



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 17/57 – 4 August 2020



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2020, 80pp 30cm

Chair: Felicity Wilson MP

4 August 2020

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 17 of 57

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 17 of 57

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”.

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	1
1. CASINO CONTROL AMENDMENT (INQUIRIES) BILL 2020	1
2. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (SERVICE PROVIDERS) BILL 2020*	7
3. STRATA SCHEMES MANAGEMENT AMENDMENT (SUSTAINABILITY INFRASTRUCTURE) BILL 2020	8
4. WATER MANAGEMENT AMENDMENT (WATER RIGHTS TRANSPARENCY) BILL 2020 (NO 2)*	15
5. WORK HEALTH AND SAFETY AMENDMENT (INFORMATION EXCHANGE) BILL 2020	20
PART TWO – REGULATIONS	24
1. COMMUNITY LAND MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020	24
2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (INMATE MAIL) REGULATION 2020	27
3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (USE OF BIOMETRIC DATA) REGULATION 2020	30
4. LIQUOR AMENDMENT (COVID-19 LICENCE AND ENDORSEMENTS AND TEMPORARY FREEZE REGULATION) 2020	34
5. <i>PROFESSIONAL STANDARDS ACT 1994</i> – THE WESTERN AUSTRALIA BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME	38
6. PUBLIC HEALTH AMENDMENT (AUTHORISED OFFICERS) REGULATION 2020	40
7. PUBLIC HEALTH AMENDMENT (COVID-19 BORDER CONTROL) REGULATION 2020	43
8. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 2) 2020	47
9. STATUTORY AND OTHER OFFICES REMUNERATION (JUDICIAL AND OTHER OFFICE HOLDERS) AMENDMENT (TEMPORARY WAGES POLICY) 2020	51
10. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020	53
11. WORK HEALTH AND SAFETY AMENDMENT (SILICA) REGULATION 2020	56
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	60

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 2226 / 02 9230 3382
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 – BILLS

1. CASINO CONTROL AMENDMENT (INQUIRIES) BILL 2020

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

Abrogation of privilege

The Bill would amend section 143A of the *Casino Control Act 1992* (the Act) to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143 of the Act presided over by a Judge of the Supreme Court or an Australian lawyer of at least 7 years standing is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or any other ground.

The Bill may thereby abrogate certain legal privileges. For example, it may impact on the privilege against self-incrimination. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For instance, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*. Further, the Bill may impact on legal professional privilege which allows clients to instruct lawyers without fear of the information being disclosed, so that they may obtain complete and accurate legal advice and effective legal representation.

The Bill contains safeguards – any answer given or document produced by the witness is not admissible in civil or criminal proceedings against that person. Further, the Committee acknowledges that it is important that inquiries conducted under the Act have the power to compel the disclosure of privileged information so they may have a full picture of casino operations and the casino industry and thereby ensure that casinos are managed and operated appropriately in NSW. Given these considerations, and the safeguards, the Committee makes no further comment.

Retrospectivity

As noted, the Bill would amend section 143A of the Act to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143, in certain circumstances, is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or on any other ground. The Bill may thereby abrogate certain legal privileges. Further, these amendments would apply to existing inquiries under section 143 of the Act.

The amendments would therefore have retrospective effect. The Committee generally comments when provisions are drafted with retrospective effect as this runs counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. This is particularly the case where the provisions may retrospectively remove rights, in this instance, certain legal privileges.

The Committee notes that it is the Government's view that it was always Parliament's intention, in first introducing section 143A, that inquiries under the Act would have the power to compel the disclosure of privileged information, and that the amendments are intended to make this

abundantly clear. Further, the amendments are important to ensure that casinos are meeting probity and compliance requirements. The Committee refers the retrospectivity to Parliament to assess whether it is reasonable and proportionate in the circumstances.

2. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (SERVICE PROVIDERS) BILL 2020*

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

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

3. STRATA SCHEMES MANAGEMENT AMENDMENT (SUSTAINABILITY INFRASTRUCTURE) BILL 2020

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

Voting rights – reduction in voting threshold

The Bill amends the *Strata Schemes Management Act 2015* (the Act) to facilitate the installation of “sustainability infrastructure” on the common property of strata schemes. Such an installation can take place if a “sustainability infrastructure resolution” is passed by the owners corporation. Further, such a resolution can be passed at a properly convened general meeting of an owners corporation if a simple majority of 50 per cent of votes cast at the meeting are in favour. Currently, 75 per cent of votes would be needed for such a resolution to pass.

The current requirements mean that strong support is required before the installation of sustainability infrastructure can take place on the common property of strata schemes, with the attendant costs for lot owners. The amendments would mean lot owners would be liable for such costs without the need for such strong support.

However, the Committee notes a simple majority of 50 per cent of votes cast would still be needed for the installation to take place. Further, the amendments are designed to increase the uptake of sustainability infrastructure within strata schemes with resulting environmental benefits, and which may result in longer term financial benefits. In the circumstances, the Committee makes no further comment.

Opportunity for notice of applications to the Tribunal

The Bill amends section 228 of the Act. This section requires the registrar of the NSW Civil and Administrative Tribunal (the Tribunal) to give notice of an application to the Tribunal to the named parties to the application and “any other person who in the registrar’s opinion would be affected”. The registrar would instead have to give notice to the named parties to the application, and to the owners corporation of the relevant strata scheme. The owners corporation would then be required to serve a copy of the notice on each owner of a lot in the strata scheme.

The Bill may thereby restrict the number of persons notified about Tribunal applications. However, the Committee acknowledges that the amendment provides more objective criteria about the parties to be notified of a Tribunal application – this is no longer left to the subjective opinion of the registrar. Further, the amendment explicitly requires owners corporations to be notified, and requires owners corporations to in turn notify lot owners. These primary stakeholders may not be receiving notification in all cases under the current regime.

In addition, the Committee acknowledges the amendment would relieve the registrar of the administrative burden of providing notice to all lot owners in a scheme in addition to the parties to the application. In the circumstances, and given the parties to the application are still to be notified, the Committee makes no further comment.

Voting rights – disclosure of secret ballots

The Bill would amend the Act to provide that an owners corporation must not make available for inspection any record that would disclose how an owner voted in a secret ballot unless the owners corporation is directed to do so by the Tribunal or a court.

This is an improvement on the current requirements as it clarifies that the owners corporation must retain the secrecy of the ballot unless directed otherwise by the Tribunal or a court. However, the change means that the Tribunal or a court may still waive secrecy. This may undermine the principle of a secret ballot, which is to protect the identity of voters and prevent attempts to influence voters by intimidation, blackmail or vote buying.

Overall, the Committee considers that the amendment provides sufficient protection of the secret ballot – requiring a Tribunal or court order before records of secret ballots are disclosed is a high threshold. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. This is particularly the case where the legislation in question affects individual rights or obligations.

The parts of the Bill that are to commence by proclamation set down new requirements as to whom the Tribunal registrar must notify of applications to the Tribunal. They also provide for a civil penalty of up to \$5,500 to be imposed on a person who contravenes an order under the Act.

The Committee appreciates that a flexible start date may assist the Tribunal in making the necessary administrative arrangements to implement these changes. However the Committee would prefer the provisions that would allow the significant monetary penalty of \$5,500 to be imposed on individuals to commence on a fixed date or on assent. The Committee refers the matter to Parliament for consideration.

4. WATER MANAGEMENT AMENDMENT (WATER RIGHTS TRANSPARENCY) BILL 2020 (NO 2)*

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

Privacy Rights

Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access Register) and certain matters relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.

The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of an individual.

By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of an individual, the Bill may impact on the privacy rights of affected individuals. However, the Committee notes that similar searches can already be performed in NSW in respect of real property. Further, by increasing the amount of publicly available information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity – information relating to water access licences

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Retrospectivity – disclosure of interests in water access licences

The Bill would amend the *Constitution Act 1902*, and the *Constitution (Disclosures by Members) Regulation 1983* so that Members of Parliament would have to publicly disclose their interests, and the interests of their spouses, in water access licences. In particular, Members would generally be required to disclose the water access licence number of each water access licence in which the Member or the Member's spouse (if any) has an interest, or had an interest at any time during the period of five years ending on the date on which the Member takes the pledge of loyalty.

By requiring Members to declare water interests held in the last five years, these provisions have some retrospective effect and, as above, the Committee generally comments on retrospective provisions. However, the Committee notes that these provisions are to apply only in respect of elected officials and their spouses to ensure that elected officials, in whom the public has placed its trust, adhere to particularly robust standards of transparency regarding water interests. In the circumstances, the Committee makes no further comment.

5. WORK HEALTH AND SAFETY AMENDMENT (INFORMATION EXCHANGE) BILL 2020

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

Broad administrative power affecting privacy rights

The Bill would amend the *Work Health and Safety Act 2011* (the Act) to authorise the Secretary of the Ministry of Health to provide information to the work health and safety (WHS) regulator if the Secretary considers it is necessary to do so to enable the regulator to exercise its functions under the Act. In doing so, the Secretary would not be contravening any laws, in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

The amendment, taken with the recent declaration of silicosis as a scheduled medical condition under Part 4 of the *Public Health Act 2020*, is intended to ensure that the WHS regulator is informed of all diagnoses of silicosis in NSW and thereby to halt the recent increase in the number of workers affected by the disease.

However, the Committee notes that the information-sharing power is broad and does not limit the Secretary to sharing information about the diagnosis of silicosis. The Secretary has a wide discretion to disclose any information he or she considers necessary for the WHS regulator to exercise its functions under the Act, that is, monitoring and enforcing compliance with WHS laws.

The Committee prefers administrative powers such as these to be drafted with sufficient precision so that their scope and content is clear. This is to ensure an appropriate level of parliamentary oversight over the powers conferred. This is particularly so where the powers in question have the capacity to affect individual rights, in this case, privacy rights.

The Committee acknowledges that the broad power is intended to ensure that authorities can respond swiftly and flexibly should further threats to worker safety, besides silicosis, emerge in NSW. However, the Committee also notes an absence of privacy safeguards in the Bill. It is understood that a memorandum of understanding is being developed between SafeWork NSW and NSW Health to govern how information is shared, stored and used; and that the Information and Privacy Commissioners are being consulted. However, the Bill itself contains no such requirements. The Committee refers the breadth of the information-sharing power, and the issues around privacy safeguards to Parliament for consideration.

PART TWO – REGULATIONS

1. COMMUNITY LAND MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020

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 *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989*.

The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run, providing for such matters as how associations and their executive committees meet and vote.

The Regulation amends the *Community Land Management Regulation 2018* to provide for altered arrangements: for convening, and voting at, meetings of an association (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an association; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 122A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 122A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and 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 and minimise disruption to schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

2. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (INMATE MAIL) REGULATION 2020

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

Right to privacy

The Regulation expands the powers of correctional officers under the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation) to copy letters and parcels sent and received by inmates, and to deal with the original material. In particular, subclause 112(4) provides that correctional officers can copy any written or pictorial material in letters and parcels sent and received by inmates generally, and can deal with the original material in accordance with the directions of the Commissioner of Corrective Services.

Previously, such material could only be copied if it related to certain high security/high risk inmates under clause 115 of the primary Regulation; or if a correctional officer was of the opinion that the letter or parcel contained anything likely to prejudice the good order and security of any correctional centre, or anything that was threatening, offensive, indecent, obscene or abusive.

In lowering the threshold for the copying of material sent to and received by inmates, and creating new broad powers under subclauses 112(4) and 115(1A) for original material to be dealt with in accordance with the directions of the Commissioner, the Regulation may impact on privacy rights. The Committee notes a safeguard in that the expanded powers do not extend to letters or parcels addressed to, or received from, legal practitioners and "exempt bodies" such as the Ombudsman and the Inspector of Custodial Services. However, the Committee refers the expanded powers to Parliament to consider whether they impact unduly on privacy rights.

3. CRIMES (ADMINISTRATION OF SENTENCES) AMENDMENT (USE OF BIOMETRIC DATA) REGULATION 2020

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

Right to privacy

The Regulation amends the *Crimes (Administrations of Sentences) Regulation 2014* (the primary Regulation) to provide that the Commissioner of Corrective Services can authorise the use of a biometric identification system to control access to a correctional centre or a controlled part of a centre, movement within the centre, access to medication within the centre or access to equipment or other items in the centre. If a person refuses to comply with requirements relating to the operation of the system for the purpose for which it can be used, he or she may be denied access to the centre, part of the centre, medication or equipment, or prevented from leaving.

The biometric identification systems in question take personal biometric information from individuals, including inmates and visitors to correctional centres, for example, capturing fingerprints and scanning irises. The Regulation may thereby impact on the right to privacy. However, the Committee acknowledges that the Regulation is intended to ensure the security and good order of correctional centres verifying the identity of persons who enter and leave correctional centres, and who carry out activities therein, and preventing escapes.

Further, there are a number of safeguards. The Regulation only allows biometric identification systems to be used for the stated purposes. In addition, the primary Regulation contains strict controls around how biometric information is stored and who can access it. In particular, any image or recording of a person's features, for example, their fingerprints or iris scans, must not be retained and must be deleted as soon such information is made into the person's biometric algorithm. Further, the biometric algorithm is to be stored only in the biometric identification system's database and is not to be stored on any other database that is maintained by Corrective Services NSW; and permission is not to be given so that persons and agencies other than correctional and departmental officers can access algorithms. Similarly, biometric identification systems cannot generally be used in respect of persons under 18 years. In the circumstances, and given the safeguards, 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 amends the primary Regulation to provide that the Commissioner of Corrective Services can authorise the use of a biometric identification system for certain purposes. As also noted, the biometric identification systems in question take personal biometric information from individuals, including inmates and visitors to correctional centres, for example, capturing fingerprints and scanning irises.

The Committee would prefer significant matters such as these, which may impact on the right to privacy, to be included in primary legislation. This is to ensure an appropriate level of parliamentary oversight including as regards the adequacy of any safeguards contained in the legislation. The Committee refers this matter to Parliament for consideration.

