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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

CHAIR	Ms Felicity Wilson MP, Member for North Shore
DEPUTY CHAIR	The Hon Trevor Khan MLC
MEMBERS	Mr Lee Evans MP, Member for Heathcote Mr David Mehan MP, Member for The Entrance The Hon Leslie Williams MP, Member for Port Macquarie Ms Wendy Lindsay MP, Member for East Hills The Hon Shaoquett Moselmane MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2214
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

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 – REGULATIONS

1. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (COVID-19 PLANNING BODIES) REGULATION 2020

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

Right to participate in public life and access to public information

The Regulation provides for public hearings and public meetings of planning bodies, including the Independent Planning Commission, Sydney district and regional planning panels, and local planning panels, to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

These panels are largely independent of government and have the power to make determinations on planning matters. Public meetings enable people to put their views to these panels before a determination is made, while the meetings and public hearings also increase the amount of publicly available information about planning decisions.

By providing that public meetings and hearings can be held by audio link or audio visual link, the Regulation may limit this ability of people to put their views to the determining bodies, or to access information about planning decisions, if they do not have the relevant technology. It may thereby impact on the right to participate in public life, and to access public information.

However, the Committee notes that the provisions are an extraordinary measure to ensure that public meetings and hearings are conducted appropriately in the context of the public health risk posed by COVID-19, and are accordingly time-limited to last 6 months. In the circumstances, the Committee considers that the provisions are reasonable and makes no further comment.

2. LOCAL GOVERNMENT (GENERAL) AMENDMENT (COVID-19) REGULATION 2020

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

Access to government information – inspection of documents at council offices

Schedule 1[15] of the Regulation removes the need for councils to make certain documents available for inspection by members of the public in the offices of the councils. These requirements are instead satisfied if such documents are made available on the council website and are provided to a person on request in an electronic form, or in any other form sought by the person and approved by the council.

These provisions may impact on the right to access government information. In particular, people in the community who do not have access to electronic resources can request to inspect documents in a non-electronic form, but this is at the discretion of the council. Access to government information is part of the right to participate in public life as recognised in Article 25 of the International Covenant on Civil and Political Rights to which Australia is a party.

The Committee appreciates that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, and that they are accordingly time-limited to apply for no more than 6 months. Even so, the Committee would prefer there to be a requirement for councils to provide the documents in non-electronic form e.g. by mail, if asked to do so. The Committee refers the matter to Parliament for consideration.

Access to government information – newspapers

The Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council considers necessary to bring the notice or advertisement to the attention of appropriate persons. Such notices impart significant information and include notices relating to constitutional referenda or council polls; and notices to do with consultation concerning categorisation of land as an area of cultural significance.

These provisions are not time limited, nor drafted to relate to COVID-19. They may impact on the right to access government information. In particular, there is no requirement for councils to make the information accessible to people who do not have access to electronic resources – this is left to the council’s discretion. The Committee refers the provisions to Parliament for consideration.

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

As above, the Regulation removes the requirement under the *Local Government Act 1993* (the Act) for councils to make documents available for inspection by members of the public in the offices of the council, and makes provision for alternative arrangements. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee’s Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

3. LOCAL GOVERNMENT (GENERAL) AMENDMENT (COVID-19) REGULATION (NO 2) 2020

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

Certainty of remuneration

The Regulation modifies the application of the *Local Government Act 1993* (the Act) to extend by two months the time within which the Remuneration Tribunal is required to determine the fees to be paid the following year to councillors and mayors. In doing so, the Regulation delays certainty of remuneration for affected persons.

However, the Committee notes that under section 246 of the Act, a determination of the Remuneration Tribunal may not be challenged, reviewed, or called into question. Therefore, although the Regulation delays certainty of remuneration it does not affect any existing opportunity to challenge a determination.

Similarly, the Regulation is made in response to the COVID-19 pandemic and may assist with such things as allowing the Remuneration Tribunal more time to coordinate their determinations via remote means, and accommodating changing economic circumstances. 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

As above, the Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, this delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

4. RESIDENTIAL TENANCIES AMENDMENT (COVID-19) REGULATION 2020

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

Retrospectivity, property rights and freedom of contract

The Regulation is made under the *Residential Tenancies Act 2010* (the Act) which provides the Minister for Better Regulation and Innovation with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop residential landlords and proprietors of boarding houses enforcing certain rights under residential tenancy and occupancy agreements, and relevant legislation.

The Regulation accordingly limits landlords' rights in response to the pandemic. For example, during the "moratorium period" of 6 months from the commencement of the Regulation, a landlord generally cannot give a tenant who is financially impacted by COVID-19 (an "impacted tenant") a termination notice under the Act for non-payment of rent. An exception exists where the landlord has participated in good faith in a formal rent negotiation process with an "impacted tenant" and it is fair and reasonable in the circumstances.

