



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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

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# Membership

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# Guide to the Digest

## COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

## COMMENT ON REGULATIONS

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

# Conclusions

## PART ONE – BILLS

### 1. COMMUNITY LAND MANAGEMENT BILL 2020; COMMUNITY LAND DEVELOPMENT BILL 2020

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

##### *Significant increase in penalty for by-law breaches*

The *Community Land Management Bill 2020* provides that the NSW Civil and Administrative Tribunal (the Tribunal) may impose a civil penalty for a breach of by-laws for a community, precinct or neighbourhood scheme. In the case that an association for the scheme has given a person notice to comply with a by-law and that person has since contravened the by-law, the Tribunal may impose a penalty of up to \$1,100 (proposed subsection 138(1)), or up to \$2,200 if the person breaches the by-law again within 12 months of the Tribunal's first order (proposed subsection 138(2)).

Further, proposed subsection 138(3) provides that notwithstanding subsections 138(1) and (2), in dealing with a contravention of a by-law, the Tribunal may impose a penalty of up to \$5,500 under proposed subsection 138(1) and a penalty of up to \$11,000, under proposed subsection 138(2).

The provisions do not specify in what circumstances the Tribunal may impose the higher penalties upon a person. This may constitute an unreasonably harsh penalty, particularly where it is the first time a person has contravened a by-law under proposed subsection 138(1). The Committee refers these provisions to Parliament for consideration.

##### *Strict liability offences*

Proposed Division 3 of Part 4 of the Bill covers the accountability of managing agents of community, precinct and neighbourhood schemes, providing that the association for the scheme can require the managing agent to provide certain information including information about trust accounts and other accounts (proposed section 62); and information about money received and other transactions (proposed section 63). Further, proposed section 66 provides that a managing agent must comply with a notice to provide such information within 14 days after the notice is given. The maximum penalty for not complying with this provision is a \$2,200 fine.

Proposed section 75 of the Bill also provides that persons to be appointed as the managing agent or facilities manager for a scheme must disclose certain interests, such as a pecuniary interest in the scheme before their appointment or be liable to a maximum penalty of a \$5,500 fine.

These are strict liability offences and so derogate from the common law principle that *mens rea* (the mental element of a crime) must be proved to hold a person liable for an offence. However the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. The Committee also notes that a person cannot be found guilty of failing to comply with a notice under proposed section 66 if reasonable cause for the failure is shown. In the circumstances, the Committee makes no further comment.

*Representation at mediation*

Proposed Part 11 of the *Community Land Management Bill 2020* deals with the resolution of disputes in schemes and the powers of the Tribunal. Division 2 of that Part sets out procedures for alternative dispute resolution by the Secretary. Under this Division, proposed section 181 provides that a party to a dispute is not entitled to be represented by another person at a mediation session unless all other parties consent to the representation.

The Committee notes that the provision applies in the context of civil disputes, rather than criminal matters where a person has a right to legal representation, and applies only to the mediation process under proposed Part 11, and not to Tribunal proceedings. Mediation is a more informal method of dispute resolution and the absence of representatives may assist parties to resolve disputes with as little formality as possible.

However, the Committee considers that the provision may impact on parties' access to a legal representative in the course of a legal dispute, and may have a particular impact on certain members of the community who may find it harder than most to present their side of the case without assistance, for example, people with little formal education or people with intellectual disability. The Committee refers the provision in question to Parliament for consideration.

*Right to privacy*

As noted, proposed Part 11, Division 2 of the *Community Land Management Bill 2020* sets out procedures for alternative dispute resolution by the Secretary, for disputes in schemes.

Proposed section 184 of that Division provides that a mediator may disclose information obtained in connection with the administration or execution of the Division in certain circumstances. These circumstances include where consent has been given by the person from whom the information was obtained; if the disclosure is in connection with the administration or execution of the Division; if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of personal injury or property damage; if the disclosure is reasonably required to refer a party to a mediation to an appropriate entity and the disclosure is made with the consent of parties to the mediation to aid resolution of the dispute; or in accordance with a State or Commonwealth law.

While the disclosure of confidential information may impact on a person's right to privacy, the Committee considers that the situations in which confidential information may be disclosed under proposed section 184 are reasonable and proportionate. In the circumstances the Committee makes no further comment.

*Powers of entry without warrant*

Part 12 Division 1 of the *Community Land Management Bill 2020* deals with offences and enforcement powers under the proposed Act. Proposed section 209 sets out the investigation powers of the Secretary. Under subsection 209(1), if the Secretary believes on reasonable grounds that an offence under the proposed Act has been or may be committed, the Secretary can exercise certain powers to investigate the grounds for the belief. These include entering the association or common property; and entering a neighbourhood or strata lot at a reasonable time on notice given to the occupier.

The Committee notes that there appears to be no requirement to obtain a warrant before exercising these powers. This is of particular note with respect to the Secretary's power to enter individual neighbourhood or strata lots. The Committee acknowledges the safeguards

that do apply under the Bill. First, there is an objective test that the Secretary must satisfy – he or she must believe on reasonable grounds that an offence under the proposed Act has been or may be committed before exercising the powers. Further, where individual neighbourhood or strata lots are concerned, the Secretary can only exercise the power of entry at a reasonable time, and on notice given to the occupier.

Nonetheless, the Secretary's power to enter individual neighbourhood or strata lots without having to obtain a warrant may unduly impact on the right to be free from arbitrary interference. Therefore, the Committee refers the provision in question to Parliament for consideration.

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

*Wide power of delegation*

Proposed section 218 of the *Community Land Management Bill 2020* provides that the Secretary may delegate the exercise of any of his or her functions under the proposed Act, other than the power of delegation, to any member of staff of the Department of Customer Service, or to any person, or any class of persons, authorised for the purposes of the section by the regulations.

The Committee notes that delegation is not restricted to employees with a certain level of seniority or expertise. Further, the Secretary's functions under the proposed Act are significant and will affect rights and obligations e.g. investigating and attempting to resolve complaints and disputes relating to schemes, and prosecuting offences under the proposed Act or regulations. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers to Parliament the question of whether the provision in question makes rights and obligations unduly dependent on insufficiently defined administrative powers.

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

*Commencement by proclamation*

The *Community Land Management Bill 2020* and the *Community Land Development Bill 2020* are to commence on proclamation. The Committee prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected. However, the Committee acknowledges the detailed administrative arrangements that will be required to set the new community scheme laws into motion. A flexible start date may facilitate such a process. In the circumstances, the Committee makes no further comment.

*Offences and penalties to be set by regulation*

Proposed subsection 233(1) of the *Community Land Management Bill 2020* provides that the Governor may make regulations, not inconsistent with the proposed Act, for or with respect to any matter that by the proposed Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the proposed Act.

Further, proposed subsection 233(2)(j) provides that the regulations so made may make provision for or with respect to requiring persons to provide information about community, precinct and neighbourhood schemes to the Secretary, including for the purposes of the Secretary making that information publicly available on the internet or in any other way.



In addition, proposed subsection 233(3)(i) provides that the regulations made under subsection 233(2)(j) to require persons to provide information, may also prescribe offences, with a penalty not exceeding a \$5,500 fine, for failing to comply.

The Committee prefers significant matters, such as the creation of offences, to be dealt with in primary legislation to foster increased opportunity for parliamentary scrutiny and debate over whether the conduct in question should be punishable, and if so, what penalties are appropriate. The Committee also notes that in this case, the maximum penalty that could be set by the regulations – a \$5,500 fine – is not insignificant. The Committee refers the provisions in question to Parliament for consideration.