4. LIQUOR AMENDMENT (COVID-19 LICENCE AND ENDORSEMENTS AND TEMPORARY FREEZE REGULATION) 2020

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 – expired endorsements

The Regulation provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the “prescribed period” from 1 March 2020 until 29 June 2021, is taken not to expire and is instead to continue in force until 30 June 2021.

This extended expiry date for these endorsements is a special provision in response to the COVID-19 pandemic. Liquor and Gaming NSW has issued a Statement of Regulatory Intent indicating that it intends to take a flexible regulatory approach with regard to the requirements of the *Liquor Act 2007* and the *Liquor Regulation 2018* in response to the exceptional circumstances created by COVID-19, and their impact on business.

The extension applies despite any other provision of the *Liquor Act 2007*. This has the effect of a Henry VIII clause, which allows subordinate legislation to override provisions in an Act. The Committee notes that regulations of this kind typically involve an inappropriate delegation of legislative power. However, the Regulation responds to the extraordinary circumstances created by COVID-19. It may be reasonable to endorse a more flexible approach in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, the Committee notes the relevant provision is time-limited with extensions ending on 30 June 2021. Regulations must also be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given the safeguards, the Committee makes no further comment.

Henry VIII Clause – special licence conditions

The Regulation amends Schedule 4 to the *Liquor Act 2007* to remove all four venues from the list of “declared 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 an appropriate level of parliamentary oversight over the changes.

However, it appears that these changes around special licensing are a response to COVID-19. Liquor and Gaming NSW has indicated that it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Again, it may be reasonable to proceed via regulation in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given this safeguard, the Committee makes no further comment.

5. *PROFESSIONAL STANDARDS ACT 1994 – NOTIFICATION PURSUANT TO SECTION 13 – THE WESTERN AUSTRALIA BAR ASSOCIATION PROFESSIONAL STANDARDS SCHEME*

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

Consumer rights –limited liability

The Western Australian Bar Association Professional Standards scheme, which applies in NSW, limits the occupational liability of barristers covered by the scheme to a maximum of \$2 million. It may thereby limit the consumer rights of people who bring occupational liability actions against such barristers.

However, the Committee notes that the scheme makes provision for consumers by stipulating that the barristers must have occupational liability insurance cover for a minimum of \$2 million to take advantage of the limited liability provisions. In addition, the scheme only affects liability for damages arising from a single cause of action where such damages exceed \$500,000. Further, the Western Australian Bar Association has developed a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.

The scheme thereby seeks to strike a balance between consumer rights and the commercial viability of practising as a barrister in NSW, protecting consumers through insurance and risk management, not unlimited liability. The Committee also notes that unlimited liability may only be an effective consumer protection strategy if all barristers concerned had significant assets. In the circumstances, the Committee makes no further comment.

6. PUBLIC HEALTH AMENDMENT (AUTHORISED OFFICERS) REGULATION 2020

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

Broadly drafted provisions in subordinate legislation that may confer significant administrative powers

The *Public Health Act 2010* (the Act) provides that the Secretary of the Ministry of Health can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an “authorised officer”, either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.

The Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.

The precise functions that a person appointed under these provisions could exercise appears to be left to the terms of his or her appointment. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to enter and inspect premises, require a person to answer questions, and require that documents and information be provided to the authorised officer.

The Committee would prefer provisions that may confer significant powers to be drafted with a greater level of precision. In short, the provisions should clearly set out the functions being conferred, and the category of persons to whom they are being conferred. This would foster a greater level of parliamentary oversight. In the current case, the exact functions are unclear and the categories of person to whom they are being conferred is broad – any officer of the named agencies. There is no requirement for any particular level of seniority or expertise in an officer before the functions could be conferred on him or her.

The Committee would also generally prefer provisions that may confer significant powers to be included in primary, not subordinate legislation, again to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions

so that authorities can respond swiftly and flexibly to the pandemic. Further, the provisions are time limited to repeal in March 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

7. PUBLIC HEALTH AMENDMENT (COVID-19 BORDER CONTROL) REGULATION 2020

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

Penalty notice offences – right to a fair trial

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an “affected person” must not enter NSW unless the person is authorised to do so. The Order defines an “affected person” to be a person who has been in Victoria within the previous 14 days.

Under clause 6 of the Order the Minister also directed that a person must, if required to do so by an enforcement officer, provide information to allow a decision to be made about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW. Further, the Minister directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.

The Regulation provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order (i.e. by failing to provide the required information, or providing false or misleading information).

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that \$4000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

Right to privacy and freedom of movement

As above, the Regulation provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information, including photo identification, to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

By providing that a person can receive an on-the-spot penalty for failing to provide such information, or for failing to provide true and accurate information, the Regulation may impact on privacy rights. Further, as the information may be used to deny people entry to NSW, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia

is a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. This is particularly so as the associated Order is time limited and will automatically expire 90 days after it commences if it is not repealed sooner.

The fact that the Regulation responds to the public health emergency also makes its possible privacy impacts reasonable in the circumstances. The Committee also notes a safeguard in this regard: an enforcement officer can only require the information under clause 6 of the Order where the enforcement officer believes on reasonable grounds that the person may be an “affected person” – that is, a person who has been in Victoria within the previous 14 days. In the extraordinary circumstances, and given the safeguards, 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 provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.

8. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 2) 2020

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

Penalty notice offences – right to a fair trial

The Regulation allows a penalty notice of \$5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker’s place

of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of \$5000 could be issued to a person who contravened an earlier version of the Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which has now expired.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that \$5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, 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 allows a penalty notice of \$5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on other worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As also noted, in its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of \$5000 could be issued to a person who contravened an earlier version of the Order which has now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

9. STATUTORY AND OTHER OFFICES REMUNERATION (JUDICIAL AND OTHER OFFICE HOLDERS) AMENDMENT (TEMPORARY WAGES POLICY) 2020

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

Right to fair remuneration

The Regulation implements a 12 month freeze on remuneration increases for office holders covered by Part 3 of the *Statutory and Other Offices Remuneration Act 1975*. This may impact on the right of affected office holders to fair remuneration for work performed.

However, the Committee acknowledges that the Regulation is made in response to economic conditions that have arisen in NSW as a result of the COVID-19 pandemic. It further acknowledges the time-limited nature of the remuneration freeze imposed by the Regulation, and the fact that it only covers certain office holders including judicial officers and the heads of statutory agencies. It does not apply to all public sector employees, in particular, those at the lower end of the pay scale. Given the circumstances, the Committee makes no further comment.

10. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION 2020

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 *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.

The Regulation amends the *Strata Schemes Management Regulation 2016* to provide for altered arrangements for: convening, and voting at, meetings of an owners corporation or a strata committee (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an owners corporation; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 271A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 271A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and 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 and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

11. WORK HEALTH AND SAFETY AMENDMENT (SILICA) REGULATION 2020

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

Strict liability offence

The Regulation creates a strict liability offence if a person conducting a business or undertaking at a workplace directs or allows a worker to cut manufactured stone containing crystalline silica with a power tool unless certain controls are in place to protect workers from inhaling the dust from the cutting. The maximum penalty for contravening these provisions is \$6000 for an individual and \$30,000 for a corporation.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, the offence is part of the Government's strategy to combat a rise in diagnoses of the potentially fatal occupational disease, silicosis. Further, the maximum penalties for the offence are monetary, not custodial. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

As above, the Regulation creates a new offence to ensure that workers cutting manufactured stone are protected from silicosis. The Regulation also provides that this new offence can be dealt with by way of penalty notice.

In addition, the Regulation provides that an existing offence under the *Work Health and Safety Regulation 2017* that occurs where a person conducting a business or undertaking fails to give a health monitoring report of a worker to the regulator under the *Work Health and Safety Act 2011*, can be dealt with by way of penalty notice. If these offences are dealt with by penalty notice, the amount payable would be \$720 for an individual and \$3600 for a corporation.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, 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

The Regulation amends the *Work Health and Safety Regulation 2017* to insert a new offence to ensure that workers cutting manufactured stone are protected from silicosis. The maximum penalty for contravening these provisions is \$6000 in the case of an individual, and \$30,000 in the case of a body corporate.

The Committee generally prefers significant matters, such as the creation of new offences with significant penalties, to be dealt with in primary rather than subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the provisions. The Committee refers this matter to Parliament for consideration.

Part One – Bills

1. Casino Control Amendment (Inquiries) Bill 2020

Date introduced	17 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of the Bill are as follows—

- (a) to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143 of the *Casino Control Act 1992* presided over by a Judge of the Supreme Court or an Australian lawyer of at least 7 years standing is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or on any other ground,
- (b) to make it clear that any answer given or document produced by the witness is not admissible in civil or criminal proceedings against that person,
- (c) to extend the amendments made by the proposed Act to existing inquiries under section 143 of the *Casino Control Act 1992*.

BACKGROUND

2. In the second reading speech, the Hon Victor Dominello MP, Minister for Customer Service stated that the Bill was being introduced in the context of the current Bergin casino inquiry:

The Casino Control Amendment (Inquiries) Bill 2020 is a bill which is designed to ensure that the current Bergin casino inquiry, and any future casino inquiries, have sufficient powers to ensure that the highest level of oversight is possible.

3. The *Casino Control Act 1992* (the Act) is an Act to provide for the establishment of one casino in NSW and the control of its operations. Part 10 deals with the role of “the Authority” under the Act. “The Authority” is defined in section 3 to mean the Independent Liquor and Gaming Authority, constituted under the *Gaming and Liquor Administration Act 2007*.
4. Under Part 10, section 140 of the Act, the objects of the Authority under the Act are to maintain and administer systems for the licensing, supervision and control of a casino for the purposes of:

- ensuring that the management and operation of the casino remains free from criminal influence or exploitation, and
 - ensuring that gaming in the casino is conducted honestly, and
 - containing and controlling the potential of a casino to cause harm to the public interest and to individuals and families.
5. Under section 141, the Authority is granted such functions as are necessary or convenient to enable it to achieve its objects under the Act. These include:
- at the direction of the Minister for Customer Service (the Minister), to invite expressions of interest for the establishment and operation of casinos and applications for casino licences and to consider and determine those applications
 - to keep under constant review all matters connected with casinos and the activities of casino operators, persons associated with casino operators, and persons who are in a position to exercise direct or indirect control over the casino operators or persons associated with casino operators
 - to advise the Minister on matters relating to the administration of the Act
 - to approve the games to be played in a casino and the rules under which such games are played
 - to approve gaming equipment for use in a casino
 - to approve operating times of a casino.
6. In addition, under section 143, for the purpose of exercising its functions, the Authority may arrange for the holding of inquiries in public or in private presided over by a member of the Authority or another person appointed by the Authority to preside. Evidence may be taken on oath or affirmation at such an inquiry.
7. Section 143A deals with the attendance of witnesses at such inquiries. It provides that the person presiding at an inquiry being conducted by or on behalf of the Authority under section 143:
- has the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923*, and
 - if the person is a Judge of the Supreme Court, or is an Australian lawyer of at least 7 years' standing whose instrument of appointment to preside at the inquiry expressly so provides, has the powers and authorities conferred on a commissioner by Division 2 of Part 2 of the *Royal Commissions Act 1923* (except for section 17 (4) and (5)).
8. Relevantly, Division 2, Part 2 of the *Royal Commissions Act 1923* grants special powers to the Commissioners of Royal Commissions. Section 17 of Division 2, Part 2 grants various

powers to compel answers and the production of documents and other things. In particular subsections 17(1) to (3) provide:

- (1) A witness summoned to attend or appearing before the Royal Commission shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may criminate or tend to criminate the witness, or on the ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.
- (1A) Subsection (1) prevails over any inconsistent provision of any other Act or law (whether the inconsistent provision is made before or after the commencement of this subsection) unless the inconsistent provision specifically states that it is to have effect despite this section.
- (2) An answer made, or document or other thing produced by a witness to or before the commission shall not, except as otherwise provided in this section, be admissible in evidence against that person in any civil or criminal proceedings.
- (3) Nothing in this section shall be deemed to render inadmissible:
 - a. any answer, document or other thing in proceedings for an offence against the *Royal Commissions Act 1923*
 - b. any answer, document or other thing in any civil or criminal proceedings if the witness was willing to give the answer or produce the document or other thing irrespective of the provisions of subsection (1)
 - c. any book, document or writing in civil proceedings for or in respect of any right or liability conferred or imposed by the document or other thing.

ISSUES CONSIDERED BY THE COMMITTEE

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

Abrogation of privilege

9. Schedule 1 of the Bill would amend section 143A of the Act to make it clear that:
 - a witness who is compelled to attend and give evidence at an inquiry under section 143 of the Act presided over by a Judge of the Supreme Court or an Australian lawyer of at least 7 years standing is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or on any other ground, and
 - any answer given or document produced by the witness is not admissible in civil or criminal proceedings against that person.

10. The Minister told Parliament that these amendments were being made in the context of legal proceedings arising from the abovementioned Bergin casino inquiry, that is, the Authority's inquiry under section 143 of the Act, into the matters relating to various Crown casino entities and Melco Resorts and Entertainment Limited. The inquiry is being presided over by the Hon. Patricia Bergin SC.
11. The Minister stated that the inquiry had been proceeding on the basis that section 143A of the Act picked up certain provisions of the *Royal Commissions Act 1923*, including the power to require the disclosure of privileged information. However, one of the entities involved in the proceedings resisted producing certain documents which resulted in legal proceedings:

Shortly after it commenced, the inquiry issued summonses to the parties requiring the production of several thousands of documents. Melco Resorts and Entertainment Limited, a Hong Kong based casino operator, resisted production of certain material that is subject to a claim of legal professional privilege. It challenged the summons on the basis that an inquiry constituted under section 143 of the *Casino Control Act 1992* is not a royal commission and that relevant provisions of the *Royal Commissions Act 1923*, which provide for the abrogation of privilege, were not effectively picked up by the *Casino Control Act 1992*.