The Regulation also covers boarding houses. For example, it provides that during the "moratorium period" a boarding house proprietor must give a boarding house resident financially impacted by the COVID-19 pandemic (an "impacted resident") 6 months' notice of an eviction based solely on non-payment of fees under an occupancy agreement, unless the occupant did not participate in good faith negotiations about the fees.

The Regulation also provides that landlords and proprietors must generally give at least 90 days' notice before terminating a tenancy or evicting a resident and this applies regardless of whether an "impacted tenant" or "impacted resident" is involved.

In retrospectively limiting landlords' and proprietors' rights under tenancy and occupancy agreements and relevant legislation, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

Similarly, by limiting the ability of the landlord or proprietor to exercise his/her rights under an existing agreement, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. It is accordingly time limited to last for no more than 6 months. The Committee notes that the Regulation furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

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

Government regulation of boarding house occupancy agreements

As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic. Proprietors are required to give significant amounts of notice before evicting "impacted residents" for non-payment of occupancy fees, or to participate in negotiations about the fees with them. Proprietors must also generally give 90 days' written notice before evicting any resident, regardless of whether they are an "impacted resident".

The Regulation may thereby have some adverse impact on this sector of the business community, requiring them to negotiate about occupancy fees, and limiting their ability to evict current residents in order to seek new residents who can pay their fees.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. It is accordingly time limited to last for no more than 6 months. 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

Matters that should be included in primary legislation

As above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on landlords and proprietors.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future. The Regulations are also time limited to last no more than 6 months. Given these factors, the Committee makes no further comment.

5. RETAIL AND OTHER COMMERCIAL LEASES (COVID -19) REGULATION 2020

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

Retrospectivity, property rights and freedom of contract

The Regulation is made under the *Retail Leases Act 1994* (the Act) which provides the Minister for Finance and Small Business (the Minister) with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop commercial lessors from enforcing certain rights under commercial tenancy agreements, and relevant legislation. The Regulation also gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020.

The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

By retrospectively limiting lessors' rights under commercial tenancy agreements the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

Similarly, by prohibiting the lessor from exercising his or her legal rights as agreed upon in the lease, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation only applies to cases involving “impacted lessees” – those who have experienced economic hardship due to COVID-19, who are eligible for JobKeeper payments, and who had less than \$50 million in turnover in the 2018-19 financial year. It does not prohibit lessors from exercising prescribed action in cases not related to the economic impacts of COVID-19. Similarly, the Regulation is time limited to apply only for a period of 6 months from its commencement. The Committee considers the Regulation is a reasonable and proportionate response to the far-reaching economic consequences of COVID-19, and given these extraordinary circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA*Government regulation of private business contracts - businesses required to incur a loss*

As above, the Regulation significantly limits the ability of lessors to take any prescribed action against lessees on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours where the lessor has been unable to meet his or her obligations due to economic hardship resulting from the COVID-19 crisis.

In doing so, the Regulation may adversely affect the business of the lessor by prohibiting him or her from recovering lost rent, or from evicting current tenants in order to seek new tenants who can finance the lease. This may force the lessor to incur a loss for a period of 6 months.

However, the Committee recognises that the Regulation is in response to a public health emergency and implements a National Cabinet decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While the lessor is significantly limited from taking prescribed action for failure to pay rent or outgoings, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months. 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*Matters that should be included in primary legislation*

As above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on commercial lessors and lessees.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future, and such regulations must expire within 6 months of their commencement. Given these factors, the Committee makes no further comment.

Part One – Regulations

1. Environmental Planning and Assessment Amendment (COVID-19 Planning Bodies) Regulation 2020

Date published	30 April 2020
Disallowance date	To be confirmed
Minister responsible	The Hon. Robert Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for public hearings and public meetings of planning bodies to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.
2. The relevant planning bodies are the Independent Planning Commission, Sydney district planning panels, regional planning panels, local planning panels and panels established by the Minister or Planning Secretary under section 2.3 of the *Environmental Planning and Assessment Act 1979*.
3. This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 2.3(7), 2.16(3)(a) and 10.13 (the general regulation-making power) and clause 8(a) 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

Right to participate in public life and access to public information

4. The Regulation provides for public hearings and public meetings of planning bodies to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.
5. The relevant planning bodies are the Independent Planning Commission, Sydney district planning panels, regional planning panels, local planning panels and panels established by the Minister or Planning Secretary under section 2.3 of the *Environmental Planning and Assessment Act 1979*.

6. These panels are largely independent of government and have power to make determinations on planning matters.¹ For example, the Independent Planning Commission determines state significant development applications where there is significant opposition from the community.² Similarly, Sydney district and regional planning panels determine regionally significant development applications.³
7. Public meetings enable the public to put their views to the determining body before a decision is made.⁴ The Independent Planning Commission also has the function of holding a public hearing into any matter where the Minister for Planning and Public Spaces so requests and the Commission has powers to require certain people to attend the public hearing and give evidence.⁵

The Regulation provides for public hearings and public meetings of planning bodies, including the Independent Planning Commission, Sydney district and regional planning panels, and local planning panels, to be held by means of an audio link or audio visual link for 6 months during the COVID-19 pandemic.