*Matters that should be included in primary legislation*

The *Community Land Development Bill 2020* and the *Community Land Management Bill 2020* delegate certain matters to the regulations. For example, proposed section 12 of the *Community Land Development Bill 2020* sets out the required documents to register a scheme plan to establish a community, precinct or neighbourhood scheme, including “any documents prescribed by the regulations”. Similarly, proposed section 46 sets out what a development contract must contain, including “any documents or other particulars, information or matter prescribed by the regulations”. The Committee notes that these are significant matters affecting the establishment of schemes, and the disclosure of details of future developments for schemes. However, they are also administrative in nature that the regulations may afford flexibility to address. Given this, the Committee considers it is reasonable, as is the case here, to provide for the requirements in primary legislation, whilst also allowing for the regulations to provide for additional requirements.

Regarding the *Community Land Management Bill 2020*, proposed Schedule 1 would allow the regulations to make provision for or with respect to the means of voting (other than in person) that may be adopted by an association, the procedures for voting by those means, and prohibiting the use of specified means of voting (proposed sub clause 27(2)); and the procedures for a secret ballot (proposed sub clause 28(2)). Again, the Committee considers that these are predominantly administrative matters that the regulations may afford flexibility to address, and makes no further comment in respect of these provisions.

However, the Committee also notes that proposed section 29 of the *Community Land Management Bill 2020* would permit the regulations to provide for the circumstances when a person is a resident of a lot for the purposes occupancy limits within an association scheme by-law. This definition would impact those subject to these occupancy limits, and may thereby affect their living arrangements. It may therefore be more suitably dealt with in primary legislation to foster a greater level of parliamentary oversight over the requirements set. The Committee refers this section to the Parliament for its consideration.

2. CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT (COERCIVE CONTROL – PREETHI'S LAW) BILL 2020\*

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

*Lack of certainty*

Schedule 1 to the Bill seeks to insert a new section 14A into the *Crimes (Domestic and Personal Violence) Act 2007* to create an offence of engaging in conduct that constitutes “coercive control” of another person with whom the person has, or has had, a domestic relationship. The offence would have a maximum penalty of imprisonment for 5 years, or a \$5,500 fine, or

both. If it were committed in circumstances of aggravation it would have a maximum penalty of imprisonment for 10 years, or a fine of \$13,200 or both (proposed section 14B).

Proposed section 14A(2) defines such “coercive control” broadly to include conduct that has, or is reasonably likely to have, certain effects including “making the other person dependent on, or subordinate to, the person”; “controlling, regulating or monitoring the other person’s day to day activities”; “depriving the other person of, or restricting the other person’s, freedom of action”; and “frightening, humiliating, degrading or punishing the other person”.

The Committee notes that these are quite vague concepts. The Committee would prefer offence provisions, particularly those with potential terms of imprisonment attached, to be drafted with sufficient specificity so that their scope and content is clear. This enables people a clear idea of the conduct outlawed so that they may regulate their conduct accordingly. The Committee acknowledges that proposed section 14D creates a defence of reasonableness to the new offences, and that the Bill aims to reduce rates of domestic abuse. However, the Committee refers the Bill to Parliament to consider whether the broadly defined new offences would impact unduly on principles of legal certainty.

### 3. GOVERNMENT SECTOR EMPLOYMENT AMENDMENT (TELEWORKING) BILL 2020\*

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

##### *Matters deferred to the rules*

The Bill amends the *Government Sector Employment Act 2013* to require the Public Service Commissioner to make government sector employment rules regarding teleworking arrangements within 12 months of the proposed Act receiving assent. The rules would deal with a number of matters including the suitability criteria which apply (including in relation to work health and safety), requirements for monitoring and review of employees, and termination of teleworking arrangements.

The Bill may thereby insufficiently subject the exercise of legislative power to parliamentary scrutiny. Unlike the regulations, which are made by the Governor, there appears to be no requirement under the *Interpretation Act 1941* for the rules relating to teleworking arrangements to be tabled in Parliament and subject to disallowance. Of particular note is the fact that the Bill also provides that the rules relating to teleworking arrangements prevail to the extent of any inconsistency with regulations under the Act.

The Committee acknowledges the administrative convenience of deferring appropriate matters to the rules, noting that the existing *Government Sector Employment Rules 2013* appear to deal with similar issues, such as merit-based assessments and performance management. However, the rules may affect the working conditions of a large workforce and should be subject to an appropriate level of parliamentary scrutiny. In the circumstances, the Committee refers these matters to Parliament for consideration, particularly the provision allowing the rules to prevail over the regulations to the extent of any inconsistency.

### 4. HEALTH LEGISLATION (MISCELLANEOUS AMENDMENTS) BILL 2020

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

##### *Procedural fairness – public warnings*

Schedule 1, item 25 of the Bill builds on the existing warning mechanism in section 94A of the *Health Care Complaints Act 1993* which allows the Health Care Complaints Commission (HCCC) during or after an investigation to issue a public statement about a particular treatment or health service, identifying and giving warnings or information about that treatment or health service which the HCCC believes is necessary to protect public health or safety. The Bill would introduce a modified s94A which would allow the HCCC to specifically name a health care practitioner or health service organisation in such a warning.

Part 2, Division 6A of the *Health Care Complaints Act 1993* currently has a number of protections in place for health practitioners who are the subject of prohibition orders and public statements under section 41A. An investigation must be completed before such orders or statements are made (section 41A); reasons must be given (section 41B); and health practitioners can seek review of decisions in the NSW Civil and Administrative Tribunal (section 41C).

In contrast, proposed section 94A would attract none of these protections. As a result, health service providers who are the subject of such a warning may not have access to procedural fairness for allegations made against them which is inconsistent with other provisions in the Act. In particular, an early and inaccurate warning could harm the health provider's reputation and financial health, with no opportunity to test any allegations or belief held by the HCCC before a competent Court or Tribunal.

The Committee acknowledges that in certain circumstances swift action may be required to ensure that the public is aware that a particular health service provider may pose a danger. Further, the amendments in question follow findings by the NSW Parliament's Joint Committee on the HCCC ("the Joint Committee") as part of its inquiry into cosmetic health service complaints that the HCCC should have power to issue warnings about specific health service providers to protect the public. However, given the potential for reputational and financial damage caused by public ventilation of a false warning, the Committee refers the provisions in question to Parliament to consider whether the powers are reasonable in the circumstances, and whether the provisions as drafted adequately safeguard rights to procedural fairness.

#### *Procedural fairness – notification to employers of possible contravention*

Schedule 2, item 6 of the Bill proposes to insert a new section 176BB into the *Health Practitioner Regulation (Adoption of National Law) Act 2009* which would require a health professional Council to notify each employer and accreditor of a registered health practitioner if the Council suspends the registered health practitioner's registration (proposed section 176BB(1)). Similarly, it would provide that if a Council "reasonably believes" that a registered health practitioner has contravened a condition imposed on the practitioner's registration, the Council may, if it considers appropriate, give written notice of the alleged contravention to each employer or accreditor of the practitioner (proposed section 176BB(2)).