12. The Supreme Court of NSW found that legal professional privilege was not abrogated for the purposes of an inquiry being conducted under the Act.¹ However the NSW Court of Appeal later overturned this decision² and the High Court refused special leave to appeal.³
13. The Minister told Parliament that despite the Court of Appeal decision that the Bergin casino inquiry could compel disclosure of privileged information, this decision had fairly limited scope and the amendments in the Bill were still necessary to clarify that section 143A of the Act also picks up subsections 17(1A), (2) and (3) of the *Royal Commissions Act 1923*:

One of the main reasons the amendments in this bill are still required is that the Court of Appeal decision did not address all of the Royal Commissions Act provisions that section 143A of the Casino Control Act tries to pick up. Melco's court action was a narrow challenge that focused on the powers and authorities of the commissioner under section 17(1) of the Royal Commissions Act to require the disclosure of privileged or secret information. However, section 143A of the Casino Control Act also picks up sections 17 (1A), (2) and (3) of the Royal Commissions Act. These are vitally important provisions which ensure that the power to compel privileged or secret information prevails over any inconsistent provisions of any other legislation, and renders evidence collected by an inquiry inadmissible in civil or criminal proceedings, subject to exceptions outlined in section 17(3).

14. The Minister also stated that it is important that inquiries conducted under the Act have some of the same powers and protections as royal commissions:

¹ *Melco Resorts & Entertainment Limited v The Independent Liquor and Gaming Authority* [2020] NSWSC 53: <https://www.caselaw.nsw.gov.au/decision/5e40d8b0e4b0a51ed5e2d36b>

² *Attorney General v Melco Resorts & Entertainment Ltd* [2020] NSWCA 40: <https://www.caselaw.nsw.gov.au/decision/5e696b50e4b0529762cf03ba>

³ Judicial Commission of NSW, "New South Wales Court of Appeal, New South Wales Court of Criminal Appeal, Status of decisions appealed to the High Court of Australia June 2020" p5: <https://nswca.judcom.nsw.gov.au/wp-content/uploads/2017/04/HC-appeals-status-2020-06-June.pdf>

It is the Government's view that it was always intended that inquiries conducted under the *Casino Control Act 1992* would have some of the same powers and protections as royal commissions, specifically the power to compel the disclosure of privileged information along with the complementary protections in civil and criminal proceedings for those forced to disclose privileged information...It is vital that any inquiry into the casino industry has the power to compel the disclosure of privileged information.

15. And further:

An inquiry into casino operations that cannot examine privileged information will never have a full picture of either a casino's operations or the casino industry as a whole. The amendments are, therefore, crucial to ensuring that the primary objects of the *Casino Control Act 1992* are upheld, including the requirement to ensure that the management and operation of casinos in New South Wales remain free from criminal influence and exploitation.

The Bill would amend section 143A of the *Casino Control Act 1992* (the Act) to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143 of the Act presided over by a Judge of the Supreme Court or an Australian lawyer of at least 7 years standing is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or any other ground.

The Bill may thereby abrogate certain legal privileges. For example, it may impact on the privilege against self-incrimination. It is a general principle of law that a person should not be compelled to answer questions or produce information that may incriminate him or her. For instance, in criminal proceedings there is a general right to silence at common law and under section 89 of the *Evidence Act 1995*. Further, the Bill may impact on legal professional privilege which allows clients to instruct lawyers without fear of the information being disclosed, so that they may obtain complete and accurate legal advice and effective legal representation.

The Bill contains safeguards – any answer given or document produced by the witness is not admissible in civil or criminal proceedings against that person. Further, the Committee acknowledges that it is important that inquiries conducted under the Act have the power to compel the disclosure of privileged information so they may have a full picture of casino operations and the casino industry and thereby ensure that casinos are managed and operated appropriately in NSW. Given these considerations, and the safeguards, the Committee makes no further comment.

Retrospectivity

16. As above, schedule 1 of the Bill would amend section 143A of the Act to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143 of the Act presided over by a Judge of the Supreme Court or an Australian lawyer of at least 7 years standing is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or on any other ground.

17. Further, schedule 1 provides that these amendments would apply to existing inquiries under section 143 of the Act. The Minister told Parliament that this would ensure that the amendments apply to the current Bergin casino inquiry:

...a new section 143A(3) is inserted, which explicitly states that the amendments apply to inquiries under the Casino Control Act 1992 that had begun but had not been completed at the date of commencement. That ensures that the sections will apply to the Bergin casino inquiry. Inquiries conducted under the Casino Control Act 1992 are crucial to ensure not only that casinos are meeting our strict probity and compliance requirements but also that our policy framework is evidence based and appropriately tailored to the fast-moving casino industry.

18. The Minister also stated that it is the Government's view that it was always Parliament's intention that inquiries under the Act would have the power to compel the disclosure of privileged information:

...it was always intended that inquiries conducted under the Casino Control Act 1992 would have some of the same powers and protections as royal commissions, specifically the power to compel disclosure of privileged information...It is the Government's view that that was the intention of Parliament when section 143A was inserted into the Casino Control act in 2001...the Government wants to make it abundantly clear that Parliament intends to abrogate the rights of witnesses before inquiries conducted under the Casino Control Act 1992 where that inquiry is presided over by a Supreme Court judge or a lawyer of seven years experience...

As noted, the Bill would amend section 143A of the Act to make it clear that a witness who is compelled to attend and give evidence at an inquiry under section 143, in certain circumstances, is not excused from answering questions or producing documents on the ground of self-incrimination, privilege, duty of secrecy or other restriction on disclosure or on any other ground. The Bill may thereby abrogate certain legal privileges. Further, these amendments would apply to existing inquiries under section 143 of the Act.

The amendments would therefore have retrospective effect. The Committee generally comments when provisions are drafted with retrospective effect as this runs counter to the rule of law principle that a person is entitled to know the law to which they are subject at any given time. This is particularly the case where the provisions may retrospectively remove rights, in this instance, certain legal privileges.

The Committee notes that it is the Government's view that it was always Parliament's intention, in first introducing section 143A, that inquiries under the Act would have the power to compel the disclosure of privileged information, and that the amendments are intended to make this abundantly clear. Further, the amendments are important to ensure that casinos are meeting probity and compliance requirements. The Committee refers the retrospectivity to Parliament to assess whether it is reasonable and proportionate in the circumstances.

2. Privacy and Personal Information Protection Amendment (Service Providers) Bill 2020*

Date introduced	18 June 2020
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the Bill is to amend the *Privacy and Personal Information Protection Act 1998* to extend the application of that Act to a person or body that provides services for or on behalf of a public sector agency, or that receives funding from a public sector agency in connection with providing services, if that person or body is prescribed by the regulations under that Act.
2. That Act currently extends only to persons or bodies that provide data services in those circumstances, being services relating to the collection, processing, disclosure or use of personal information or that provide for access to personal information.

BACKGROUND

3. The *Privacy and Personal Information Protection Act 1998* (PPIPA) is an Act to provide for the protection of personal information and for the protection of the privacy of individuals generally.
4. In the second reading speech Mr Paul Lynch MP told Parliament:

The object of the bill is to extend the coverage of PPIPA to non-government agencies that are performing government functions. The obligation to respect a citizens' privacy and secure their data does not cease merely because a non-government organisation is performing functions on behalf of government, especially ones that government used to carry out. Increasing functions are being outsourced by government to bodies that are not the Government. The original provisions of PPIPA do not extend to NGOs unless they provide "data services" and the NGO has been prescribed. No bodies have been prescribed under the current legislation. Thus, the PPIPA regime has almost no coverage of non-government agencies. Some may be covered under Commonwealth legislation, but that is only for comparatively large organisations. It leaves a very wide field uncovered.

ISSUES CONSIDERED BY THE COMMITTEE

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

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

3. Strata Schemes Management Amendment (Sustainability Infrastructure) Bill 2020

Date introduced	17 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows—

- (a) to facilitate the installation of sustainability infrastructure in strata schemes,
- (b) to prevent records of secret ballots from being disclosed as part of strata records,
- (c) to remove a duplicated requirement to give a tenant a copy of the by-laws for a strata scheme,
- (d) to make an owners corporation responsible for the service of notices about applications to the NSW Civil and Administrative Tribunal under the *Strata Schemes Management Act 2015*,
- (e) to enable applications to the NSW Civil and Administrative Tribunal for a civil penalty against a person who has contravened an order of the Tribunal,
- (f) to enable a person who owns more than 1 lot in a strata scheme to nominate 1 individual to act as a proxy for all the lots,
- (g) to provide that a nomination of a proxy for a meeting is not rendered invalid if the meeting is adjourned.

BACKGROUND

2. The Bill amends the *Strata Schemes Management Act 2015* (the Act), which provides a legislative framework for the management of strata schemes and the resolution of disputes arising from strata schemes in NSW.
3. In particular, the Bill amends the Act to facilitate the installation of sustainability infrastructure in strata schemes. The Hon Kevin Anderson MP, Minister for Better Regulation and Innovation told Parliament that this follows a February 2019 election commitment by the Premier to reduce barriers to the uptake of sustainability infrastructure in apartment buildings. The Minister stated:

The bill delivers on a key part of the Premier's commitment, which was to reduce the voting threshold for approval of sustainability infrastructure installations from 75 per cent to a simple majority of 50 per cent of votes.

4. The Bill defines “sustainability infrastructure” to mean changes to part of the common property for any one or more of the following purposes:
- to reduce the consumption of energy or water or to increase the efficiency of its consumption,
 - to reduce or prevent pollution,
 - to reduce the amount of waste sent to landfill,
 - to increase the recovery or recycling of material,
 - to reduce greenhouse gas emissions,
 - to facilitate the use of sustainable forms of transport,
 - a purpose prescribed by the regulations.

5. The Minister stated that while the uptake of residential sustainability infrastructure is growing rapidly in NSW, this increased uptake had not occurred for strata schemes, a matter that needs to be addressed because many people in NSW are strata residents:

There are now 81,200 strata schemes registered in New South Wales...These strata schemes house around 1.1 million people and provide direct employment to over 3,500 people. If steps are not taken to address the gap in the uptake of sustainability infrastructure by strata schemes we risk strata residents being left behind, unable to reap the full environmental and financial benefits of installing sustainability infrastructure and renewable energy.

6. In addition to the sustainability provisions, the Bill also contains six amendments to the Act to address some practical difficulties and unintended consequences following a major re-write of the strata laws in 2015. The Minister told Parliament:

It was this Government that delivered once-in-a-generation reforms to the laws governing strata schemes with the passage of the Strata Schemes Management Act 2015 and its twin, the Strata Schemes Development Act 2015...As can be expected with any major rewrite of laws, some practical difficulties and unintended consequences have been identified that are timely to address in this amendment bill.

7. The first amendment relates to secret ballots available to the owners corporations of strata schemes. The amendment removes an ambiguity and clarifies that where the owners corporation produces a strata scheme’s records for inspection, it cannot hand over records that identify how an owner voted in a secret ballot unless directed to do so by the NSW Civil and Administrative Tribunal (the Tribunal) or a court.
8. The second amendment addresses an inconsistency between the strata laws and the *Residential Tenancies Act 2010* regarding a prospective tenant’s right to be provided with a copy of the scheme’s by-laws. The Bill provides that where a lot owner has already fulfilled his or her obligation under tenancy laws to provide by-laws to a tenant he or she is not also required to do so under strata laws.
9. The third amendment clarifies which parties the Tribunal is required to notify of applications to the Tribunal. Currently, the Tribunal is required to notify named parties to the application and “any other person who in the registrar’s opinion would be affected”.

The Bill changes this to clarify that the Tribunal need only give such notice to the owners corporation to ensure all lot owners in a scheme are notified.

10. The fourth amendment re-instates a remedy that was available, prior to the 2015 reforms, to an applicant for Tribunal orders where a respondent contravenes those Tribunal orders. The Minister stated:

...the bill reintroduces a provision that is similar to section 202 in the former Strata Schemes Management Act 1996, which was repealed under the 2015 reforms. That section enabled original applicants for tribunal orders to apply to the tribunal for an order for a monetary penalty to be paid by a person who has contravened a tribunal order. However section 202 was not carried across to the 2015 Act.

11. The Bill would allow the applicant for Tribunal orders, the owners corporation or any other interested party to apply to the Tribunal for an order requiring the respondent to pay a pecuniary penalty of up to \$5,500 for contravening the original orders. The Minister further stated:

The bill before the House today corrects this historical anomaly and provides for better access to enforcement of tribunal orders...Importantly, the Bill provides a double jeopardy protection by making it clear that a person cannot be punished twice if their act or omission also constitutes a contravention under a civil penalty provision of the Civil and Administrative Tribunal Act.

12. Finally, the Minister noted that the Bill addresses two unintended consequences that arose from the 2015 reforms related to the appointment of proxies for voting at meetings of owners corporations. Currently, a person voting on a motion or in elections can only hold proxies for a maximum of 5 per cent of the lots in the strata scheme. This may adversely impact people who own multiple lots in schemes. Therefore, the Bill amends the Act to clarify that a person who owns more than one lot in a strata scheme can appoint a single proxy in respect of all their lots. Further, the Bill clarifies that a duly appointed proxy remains valid at a later meeting if an earlier meeting for which it is appointed is adjourned.

ISSUES CONSIDERED BY THE COMMITTEE

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

Voting rights – reduction in voting threshold

13. As above, the Bill amends the Act to facilitate the installation of “sustainability infrastructure” on the common property of strata schemes. Such an installation can take place if a “sustainability infrastructure resolution” is passed by the owners corporation.
14. Schedule 1, item 5 of the Bill defines “sustainability infrastructure resolution” to mean a resolution to do with any one or more of the following that is specified to be a sustainability infrastructure resolution:
 - to finance sustainability infrastructure,
 - to add to the common property, alter the common property or erect a new structure on common property for the purpose of installing sustainability infrastructure,

- to change the by-laws of the strata scheme for the purposes of the installation or use (or both) of sustainability infrastructure.
15. Schedule 1, item 2 of the Bill amends section 5 of the Act which deals with resolutions of owners corporations. The Bill provides that a “sustainability infrastructure resolution” is passed at a properly convened general meeting if a simple majority of 50 per cent of votes cast at the meeting are in favour. Currently, 75 per cent of votes would be needed for such a resolution to pass.