These panels are largely independent of government and have the power to make determinations on planning matters. Public meetings enable people to put their views to these panels before a determination is made, while the meetings and public hearings also increase the amount of publicly available information about planning decisions.

By providing that public meetings and hearings can be held by audio link or audio visual link, the Regulation may limit this ability of people to put their views to the determining bodies, or to access information about planning decisions, if they do not have the relevant technology. It may thereby impact on the right to participate in public life, and to access public information.

However, the Committee notes that the provisions are an extraordinary measure to ensure that public meetings and hearings are conducted appropriately in the context of the public health risk posed by COVID-19, and are accordingly time-limited to last 6 months. In the circumstances, the Committee considers that the provisions are reasonable and makes no further comment.

¹ See Part 2 of the *Environmental Planning and Assessment Act 1979*, and in particular sections 2.3, 2.7, 2.9, 2.12, 2.15, 2.17 and 2.19.

² See: <https://www.ipcn.nsw.gov.au/about-us>

³ See: <https://www.planningportal.nsw.gov.au/planning-panels/about-planning-panels>

⁴ See for example discussion of public meetings by the Independent Planning Commission:

<https://www.ipcn.nsw.gov.au/ourprocesses>; and involving local planning panels:

<https://www.planning.nsw.gov.au/Assess-and-Regulate/Development-Assessment/Local-Planning-Panels>

⁵ See *Environmental Planning and Assessment Act 1979*, s2.9(1)(d) and <https://www.ipcn.nsw.gov.au/ourprocesses>

2. Local Government (General) Amendment (COVID-19) Regulation 2020

Date published	17 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are—

(a) to introduce the following temporary modifications to the application of provisions of the *Local Government Act 1993* in response to the public health emergency caused by the COVID-19 pandemic—

- (i) pushing back dates on which certain things must be done by councils (including the adoption of annual operational plans, preparation and auditing of financial records and the preparation of annual reports),
- (ii) providing additional time for the payment of an instalment of annual rates and charges,
- (iii) permitting councils to waive payment of, or reduce, a fee in a category of cases without first giving public notice of that category if the category relates to a response to the COVID-19 pandemic,
- (iv) removing the need for councils to make certain documents available for inspection by members of the public in the offices of the councils and to instead make these documents available by other means, and

(b) to remove requirements on councils to publish certain notices and advertisements in newspapers and to instead require publication on council websites and in other ways that a particular council (or in the case of a notice relating to a constitutional referendum or council poll, the relevant election manager) considers necessary to bring the notice or advertisement to the attention of appropriate persons, and

(c) to provide that a water supply restriction may be imposed by a council by notice published on the website of the council rather than in a newspaper.

2. This Regulation is made under the *Local Government Act 1993*, including sections 747B and 748 (the general regulation-making power) and Schedule 6.

ISSUES CONSIDERED BY THE COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA*Access to government information – inspection of documents at council offices*

3. Section 747B of the *Local Government Act 1993* (the Act) authorises regulations under the Act to modify the application of the Act for the purposes of responding to the public health emergency created by the COVID-19 pandemic. Regulations made under this section are time limited to expire 6 months after the day on which the regulation commences or on an earlier day decided by Parliament by resolution of either House (see s747B(4)).
4. Schedule 1[15] of the Regulation accordingly inserts Division 15 into Part 13 of the *Local Government (General) Regulation 2005* to make temporary measures for the COVID-19 pandemic.
5. Among those measures, clause 413K provides that a requirement under section 9(2), 43, 113(5), 167, 364(1), 418(4) and 733(6) of the Act that a document be made available at the offices of a council is satisfied if the document is instead made available on the website of the council, and provided to a person on request in an electronic form, or in any other form requested by the person and approved by the council. An example of such a document is the agenda and associated business papers of a council meeting (see section 9 of the Act).
6. Similarly, a requirement in section 47G, 302(2) and 405(4) of the Act that a document be made available at the offices of a council or a location in the area of the council is satisfied if the document is instead provided to a person on request in an electronic form, or in any other form approved by the council. An example of such a document is the roll of electors that the General Manager of a council must make publicly available (see section 302(2) of the Act).

Schedule 1[15] of the Regulation removes the need for councils to make certain documents available for inspection by members of the public in the offices of the councils. These requirements are instead satisfied if such documents are made available on the council website and are provided to a person on request in an electronic form, or in any other form sought by the person and approved by the council.