The amendments contained in proposed section 176BB(2) may impact on a practitioner's right to procedural fairness. Currently, under section 150A of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* a practitioner can apply to a Council for a review of a decision of the Council under section 150 to suspend his or her registration. In contrast, the practitioner could not appeal or interject where a Council notified his or her employer or accreditor that the Council "reasonably believes" a condition on their registration has been breached under proposed section 176BB(2). Such a notification could cause reputational or financial damage, similar to any damage caused by notification about a suspension.

However, the Committee notes that in certain circumstances swift action may be required to ensure that employers and accreditors are aware of practitioners who may pose a danger to the public, and that it may be beneficial if Councils can notify employers and accreditors of suspected breaches without having to undertake a time consuming process. Further, the amendments seek to implement recommendations of the Furness Review which reported in January 2019, and increase the amount of information that health professional Councils provide to employers. Due to the fact that the notification would be insulated within the employer/accreditor/practitioner circle (and not made public), the risk of reputational and financial damage is minimised. In the circumstances, the Committee makes no further comment.

#### *Procedural fairness – access to documentation*

Schedule 1, item 29 of the Bill would amend the *Health Care Complaints Act 1993* to provide that a health professional Council, or a person exercising functions on behalf of a Council, cannot be compelled in legal proceedings to give evidence about, or produce documents containing, information exchanged between a Council and the HCCC under the *Health Care Complaints Act 1993* or the *Health Practitioner Regulation National Law (NSW)*.

This may impact on the right of practitioners to procedural fairness. Where a practitioner cannot access evidence relevant to an allegation made against him or her in legal proceedings, his or her right to a fair hearing may be impacted. However, schedule 1, item 31 would insert a new section 99A(3)(d)(e) into the Act to provide an exception so that a Council could be compelled to produce documents in proceedings under the *Health Practitioner Regulation National Law (NSW)* if the professional Council is a party to the proceedings and the information is necessary for the just and equitable resolution of the proceedings. Given this safeguard, the Committee makes no further comment.

#### *Search without warrant*

Schedule 1, items 13, 14 and 16 of the Bill, would amend sections 32 and 33 of the *Health Care Complaints Act 1993* to modify the circumstances under which an authorised officer of the HCCC could exercise certain entry, search and seizure powers for the purposes of the investigation of a complaint by the HCCC.

Section 32 currently provides that an authorised person may not enter any premises and exercise the search and seizure functions under section 33 except with the consent of the owner or occupier of the premises or under the authority of a search warrant. The amendments would mean that an authorised person would still require the occupier's consent or a search warrant to enter residential premises and exercise their search and seizure powers under section 33. However, they would no longer require a warrant or such consent with respect to all other forms of premises.

Schedule 1, item 22 of the Bill would also amend the *Health Care Complaints Act 1993* to insert a new Part 3A. Under the new Part, the HCCC could exercise search and entry powers to assess a person's compliance with a "relevant matter" (proposed section 63E). A relevant matter is defined to include an interim prohibition order or a prohibition order, or certain recommendations made by the HCCC. Again, an authorised person could not enter residential premises and exercise the search and seizure powers conferred under the new Part 3A except with the consent of the occupier or under the authority of a search warrant (proposed section 63D), but there appears to be no such requirement in respect of other premises.

By broadening the circumstances under which authorised officers can exercise their powers of entry and search and seizure, and providing that a warrant or consent is not required for non-residential premises, the Bill may impact on property and privacy rights and the right to be free from arbitrary interference. The requirement for a warrant to be issued before entry, search and seizure of goods occurs is designed to ensure there is just cause for the exercise of such powers.

The Committee acknowledges that there would still be a requirement to obtain a warrant, or the occupier's consent, to exercise the powers in respect of residential premises. Further, the amendments around warrants implement recommendations of the Joint Committee as part of its inquiry into cosmetic health service complaints. However, the Committee refers the matter to Parliament for consideration.

#### *Privilege against self-incrimination and right to silence*

As noted, Schedule 1, item 22 of the Bill would amend the *Health Care Complaints Act 1993* to insert a new Part 3A. In addition to giving the HCCC powers of entry to assess compliance in relation to a "relevant matter" Part 3A would also give the HCCC the power to require the production of documents and the answering of questions for this purpose (proposed section 63G).

In short, under the proposed new section 63G, it would be an offence, punishable by a maximum penalty of a \$22,000 fine, to fail without reasonable excuse to give the HCCC information or evidence, or to produce documents to the HCCC when required to do so to assist the HCCC's assessment of compliance with a "relevant matter". Further, Schedule 2, item 3 of the Bill would provide that breach by a registered health practitioner of proposed section 63G would be unsatisfactory professional conduct.

In addition, the operation of proposed section 63G(3) would mean that a person could not object to giving the HCCC information or evidence, or producing documents on the grounds this may incriminate the person or expose them to a penalty.

These provisions impact on the privilege against self-incrimination and the right to silence. In noting this, the Committee acknowledges that forced production of information may have benefits for the public as regards health and safety. Further, certain safeguards apply because of the operation of proposed section 63G(3). While a person could not object to giving the HCCC information or evidence, or producing documents on the grounds this may incriminate the person, any information or answer given in compliance with a requirement under proposed section 63G would not generally be admissible in evidence against the person in any civil or criminal proceedings if the person raises an objection or was not warned appropriately that s/he could object.

However, any document produced by a person in compliance with a requirement under proposed section 63G would not be inadmissible in evidence against the person in any proceedings on the ground that the document might incriminate the person. In the circumstances, the Committee refers the provisions in question to Parliament to consider whether they appropriately protect the right to silence and privilege against self-incrimination.

#### *Right to personal physical integrity - forced medical testing*

Schedule 6, items 3 to 5 of the Bill would amend section 61 of the *Public Health Act 2010*. If so amended, section 61 would apply if the Secretary of the Ministry of Health knows, or suspects

on reasonable grounds that a person has a Category 4 or 5 condition; and considers that the person may, on that account be a risk to public health; and considers that the nature of the condition warrants medical examination or testing relating to the condition.

In these circumstances, the Secretary may, by notice in writing, direct the person concerned to undergo, within a specified period, a specified kind of medical examination or test relating to the Category 4 or 5 condition. Failure to do so can expose the person to a maximum penalty of a \$5,500 fine. Category 4 conditions are defined to include a range of conditions including COVID-19 and tuberculosis. A category 5 condition is defined to mean the Human Immunodeficiency Virus (HIV) infection.

By requiring a person to submit to a medical examination or test, the provisions may unduly trespass on the right to personal physical integrity. The Committee acknowledges that the provisions are intended to protect public health by assisting to determine whether a public health order is necessary in respect of a person. However, Article 7 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that “no one shall be subjected, without his free consent, to medical or scientific experimentation”. This approach is broadly reflected in NSW Health’s policy directives which place an emphasis on the consent of the patient. The Committee refers the provisions in question to Parliament to determine whether they are reasonable and proportionate in the circumstances.

#### *Strict liability offences and increased maximum penalties*

The Bill significantly increases existing maximum penalties for strict liability offences under the *Health Care Complaints Act 1993* and the *Public Health Act 2010*. 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.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, it appreciates that penalties have been increased under the Bill in response to concerns that the current penalties did not reflect the seriousness of certain offences. For example, furnishing false or misleading information to the HCCC currently attracts a maximum penalty of a \$2,200 fine under section 99 of the *Health Care Complaints Act 1999*. This would be increased to a maximum penalty of a \$22,000 fine under schedule 1, item 7 of the Bill.