The Bill amends the *Strata Schemes Management Act 2015* (the Act) to facilitate the installation of “sustainability infrastructure” on the common property of strata schemes. Such an installation can take place if a “sustainability infrastructure resolution” is passed by the owners corporation. Further, such a resolution can be passed at a properly convened general meeting of an owners corporation if a simple majority of 50 per cent of votes cast at the meeting are in favour. Currently, 75 per cent of votes would be needed for such a resolution to pass.

The current requirements mean that strong support is required before the installation of sustainability infrastructure can take place on the common property of strata schemes, with the attendant costs for lot owners. The amendments would mean lot owners would be liable for such costs without the need for such strong support.

However, the Committee notes a simple majority of 50 per cent of votes cast would still be needed for the installation to take place. Further, the amendments are designed to increase the uptake of sustainability infrastructure within strata schemes with resulting environmental benefits, and which may result in longer term financial benefits. In the circumstances, the Committee makes no further comment.

Opportunity for notice of applications to the Tribunal

16. Schedule 1, items 9 to 11 of the Bill amend section 228 of the Act which requires the Tribunal registrar to give notice of an application to the Tribunal to the named parties to the application and “any other person who in the registrar’s opinion would be affected”.
17. The registrar would instead have to give notice to the named parties to the application, and to the owners corporation of the relevant strata scheme. The owners corporation is then to serve a copy of the notice on each owner of a lot in the strata scheme.
18. In the second reading speech, the Minister provided the following background to this amendment:

This section needs improvement for two reasons. First, the law leaves it up to the subjective discretion of the registrar to decide who might be affected by an application and where the owners corporation is not a named party to the application the law does not strictly require notification of the owners corporation. The tribunal advises that owners corporations are named in 88 per cent of applications, leaving 12 per cent of owners corporations potentially unaware that there is a dispute in the tribunal concerning their scheme.

The bill instead makes the notification requirements clear and objective by requiring the registrar to notify owners corporations in all cases and the owners corporation to notify all lot owners in

the scheme of the tribunal application. This amendment also relieves a significant administrative burden on the tribunal in providing notice to potentially hundreds of lot owners in a scheme, in addition to the parties to the application.

The Bill amends section 228 of the Act. This section requires the registrar of the NSW Civil and Administrative Tribunal (the Tribunal) to give notice of an application to the Tribunal to the named parties to the application and “any other person who in the registrar’s opinion would be affected”. The registrar would instead have to give notice to the named parties to the application, and to the owners corporation of the relevant strata scheme. The owners corporation would then be required to serve a copy of the notice on each owner of a lot in the strata scheme.

The Bill may thereby restrict the number of persons notified about Tribunal applications. However, the Committee acknowledges that the amendment provides more objective criteria about the parties to be notified of a Tribunal application – this is no longer left to the subjective opinion of the registrar. Further, the amendment explicitly requires owners corporations to be notified, and requires owners corporations to in turn notify lot owners. These primary stakeholders may not be receiving notification in all cases under the current regime.

In addition, the Committee acknowledges the amendment would relieve the registrar of the administrative burden of providing notice to all lot owners in a scheme in addition to the parties to the application. In the circumstances, and given the parties to the application are still to be notified, the Committee makes no further comment.

Voting rights – disclosure of secret ballots

19. Schedule 1, item 7 of the Bill inserts subsection 182(5) into the Act which provides that an owners corporation must not make available for inspection any record that would disclose how an owner voted in a secret ballot unless the owners corporation is directed to do so by the Tribunal or a court.
20. In the second reading speech, the Minister provided the following explanation for the changes:

The major reforms of 2015 made secret ballots available to owners corporations for the first time so that they could vote on motions and in strata committee elections in accordance with their own wishes and not...feel intimidated by others when voting in open meetings. However, the strata community has since found the law to be ambiguous about whether records of those secret ballots could be revealed when a strata scheme's records are produced for inspection, for example, when a strata report is being compiled for a prospective purchaser. This bill removes the ambiguity and protects the secrecy of votes cast in secret ballots. The bill amends section 182 of the Act to insert an exclusion clause preventing any records that could identify how an owner voted from being handed over unless the owners corporation is ordered to do so by the tribunal or a court.

The Bill would amend the Act to provide that an owners corporation must not make available for inspection any record that would disclose how an owner voted in a secret ballot unless the owners corporation is directed to do so by the Tribunal or a court.

This is an improvement on the current requirements as it clarifies that the owners corporation must retain the secrecy of the ballot unless directed otherwise by the Tribunal or a court. However, the change means that the Tribunal or a court may still waive secrecy. This may undermine the principle of a secret ballot, which is to protect the identity of voters and prevent attempts to influence voters by intimidation, blackmail or vote buying.

Overall, the Committee considers that the amendment provides sufficient protection of the secret ballot – requiring a Tribunal or court order before records of secret ballots are disclosed is a high threshold. In the circumstances, the Committee makes no further comment.

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

Commencement by proclamation

21. The majority of the Bill commences on the date of assent. However, there are some exceptions. Schedule 1, items 9 to 13 commence on a day or days to be appointed by proclamation.
22. As above, schedule 1, items 9 to 11 of the Bill amend section 228 of the Act which requires the Tribunal registrar to give notice of an application to the Tribunal to the named parties to the application and “any other person who in the registrar’s opinion would be affected”. The registrar would instead have to give notice to the named parties to the application, and to the owners corporation of the relevant strata scheme. The owners corporation would then be required to serve a copy of the notice on each owner of a lot in the strata scheme.
23. Schedule 1, item 12 inserts section 247A into the Act, which provides for a civil penalty of up to \$5,500 to be imposed by the Tribunal for a contravention of an order under the Act. As above, this re-instates a remedy that was available, prior to the 2015 reforms, to an applicant for Tribunal orders where a respondent contravenes those Tribunal orders. The penalty can be sought by:
 - the applicant for the order,
 - the owners corporation,
 - an owner, or other person with an interest in a lot in the strata scheme to which the order relates, or
 - a party to mediation if the order gives effect to any agreement or arrangement arising out of a mediation session.
24. Schedule 1, item 13 is a consequential amendment, inserting a note that section 247A of the Act will now provide for a civil penalty for a contravention of an order of the Tribunal.

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. This is particularly the case where the legislation in question affects individual rights or obligations.

The parts of the Bill that are to commence by proclamation set down new requirements as to whom the Tribunal registrar must notify of applications to the Tribunal. They also provide for a civil penalty of up to \$5,500 to be imposed on a person who contravenes an order under the Act.

The Committee appreciates that a flexible start date may assist the Tribunal in making the necessary administrative arrangements to implement these changes. However the Committee would prefer the provisions that would allow the significant monetary penalty of \$5,500 to be imposed on individuals to commence on a fixed date or on assent. The Committee refers the matter to Parliament for consideration.

4. Water Management Amendment (Water Rights Transparency) Bill 2020 (No 2)*

Date introduced	18 June 2020
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
	* Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Water Management Act 2000* (the Act), the *Water Management (General) Regulation 2018* (the Water Regulation), the *Constitution Act 1902* and the *Constitution (Disclosures by Members) Regulation 1983* as follows—
 - (a) to facilitate public access to information relating to water access licences (within the meaning of the Act) and recorded in the Water Access Licence Register established by the Act (the Access Register),
 - (b) to impose requirements relating to maintaining and updating the Access Register,
 - (c) to provide for the independent audit of the Access Register,
 - (d) to impose requirements relating to the information to be provided in applications for water access licences,
 - (e) to require the public disclosure of interests in water access licences held by Members of Parliament and the spouses of Members of Parliament,
 - (f) to make other consequential amendments,
 - (g) to insert provisions of a transitional nature consequent on the enactment of the proposed Act.

BACKGROUND

2. The Bill is very similar to the *Water Management Amendment (Water Rights Transparency) Bill 2020* which Mrs Helen Dalton MP introduced into the Legislative Assembly on 27 February 2020 (the first Bill). The first Bill lapsed in accordance with the Standing Orders on 23 April 2020. The Committee commented on the first Bill in its Digest No. 11/57.
3. In addition, the Bill is identical to the *Water Management Amendment (Transparency of Water Rights) Bill 2020* which the Hon. Mark Banasiak MLC introduced into the Legislative Council on 3 June 2020 (the second Bill). The Committee commented on the second Bill in its Digest No. 16/57.

4. In the second reading speech regarding the current Bill, Mrs Dalton told Parliament “Since water was separated from land and became an individual property right there have been many issues around registering and providing public transparency on water ownership”. Mrs Dalton also stated “New South Wales is Australia’s biggest State. We should be leading the way when it comes to water transparency”.
5. As above, the Bill seeks to amend the *Water Management Act 2000* (the Act), which is an Act to provide for the sustainable and integrated management of the water sources of the State (section 3).
6. As part of the water management regime set down under the Act, a person may apply to the Minister for Water, Property and Housing for a water access licence (Chapter 2, Part 2). Such a licence entitles the holder:
 - to specified shares in available water within a specified water management area or from a specified water source; and
 - to take water at specified times, at specified rates or in specified circumstances, and in specified areas or from specified locations (see in particular sections 56(1)) and 61).
7. The Act requires the Minister to keep a Water Licence Register (Access Register) for the purposes of the Act (section 71) and certain matters relating to a water access licence must be recorded on the Register including any general dealing in the licence; and any caveat lodged in relation to the licence (section 71A).
8. The Bill seeks to amend the Act to change the application process to obtain a water access licence and Mrs Dalton told Parliament:

...getting a water licence is easier than opening up a bank account. It is possible for corporate entities to obtain a licence without disclosing names of major shareholders, company owners, parent companies or other individuals who may directly benefit from the water purchased...There is...a need to increase the amount of information a person or entity must provide authorities to hold or obtain a water access licence. It is not good enough for a company in the Cayman Islands to buy large quantities of water while keeping the names of directors, board members and major shareholders a secret.
9. In addition, the Bill seeks to amend the Act to make changes around the Access Register, and Mrs Dalton stated:

At present it is very difficult for ordinary members of the public to find out who has entitlements to New South Wales river water, groundwater and floodplain harvesting water. While the New South Wales Government authority WaterNSW maintains an online water register, the limited information contained in the register and its restrictive search functions block transparency. It is not possible to search for the water access licence of an individual person’s name, a company name, an Australian business number, a government department name or an irrigation scheme name. Instead, the register allows people to search for a water licence number or a works approval number to find out details on water entitlements.
10. Mrs Dalton stated further:

The Bill I put forward proposes a number of simple changes to allow a member of the public to search for water entitlements by the name of the individual, the Australian business number and

government department names. This information is to be available, either free of charge or for a small cost via an online database.

11. The Bill also seeks to amend the *Constitution Act 1902*, and the *Constitution (Disclosures by Members) Regulation 1983*, which is made under it. The *Constitution (Disclosures by Members) Regulation 1983* requires the pecuniary interests of Members of the NSW Parliament to be disclosed including interests in real property, sources of income and gifts (Part 3). The amendments would mean that Members of Parliament would have to publicly disclose their interests, and the interests of their spouses, in water access licences. Mrs Dalton provided the following background to these amendments:

My bill changes the pecuniary interests form for New South Wales MPs so that they have to declare their water ownership – not just MPs but their spouses too...Those of us here in this Chamber – members of the New South Wales Parliament – are not required to disclose our water entitlements as part of our disclosure of pecuniary interests. Members are required under legislation to disclose property ownership, gifts, income sources, debts and contributions to travel, but there is no requirement to disclose water entitlements.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy Rights

12. As above, the Bill seeks to make it easier for the public to obtain information about water access entitlements, consistent with the first Bill and the second Bill.
13. Schedule 1, item 1 of the Bill proposes to amend the Act to provide that the purposes of the Access Register include creating, maintaining and updating records relating to water access licences and licence holders, and facilitating public access to those records.
14. Schedule 1, item 6 of the Bill requires the Minister to make the information recorded in the Access Register publicly available through an electronic search facility on a website, and prohibits restrictions being placed on access to the information. The electronic search facility would enable details of water access licences to be searched by entering a number of search terms including the name of an individual.
15. As noted by the Committee in its report on the first Bill (Digest No.11/57) and the second Bill (Digest No.16/57), by allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of a person, the Bill may impact on the privacy rights of affected persons. However, as the Committee noted in the previous reports, similar searches can already be done in NSW in respect of real property.⁴

Under the *Water Management Act 2000* a person may apply to the Minister for a water access licence which entitles the holder to specified shares in available water within a specified water management area. The Act also requires the Minister to keep a Water Licence Register (Access Register) and certain matters

⁴ See the Property Registry website https://propertyregistry.com.au/?state=nsw&search_type=Title+Search for details of the land title searches that can be done for NSW properties for a fee. These searches include current ownership details with full name.

relating to a water access licence must be recorded on the Access Register including any general dealing in the licence.

The Bill seeks to amend the Act to provide for information recorded in the Access Register to be made publicly available through an electronic search facility, and so that searches could be performed by entering the name of an individual.

By allowing information recorded in the Access Register to be made publicly available, including information that is attached to the name of an individual, the Bill may impact on the privacy rights of affected individuals. However, the Committee notes that similar searches can already be performed in NSW in respect of real property. Further, by increasing the amount of publicly available information about water entitlements the proposed changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers these matters to Parliament to consider whether the possible privacy impacts are reasonable in the circumstances.

Retrospectivity – information relating to water access licences

16. As above, the Bill also seeks to increase the amount of information that people and companies must provide when making an application for a water access licence under the Act. Again, this is consistent with the first Bill and the second Bill.
17. Schedule 2.3, item 3 of the Bill seeks to amend the *Water Management (General) Regulation 2018* to specify information that is to be required by the approved form for an application for a water access licence under section 61(1) of the Act. This includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant.
18. Schedule 1, item 9 of the Bill requires the holder or co-holder of a water access licence that is in force on the day on which the proposed Act commences, or for which an application was made but not determined by that day, to provide the Minister with additional information relating to that licence. That additional information corresponds with the information that the Bill requires to be included in the approved form for a water access licence application.
19. In short, and as noted by the Committee in its reports on the first Bill and the second Bill, the provisions in the Bill that would require additional information to be provided when making an application for a water access licence would operate retrospectively. Further, schedule 1, item 9 provides that a failure to comply with these requirements may result in the cancellation of the relevant water access licence.