These provisions may impact on the right to access government information. In particular, people in the community who do not have access to electronic resources can request to inspect documents in a non-electronic form, but this is at the discretion of the council. Access to government information is part of the right to participate in public life as recognised in Article 25 of the International Covenant on Civil and Political Rights to which Australia is a party.

The Committee appreciates that the provisions are an extraordinary measure to respond to the public health emergency created by COVID-19, and that they are accordingly time-limited to apply for no more than 6 months. Even so, the Committee would prefer there to be a requirement for councils to provide the

documents in non-electronic form e.g. by mail, if asked to do so. The Committee refers the matter to Parliament for consideration.

Access to government information – newspapers

7. Schedule 1[1]-[12] of the Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council (or in the case of a notice relating to a constitutional referendum or council poll, the relevant election manager) considers necessary to bring the notice or advertisement to the attention of appropriate persons. These provisions are not time limited nor drafted to relate to the COVID-19 pandemic.
8. Such notices include advertisements inviting tenders for council contracts (schedule 1[10]-[12]); notices to do with consultation concerning categorisation of land as an area of cultural significance (schedule 1[5]); and, as above, notices relating to constitutional referenda or council polls e.g. their date, location, or the question to be asked at them (schedule 1[16]).

The Regulation removes requirements in the *Local Government (General) Regulation 2005* for councils to publish certain notices and advertisements in newspapers and instead requires publication on council websites and in other ways that a particular council considers necessary to bring the notice or advertisement to the attention of appropriate persons. Such notices impart significant information and include notices relating to constitutional referenda or council polls; and notices to do with consultation concerning categorisation of land as an area of cultural significance.

These provisions are not time limited, nor drafted to relate to COVID-19. They may impact on the right to access government information. In particular, there is no requirement for councils to make the information accessible to people who do not have access to electronic resources – this is left to the council's discretion. The Committee refers the provisions to Parliament for consideration.

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

9. As above, Schedule 1[15] of the Regulation is made under section 747B of the Act which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. Schedule 1[15] of the Regulation removes the requirement under the Act for councils to make documents available for inspection by members of the public in the offices of the councils, and makes provision for alternative arrangements.
10. As also noted above, regulations made under section 747B expire within 6 months or such earlier day decided by Parliament by resolution of either House of Parliament (section 747B(4)).

As above, the Regulation removes the requirement under the *Local Government Act 1993* (the Act) for councils to make documents available for

inspection by members of the public in the offices of the council, and makes provision for alternative arrangements. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

3. Local Government (General) Amendment (COVID-19) Regulation (No 2) 2020

Date published	24 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Shelley Hancock
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to delay by 2 months, in response to the COVID-19 pandemic, the time within which the Remuneration Tribunal is required to determine the fees to be paid during the following year to councillors and mayors.
2. This Regulation is made under the *Local Government Act 1993*, including sections 747B and 748 (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

Certainty of remuneration

3. The Regulation is made under the *Local Government Act 1993* (the Act), which provides a legal framework for the system of local government in NSW, and in particular section 747B which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.
4. The Local Government Remuneration Tribunal is established under Chapter 9, Part 2, Division 4 of the Act and one of its functions is to determine, not later than 1 May each year, the maximum and minimum amount of fees to be paid during the following year to councillors and mayors (section 241).
5. Section 246 of the Act provides that a determination of the Remuneration Tribunal may not be challenged, reviewed, quashed or called into question before any court in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition, mandamus, certiorari or otherwise.
6. Clause 3 of the Regulation provides that despite section 241 of the Act, fees determinations made under that section are to be made no later than 1 July 2020, rather than 1 May 2020. That is, the Regulation extends by two months the time for the determinations to be made in 2020.

The Regulation modifies the application of the *Local Government Act 1993* (the Act) to extend by two months the time within which the Remuneration Tribunal

is required to determine the fees to be paid the following year to councillors and mayors. In doing so, the Regulation delays certainty of remuneration for affected persons.

However, the Committee notes that under section 246 of the Act, a determination of the Remuneration Tribunal may not be challenged, reviewed, or called into question. Therefore, although the Regulation delays certainty of remuneration it does not affect any existing opportunity to challenge a determination.

Similarly, the Regulation is made in response to the COVID-19 pandemic and may assist with such things as allowing the Remuneration Tribunal more time to coordinate their determinations via remote means, and accommodating changing economic circumstances. 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

7. As above, the Regulation is made under section 747B of the Act which allows regulations to be made to modify the application of the Act for the purposes of responding to the public health emergency caused by the COVID-19 pandemic. The Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations.
8. Regulations made under section 747B expire within 6 months or such earlier day decided by Parliament by resolution of either House of Parliament (section 747B(4)).

As above, the Regulation modifies the application of the Act to extend the time within which the Remuneration Tribunal must make certain fees determinations. It does so, drawing on a power contained in section 747B of the Act, which allows regulations to be made to modify the application of the Act for the purposes of responding to COVID-19.

