwealth Acts is excluded from the application of section 271 of the *Work Health and Safety Act 2011*, which would otherwise prevent a person who obtains information or gains access to a document in exercising any power or function under certain provisions of that Act from disclosing, giving access to or using the information or document,

   (b) to provide that Subdivision 2 of Division 3 of Part 5.2 of the *Occupational Health and Safety Regulation 2001* continues to apply until 1 January 2021 (as if that Regulation had not been repealed) to and in respect of the registration of certain items of plant, other than certain mining specific plant and amusement devices that are passenger ropeways or certain water slides,

   (c) to include penalty notice offences for failing to notify the relevant regulator of a notifiable incident and failing to display an improvement notice, prohibition notice or non-disturbance notice in a prominent part of the workplace,

   (d) to make minor law revision amendments.

2. This Regulation is made under the *Work Health and Safety Act 2011*, including sections 243 and 271(3)(c)(ii) and clause 1 of Schedule 4, and section 276 and Schedule 3 (the general regulation-making powers).

ISSUES CONSIDERED BY THE COMMITTEE

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

Confidentiality of information

3. Schedule 1[3] of the Regulation expands clause 702 of the *Work Health and Safety Regulation 2017* to include an additional 12 Acts that are to be excluded from the operation of s271 of the *Work Health and Safety Act 2011* ('the Act'). Section 271

generally prohibits a person who has obtained information or gained access to a document whilst exercising powers or functions under the Act from disclosing, giving access to, or using such information or document.

The Regulation expands by 12 Acts the list of legislation that is exempt from the confidentiality requirements of section 271 of the *Work Health and Safety Act 2017*. A person exercising powers or functions under the Act who has gained certain information or access to a document is accordingly not prohibited from disclosing, giving access to or using the information or document. Consequently, personal information that was previously considered to be confidential may potentially be disclosed in certain circumstances. However, this exemption only applies where the regulator reasonably believes the disclosure, access to or use of the information or document is necessary for the administration or enforcement of the Acts listed. Accordingly, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

4. Schedule 1[5] and [6] of the Regulation amend the *Work Health and Safety Regulation 2017* to expand the list of offences for which a penalty notice may be issued, to include offences under sections 38(1) and 210 of the Act.

5. Section 38(1) of the Act provides that it is an offence to fail to notify the regulator of a notifiable incident (with a maximum penalty of $10,000 for an individual and $50,000 for a body corporate). Schedule 1[5] of the Regulation permits a penalty notice to be issued for such an offence, with a penalty of $1200 for individuals and $6000 for corporations.

6. Section 210 of the Act provides that it is an offence to fail to display, in a prominent part of the workplace, a notice issued by an inspector that identifies a contravention of work health and safety legislation (attracting a maximum penalty of $5000 for an individual and $25,000 for a body corporate). Schedule 1[6] of the Regulation permits a penalty notice to be issued for such an offence, with a penalty of $600 for individuals and $3000 for corporations.

The Regulation expands the list of offences for which a penalty notice may be issued. Penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed. Given this, and the size of the penalties that may be issued by penalty notice – up to $1200 for an individual and $6000 for a corporation – the Committee refers the matter to Parliament for its 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.