However, the Committee also notes that some of the strict liability offences in question carry a custodial sentence. In particular, schedule 6, item 16 of the Bill would amend section 102(3) of the *Public Health Act 2010* to triple the maximum custodial penalty for the offence of providing a health service in contravention of a prohibition order. The Committee refers these matters to Parliament to consider whether the significantly increased penalties under the Bill are reasonable and proportionate in the circumstances, particularly as they relate to strict liability offences and custodial sentences.

#### 5. LIQUOR AMENDMENT (RIGHT TO PLAY MUSIC) BILL 2020\*

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

##### *Right of community members to participate in planning decisions*

The Bill seeks to amend the *Environmental Planning and Assessment Act 1979* to provide that a consent authority that is a council may modify conditions of a development consent relating to the performance of music on licensed premises by publishing a notice on the council’s website.

The council may declare that the conditions do not apply to a local government area, a specified use of land in the local government area, or a suburb in the local government area.

Further, the Bill would exempt councils from the Act's current community consultation requirements. Councils could modify the conditions in the development consents relating to the performance of music on licensed premises without having to fulfil community notification requirements or requirements to consider any submissions made concerning the proposed modifications. In so doing, the Bill impacts on community rights to participate in decision-making about these local planning matters. The Committee appreciates that the Bill seeks to stimulate the live music industry in NSW, and to create jobs. However, the Committee refers the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.

6. LOCAL LAND SERVICES AMENDMENT (LAND MANAGEMENT AND FORESTRY) BILL 2020\*

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

*Potential to override existing consents or decisions of the Court - rights of applicants and other interested parties*

The Bill seeks to amend the *Local Land Services Act 2013* (LLS Act) so that in the event of an inconsistency between certain provisions of the LLS Act and a consent granted under the *Environmental Planning and Assessment Act 1979* (EP&A Act), the relevant provision in the LLS Act would prevail. Specifically, Parts 5A (Land Management (Native Vegetation)), Part 5B (Private native forestry) and Schedule 5A (Allowable clearing of native vegetation) would prevail in the event of an inconsistency.

The Bill could potentially affect existing legal rights relating to development. For instance, in some cases the conditions of a development consent may be determined by a court in the context of an appeal brought by a party who has objected to the original consent on environmental grounds. The Bill could also have some unforeseen implications for developers who have already obtained a consent. It is noted that obtaining a development consent, or contesting or defending a development consent in court proceedings, often takes significant time and resources.

Given that many complex and technical provisions of the LLS Act are captured by the new provisions, it is not immediately clear how the rights of developers and environmental groups could be affected. In the circumstances, the Committee refers this matter to the Parliament for consideration.

7. RESTART NSW FUND AMENDMENT (RURAL AND REGIONAL INFRASTRUCTURE FUNDING) BILL 2020\*

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

8. STATE INSURANCE AND CARE GOVERNANCE AMENDMENT (EMPLOYEES) BILL 2020\*

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

*Freedom of contract*

The Bill proposes to amend the *State Insurance and Care Governance Amendment (Employees) Bill 2020* to give the Minister the ability to determine the pay and employment conditions for

all employees at Insurance and Care NSW (ICNSW), including senior executives and the Chief Executive. The Minister would have the power to set the pay and conditions of these employees through regulations and other forms of approval provided that the terms set do not breach any industrial agreement, award, enterprise agreement or other law, and notwithstanding any contractual terms negotiated privately between the employee and ICNSW. The Bill would also prohibit any ICNSW employees from earning performance-related bonuses or incentive payments under their contracts.

The Bill may thereby impact on freedom of contract because the Minister, not ICNSW, has the ultimate power to determine pay and conditions for those employed directly by ICNSW; and because ICNSW and employees would no longer be able to negotiate terms involving the prohibited bonuses. The Committee generally comments on restrictions on freedom of contract as they limit the ability of parties to determine the contractual terms to which they are subject. In this case they may have some impact on the ability of ICNSW to compete with the private sector in attracting candidates.

However, the Committee acknowledges that the Bill seeks to ensure Ministerial oversight over employment terms and thereby balance ICNSW's employment costs with other considerations such as minimising workers' compensation premiums for employers and ensuring sufficient funds are available to compensate sick and injured employees. The Committee also notes that limitations on freedom of contract are not uncommon in the area of employment law e.g. the various awards and industrial agreements that exist to define the minimum terms of employment in an industry or occupation.

Similarly, ICNSW is a NSW Government agency and limits on freedom of contract are not uncommon where remuneration for executives who run state owned entities is concerned. For example, the *State Owned Corporations Act 1989* currently provides that, while acting in the office of a chief executive officer, a person is entitled to be paid such remuneration as the Minister may from time to time determine in respect of the person. In the circumstances, the Committee refers the provisions limiting freedom of contract to Parliament to determine whether they are reasonable and proportionate in the circumstances.

#### *Retrospectivity*

The Bill proposes to prohibit the payment of performance-related bonuses or incentive payments to ICNSW employees, including executives and the Chief Executive. These reforms are intended to impact contracts which are already on foot (with some possible exceptions), notwithstanding the fact that those contracts may provide for a bonus or incentive payment to be made. This proposed modification of contracts on foot is a retrospective amendment.

The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time, including when contracts are negotiated. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations, as is the case here. The Committee acknowledges the objectives of the Bill. That notwithstanding, the Committee refers the element of retrospectivity in the Bill to Parliament to consider whether it is reasonable in the circumstances.

#### 9. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL 2020

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



### *Industrial rights*

Schedule 1.2 to the Bill seeks to extend section 14A of the *Annual Holidays Act 1944*, (which allows a local council and an employee of the local council to agree to the employee receiving a payment in lieu of annual holidays, or taking annual holidays at double or half pay) to county councils and joint organisations and their employees.

By extending the application of a provision that allows an employee to receive payment in lieu of annual holidays, the Bill may impact on industrial rights. In particular, it may encourage some employees, particularly lower paid employees, to forego recreational time for monetary reasons. The Committee also notes that while employees must consent before they are paid in lieu of annual holidays, it is possible that in a particular case an employee could feel pressure from their employer to consent to such an arrangement. The Committee refers these matters to Parliament for consideration.

### *Penalty notice offences – right to a fair trial*

Schedules 1.11, 1.32 and 1.36 of the Bill amend the penalty notice provisions in the *Contaminated Land Management Act 1997*; the *Pesticides Act 1999*; and the *Protection of the Environment Operations Act 1997* respectively. In particular, these amendments apply the *Fines Act 1996*, as amended by the *Fines Amendment (Electronic Penalty Notices) Act 2016* to penalty notices issued under the three Acts. If a person is issued with a penalty notice under the Acts and does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.

The Committee identifies that penalty notices may impact on a person's right to a fair trial, notably the automatic right to have their matter heard by an impartial decision maker in public with the opportunity to put forward their side of the case. Further, it notes that some of the amounts payable under the penalty notice provisions in question may be quite significant – as high as \$15,000.

However, the Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the Bill does not prevent a person from electing to have their matter proceed to court. In addition, each of the three Acts in question already contain penalty notice provisions – the Bill does not introduce new provisions but is merely updating existing provisions for consistency with other legislation. In the circumstances, the Committee makes no further comment.