The Bill would increase the amount of information that people and companies need to provide when making an application for a water access licence under section 61(1) of the *Water Management Act 2000*. This information includes the applicant's name, address and contact details, and details of any existing interests in access licences held by the applicant. These requirements would operate retrospectively. That is, those who already held water access licences on the day on which the proposed Act commenced would have to provide the additional information to the Minister or risk having their water access licence cancelled.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, a person could have his or her existing water access licence cancelled if he or she did not wish to comply with retrospectively imposed requirements relating to that licence. The Committee notes that the proposed retrospective changes are intended to promote transparency and public trust in NSW's water management system. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Retrospectivity – disclosure of interests in water access licences

20. As above, the Bill would amend the *Constitution Act 1902*, and the *Constitution (Disclosures by Members) Regulation 1983* so that Members of Parliament would have to publicly disclose their interests, and the interests of their spouses, in water access licences. This is consistent with the second Bill. Under the first Bill Members would only have to publicly disclose their own interests in water access licences, not those of their spouses.
21. Specifically, schedule 2.2, item 3 of the current Bill seeks to amend the *Constitution (Disclosures by Members) Regulation 1983* so that a Member of Parliament would be required to disclose, with limited exceptions, the water access licence number of each water access licence in which the Member or the Member's spouse (if any) has an interest, or had an interest at any time during the period of five years ending on the date on which the Member takes the pledge of loyalty, and the nature of that interest.
22. Mrs Dalton told Parliament "...my bill is retrospective for MPs. If a member has bought up any water in the past five years and sold it, they will still have to declare that".

The Bill would amend the *Constitution Act 1902*, and the *Constitution (Disclosures by Members) Regulation 1983* so that Members of Parliament would have to publicly disclose their interests, and the interests of their spouses, in water access licences. In particular, Members would generally be required to disclose the water access licence number of each water access licence in which the Member or the Member's spouse (if any) has an interest, or had an interest at any time during the period of five years ending on the date on which the Member takes the pledge of loyalty.

By requiring Members to declare water interests held in the last five years, these provisions have some retrospective effect and, as above, the Committee generally comments on retrospective provisions. However, the Committee notes that these provisions are to apply only in respect of elected officials and their spouses to ensure that elected officials, in whom the public has placed its trust, adhere to particularly robust standards of transparency regarding water interests. In the circumstances, the Committee makes no further comment.

5. Work Health and Safety Amendment (Information Exchange) Bill 2020

Date introduced	18 June 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Bill is to authorise the Secretary of the Ministry of Health to provide information to the regulator established by the *Work Health and Safety Act 2011*.

BACKGROUND

2. In the second reading speech, the Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP spoke of the Government's commitment to reducing the prevalence of occupational diseases in NSW.
3. In particular, the Minister noted the need to address an increase in reported cases of the occupational lung disease, silicosis. Silicosis is caused by inhaling respirable crystalline silica dust, which is a mineral present in a range of building material, including manufactured stone, and produced when these materials are cut or drilled. Silicosis can significantly damage lung functionality, and in some cases, be fatal. The disease can develop quickly, and has been observed in workers within a few months of exposure to high concentrations of silica.
4. The Minister stated that until recently this disease had been relatively rare but that diagnoses have been rising due to the use of manufactured stone in housing and construction, particularly for benchtop material in kitchens, bathrooms and laundries. The Minister noted that manufactured stone can contain much higher percentages of silica than other materials and products. The Minister told Parliament:

From 1 July 2019 to 31 January 2020, 70 cases of silicosis were identified by icare in New South Wales. In the 2018-19 financial year there were 40 cases and the year before there were nine.

5. The Minister stated that in response to this rise, the NSW Government has developed a comprehensive, multi-agency strategy to ensure that individuals working with silica are doing so safely, thus minimising the risk of silicosis. This strategy includes an explicit ban on dry cutting manufactured stone, and working to halve the workplace exposure standard for respirable crystalline silica. The Minister stated that the third element of the strategy includes the reform contained in the Bill:

This brings me to the third element of the Government's Silica Strategy—the reform contained in this bill, which will be supported by a declaration by the health Minister under the Public Health Act 2010 that silicosis is a scheduled medical condition, notifiable to NSW Health. The goal of creating the information-sharing power in this bill is to enable NSW Health to assist work

health and safety...regulators to target their ongoing efforts in education, enforcement, and compliance at the workplaces where they are most needed—that is, at workplaces where workers are contracting silicosis.

6. The Minister stated that currently, information sharing arrangements and reporting mechanisms regarding silicosis are not sufficient. As it stands, persons conducting a business or undertaking (PCBU) are required to ensure that workers who are exposed to respirable crystalline silica are subject to regular health monitoring. If a worker is diagnosed with silicosis, the PCBU is required by law to provide a copy of the health monitoring report to the relevant work health and safety regulator (WHS regulator).
7. However, the Minister noted that, in practice, notifications to the regulator regarding silicosis are not “reliably consistent and, alone, are not sufficient to stem the increasing number of diagnosed cases”. The WHS regulator cannot take enforcement action against a PCBU for failing to report a diagnosis, and not all cases are diagnosed through this process. For instance, a person may be diagnosed by his or her own doctor, and there is currently no obligation for doctors or workers to notify WHS regulators.
8. The Minister stated:

...WHS regulators are still not informed of all diagnoses of silicosis in New South Wales. This is the only way to halt this rapid increase in the number of workers affected by silicosis. The Government therefore intends to implement a system that will seek to ensure that WHS regulators, with the co-operation of the Department of Health New South Wales, are informed of all diagnoses of silicosis in this State...This bill is the first step in establishing the legal framework for that system. The next step is for the Minister for Health and Medical Research to declare that silicosis is a scheduled medical condition within the meaning of part 4 of the Public Health Act 2010.
9. The effect of declaring silicosis a scheduled medical condition under Part 4 of the *Public Health Act 2010* is that where a medical practitioner diagnoses a person with this disease, he or she will be required to notify the NSW Ministry of Health. The Minister explained further:

[the medical practitioner] will need to use a form that has been designed to ensure it collects the information WHS regulators need to target their compliance with enforcement efforts, including the details of the worker’s current or most recent employer.
10. The Minister for Health and Medical Research made such a declaration on 22 June 2020, under the *Public Health Amendment (Scheduled Medical Conditions) Order 2020*. Silicosis is now on the list of medical conditions in Schedule 1 of the *Public Health Act 2010* meaning that a medical practitioner must notify the Secretary of the Ministry of Health if a person is diagnosed with that condition.
11. The Bill would amend the *Work Health and Safety Act 2011* (the Act) so that the Secretary of the Ministry of Health could in turn provide information about the diagnosis to the work health and safety regulators without contravening any laws, in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

ISSUES CONSIDERED BY THE COMMITTEE

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA*Broad administrative power affecting privacy rights*

12. The Bill would amend the Act to authorise the Secretary of the Ministry of Health to provide information to the regulator if the Secretary considers it is necessary to do so to enable the regulator to exercise its functions under the Act. In doing so, the Secretary would not be contravening any laws, in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

13. “The regulator” means SafeWork NSW and the NSW Resources Regulator.⁵ Part 8, Division 1 of the Act sets out the regulator’s functions, which include monitoring and enforcing compliance with the Act.

14. As above, the amendment, taken with the recent declaration of silicosis as a scheduled medical condition under Part 4 of the *Public Health Act 2020*, is intended to ensure that WHS regulators are informed of all diagnoses of silicosis in NSW and thereby to halt the increase in the number of workers affected by the disease. The Minister told Parliament:

The goal of creating the information-sharing power in this bill is to enable NSW Health to assist work health and safety regulators to target their ongoing efforts in education, enforcement and compliance at the workplaces where they are most needed – that is, workplaces where workers are contracting silicosis.

15. However, the proposed amendment does not limit the Secretary to sharing information about the diagnosis of silicosis and the Minister stated that this will ensure that in the future, information can be shared between the Secretary and WHS regulators to address any emerging occupational diseases:

In the first instance, the Government intends to use the information-sharing power to target silicosis. But over time, as new materials and new technologies come into use in New South Wales, other threats to workers' health may emerge—or re-emerge—as silicosis has...That is why the Government has ensured that the bill will enable information sharing between NSW Health and WHS regulators in relation to other conditions if it becomes necessary in the future.

16. The Minister further emphasised that the new power would allow a swift and flexible response to any emerging threats to worker safety:

New South Wales WHS regulators must be able to respond swiftly and flexibly to protect workers in the State. The COVID-19 pandemic has demonstrated the importance of having the infrastructure in place to mobilise quickly and efficiently to respond to a health crisis, particularly in our workplaces. The bill will ensure that if threats to workers' safety emerge, our WHS regulators can seek assistance from the Health department, which has well-established systems for monitoring the prevalence of conditions or diseases of public concern.

17. The Minister also provided the following commentary about the breadth of the Secretary’s discretion under the new power:

⁵ See *Work Health and Safety Act 2010*, Schedule 2; *Work Health and Safety (Mines and Petroleum Sites) Act 2013*, s5; and NSW Resources Regulator website: <https://www.resourcesregulator.nsw.gov.au/about-us>.

The health secretary is not under any duty to disclose information. The health secretary will have discretion to provide or withhold information and the discretion to do so will be based on the secretary's assessment of whether the information in question is necessary for the work health and safety regulators to enforce work health and safety laws in New South Wales.

18. The Minister stated that a memorandum of understanding is being developed to govern the information sharing between SafeWork NSW and NSW Health relating to silicosis. This memorandum will set out how information will be shared, stored and used. This is being done in consultation with the Information and Privacy Commissioners "to ensure that workers' personal information is treated with the respect for their privacy that the Government believes it deserves".
19. The Minister also stated that the Commissioners would be consulted on the sharing of information about other workplace health issues should they arise in the future.

The Bill would amend the *Work Health and Safety Act 2011* (the Act) to authorise the Secretary of the Ministry of Health to provide information to the work health and safety (WHS) regulator if the Secretary considers it is necessary to do so to enable the regulator to exercise its functions under the Act. In doing so, the Secretary would not be contravening any laws, in particular, the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.

The amendment, taken with the recent declaration of silicosis as a scheduled medical condition under Part 4 of the *Public Health Act 2020*, is intended to ensure that the WHS regulator is informed of all diagnoses of silicosis in NSW and thereby to halt the recent increase in the number of workers affected by the disease.

However, the Committee notes that the information-sharing power is broad and does not limit the Secretary to sharing information about the diagnosis of silicosis. The Secretary has a wide discretion to disclose any information he or she considers necessary for the WHS regulator to exercise its functions under the Act, that is, monitoring and enforcing compliance with WHS laws.

The Committee prefers administrative powers such as these to be drafted with sufficient precision so that their scope and content is clear. This is to ensure an appropriate level of parliamentary oversight over the powers conferred. This is particularly so where the powers in question have the capacity to affect individual rights, in this case, privacy rights.

The Committee acknowledges that the broad power is intended to ensure that authorities can respond swiftly and flexibly should further threats to worker safety, besides silicosis, emerge in NSW. However, the Committee also notes an absence of privacy safeguards in the Bill. It is understood that a memorandum of understanding is being developed between SafeWork NSW and NSW Health to govern how information is shared, stored and used; and that the Information and Privacy Commissioners are being consulted. However, the Bill itself contains no such requirements. The Committee refers the breadth of the information-sharing power, and the issues around privacy safeguards to Parliament for consideration.

Part Two – Regulations

1. Community Land Management Amendment (COVID-19) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Community Land Management Act 1989* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic:
 - a. altered arrangements for convening, and voting at, meetings of an association or its executive committee,
 - b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
 - c. the extension, to 6 months, of the time periods within which—
 - i. the first annual general meeting of an association must be convened and held, and
 - ii. an estimate must be made to reimburse an amount paid or transferred from an administrative fund or a sinking fund.
2. This Regulation is made under the *Community Land Management Act 1989*, including sections 122 (the general regulation-making power) and 122A.

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. The *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct

and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989*.

4. The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run. They provide for such matters as how associations and their executive committees meet and vote, and the time periods within which certain steps should be taken for the management of schemes.
5. Section 122A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for matters including:
 - altered arrangements for convening an association meeting including arrangements for the issue or service of notices and other documents in relation to the meeting,
 - altered arrangements for the way voting may be conducted at an association meeting,
 - an alternative to affixing the seal of the association, including any requirements for witnessing or attesting to the alternative way, and
 - extension of a time period in which a thing is required to be done under the Act.
6. Section 122A further provides that regulations made under the section:
 - can override a provision of the Act, and
 - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.
7. In addition, section 122A provides for its own repeal on:
 - 13 November 2020, or
 - On a later day, not later than 13 May 2021, prescribed by the regulations.
8. The Regulation is made under section 122A (and section 122, which is the general regulation-making power) and it accordingly amends the *Community Land Management Regulation 2018* to:
 - provide for altered arrangements for convening, and voting at, meetings of an association or its executive committee,
 - allow instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
 - extend certain time periods e.g. the time in which the first annual general meeting of an association must be convened under section 9 of the Act.
9. In particular, schedule 1, clause 23 of the Regulation authorises altered arrangements for voting at association meetings, and provides that these arrangements are to apply despite

any requirements in the Act for a vote to be exercised in person. Further, clause 26 sets down the altered methods of voting that can be used at an association meeting, or at a meeting of an association's executive committee. These methods include voting by means of teleconference, video-conferencing, email or other electronic means.

The *Community Land Management Act 1989* (the Act) establishes the roles and responsibilities of community associations, and executive committees of associations. These associations are responsible for the management of various community precinct and neighbourhood schemes established by the subdivision of land under the *Community Land Development Act 1989*.

The Act and the *Community Land Management Regulation 2018* made under it detail how the schemes should be run, providing for such matters as how associations and their executive committees meet and vote.