As noted in the Committee's Digest No.12/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and the regulations made under it, would ordinarily involve an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by COVID-19, this delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic in a way that minimises disruption in matters of public administration. Further, there is a limited amount of time for which regulations made under this power can apply. In the circumstances, the Committee makes no further comment.

4. Residential Tenancies Amendment (COVID-19) Regulation 2020

Date published	15 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to—

(a) generally prohibit, in the 6 months after the commencement of the regulation (the “moratorium period”), a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from—

(i) giving a tenant who is a member of a household financially impacted by the COVID-19 pandemic (an “impacted tenant”) a termination notice under the *Residential Tenancies Act 2010* for non-payment of rent or charges, or

(ii) applying to NSW Civil and Administrative Tribunal (NCAT) under the *Residential Tenancies Act 2010* for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or

(iii) otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges, and

(b) provide that, during the moratorium period, a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) may only evict an impacted tenant for non-payment of rent or charges if—

(i) the landlord gives a termination notice, or applies for a termination order, at least 60 days after the commencement of the regulation, and

(ii) the landlord and impacted tenant have participated, in good faith, in a formal rent negotiation process about the rent or charges payable, and

(iii) it is fair and reasonable in the circumstances of the case for the landlord to give the termination notice or apply for the order, and

(c) require a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) to give at least 90 days’ notice of the termination of—

(i) a fixed term tenancy at the end of the term, or

- (ii) a periodic tenancy, or
- (iii) a tenancy because of a breach of the residential tenancy agreement (other than non-payment of rent or charges), or
- (iv) a tenancy of 20 years or more, and
- (d) prohibit a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from listing an impacted tenant on a residential tenancy database for the non-payment of rent or charges, and
- (e) prescribe, during the moratorium period, the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an “impacted resident”) of an eviction based solely on the non-payment of fees (including occupancy fees or rent) or fees for services as follows—
 - (i) if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith—60 days, or
 - (ii) otherwise—6 months, and
- (f) prescribe, during the moratorium period, that the proprietor of a boarding house must give a resident 90 days written notice of eviction, unless the eviction is based on—
 - (i) the resident causing or permitting serious damage to the premises or other residents’ property, or
 - (ii) the resident using the premises for illegal purposes, or
 - (iii) the resident threatening, abusing, intimidating or harassing other residents, or
 - (iv) the non-payment of fees (including occupancy fees or rent) or fees for services, unless the resident is an impacted resident.
- 2. This Regulation is made under the *Residential Tenancies Act 2010*, including sections 224 (the general regulation-making power) and 229(1)(a), (b) and (c).

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

- 3. The Regulation is made under the *Residential Tenancies Act 2010* (the Act) and in particular, section 229(1)(a),(b) and (c) which provide that the Minister for Better Regulation and Innovation (the Minister) can make regulations under any “relevant Act” to respond to the public health emergency caused by the COVID-19 pandemic:

- prohibiting the recovery of possession of premises by a landlord, owner or proprietor of premises from a tenant or resident of the premises under the “relevant Act” in particular circumstances,
 - prohibiting the termination of a residential tenancy agreement, occupancy agreement or site agreement by a landlord, proprietor of premises or operator of a community under the “relevant Act” in particular circumstances, and
 - regulating or preventing the exercise or enforcement of another right of a landlord, proprietor of premises or operator of a community by the landlord, proprietor or operator under the “relevant Act” or an agreement relating to the premises.
4. Such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 229(4)). Further, they can only be made if, in the Minister’s opinion, they are reasonable to protect the health, safety and welfare of tenants or residents under the Act (section 229(5)).
5. “Relevant Act” is defined to mean the *Boarding Houses Act 2012*; the *Residential (Land Leases) Communities Act 2013*; the *Residential Tenancies Act 2010*; and “any other Act relating to the leasing of premises or land for residential purposes” (section 229(5)).
6. The Regulation accordingly generally prohibits in the 6 months after the commencement of the Regulation (the “moratorium period”), a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) from:
- giving an “impacted tenant” a termination notice under the Act for non-payment of rent or charges, or
 - applying to NSW Civil and Administrative Tribunal (NCAT) under the Act for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or
 - otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges (schedule 1, clause 41C(1)).
7. An “impacted tenant” is defined as a tenant who is a member of a household impacted by the COVID-19 pandemic (schedule 1, clause 41A). Further, a household is considered to be impacted by the COVID-19 pandemic if:
- any one or more rent-paying members of the household have:
 - lost employment or income as a result of the impact of the COVID-19 pandemic, or
 - had a reduction in work hours or income as a result of the impact of the COVID-19 pandemic, or
 - had to stop working, or materially reduce the member’s work hours because of the member’s illness with COVID-19, or another member of

the household's illness with COVID-19, or the member's carer responsibilities for a family member ill with COVID-19,

and as a result, the weekly household income has been reduced by at least 25 per cent (schedule 1, clause 41B).