### *Procedural fairness*

As noted, schedules 1.32 and 1.36 to the Bill amend the penalty notice provisions in the *Pesticides Act 1999* and the *Protection of the Environment Operations Act 1997* respectively. In addition to the matters already identified, these schedules provide that where a penalty notice is issued under these Acts, it can be so issued by leaving it on a vehicle or at premises in respect of which the offence was committed.

The Bill may thereby have some impact on procedural fairness – it is important that people are appropriately served with the penalty notices so that they might respond, and leaving a notice on a vehicle or at premises may be a less reliable method of service. However, the Committee understands that Revenue NSW sends reminder notices where a person has not paid a fine within the relevant period, and persons can elect to pay the fine without any additional

penalty, or to go to court, until that reminder notice has expired. Given these safeguards the Committee makes no further comment.

*Threshold to commence prosecutions*

Schedule 1.34, item 1 of the Bill seeks to amend section 8 of the *Prevention of Cruelty to Animals Act 1979* to remove the requirement for the prosecution to obtain advice from both Local Land Services and Regional NSW about the state of a stock animal and the appropriate care for it before commencing proceedings for an offence of failing to provide the animal with food, drink or shelter. Instead, the prosecution will only be required to obtain advice from Local Land Services.

The Bill thereby lowers the threshold to commence prosecutions in these matters. However, the Committee notes that the prosecution would still have to obtain advice from Local Land Services before commencing such a prosecution, and that the Bill does not alter any other provisions relating to the prosecutions, that is, the prosecution would still have to prove all elements of the offence under section 8 before a person can be exposed to any penalty. In the circumstances, the Committee makes no further comment.

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

*Wide powers of delegation*

There are some instances in the Bill where Ministers are granted wide powers of delegation. For example, schedule 1.24, item 1 of the Bill seeks to amend section 21 of the *Health Administration Act 1982* so that the Minister for Health and Medical Research can delegate to any person his or her power under section 23 to approve the disclosure of information obtained in connection with the conduct of research or investigations into morbidity or mortality occurring within NSW. The Committee notes that such information may include sensitive details which may have privacy impacts for individuals. Further, there are no restrictions on this power to delegate e.g. restricting delegation to people with certain qualifications or expertise.

Similarly, schedule 1.42 of the Bill seeks to amend section 205 of the *Retirement Villages Act 1999* so that the Minister for Better Regulation and Innovation can delegate his or her power to issue certain compliance notices to persons employed in the Department of Customer Service. Again, there are few restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. However, in issuing such notices, the person must form a judgment about whether there has been failure to comply with conditions related to ministerial exemptions for retirement villages during the COVID-19 pandemic; and failure to comply with such a notice can result in a penalty of up to \$5,500.

In short, the exercise of the powers of disclosure and to issue compliance notices may impact on individual rights. Therefore, the Committee refers the provisions in question to Parliament to consider whether the wide powers of delegation contained therein make rights unduly dependent on insufficiently defined administrative powers.

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

*Regulations incorporating standards that are not subject to disallowance*

Schedule 1.6, item 2 of the Bill seeks to amend section 35 of the *Building and Construction Industry Security of Payment Act 1999* to enable the regulations to apply, adopt or incorporate any publication as in force at a particular time or as in force from time to time. In doing so, the Bill would allow the regulations to incorporate standards that are not subject to disallowance by Parliament. While there is a requirement under the *Interpretation Act 1987* for regulations to be tabled in Parliament and subject to disallowance, there appears to be no such requirement for the publications in question.

The Explanatory Note to the Bill states that the proposed amendment would allow for updates to the Continuing Professional Development Guidelines for Adjudicators (CPD Guidelines) and ensure that continuing professional development requirements, as informed by the CPD Guidelines, remain relevant for adjudicators. However, the Committee notes that the proposed amendment appears to go beyond that with no express limitation. The Committee refers the proposed amendment to Parliament to consider whether it would result in a case where the exercise of legislative power is not sufficiently subjected to parliamentary scrutiny.

*Ministerial orders incorporating standards that are not subject to disallowance*

Sections 7, 8 and 9 of the *Public Health Act 2010* enable the Minister for Health and Medical Research by order to give directions to deal with public health risks. Further, section 10 of the *Public Health Act 2010* provides that it is an offence not to comply with a Ministerial direction under section 7, 8 or 9 without reasonable excuse, and that the maximum penalty for this offence is an \$11,000 fine or imprisonment for 6 months or both, and in the case of a continuing offence, a further \$5,500 fine for each day the offence continues.

Schedule 1.40 to the Bill seeks to insert a new section 10A into the *Public Health Act 2010* to provide that a direction made by the Minister by order under section 7, 8 or 9 may adopt, and require compliance with, a publication in force for the time being. The Committee notes that unlike regulations, there appears to be no requirement for the ministerial orders in question to be tabled in Parliament or subject to disallowance. Further, the amendment in Schedule 1.40 would mean that such orders could incorporate, and require compliance with, publications in force from time to time and again, there appears to be no requirement for those to be tabled in Parliament or subject to disallowance either.

In short, by requiring people to comply with ministerial orders (on pain of quite significant penalties), that incorporate publications in force from time to time, neither of which are subject to tabling requirements or disallowance, schedule 1.40 of the Bill may evidence a scheme under which the exercise of legislative power is subjected to insufficient parliamentary scrutiny.

However, the Committee notes further that these provisions are intended to facilitate a flexible and timely response during public health situations, such as the current COVID-19 pandemic. In particular, by allowing ministerial orders to incorporate publications in force, orders can keep pace with rapidly evolving scientific knowledge and medical advice. Having regard to the public health context of the provisions, and the potentially serious consequences should a flexible and timely response not be forthcoming, the Committee makes no further comment.

10. WARNERVALE AIRPORT (RESTRICTIONS) REPEAL BILL 2020

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

*Commencement by proclamation*

The Bill repeals the *Warnervale Airport (Restrictions) Act 1996* on the earlier of a day to be appointed by proclamation or the day that is 2 years after the date of assent to the amending Act. Generally, the Committee prefers that Acts commence on assent or on a fixed date to provide certainty to affected parties.

However, the Bill does provide some certainty that the Act effecting the repeal would be commenced, at the latest, 2 years after the date of assent. While the Act could be commenced by proclamation at any time during the preceding period, the second reading speech suggests that the deferred commencement is designed to allow Council sufficient time to implement local planning controls, changes to the airport, and business and operations plans. In the circumstances, the Committee makes no further comment.

## PART TWO – REGULATIONS

## 1. WORKERS COMPENSATION AMENDMENT (CONSEQUENTIAL COVID-19 MATTERS) REGULATION 2020

***The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA****Restricting right to compensation – types of prescribed employment*

Clause 5D of the Regulation prescribes certain additional forms of employment for the purpose of establishing a presumption under the Act that a worker contracted COVID-19 in the course of their employment.

Although both section 19B(9) of the Act and clause 5D of the Regulation prescribe many different types of employment to which the presumption applies, some workplaces which have been considered high-risk settings for contracting COVID-19 in Victoria appear to be omitted. For example, it is not clear that the following forms of employment are captured: meat processing, medical and pharmaceutical supply, supermarket distribution and warehousing and distribution. It is also not clear that security and other staff involved in hotel quarantine are captured.

While it is possible that some of the identified industries may be classified as “retail”, which is a prescribed form of employment, the Committee notes that the potential omissions or lack of clarity may restrict access to compensation for some workers. Accordingly, the Committee refers this matter to the Parliament.