The Regulation amends the *Community Land Management Regulation 2018* to provide for altered arrangements: for convening, and voting at, meetings of an association (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an association; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 122A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 122A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and 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 and minimise disruption to schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

2. Crimes (Administration of Sentences) Amendment (Inmate Mail) Regulation 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that a letter or parcel sent to an inmate may be copied and the copy provided to the inmate instead of the original. The ability to copy this mail does not extend to letters or parcels addressed to, or received from, exempt bodies and persons such as the Ombudsman, Civil and Administrative Tribunal or a legal practitioner.
2. This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 79(1)(k) and 271 (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

Right to privacy

3. The Regulation is made under the *Crimes (Administration of Sentence) Act 1999* the objects of which are to ensure that offenders held in custody are supervised in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A).
4. The Regulation amends clause 112 of the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation). Subclause 112(1) of the Regulation provides that the governor of a correctional centre or a nominated officer may open, inspect and read a letter or parcel sent or received by an inmate. Further, subclause 112(4) provides that the governor of a correctional centre or a nominated officer may:
 - copy any written or pictorial matter contained in a letter or parcel sent to an inmate that has been opened or read under the clause, and
 - deal with the original written or pictorial matter in accordance with the directions of the Commissioner, and
 - deliver a copy of the written or pictorial matter to the inmate instead of the original matter.

5. Previously, clause 112 of the primary Regulation provided that the governor of a correctional centre or a nominated officer could open, inspect and read a letter or parcel sent or received by an inmate and that a nominated officer could direct that any written or pictorial matter contained in a letter or parcel opened, inspected or read under the clause be copied before the letter or parcel containing the matter is delivered to the addressee. However, such a direction could only be given if the nominated officer was of the opinion that the matter to be copied:
 - contained anything likely to prejudice the good order and security of any correctional centre, or
 - was threatening, offensive, indecent, obscene or abusive.
6. The Regulation also amends clause 115 of the primary Regulation which applies to Category AA male inmates, category 5 female inmates, extreme high risk restricted inmates and national security inmates, as they are excluded from the operation of clause 112.⁶
7. Under subclause 115(1) of the primary Regulation, the governor of a correctional centre or a nominated officer *must*, generally open and inspect, and read and copy the contents of, any letter or parcel that is:
 - sent to any person or body by a Category AA male inmate, a Category 5 female inmate, an extreme high risk restricted inmate or a national security interest inmate, or
 - sent by any person or body to a Category AA male inmate, a Category 5 female inmate, an extreme high risk restricted inmate or a national security interest inmate.
8. The Regulation amends clause 115 in respect of letters and parcels so opened so that under a newly inserted subclause 115(1A) the governor or a nominated officer may:
 - direct that a further copy of any written or pictorial matter contained in a letter or parcel opened, inspected, read and copied under subclause (1) be made and retained, and
 - deal with the original written or pictorial matter in accordance with the directions of the Commissioner, and
 - deliver a copy of the written or pictorial matter to the inmate instead of the original matter.
9. The ability to copy and deal with the material under subclauses 112(4) and 115(1A) of the Regulation does not extend to letters or parcels addressed to, or received from “exempt

⁶ The classification and designation of inmates is dealt with in Part 3, Division 1 of the *Crimes (Administration of Sentences) Regulation 2014*, see in particular clauses 12, 13 and 15. Clause 115(5)(b) of that Regulation provides that clause 112 does not apply in respect of letters and parcels sent to and received by Category AA male inmates, Category 5 female inmates, extreme high risk restricted inmates or national security interest inmates.

persons” including a legal practitioner, or “exempt bodies” such as the Ombudsman or the Inspector of Custodial Services.⁷

The Regulation expands the powers of correctional officers under the *Crimes (Administration of Sentences) Regulation 2014* (the primary Regulation) to copy letters and parcels sent and received by inmates, and to deal with the original material. In particular, subclause 112(4) provides that correctional officers can copy any written or pictorial material in letters and parcels sent and received by inmates generally, and can deal with the original material in accordance with the directions of the Commissioner of Corrective Services.

Previously, such material could only be copied if it related to certain high security/high risk inmates under clause 115 of the primary Regulation; or if a correctional officer was of the opinion that the letter or parcel contained anything likely to prejudice the good order and security of any correctional centre, or anything that was threatening, offensive, indecent, obscene or abusive.

In lowering the threshold for the copying of material sent to and received by inmates, and creating new broad powers under subclauses 112(4) and 115(1A) for original material to be dealt with in accordance with the directions of the Commissioner, the Regulation may impact on privacy rights. The Committee notes a safeguard in that the expanded powers do not extend to letters or parcels addressed to, or received from, legal practitioners and “exempt bodies” such as the Ombudsman and the Inspector of Custodial Services. However, the Committee refers the expanded powers to Parliament to consider whether they impact unduly on privacy rights.

⁷ See subclause 112(5) (a) and subclauses 115(2), (3) and (4) of the *Crimes (Administration of Sentences) Regulation 2014*. See also clause 3, which defines “exempt person” and “exempt body”.

3. Crimes (Administration of Sentences) Amendment (Use of Biometric Data) Regulation 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Counter Terrorism and Corrections

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that the Commissioner of Corrective Services may authorise the use of a biometric identification system to control access to a correctional centre or a controlled part of a centre, movement within the centre, access to medication within the centre or access to equipment or other items in the centre.
2. This Regulation is made under the *Crimes (Administration of Sentences) Act 1999*, including sections 79 and 271 (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

Right to privacy

3. The Regulation is made under the *Crimes (Administration of Sentence) Act 1999* the objects of which are to ensure that offenders held in custody are supervised in a safe, secure and humane manner, to provide for their rehabilitation, and to ensure the safety of the persons who have custody of such offenders (section 2A).
4. The Regulation amends clause 320 of the *Crimes (Administrations of Sentences) Regulation 2014* (the primary Regulation) to provide that the Commissioner of Corrective Services can authorise the use in correctional centres of a biometric identification system to:
 - control access to the centre,
 - control persons leaving, or attempting to leave, the centre,
 - control access to part of the centre or the movement of persons within the centre,
 - control access to medication in the centre,

- control access to equipment and other items within the centre.
5. A recent brochure produced by NSW Corrective Services regarding visiting a correctional centre explains that a biometric identification system is used to photograph a visitor's face, scan their irises and capture their fingerprints. It further explains that the information captured on the system at an initial visit will be available at all networked centres for subsequent visits.⁸
 6. In addition, the Regulation provides that a person may be required to comply with requirements relating to the operation of the biometric identification system for the purpose for which the system may be used, and may be denied access to the centre, part of the centre, medication or equipment, or prevented from leaving, if the person refuses to comply with the requirement.
 7. Clause 321 of the primary Regulation contains privacy and security safeguards in relation to the use of a biometric identification system in a correctional centre. In particular,
 - any image or recording of a person's features, other than the person's photograph, must not be retained on the system, and must be deleted as soon as the person's biometric algorithm is made,
 - a person's biometric algorithm must not be made, stored or kept as part of any other database that is maintained by or on behalf of Corrective Services NSW,
 - the system must not be used to reconstruct a person's features from a person's biometric algorithm,
 - the photograph of each visitor to a correctional centre must be eliminated from the system:
 - within 6 months after the person's last recorded visit to a correctional centre, or
 - as soon as practicable at the request of the person,
 - a person's biometric algorithm must not be stored in the system's database in a way that would enable unauthorised access to the information,
 - permission must not be given to any person or agency that would enable any person, other than a correctional officer or departmental officer, to gain access to a person's biometric algorithm stored in the system's database.
 8. Further, clause 321 provides that any person who is involved in the operation of an authorised biometric identification system must not knowingly or negligently:
 - permit a person to gain access to any information in the system's database, or
 - provide a person with any information in the system's database, or
 - use the system to reconstruct a person's features from the person's biometric algorithm.
 9. For the purposes of clause 321, "a person's features" are taken to include all aspects of the person's physical characteristics (for example, fingerprints and iris scans) and all

⁸ NSW Corrective Services, Visiting a correctional Centre (6 March 2020), p6, <https://www.correctiveservices.justice.nsw.gov.au/Documents/Reports%20and%20Publications/Visit-a-correctional-centre-brochure-english.pdf>

aspects of a person's behavioural characteristics (for example, tone of voice and style of handwriting).

10. However, clause 321 also makes clear that the safeguards contained therein do not prevent access to a person's photograph or personal details by:
 - the Commissioner of Corrective Services, or
 - the principal officer, however described, of a law enforcement agency, or
 - any person involved in the operation, maintenance, repair or replacement of the system.
11. There are also additional safeguards for people under 18 years so that the provisions in clause 320 relating to the use of biometric identification systems do not apply to such people unless:
 - the person is subject to an order by the Commissioner of Corrective Services under clause 108 of the Regulation barring the person from visiting correctional centres,
 - the person has been convicted of an offence in relation to a previous visit by the person to a correctional centre, or
 - the correctional officer in charge of the visiting area of the correctional centre being visited by the person is of the opinion that the person's physical appearance is similar to that of an inmate of the centre (subclause 320(5) of the primary Regulation).

The Regulation amends the *Crimes (Administrations of Sentences) Regulation 2014* (the primary Regulation) to provide that the Commissioner of Corrective Services can authorise the use of a biometric identification system to control access to a correctional centre or a controlled part of a centre, movement within the centre, access to medication within the centre or access to equipment or other items in the centre. If a person refuses to comply with requirements relating to the operation of the system for the purpose for which it can be used, he or she may be denied access to the centre, part of the centre, medication or equipment, or prevented from leaving.

The biometric identification systems in question take personal biometric information from individuals, including inmates and visitors to correctional centres, for example, capturing fingerprints and scanning irises. The Regulation may thereby impact on the right to privacy. However, the Committee acknowledges that the Regulation is intended to ensure the security and good order of correctional centres verifying the identity of persons who enter and leave correctional centres, and who carry out activities therein, and preventing escapes.

Further, there are a number of safeguards. The Regulation only allows biometric identification systems to be used for the stated purposes. In addition, the primary Regulation contains strict controls around how biometric information is stored and who can access it. In particular, any image or recording of a person's

features, for example, their fingerprints or iris scans, must not be retained and must be deleted as soon such information is made into the person's biometric algorithm. Further, the biometric algorithm is to be stored only in the biometric identification system's database and is not to be stored on any other database that is maintained by Corrective Services NSW; and permission is not to be given so that persons and agencies other than correctional and departmental officers can access algorithms. Similarly, biometric identification systems cannot generally be used in respect of persons under 18 years. In the circumstances, and given the safeguards, 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

12. As above, the Regulation amends the primary Regulation to provide that the Commissioner of Corrective Services can authorise the use of a biometric identification system for certain purposes. As also noted, the biometric identification systems in question take personal biometric information from individuals, including inmates and visitors to correctional centres, for example, capturing fingerprints and scanning irises, and the Regulation may thereby impact on the right to privacy.

As above, the Regulation amends the primary Regulation to provide that the Commissioner of Corrective Services can authorise the use of a biometric identification system for certain purposes. As also noted, the biometric identification systems in question take personal biometric information from individuals, including inmates and visitors to correctional centres, for example, capturing fingerprints and scanning irises.

The Committee would prefer significant matters such as these, which may impact on the right to privacy, to be included in primary legislation. This is to ensure an appropriate level of parliamentary oversight including as regards the adequacy of any safeguards contained in the legislation. The Committee refers this matter to Parliament for consideration.

4. Liquor Amendment (COVID-19 Licence and Endorsements and Temporary Freeze Regulation) 2020

Date tabled	2 June 2020
Disallowance date	LA: 22 September 2020 LC: 13 October 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The objects of the Regulation are as follows—
 - a. to provide for RSA and RCG endorsements that have expired in a prescribed period to continue in force until 30 June 2021,
 - b. to extend the temporary freeze on licences and other authorisations in prescribed precincts from 1 June 2020 to 1 December 2020,
 - c. to except premises holding certain licences from the temporary freeze on extended trading, licence conditions and licence removals,
 - d. to remove the imposition of special licence conditions that currently apply to certain licensed premises.
2. The Regulation is made under the *Liquor Act 2007*, including sections 11(1A), 47A, 47J(c) and 159 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Henry VIII Clause – expired endorsements

3. Schedule 1, item 1 of the Regulation inserts clause 73A into the *Liquor Regulation 2018*, entitled “COVID-19 pandemic – special provision for expired RSA and RCG endorsements to continue in force”.
4. Clause 73A provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the “prescribed period” from 1 March 2020 until 29 June 2021, is taken not to expire and to continue in force until 30 June 2021.
5. The extension of expiry dates for RSA and RCG endorsements forms part of the Liquor and Gaming NSW response to COVID-19. Liquor and Gaming NSW has issued a Statement of

Regulatory Intent, setting out the enforcement approach that it will take with regard to certain requirements under the *Liquor Act 2007* and the *Liquor Regulation 2018*, in response to the pandemic. The Statement notes:

Liquor & Gaming NSW recognises that the COVID-19 pandemic has created an exceptional set of circumstances and will have significant impacts on the businesses we regulate. Liquor & Gaming NSW appreciates that exceptional circumstances require flexibility on the part of the regulator.⁹

6. Liquor and Gaming NSW has also published a document relating to the Statement of Regulatory Intent entitled “COVID-19 (coronavirus) FAQs for the liquor and gaming industries” which notes the extended expiry date of 30 June 2021 for endorsements due for renewal on or after 1 March 2020.¹⁰
7. Schedule 1, item 1 of the Regulation provides that this clause applies despite any other provision of the *Liquor Act 2007* or the *Liquor Regulation 2018*.

The Regulation provides that a Responsible Service of Alcohol (RSA) or a Responsible Conduct of Gambling (RCG) endorsement that expires during the “prescribed period” from 1 March 2020 until 29 June 2021, is taken not to expire and is instead to continue in force until 30 June 2021.

This extended expiry date for these endorsements is a special provision in response to the COVID-19 pandemic. Liquor and Gaming NSW has issued a Statement of Regulatory Intent indicating that it intends to take a flexible regulatory approach with regard to the requirements of the *Liquor Act 2007* and the *Liquor Regulation 2018* in response to the exceptional circumstances created by COVID-19, and their impact on business.

The extension applies despite any other provision of the *Liquor Act 2007*. This has the effect of a Henry VIII clause, which allows subordinate legislation to override provisions in an Act. The Committee notes that regulations of this kind typically involve an inappropriate delegation of legislative power. However, the Regulation responds to the extraordinary circumstances created by COVID-19. It may be reasonable to endorse a more flexible approach in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, the Committee notes the relevant provision is time-limited with extensions ending on 30 June 2021. Regulations must also be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given the safeguards, the Committee makes no further comment.