8. Further, schedule 1, clause 41C(2) of the Regulation provides that, during the moratorium period, a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) may only evict an impacted tenant for non-payment of rent or charges if—
 - the landlord gives a termination notice, or applies for a termination order, at least 60 days after the commencement of the Regulation, and
 - the landlord and impacted tenant have participated, in good faith, in a formal rent negotiation process about the rent or charges payable, and
 - it is fair and reasonable in the circumstances of the case for the landlord to give the termination notice or apply for the order.
9. In deciding whether the landlord has participated in good faith, and that it is fair and reasonable in the circumstances, NCAT may have regard to a number of factors including:
 - the nature of any financial hardship experienced by the landlord or impacted tenant, including the general financial position of each party,
 - the availability and affordability of reasonable alternative accommodation for the impacted tenant,
 - the public health objectives of ensuring citizens remain in their homes and preventing all avoidable movement of persons (schedule 1, clause 41C(4)).
10. Schedule 1, clause 41D of the Regulation also provides that a landlord (under a residential tenancy agreement other than a social housing tenancy agreement) must give at least 90 days' notice of the termination of:
 - a fixed term tenancy at the end of the term, or
 - a periodic tenancy, or
 - a tenancy because of a breach of the residential tenancy agreement (other than non-payment of rent or charges), or
 - a tenancy of 20 years or more,

and this applies regardless of whether the tenant is an "impacted tenant".

11. The Regulation also covers boarding houses. Schedule 2, clause 34 provides that during the "moratorium period" (again the period ending 6 months after the day on which the Regulation commences), the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an

“impacted resident”) of an eviction based solely on the non-payment of fees (including occupancy fees or rent) or fees for services is as follows:

- if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith, 60 days, or
 - otherwise, 6 months.
12. The definition of an “impacted resident” is set down in schedule 2, clauses 32 and 33 and is similar to that for an “impacted tenant” under the Regulation, that is, the “impacted resident” has had their income reduced by at least 25 per cent because of COVID-19.
13. Schedule 2, clause 35 of the Regulation also provides that, during the moratorium period, the proprietor of a boarding house must generally give a resident 90 days written notice of eviction and this applies regardless of whether the resident is an “impacted resident”. Exceptions include where the resident is using the premises for illegal purposes or causing serious damage to the premises.

The Regulation is made under the *Residential Tenancies Act 2010* (the Act) which provides the Minister for Better Regulation and Innovation with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop residential landlords and proprietors of boarding houses enforcing certain rights under residential tenancy and occupancy agreements, and relevant legislation.

The Regulation accordingly limits landlords’ rights in response to the pandemic. For example, during the “moratorium period” of 6 months from the commencement of the Regulation, a landlord generally cannot give a tenant who is financially impacted by COVID-19 (an “impacted tenant”) a termination notice under the Act for non-payment of rent. An exception exists where the landlord has participated in good faith in a formal rent negotiation process with an “impacted tenant” and it is fair and reasonable in the circumstances.

The Regulation also covers boarding houses. For example, it provides that during the “moratorium period” a boarding house proprietor must give a boarding house resident financially impacted by the COVID-19 pandemic (an “impacted resident”) 6 months’ notice of an eviction based solely on non-payment of fees under an occupancy agreement, unless the occupant did not participate in good faith negotiations about the fees.

The Regulation also provides that landlords and proprietors must generally give at least 90 days’ notice before terminating a tenancy or evicting a resident and this applies regardless of whether an “impacted tenant” or “impacted resident” is involved.

In retrospectively limiting landlords’ and proprietors’ rights under tenancy and occupancy agreements and relevant legislation, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights,

because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

Similarly, by limiting the ability of the landlord or proprietor to exercise his/her rights under an existing agreement, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. It is accordingly time limited to last for no more than 6 months. The Committee notes that the Regulation furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

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

Government regulation of boarding house occupancy agreements

14. As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic.
15. In particular, proprietors must give a significant amount of written notice – 6 months – before evicting an “impacted resident” for non-payment of occupancy fees and fees for service under the occupancy agreement. An exception exists where the proprietor has participated in good faith in a negotiation about the fees, but the resident did not participate in good faith. Proprietors must also generally give 90 days’ written notice before evicting any resident, including residents who are not “impacted residents”.

As above, the Regulation introduces significant changes to the circumstances under which boarding house proprietors can enforce certain rights under occupancy agreements, in response to the COVID-19 pandemic. Proprietors are required to give significant amounts of notice before evicting “impacted residents” for non-payment of occupancy fees, or to participate in negotiations about the fees with them. Proprietors must also generally give 90 days’ written notice before evicting any resident, regardless of whether they are an “impacted resident”.