*Restricting right to compensation – types of tests*

Clause 5B of the Regulation prescribes certain tests which may be used to classify a worker as having COVID-19 for the purposes of workers compensation. Other than the nominated tests, there appear to be no clinical criteria – such as the presence of symptoms – which may enable a diagnosis of COVID-19. There also appear to be other tests which are not included in the Regulation. For instance, the Regulation appears to omit tests that may detect past rather than active infections, such as serological testing.

According to the Therapeutic Goods Administration (TGA), there is limited evidence to assess the accuracy and utility of COVID-19 tests generally. They have also noted that several SARS-Cov-2 tests have been assessed on an expedited basis.

In light of the emerging evidence around tests, the potential for false negatives, and the possibility of ongoing complications from COVID-19 after an active infection, the testing and clinical criteria for determining that a worker has COVID-19 may appear to be quite narrow. Although the TGA notes that PCR testing, which appears to be included in the Regulation, is the "gold standard" for COVID-19 diagnosis, it is possible that the current classification criteria may result in some active infections or past infections being missed. In limited circumstances, this may operate to restrict the access of some workers to compensation. In the circumstances, the Committee refers this matter to Parliament for its consideration.



## Part One – Bills

### 1. Community Land Management Bill 2020; Community Land Development Bill 2020

Date introduced	23 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

#### PURPOSE AND DESCRIPTION

1. The object of the *Community Land Management Bill 2020* is to re-enact and update legislation with respect to the management of community, precinct and neighbourhood subdivision schemes and to align the legislation with legislation applying to the management of strata title schemes.
2. The object of the *Community Land Development Bill 2020* is to repeal and re-enact the *Community Land Development Act 1989*.

#### BACKGROUND

3. The Bills were introduced into Parliament as cognate Bills. Therefore, in accordance with the Committee's usual practice, they have been considered together in the one report.
4. In the second reading speech, the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, told Parliament that the Bills modernise and update community schemes laws in NSW, completely re-writing the *Community Land Management Act 1989* and the *Community Land Development Act 1989*. The Minister explained the demarcation between each of the Bills:

The development bill has the same objects as the current Acts – primarily to facilitate the subdivision and development of land with shared property, the first phase in the life of a community scheme. The management bill becomes more important when the development phase ends, as it governs the management of community schemes, precinct schemes and neighbourhood schemes, providing for meetings and decision-making of associations and committees, the role of managing agents, insurance, financial management, dispute resolution and other needs of a scheme throughout its life.

5. Community schemes are a form of land title and the Minister also provided the following detail about how they operate:

In 1989 New South Wales enacted a world first with the introduction of community schemes legislation, offering an alternative to conventional strata scheme subdivision, by allowing shared property to be included within Torrens title land subdivisions. These laws enable communities to be developed and sold in stages. Communities often feature a particular aesthetic or theme such as a vineyard estate—popular in California and also to be found in our

own Hunter Valley, a holiday cabin, a permaculture hamlet, a retirement village or simply a building standard that is to be followed and perpetuated...

Another notable feature of community schemes is that they more often involve more mixed use than in strata, with greater diversity enabled by the tiered management structure. Every community scheme is different. Schemes range from rural subdivisions with irrigation channels as association property to large closed communities with private roads, high security and extensive recreational facilities such as marinas and golf courses.

6. The Minister also stated that there has been significant growth in community title since its introduction in 1989:

There has been significant growth in community title since its introduction in New South Wales in 1989. There are now 993 community schemes, 69 precinct schemes and 1,818 neighbourhood schemes in New South Wales, with neighbourhood and community schemes in particular expected to grow further in popularity. Strata schemes can also sit within community or precinct schemes as a subsidiary and there are now 258 such strata schemes, with over 4,000 lots in total.

7. In addition, the Minister noted the major reform process that took place around the laws governing strata schemes in NSW, which culminated in the *Strata Schemes Management Act 2015* and the *Strata Schemes Development Act 2015* that commenced in November 2016. The Minister stated that the Bills would align community schemes legislation with these strata laws where appropriate:

These reforms align the community schemes legislation with the Strata Schemes Management Act 2015 and the Strata Schemes Development Act 2015 for much-needed consistency, while accounting for important differences between strata and community title. The Community Land Management Act and the Community Land Development Act were modelled on the first strata scheme laws, as many parallels existed between the two types of land title. However, over the years community schemes laws have not kept pace with changes to the strata scheme laws, so they are now quite outdated...Of course there have also been multiple piecemeal changes to the strata laws since 2016. These bills replicate those changes to strata laws wherever they are relevant to community schemes.

8. The Minister also outlined the following particular aspects of the *Community Land Management Bill 2020* noting that:

- Parts 2 and 3 of the Bill provide for the management of schemes, updating terminology; setting out requirements for members of the association committee that manages those schemes; and outlining the roles of the chairperson, treasurer and secretary on those association committees.
- Part 4 of the Bill substantially reforms the laws governing managing agents “to bring the greater accountability that now operates in strata schemes into community schemes” that is, holding the agents “more accountable to the schemes on whose behalf they act”.
- Part 6 contains provisions for the identification and rectification of building defects, and for governance of repairs and maintenance in community, precinct and neighbourhood schemes.



- Part 11 deals with the resolution of disputes in schemes and the powers of the NSW Civil and Administrative Tribunal.
  - Part 12 deals with offences and enforcement.
9. In addition, the Minister outlined the following particular aspects of the *Community Land Development Bill 2020* stating that:
- Part 3 removes restrictions that limit associations and owners from purchasing adjoining land outside of a community, precinct or neighbourhood scheme.
  - Part 4 aims to give more freedom to community, precinct and neighbourhood schemes by allowing associations by special resolution to add land to a scheme, subdivide association property or transfer association property.
  - Part 7 makes significant changes to the way that development contracts are used. A development contract is a binding disclosure document that gives details of future development for schemes that will be completed in stages. The changes “align with similar provisions in the strata legislation, providing developers with more flexibility, while giving purchasers greater certainty about what is involved in future stages”.
  - Part 8 provides for a simplified process for subsidiary precinct and neighbourhood schemes to amalgamate with parent community schemes after the development is complete.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Significant increase in penalty for by-law breaches*

10. Proposed section 3 of the *Community Land Management Bill 2020* provides that the objects of the proposed Act are to provide for the management of community, precinct and neighbourhood schemes, and to provide for the resolution of disputes arising from those schemes. Further, proposed section 7 provides that the association for a scheme has the principal authority for management of the scheme.
11. Proposed Part 7 of the Bill provides for management statements (including by-laws) for community, precinct and neighbourhood schemes and the creation of by-laws that impose restrictions on and confer rights relating to scheme property.
12. Proposed section 138 of that Part would allow the NSW Civil and Administrative Tribunal (the Tribunal) to impose a civil penalty for a breach of the by-laws. Under subsection 138(1), the Tribunal may, on application by an association, order a person to pay a monetary penalty of up to 10 penalty units (\$1,100) if the Tribunal is satisfied that the association gave notice to the person requiring them to comply with the by-law and that the person has since contravened the by-law.
13. Further, under proposed subsection 138(2), the Tribunal may, on application by an association, order a person to pay a monetary penalty of up to up to 20 penalty units (\$2,200) if it is satisfied that the person has contravened a by-law within 12 months of

the Tribunal imposing a monetary penalty on the person for a previous breach of the by-law.