⁹ Liquor and Gaming NSW, “Statement of Regulatory Intent in regards to COVID-19 coronavirus” updated 1 June 2020: <https://www.liquorandgaming.nsw.gov.au/news-and-media/statement-of-regulatory-intent>, viewed 26 June 2020.

¹⁰ Liquor and Gaming NSW, “COVID-19 (coronavirus) FAQs for the liquor and gaming industries” 19 June 2020: <https://www.liquorandgaming.nsw.gov.au/news-and-media/covid-19-coronavirus-faqs-for-the-liquor-and-gaming-industries>, viewed 26 June 2020.

Henry VIII Clause – special licence conditions

8. 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.
9. 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
10. Schedule 2 of the Regulation amends Schedule 4 of *Liquor Act 2007*. It does so drawing on a Henry VIII clause contained in subsection 11(1A) of the Act, which provides that the regulations can amend Schedule 4 including by adding or removing a licence under Schedule 4.
11. Schedule 2 of the Regulation accordingly removes the following venues from Schedule 4 of the Act so that they are no longer “declared premises”:
 - Ivy – Sydney
 - Imperial Hotel – Tamworth
 - Northies – Cronulla Hotel – Cronulla
 - Tattersalls Hotel Penrith – Penrith.
12. This also means that the premises are no longer subject to special licensing conditions, for example:
 - Not being able to serve any drink in a glass or breakable plastic container during a “restricted service period” (Schedule 4, Clause 4, *Liquor Act 2007*);
 - Having to 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*);
 - Having to 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*);
 - Having to 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*).

¹¹ Liquor and 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, viewed 26 June 2020.

13. 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*).
14. As these four venues were the only venues listed in Schedule 4 to the Act, there are now no “declared premises” in NSW.
15. It appears that these amendments also relate to COVID-19. Liquor and Gaming NSW has indicated that, in response to COVID-19, it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Liquor and Gaming NSW’s Statement of Regulatory Intent notes:

Liquor & Gaming NSW appreciates that premises that are permitted to open to the public are not able to operate at their full capacity while customer limits and seating requirements apply under the Public Health (COVID-19 Places of Social Gathering) Order (No 3) 2020.

In recognition of this, Liquor & Gaming NSW will also take a flexible approach to enforcing certain licence conditions that are aimed at managing public amenity and safety risks at times when venues are operating at their full capacity.¹²

The Regulation amends Schedule 4 to the *Liquor Act 2007* to remove all four venues from the list of “declared 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 an appropriate level of parliamentary oversight over the changes.

However, it appears that these changes around special licensing are a response to COVID-19. Liquor and Gaming NSW has indicated that it will take a more flexible approach to enforcing standards that were designed to manage safety when businesses could operate at full capacity (i.e. before social distancing). Again, it may be reasonable to proceed via regulation in this instance, thereby allowing authorities to respond swiftly and appropriately to the impact of COVID-19 on liquor and gaming businesses.

Further, regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. In the circumstances, and given this safeguard, the Committee makes no further comment.

¹² Liquor and Gaming NSW, “Statement of Regulatory Intent in regards to COVID-19 coronavirus” updated 1 June 2020: <https://www.liquorandgaming.nsw.gov.au/news-and-media/statement-of-regulatory-intent>, viewed 26 June 2020.

5. *Professional Standards Act 1994* – Notification pursuant to section 13 – The Western Australia Bar Association Professional Standards Scheme

Date tabled	2 June 2020
Disallowance date	LA: 22 September 2020 LC: 13 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. Pursuant to section 13 of the *Professional Standards Act 1994* (NSW), the Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP, has authorised the publication of the Western Australian Bar Association Professional Standards Scheme.
2. The Western Australian Bar Association (the Association) has made an application to the Professional Standards Council, appointed under the *Professional Standards Act 1997* (WA) (the Act) for a scheme under the Act.
3. The scheme is prepared by the Association for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
4. The scheme propounded by the Association is to apply to all members of the Association who are based in and practise as independent barristers in Western Australia. The scheme is also intended to apply in other jurisdictions including NSW, Victoria, Queensland, South Australia, the Australian Capital Territory, the Northern Territory and Tasmania.
5. The scheme is intended to commence in NSW on 1 July 2020, and to be in force for 5 years from the date of commencement.

ISSUES CONSIDERED BY THE COMMITTEE

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

Consumer rights –limited liability

6. As above, the scheme that is the subject of the Minister's notification is prepared by the Association for the purposes of limiting occupational liability to the extent to which such liability may be limited under the Act.
7. Clause 3.1 of the scheme provides that the scheme only affects liability for damages arising from a single cause of action where such damages exceed \$500,000.

8. Clauses 3.2 to 3.4 effectively provide that a person against whom a cause of action relating to occupational liability is brought, to whom the scheme applies, is not liable in damages in relation to that cause of action, for anything done or omitted to be done on or after the commencement of the scheme, above a maximum of \$2 million.
9. However, to benefit from these provisions, the person to whom the scheme applies must be able to satisfy the court that they have the benefit of an insurance policy:
 - of a kind which complies with the standards determined by the Association,
 - insuring such a person against that occupational liability, and
 - under which the amount payable in respect of that liability is at least \$2 million.
10. In addition, the preamble to the scheme states that the Association has furnished the Councils with a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.

The Western Australian Bar Association Professional Standards scheme, which applies in NSW, limits the occupational liability of barristers covered by the scheme to a maximum of \$2 million. It may thereby limit the consumer rights of people who bring occupational liability actions against such barristers.

However, the Committee notes that the scheme makes provision for consumers by stipulating that the barristers must have occupational liability insurance cover for a minimum of \$2 million to take advantage of the limited liability provisions. In addition, the scheme only affects liability for damages arising from a single cause of action where such damages exceed \$500,000. Further, the Western Australian Bar Association has developed a detailed list of the risk management strategies intended to be implemented in respect of its members and the means by which those strategies are intended to be implemented.

The scheme thereby seeks to strike a balance between consumer rights and the commercial viability of practising as a barrister in NSW, protecting consumers through insurance and risk management, not unlimited liability. The Committee also notes that unlimited liability may only be an effective consumer protection strategy if all barristers concerned had significant assets. In the circumstances, the Committee makes no further comment.

6. Public Health Amendment (Authorised Officers) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to allow the Secretary of the Ministry of Health to appoint members and members of staff of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.
2. The Regulation is made under the *Public Health Act 2010*, including sections 126(1) and 134 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Broadly drafted provisions in subordinate legislation that may confer significant administrative powers

3. The objects of the *Public Health Act 2010* (the Act) are set down in section 3 and include:
 - to promote, protect and improve public health,
 - to control risks to public health,
 - to promote control of infectious diseases,
 - to prevent the spread of infectious diseases,
 - to monitor diseases and conditions affecting public health.
4. The Act therefore sets down various powers so that the NSW Government can deal with public health risks. For example, under section 7, where the Minister for Health considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, he or she can issue public health orders to deal with the risk, which are to be

published in the NSW Government Gazette. The Minister has recently issued a number of such public health orders in response to the COVID-19 pandemic.¹³

5. Under section 126 of the Act, the Secretary of the Ministry of Health can appoint persons as “authorised officers” to enforce compliance with the requirements of the Act. In particular, subsection 126(1)(c) provides that the Secretary can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an authorised officer, either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.
6. Clause 99A of the Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health. Clause 99A is time limited, to be repealed on 26 March 2021.
7. The precise functions that a person appointed under these provisions would exercise appears to be left to the terms of his or her appointment. Subsection 127(1) of the Act provides that, subject to the terms of his or her appointment, an authorised officer has such functions as are conferred or imposed on an authorised officer by or under the Act, or any other Act.
8. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to:
 - enter and inspect any premises, inspect documents (and make copies), take photographs and video, and take samples (section 108),
 - require a person to answer questions (section 110),
 - require that documents and information be provided to the authorised officer, including names and addresses (sections 111 and 112).
9. Certain safeguards apply. For example, before entering premises an authorised officer must:
 - give reasonable notice where possible (subsection 108(2)(c)), and
 - if seeking to enter residential premises, obtain the consent of the occupier, or do so under the authority of a search warrant (subsection 108(4)).

The *Public Health Act 2010* (the Act) provides that the Secretary of the Ministry of Health can appoint any member, or any member of staff, of a body prescribed by the regulations, to be an “authorised officer”, either generally or in relation to a particular function exercisable by authorised officers under the Act or any other Act relating to public health.

¹³ For a list of public health orders to date that respond to COVID-19, see the NSW Legislation website: <https://www.legislation.nsw.gov.au/#/>, viewed 26 June 2020.

The Regulation accordingly allows the Secretary to appoint members, and members of staff, of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health.

The precise functions that a person appointed under these provisions could exercise appears to be left to the terms of his or her appointment. However, it is possible that a person appointed under the provisions could have significant coercive powers. For example, under Part 8 of the Act, authorised officers are granted significant powers to assist them to enforce the Act including to enter and inspect premises, require a person to answer questions, and require that documents and information be provided to the authorised officer.

The Committee would prefer provisions that may confer significant powers to be drafted with a greater level of precision. In short, the provisions should clearly set out the functions being conferred, and the category of persons to whom they are being conferred. This would foster a greater level of parliamentary oversight. In the current case, the exact functions are unclear and the categories of person to whom they are being conferred is broad – any officer of the named agencies. There is no requirement for any particular level of seniority or expertise in an officer before the functions could be conferred on him or her.

The Committee would also generally prefer provisions that may confer significant powers to be included in primary, not subordinate legislation, again to foster an appropriate level of parliamentary oversight.

However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic. Further, the provisions are time limited to repeal in March 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

7. Public Health Amendment (COVID-19 Border Control) Regulation 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a ministerial direction under the *Public Health (COVID-19 Border Control) Order 2020*.
2. The Ministerial direction relates to the provision of information to help enforcement officers decide whether persons entering NSW have been in Victoria in the last 14 days and, if they have, whether they are authorised to enter NSW.
3. The Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (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

Penalty notice offences – right to a fair trial

4. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.
5. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. In addition, subsection 7(5) provides that, unless earlier revoked, such an order expires at the end of 90 days after it was made, or earlier if so specified in the Order. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.
6. On 7 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that an “affected person” must not enter NSW unless the person

is authorised to do so (that is, they must belong to a specified class of persons, hold a current entry permit and comply with specified conditions). Clause 3 of the Order defines an “affected person” to be a person who has been in Victoria within the previous 14 days.

7. Clause 4 of the Order also sets down the Minister’s grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health, which are that:
 - public health authorities both internationally and in Australia have been monitoring and responding to outbreaks of COVID-19, also known as Novel Coronavirus 2019,
 - COVID-19 is a potentially fatal condition and is also highly contagious,
 - a number of cases of individuals with COVID-19 have now been confirmed in NSW, as well as other Australian jurisdictions,
 - recent cases of unexpected community transmission of COVID-19 in Victoria, with restrictions on the movement of people being put in place in certain hotspot areas,
 - the Victorian Government and the NSW Government have agreed that the border should, subject to exceptions determined by the Government of NSW, be closed until community transmission of COVID-19 in Victoria is contained.
8. Further, under clause 6 of the Order, the Minister directed that a person must, if required to do so by an enforcement officer, provide information (including photo identification) to allow a decision to be made about:
 - whether the person is an “affected person” and
 - if the person is an “affected person” – whether the person is authorised to enter NSW.
9. However, an enforcement officer may only require information about whether a person is an “affected person” if the enforcement officer believes on reasonable grounds that the person may be an “affected person”. The Minister further directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.
10. The Regulation amends the *Public Health Regulation 2012* to allow a \$4000 penalty notice to be issued for offending against section 10 of the Act by contravening the Ministerial direction under clause 6 of the Order, that is by failing to provide the required information, or providing false or misleading information.
11. The Order and the Regulation both commenced on 8 July 2020.¹⁴

On 8 July 2020, the *Public Health (COVID-19 Border Control) Order 2020* (the Order) came into force under which the Minister for Health and Medical Research directed that an “affected person” must not enter NSW unless the

¹⁴ See clause 2 of the Order and clause 2 of the Regulation, which provides that the Regulation is to commence on the day that is published on the NSW Legislation website, which was 8 July 2020.

person is authorised to do so. The Order defines an “affected person” to be a person who has been in Victoria within the previous 14 days.

Under clause 6 of the Order the Minister also directed that a person must, if required to do so by an enforcement officer, provide information to allow a decision to be made about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW. Further, the Minister directed under clause 6 that a person who provides the required information must ensure that the information is true and accurate.

The Regulation provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order (i.e. by failing to provide the required information, or providing false or misleading information).

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person’s right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that \$4000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

Right to privacy and freedom of movement

12. As above, the Regulation allows for a \$4000 penalty notice to be issued for a contravention of the Ministerial direction under clause 6 of the Order, that is, where a person fails to provide information (including photo identification) to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

As above, the Regulation provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information, including photo identification, to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

By providing that a person can receive an on-the-spot penalty for failing to provide such information, or for failing to provide true and accurate information, the Regulation may impact on privacy rights. Further, as the information may be used to deny people entry to NSW, the Regulation is part of a regime that restricts freedom of movement. This right is contained in Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is

a party. This Article protects the right to move freely in a country for those who are lawfully within that country; the right to leave any country; and the right to enter a country of which you are a citizen.

However, Article 12 also recognises that derogation from this right may be warranted in certain circumstances, including to protect public health. The Committee considers that as the Regulation is part of a regime to respond to COVID-19 and stop its spread following an increase in community transmission in Victoria, it fits within the public health exemption, and that the limits placed on freedom of movement are reasonable in the circumstances. This is particularly so as the associated Order is time limited and will automatically expire 90 days after it commences if it is not repealed sooner.