The Regulation may thereby have some adverse impact on this sector of the business community, requiring them to negotiate about occupancy fees, and limiting their ability to evict current residents in order to seek new residents who can pay their fees.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic. It is accordingly time limited to last for no more than 6 months. 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

Matters that should be included in primary legislation

16. As above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation.
17. As also mentioned above, the Regulation is made under the Act, in particular section 229(1)(a),(b) and (c) which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.
18. However, there are limits to this power. For example, the Minister can only make such regulations if Parliament is not currently sitting and not likely to sit within 2 weeks after the day the regulations are made; and if it is the Minister's opinion that the regulations are reasonable to protect the health, safety and welfare of tenants or residents under the Act (section 229(2) (a) and (b)). Further, such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 229(4)).

As above, the Regulation introduces significant changes to the circumstances under which residential landlords and boarding house proprietors can enforce certain rights under residential tenancy and occupancy agreements, and relevant legislation. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on landlords and proprietors.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future. The Regulations are also time limited to last no more than 6 months. Given these factors, the Committee makes no further comment.

5. Retail and Other Commercial Leases (COVID -19) Regulation 2020

Date published	24 April 2020
Disallowance date	To be determined
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to give effect to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted by the National Cabinet on 7 April 2020. In particular, the Regulation—
 - (a) prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and
 - (b) requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.
2. This Regulation is made under the *Retail Leases Act 1994*, including sections 85 (the general regulation-making power) and 87 and under section 202 (the general regulation-making power) of the *Conveyancing Act 1919*.
3. This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*—namely, matters arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State or Territory.
4. This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

5. The Regulation is made under the *Retail Leases Act 1994* (the Act), in particular section 87 which provides that the Minister for Finance and Small Business (the Minister) can make regulations under any “relevant Act” to respond to the public health emergency caused by the COVID-19 pandemic:

- prohibiting the recovery of possession of premises by a lessor or owner of premises or land from a lessee or tenant of the premises or land under the relevant Act in particular circumstances,
 - prohibiting the termination of a lease or tenancy by a lessor or owner of premises or land under the relevant Act in particular circumstances,
 - regulating or preventing the exercise or enforcement of another right of a lessor or owner of premises or land under the relevant Act or an agreement relating to the premises or land in particular circumstances,
 - exempting a lessee or tenant, or a class of lessees or tenants, from the operation of a provision of the relevant Act or any agreement relating to the leasing or licensing of premises or land.
6. Such regulations are time limited to expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 87(4)). Further, they can only be made if, in the Minister's opinion, they are reasonable to protect the health, safety and welfare of lessees or tenants under the Act (section 87(2)).
7. "Relevant Act" is defined to mean the *Agricultural Tenancies Act 1990*, the *Retail Leases Act 1994* and any other Act relating to the leasing of premises or land for commercial purposes.
8. The Regulation also gives effect to the *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, which was adopted by the National Cabinet on 7 April 2020. The purpose of the National Code of Conduct is to impose a set of good faith leasing principles for application to commercial tenancies (including retail, office and industrial) between owners/operators/other landlords and tenants, where the tenant is an eligible business for the purpose of the Commonwealth Government's JobKeeper program.⁶
9. The National Code of Conduct was created in response to the unfolding COVID-19 pandemic to ensure that businesses affected by the public health restrictions and unable to fulfil their rental obligations would not be forced to terminate their commercial lease agreements.
10. The Regulation applies to "impacted lessees", who are defined under Clause 4 as lessees:
- who are eligible for the JobKeeper scheme under sections 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* of the Commonwealth; and
 - who had a turnover during the 2018-19 financial year that was less than \$50 million.

⁶ National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19, <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf>.

11. Clause 6 provides that a lessor must not take any “prescribed action” against an impacted lessee on the grounds of breach of the commercial lease during the “prescribed period” for a failure to pay rent or outgoings or failing to operate during the business hours specified in the lease.
12. Clause 3 defines “prescribed action” as taking action under the provisions of a commercial lease or seeking orders or issuing proceedings in a court or tribunal for any of the following:
 - eviction of a lessee from premises or land the subject of the commercial lease
 - exercising a right of re-entry to premises or land the subject of the commercial lease
 - recovery of the premises or land
 - distraint of goods
 - forfeiture
 - damages
 - requiring a payment of interest on, or a fee or charge related to, unpaid rent otherwise payable by a lessee
 - recovery of the whole or part of a security bond under the commercial lease
 - performance of obligations by the lessee or any other person pursuant to a guarantee under the commercial lease
 - possession
 - termination of the commercial lease
 - any other remedy otherwise available to a lessor against a lessee at common law or under the law of NSW.
13. Clause 3 also defines “prescribed period” as the period ending on the day that is 6 months after the Regulation commences.
14. Instead, Clause 7 of the Regulation imposes the obligation to renegotiate rent and other terms of commercial leases before taking or continuing any prescribed action. That is, a lessor under a commercial contract must not take or continue any prescribed action against an impacted lessee for failing to pay rent during the prescribed period unless he or she has complied with the renegotiation requirements of clause 7. The parties are to renegotiate the rent payable under, and other terms of, the commercial lease having regard to the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct.
15. Consistent with the requirements of the Act, the Regulation expires 6 months after its commencement (clause 12).