14. In addition, proposed subsection 138(3) provides that despite proposed subsections 138(1) and (2) the Tribunal may, in dealing with a contravention of a by-law, impose a penalty of up to 50 penalty units (\$5,500) under subsection 138(1) and a monetary penalty of up to 100 penalty units (\$11,000) under subsection 138(2).
15. An association may make an application for an order under subsection 138(1) no later than 12 months after the notice was given (proposed subsection 138(4)), but is not required to give notice before applying for a subsequent order under subsection 138(2) (proposed subsection 138(5)).
16. In the Second Reading Speech for the Bill, the Minister noted that this was an increase in the maximum penalties for by-law breaches and was intended to improve compliance:

The management bill also promotes better compliance by increasing the penalties for by-law breaches, with the current maximum penalty of only five penalty units, or \$550, being doubled to 10 penalty units, or a maximum fine of \$1,100. Penalties incurred by an owner can be added to the owner's levy account. Penalties are generally paid to the secretary under the Act—defined as the Commissioner for Fair Trading—but the tribunal can alternatively order that amounts be paid to the applicant, which in most cases would be the community association.

**The *Community Land Management Bill 2020* provides that the NSW Civil and Administrative Tribunal (the Tribunal) may impose a civil penalty for a breach of by-laws for a community, precinct or neighbourhood scheme. In the case that an association for the scheme has given a person notice to comply with a by-law and that person has since contravened the by-law, the Tribunal may impose a penalty of up to \$1,100 (proposed subsection 138(1)), or up to \$2,200 if the person breaches the by-law again within 12 months of the Tribunal's first order (proposed subsection 138(2)).**

**Further, proposed subsection 138(3) provides that notwithstanding subsections 138(1) and (2), in dealing with a contravention of a by-law, the Tribunal may impose a penalty of up to \$5,500 under proposed subsection 138(1) and a penalty of up to \$11,000, under proposed subsection 138(2).**

**The provisions do not specify in what circumstances the Tribunal may impose the higher penalties upon a person. This may constitute an unreasonably harsh penalty, particularly where it is the first time a person has contravened a by-law under proposed subsection 138(1). The Committee refers these provisions to Parliament for consideration.**

#### *Strict liability offences*

17. As noted, proposed Part 4 of the *Community Land Management Bill 2020* deals with managing agents for community, precinct and neighbourhood schemes, providing for their appointment and functions. It also provides for the appointment and functions of facilities managers for the schemes. According to proposed section 70, a facilities manager is a person who exercises one or more of the following functions of the association for the scheme:

- managing association property (that is, property in the scheme),
  - controlling the use of association property by persons other than owners and occupiers of lots,
  - maintaining and repairing association property.
18. Proposed Division 3 of Part 4, covers the accountability of managing agents, providing that an association can require the managing agent to provide certain information including information about trust accounts and other accounts (proposed section 62); and information about money received and other transactions (proposed section 63). Further, proposed section 66 provides that a managing agent must comply with a notice to provide such information within 14 days after the notice is given. The maximum penalty for not complying with this provision is a \$2,200 fine, however, a person is not guilty of failing to comply with the notice if reasonable cause for the failure is shown.
19. Further, proposed section 75 of the Bill provides that potential managing agents and facilities managers must disclose certain interests to the association before their appointment being:
- that the person is connected with the original owner; and
  - any direct or pecuniary interest in the scheme (other than an interest arising only from an existing or prospective appointment as the managing agent or facilities manager for the scheme).
20. The maximum penalty for not complying with proposed section 75 is a \$5,500 fine.

**Proposed Division 3 of Part 4 of the Bill covers the accountability of managing agents of community, precinct and neighbourhood schemes, providing that the association for the scheme can require the managing agent to provide certain information including information about trust accounts and other accounts (proposed section 62); and information about money received and other transactions (proposed section 63). Further, proposed section 66 provides that a managing agent must comply with a notice to provide such information within 14 days after the notice is given. The maximum penalty for not complying with this provision is a \$2,200 fine.**

**Proposed section 75 of the Bill also provides that persons to be appointed as the managing agent or facilities manager for a scheme must disclose certain interests, such as a pecuniary interest in the scheme before their appointment or be liable to a maximum penalty of a \$5,500 fine.**

**These are strict liability offences and so derogate from the common law principle that *mens rea* (the mental element of a crime) must be proved to hold a person liable for an offence. However the Committee notes that strict liability clauses are not uncommon in regulatory settings to promote compliance and strengthen offence provisions. The Committee also notes that a person cannot be found guilty of failing to comply with a notice under proposed section 66 if reasonable cause for the failure is shown. In the circumstances, the Committee makes no further comment.**

*Representation at mediation*

21. As above, Part 11 of the *Community Land Management Bill 2020* deals with the resolution of disputes in schemes and the powers of the Tribunal. Division 2 of that Part sets out procedures for alternative dispute resolution by the Secretary, defined as the Commissioner for Fair Trading, or if no one is employed as Commissioner for Fair Trading, the Secretary of the Department of Customer Service.<sup>1</sup>
22. Under this Division, proposed section 181 provides that a party to a dispute is not entitled to be represented by another person at a mediation session unless all other parties consent to the representation.

**Proposed Part 11 of the *Community Land Management Bill 2020* deals with the resolution of disputes in schemes and the powers of the Tribunal. Division 2 of that Part sets out procedures for alternative dispute resolution by the Secretary. Under this Division, proposed section 181 provides that a party to a dispute is not entitled to be represented by another person at a mediation session unless all other parties consent to the representation.**

**The Committee notes that the provision applies in the context of civil disputes, rather than criminal matters where a person has a right to legal representation, and applies only to the mediation process under proposed Part 11, and not to Tribunal proceedings. Mediation is a more informal method of dispute resolution and the absence of representatives may assist parties to resolve disputes with as little formality as possible.**

**However, the Committee considers that the provision may impact on parties' access to a legal representative in the course of a legal dispute, and may have a particular impact on certain members of the community who may find it harder than most to present their side of the case without assistance, for example, people with little formal education or people with intellectual disability. The Committee refers the provision in question to Parliament for consideration.**

*Right to privacy*

23. As noted, Part 11 of the *Community Land Management Bill 2020* deals with the resolution of disputes in schemes and the powers of the Tribunal, and Division 2 of that Part sets out procedures for alternative dispute resolution by the Secretary.
24. Under proposed section 184 of Division 2, a mediator may disclose information obtained in connection with the administration or execution of the Division in certain circumstances, including:
  - with the consent of the person from whom the information was obtained,
  - in connection with the administration or execution of the Division,
  - if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise danger of injury to a person or damage to property,

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<sup>1</sup> See Dictionary to the *Community Land Management Bill 2020*.