The fact that the Regulation responds to the public health emergency also makes its possible privacy impacts reasonable in the circumstances. The Committee also notes a safeguard in this regard: an enforcement officer can only require the information under clause 6 of the Order where the enforcement officer believes on reasonable grounds that the person may be an “affected person” – that is, a person who has been in Victoria within the previous 14 days. In the extraordinary circumstances, and given the safeguards, 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

13. As above, the Regulation allows for a \$4000 penalty notice to be issued for a contravention of the Ministerial direction under clause 6 of the Order, that is, where a person fails to provide information to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

As above, the Regulation provides that a penalty notice of \$4000 can be issued to an individual who contravenes clause 6 of the Order by failing to provide information to allow a decision about whether the person is an “affected person” and, if so, whether the person is authorised to enter NSW (or where a person provides false or misleading information in this regard).

The Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic – in this case the recent increased community transmission in Victoria – it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. In the extraordinary circumstances, the Committee makes no further comment.

8. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2020

Date tabled	LA: 28 July 2020 LC: To be determined
Disallowance date	LA: 20 October 2020 LC: To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* about intentionally spitting or coughing on:
 - a public official or
 - another worker while the worker is at the worker's place of work or travelling to or from the worker's place of work,
 in a way that is likely to cause fear about the spread of COVID-19.
2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (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

Penalty notice offences – right to a fair trial

3. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, the Minister may take such action, and may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.
4. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. And under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, or unless an earlier day is specified in the order.

5. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.
6. On 3 July 2020 the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* was published in the NSW Government Gazette. The Minister made the Order under section 7 of the Act, directing under clause 5 that a person must not intentionally spit or cough on:
 - a public official, or
 - a worker while they are at their place of work or travelling to or from it,in a way that would reasonably be likely to cause fear about the spread of COVID-19.
7. Clause 4 of the Order also set down the Minister's grounds for concluding that a situation has arisen that is, or is likely to be, a risk to public health including that a number of individuals with COVID-19 have now been confirmed in NSW, and that COVID-19 is a potentially fatal condition, and highly contagious.
8. The Regulation amends the *Public Health Regulation 2012* to allow for a \$5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.
9. The Order and the Regulation both commenced on 7 July 2020.¹⁵
10. The Order replaces a previous Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020* ('the first Order'), which commenced on 9 April 2020¹⁶ and expired 90 days later in accordance with subsection 7(5) of the Act. The first Order and the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* ('the first Regulation') had the same combined effect as the current Order and the Regulation.¹⁷ It was necessary to make the Regulation to take account of the current Order, otherwise the *Public Health Regulation 2012* would still refer to the first Order, which has expired, and the \$5000 penalty notices could not be issued for contravention of the ministerial direction under the current Order.
11. The Committee commented on the first Regulation in its Digest No 13/57.

The Regulation allows a penalty notice of \$5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on another

¹⁵ See clause 2 of the Order and clause 2 of the Regulation.

¹⁶ See clause 2 of the first Order which provides that the first Order is to commence when the first Regulation commences; and clause 2 of the first Regulation which provides that it is to commence on the day that it is published on the NSW Legislation website, which was 9 April 2020.

¹⁷ That is, once the first Order was amended to protect all workers – not only public officials – and these amendments came into effect on 20 April 2020, see *Public Health (COVID-19 Spitting and Coughing) Amendment Order 2020*, clause 2.

worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of \$5000 could be issued to a person who contravened an earlier version of the Order, the *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which has now expired.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that \$5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, 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

12. As above, the Regulation allows for a \$5000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As above, the Regulation allows a penalty notice of \$5000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020* by intentionally spitting or coughing on a public official or on other worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As also noted, in its Digest No 13/57, the Committee commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* which provided that a penalty notice of \$5000 could be issued to a person who contravened an earlier version of the Order which has now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

9. Statutory and Other Offices Remuneration (Judicial and other office holders) Amendment (Temporary Wages Policy) 2020

Date tabled	29 May 2020
Disallowance date	LA: 22 September 2020 LC: 13 October 2020
Minister responsible	The Hon. Gladys Berejiklian MP
Portfolio	Premier

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Statutory and Other Offices Remuneration (Judicial and Other Office Holders) Regulation 2013* to implement a temporary wages policy, being a 12 month pause on remuneration increases for office holders covered by Part 3 of the *Statutory and Other Offices Remuneration Act 1975*.
2. This Regulation is made under the *Statutory and Other Offices Remuneration Act 1975*, including sections 6AB and 25 (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

Right to fair remuneration

3. The Regulation is made under the *Statutory and Other Offices Remuneration Act 1975* (the Act), which is an Act relating to remuneration and allowances paid to the holders of certain offices.
4. As above, the Regulation implements a temporary wages policy to pause for 12 months remuneration increases for office holders covered by Part 3 of the Act. Under section 10 of the Act, the office holders covered by Part 3 are those listed in schedules 1, 2 and 3 to the Act. These include judicial officers and the state coroner, and heads of statutory agencies such as:
 - the Auditor General,
 - the NSW Electoral Commissioner,
 - the Ombudsman,
 - the Chief Commissioner of the Law Enforcement Conduct Commission,

- the Commissioner of the NSW Crime Commission,
- the Public Service Commissioner, and
- the Information Commissioner.

5. They also include other statutory officers such as crown prosecutors and public defenders.

The Regulation implements a 12 month freeze on remuneration increases for office holders covered by Part 3 of the *Statutory and Other Offices Remuneration Act 1975*. This may impact on the right of affected office holders to fair remuneration for work performed.

However, the Committee acknowledges that the Regulation is made in response to economic conditions that have arisen in NSW as a result of the COVID-19 pandemic. It further acknowledges the time-limited nature of the remuneration freeze imposed by the Regulation, and the fact that it only covers certain office holders including judicial officers and the heads of statutory agencies. It does not apply to all public sector employees, in particular, those at the lower end of the pay scale. Given the circumstances, the Committee makes no further comment.

10. Strata Schemes Management Amendment (COVID-19) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for the following matters under the *Strata Schemes Management Act 2015* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic:
 - a. altered arrangements for convening, and voting at, meetings of an owners corporation of a strata committee,
 - b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
 - c. the extension, to 6 months, of the time periods within which—
 - i the first annual general meeting of an association must be convened and held, and
 - ii a levy must be determined to reimburse an amount paid or transferred from an administrative fund or a capital works fund.
2. This Regulation is made under the *Strata Schemes Management Act 2015*, including sections 271 (the general regulation-making power) and 271A.

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. The *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.

4. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for matters including:
 - altered arrangements for convening a relevant strata meeting including arrangements for the issue or service of notices and other documents in relation to the meeting,
 - altered arrangements for the means of voting at a relevant strata meeting including:
 - the circumstances in which the altered arrangements for voting may apply, and
 - conditions that apply to the way the vote is exercised,
 - an alternative to affixing the seal of the owners corporation including any requirements for witnessing or attesting to the alternative way,
 - extension of a time period in which a thing is required to be done under the Act.
5. Section 271A further provides that regulations made under the section:
 - can override a provision of the Act, and
 - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.
6. In addition, section 271A provides for its own repeal on:
 - 13 November 2020, or
 - on a later day, not later than 13 May 2021, prescribed by the regulations.
7. The Regulation is made under section 271A (and section 271, which is the general regulation-making power) and it accordingly amends the *Strata Schemes Management Regulation 2016* to:
 - provide for altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee,
 - allow instruments, instead of being affixed with the seal of an owners corporation in the presence of certain persons to be signed (and the signatures to be witnessed) by those persons,
 - extend certain time periods e.g. the time in which the first annual general meeting of an owners corporation must be convened and held under section 14 of the Act.
8. In particular, schedule 1, clause 71 of the Regulation provides that the means of voting specified in clause 14 of the *Strata Schemes Management Regulation 2016* can be used to determine a matter at a relevant strata meeting even if the owners corporation or strata committee has not, by resolution, adopted those means of voting. These means of voting include voting by means of:

- teleconference,
 - videoconferencing,
 - email, or
 - other electronic means.
9. However, if those means of voting have not been adopted by resolution, the secretary of the owners corporation must take reasonable steps to ensure that each owner of a lot in the strata scheme or each member of the strata committee can participate and vote at the strata meeting.
 10. Further, schedule 1, clause 71 provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person.

The *Strata Schemes Management Act 2015* (the Act) is an Act with respect to the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees; and matters such as how they meet and vote, and the time periods within which certain steps should be taken for the management of strata schemes.

The Regulation amends the *Strata Schemes Management Regulation 2016* to provide for altered arrangements for: convening, and voting at, meetings of an owners corporation or a strata committee (i.e. through electronic means); allowing instruments to be signed rather than affixed with the seal of an owners corporation; and to extend certain time periods within which certain things must be done under the Act. The Regulation specifically provides that the altered voting arrangements apply despite any requirements in the Act for a vote to be exercised in person.

The Regulation makes these changes drawing on a power contained in section 271A of the Act which authorises regulations to be made to respond to the public health emergency caused by COVID-19. Section 271A also provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, this power is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. The power, and 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 and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under the power can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

11. Work Health and Safety Amendment (Silica) Regulation 2020

Date tabled	16 June 2020
Disallowance date	LA: 13 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Health and Regulation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to create an offence if a person conducting a business or undertaking at a workplace directs or allows a worker to cut manufactured stone containing crystalline silica with a power tool unless certain controls are in place to protect workers from inhaling the dust from the cutting.
2. The new offence has a maximum penalty of \$6,000 for an individual and \$30,000 for a corporation and may also be dealt with by way of a penalty notice.
3. This Regulation also provides for an existing offence to be dealt with by way of a penalty notice. That offence relates to a failure by a person who conducts a business or undertaking to give a health monitoring report of a worker to the regulator under the *Work Health and Safety Act 2011*.
4. This Regulation is made under the *Work Health and Safety Act 2011*, including sections 243 and 276 (the general regulation-making power) and clause 4 of Schedule 3.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offence

5. On 18 June 2020, the Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP, introduced the *Work Health and Safety (Information Exchange) Bill 2020* into Parliament. In the second reading speech, the Minister noted that the NSW Government is in the process of implementing a comprehensive, multi-agency strategy aimed at addressing the rise of diagnoses of the respiratory lung disease, silicosis.
6. Silicosis is caused by inhaling respirable crystalline silica dust, which is a mineral present in a range of building material, including manufactured stone, and produced when these materials are cut or drilled. Silicosis can significantly damage lung functionality, and in some cases, be fatal. The disease can develop quickly, and has been observed in workers within a few months of exposure to high concentrations of silica.

7. The Minister stated that until recently this disease had been relatively rare but that diagnoses have been rising due to the use of manufactured stone in housing and construction, particularly for benchtop material in kitchens, bathrooms and laundries.
8. The Regulation commences on 1 July 2020, and is part of the Government's strategy to address silicosis. In particular, schedule 1, item 1 of the Regulation amends the *Work Health and Safety Regulation 2017* to introduce a new offence. It provides that a person conducting a business or undertaking (PCBU) at a workplace must not direct or allow a worker to cut manufactured stone containing crystalline silica with a power tool unless:
 - Each worker who may inhale dust from the cutting is wearing respiratory protective equipment that:
 - i. protects the worker from the inhalation of the dust, and
 - ii. complies with AS/NZS 1716–2012, Respiratory protective devices, and;
 - At least 1 of the following controls to effectively reduce exposure to the dust is in place and is properly designed, installed, used and maintained:
 - i. a water delivery system that supplies a continuous feed of water over the area being cut to suppress the generation of dust,
 - ii. a prescribed extraction system that is attached to the tool used for the cutting to capture the dust produced by the cutting,
 - iii. a local exhaust ventilation system that captures the dust produced by the cutting and transports the dust to a safe emission point or to a filter or scrubber.
9. The maximum penalty for contravening these provisions is \$6000 in the case of an individual, and \$30,000 in the case of a body corporate.

The Regulation creates a strict liability offence if a person conducting a business or undertaking at a workplace directs or allows a worker to cut manufactured stone containing crystalline silica with a power tool unless certain controls are in place to protect workers from inhaling the dust from the cutting. The maximum penalty for contravening these provisions is \$6000 for an individual and \$30,000 for a corporation.

The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In this case, the offence is part of the Government's strategy to combat a rise in diagnoses of the potentially fatal occupational disease, silicosis. Further, the maximum penalties for the offence are monetary, not custodial. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

10. As above, the Regulation creates a new offence to ensure that workers cutting manufactured stone are protected from silicosis.

11. Schedule 1, item 2 of the Regulation also amends Schedule 18A of the *Work Health and Safety Regulation 2017* to provide that:

- this offence can be dealt with by way of penalty notice, and
- an existing offence under clause 376 of the *Work Health and Safety Regulation 2017*, that occurs where a PCBU fails to give a health monitoring report of a worker to the regulator under the *Work Health and Safety Act 2011*, can be dealt with by way of penalty notice.

12. If these offences are dealt with by penalty notice, the amount payable would be \$720 for an individual and \$3600 for a corporation.

As above, the Regulation creates a new offence to ensure that workers cutting manufactured stone are protected from silicosis. The Regulation also provides that this new offence can be dealt with by way of penalty notice.

In addition, the Regulation provides that an existing offence under the *Work Health and Safety Regulation 2017* that occurs where a person conducting a business or undertaking fails to give a health monitoring report of a worker to the regulator under the *Work Health and Safety Act 2011*, can be dealt with by way of penalty notice. If these offences are dealt with by penalty notice, the amount payable would be \$720 for an individual and \$3600 for a corporation.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, 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

13. As above, the Regulation amends the *Work Health and Safety Regulation 2017* to insert a new offence to ensure that workers cutting manufactured stone are protected from silicosis. As also mentioned, the maximum penalty for contravening these provisions is \$6000 in the case of an individual, and \$30,000 in the case of a body corporate.

The Regulation amends the *Work Health and Safety Regulation 2017* to insert a new offence to ensure that workers cutting manufactured stone are protected from silicosis. The maximum penalty for contravening these provisions is \$6000 in the case of an individual, and \$30,000 in the case of a body corporate.

The Committee generally prefers significant matters, such as the creation of new offences with significant penalties, to be dealt with in primary rather than

subordinate legislation. This is to foster an appropriate level of parliamentary oversight over the provisions. The Committee refers this matter to Parliament for 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.