The Regulation is made under the *Retail Leases Act 1994* (the Act) which provides the Minister for Finance and Small Business (the Minister) with the power to make regulations to respond to the public health emergency caused by the COVID-19 pandemic that would stop commercial lessors from enforcing certain rights under commercial tenancy agreements, and relevant legislation. The Regulation also gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020.

The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

By retrospectively limiting lessors' rights under commercial tenancy agreements the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

Similarly, by prohibiting the lessor from exercising his or her legal rights as agreed upon in the lease, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation only applies to cases involving “impacted lessees” – those who have experienced economic hardship due to COVID-19, who are eligible for JobKeeper payments, and who had less than \$50 million in turnover in the 2018-19 financial year. It does not prohibit lessors from exercising prescribed action in cases not related to the economic impacts of COVID-19. Similarly, the Regulation is time limited to apply only for a period of 6 months from its commencement. The Committee considers the Regulation is a reasonable and proportionate response to the far-reaching economic consequences of COVID-19, and given these extraordinary circumstances, the Committee makes no further comment.

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

Government regulation of private business contracts - businesses required to incur a loss

16. As noted above, the Regulation is made under the *Retail Leases Act 1994* and gives effect to *National Cabinet Mandatory Code of Conduct-SME Commercial Leasing Principles During COVID-19*, adopted by the National Cabinet on 7 April 2020. The Regulation significantly limits lessors from taking any prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

17. The Regulation applies for a period of 6 months to existing commercial leases of impacted lessees – those eligible for JobKeeper payments and who had less than \$50 million in turnover in the 2018-19 financial year.
18. In the context of broader economic responses to the COVID-19 pandemic as they relate to business, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months.⁷

As above, the Regulation significantly limits the ability of lessors to take any prescribed action against lessees on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours where the lessor has been unable to meet his or her obligations due to economic hardship resulting from the COVID-19 crisis.

In doing so, the Regulation may adversely affect the business of the lessor by prohibiting him or her from recovering lost rent, or from evicting current tenants in order to seek new tenants who can finance the lease. This may force the lessor to incur a loss for a period of 6 months.

However, the Committee recognises that the Regulation is in response to a public health emergency and implements a National Cabinet decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While the lessor is significantly limited from taking prescribed action for failure to pay rent or outgoings, the Committee understands that financial mortgage assistance may be available for eligible lessors to defer business loan repayments for a period of 6 months. 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

Matters that should be included in primary legislation

19. As above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.
20. As also mentioned above, the Regulation is made under the Act, in particular section 87 which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.
21. However, there are limits to this power. For example, the Minister can only make such regulations if Parliament is not currently sitting and not likely to sit within 2 weeks after the day the regulations are made; and if it is the Minister's opinion that the regulations are reasonable to protect the health, safety and welfare of lessees or tenants under the Act (section 87(2)).

⁷ Australian Banking Association, Commercial Landlord Relief Package, <<https://www.ausbanking.org.au/covid-19/the-landlord-relief-package/>>.

22. Further, any such regulations are time limited – they must expire 6 months after they commence or on an earlier day decided by Parliament by resolution of either House of Parliament (section 87(4)), and clause 12 of the Regulation accordingly provides that the Regulation is to expire 6 months after its commencement.

As above, the Regulation introduces significant changes to the circumstances under which lessors can take prescribed action, such as eviction, against the lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours. As also mentioned, these changes are made pursuant to a power in the Act which provides that the Minister can make such regulations to respond to the public health emergency caused by the COVID-19 pandemic.

The Committee generally prefers significant matters such as these to be included in primary legislation to foster an appropriate level of parliamentary oversight. The changes are wide-reaching and will have considerable impact on commercial lessors and lessees.

However, in the current case and given the emergency created by COVID-19, the Committee considers that it may be reasonable to include such provisions in subordinate legislation. This facilitates a swift response to any emerging public health or economic issues, without the need for an amending Bill. Further, the power to make such regulations is limited to cases where Parliament is not currently sitting and is not likely to sit in the near future, and such regulations must expire within 6 months of their commencement. Given these factors, the Committee makes no further comment.

Appendix One – Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - i trespasses unduly on personal rights and liberties, or
 - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - iv inappropriately delegates legislative powers, or
 - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - i that the regulation trespasses unduly on personal rights and liberties,
 - ii that the regulation may have an adverse impact on the business community,
 - iii that the regulation may not have been within the general objects of the legislation under which it was made,
 - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
 - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - vii that the form or intention of the regulation calls for elucidation, or
 - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.