- if the disclosure is reasonably required for the purpose of referring a party or parties to a mediation session to a person, agency, organisation or other body and the disclosure is made with the consent of the parties to the mediation session for the purpose of aiding in the resolution of a dispute between those parties or assisting those parties in any other manner,
- in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

**As noted, proposed Part 11, Division 2 of the *Community Land Management Bill 2020* sets out procedures for alternative dispute resolution by the Secretary, for disputes in schemes.**

**Proposed section 184 of that Division provides that a mediator may disclose information obtained in connection with the administration or execution of the Division in certain circumstances. These circumstances include where consent has been given by the person from whom the information was obtained; if the disclosure is in connection with the administration or execution of the Division; if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of personal injury or property damage; if the disclosure is reasonably required to refer a party to a mediation to an appropriate entity and the disclosure is made with the consent of parties to the mediation to aid resolution of the dispute; or in accordance with a State or Commonwealth law.**

**While the disclosure of confidential information may impact on a person's right to privacy, the Committee considers that the situations in which confidential information may be disclosed under proposed section 184 are reasonable and proportionate. In the circumstances the Committee makes no further comment.**

#### *Powers of entry without warrant*

25. Part 12 Division 1 of the *Community Land Management Bill 2020* deals with offences and enforcement powers under the proposed Act. Proposed section 209 sets out the investigation powers of the Secretary. Under proposed subsection 209(1), if the Secretary believes on reasonable grounds that an offence under the proposed Act has been or may be committed, the Secretary can exercise the following powers to investigate the grounds for the belief:

- enter the association property or common property,
- enter a development lot,
- enter a neighbourhood or strata lot at a reasonable time on notice given to the occupier, or
- request an association or strata corporation to provide information to the Secretary and allow the Secretary to inspect its records under proposed Division 2 of Part 10 of the Bill.

26. Proposed subsection 209(3) provides that a person must not obstruct or hinder the Secretary or a delegate of the Secretary in the exercise of powers conferred by the proposed section and that the maximum penalty for doing so is a \$550 fine.

**Part 12 Division 1 of the *Community Land Management Bill 2020* deals with offences and enforcement powers under the proposed Act. Proposed section 209 sets out the investigation powers of the Secretary. Under subsection 209(1), if the Secretary believes on reasonable grounds that an offence under the proposed Act has been or may be committed, the Secretary can exercise certain powers to investigate the grounds for the belief. These include entering the association or common property; and entering a neighbourhood or strata lot at a reasonable time on notice given to the occupier.**

The Committee notes that there appears to be no requirement to obtain a warrant before exercising these powers. This is of particular note with respect to the Secretary's power to enter individual neighbourhood or strata lots. The Committee acknowledges the safeguards that do apply under the Bill. First, there is an objective test that the Secretary must satisfy – he or she must believe on reasonable grounds that an offence under the proposed Act has been or may be committed before exercising the powers. Further, where individual neighbourhood or strata lots are concerned, the Secretary can only exercise the power of entry at a reasonable time, and on notice given to the occupier.

Nonetheless, the Secretary's power to enter individual neighbourhood or strata lots without having to obtain a warrant may unduly impact on the right to be free from arbitrary interference. Therefore, the Committee refers the provision in question to Parliament for consideration.

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

*Wide power of delegation*

27. Proposed section 217 of the *Community Land Management Bill 2020* sets out the statutory functions of the Secretary which include:
- investigating and carrying out research into matters relating to or affecting schemes;
  - investigating and attempting to resolve complaints and disputes relating to schemes and taking any action that the Secretary thinks appropriate;
  - prosecuting an offence under the proposed Act or the regulations;
  - providing information to owners, occupiers, associations, managing agents and the public about the proposed Act and the services provided by the Secretary and the Tribunal;

- investigating and reporting on matters, or making inquiries in relation to matters, referred to the Secretary by the Minister<sup>2</sup> in connection with the proposed Act.

28. Proposed section 218 permits the Secretary to delegate the exercise of any of his or her functions under the proposed Act (other than the power of delegation) to any member of staff of the Department of Customer Service, or to any person, or any class of persons, authorised for the purposes of the section by the regulations.

**Proposed section 218 of the *Community Land Management Bill 2020* provides that the Secretary may delegate the exercise of any of his or her functions under the proposed Act, other than the power of delegation, to any member of staff of the Department of Customer Service, or to any person, or any class of persons, authorised for the purposes of the section by the regulations.**

The Committee notes that delegation is not restricted to employees with a certain level of seniority or expertise. Further, the Secretary's functions under the proposed Act are significant and will affect rights and obligations e.g. investigating and attempting to resolve complaints and disputes relating to schemes, and prosecuting offences under the proposed Act or regulations. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers to Parliament the question of whether the provision in question makes rights and obligations unduly dependent on insufficiently defined administrative powers.

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

#### *Commencement by proclamation*

29. Clause 2 of the *Community Land Management Bill 2020* and Clause 2 the *Community Land Development Bill 2020* provide that the respective Bills are to commence on a day or days to be appointed by proclamation.

**The *Community Land Management Bill 2020* and the *Community Land Development Bill 2020* are to commence on proclamation. The Committee prefers legislation affecting rights and obligations to commence on a fixed date or on assent to give certainty to those affected. However, the Committee acknowledges the detailed administrative arrangements that will be required to set the new community scheme laws into motion. A flexible start date may facilitate such a process. In the circumstances, the Committee makes no further comment.**

#### *Offences and penalties to be set by regulation*

30. Proposed subsection 233(1) of the *Community Land Management Bill 2020* provides that the Governor may make regulations, not inconsistent with the proposed Act, for or

<sup>2</sup> While "Minister" is not defined in the *Community Land Management Bill 2020*, the Minister for Better Regulation and Innovation is responsible for the administration of the current *Community Land Management Act 1989*, see *Allocation of the Administration of Acts*: <https://www.legislation.nsw.gov.au/view/html/inforce/current/si-2001-0338> viewed 2 October 2020, and the second reading speech notes that the Minister for Better Regulation and Innovation is responsible for the Community Land Management legislation.

with respect to any matter that by the proposed Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the proposed Act.

31. Further, proposed subsection 233(2)(j) provides that the regulations so made may make provision for or with respect to requiring persons to provide information about community, precinct and neighbourhood schemes to the Secretary, including for the purposes of the Secretary making that information publicly available on the internet or in any other way.
32. In addition, proposed subsection 233(3)(i) provides that the regulations made under subsection 233(2)(j) to require persons to provide information, may also prescribe offences, with a penalty not exceeding a \$5,500 fine, for failing to comply.

**Proposed subsection 233(1) of the *Community Land Management Bill 2020* provides that the Governor may make regulations, not inconsistent with the proposed Act, for or with respect to any matter that by the proposed Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to the proposed Act.**

**Further, proposed subsection 233(2)(j) provides that the regulations so made may make provision for or with respect to requiring persons to provide information about community, precinct and neighbourhood schemes to the Secretary, including for the purposes of the Secretary making that information publicly available on the internet or in any other way.**

**In addition, proposed subsection 233(3)(i) provides that the regulations made under subsection 233(2)(j) to require persons to provide information, may also prescribe offences, with a penalty not exceeding a \$5,500 fine, for failing to comply.**

**The Committee prefers significant matters, such as the creation of offences, to be dealt with in primary legislation to foster increased opportunity for parliamentary scrutiny and debate over whether the conduct in question should be punishable, and if so, what penalties are appropriate. The Committee also notes that in this case, the maximum penalty that could be set by the regulations – a \$5,500 fine – is not insignificant. The Committee refers the provisions in question to Parliament for consideration.**

*Matters that should be included in primary legislation*

33. A number of provisions in the *Community Land Management Bill 2020* and the *Community Land Development Bill 2020* delegate matters to the regulations. Some examples of these have been set out below.
34. As noted earlier, in the second reading speech the Minister stated that the *Community Land Development Bill 2020* is a Bill primarily to facilitate the subdivision and development of land within shared property. Consequently, the Bill sets out various requirements to establish a community, precinct or neighbourhood scheme (proposed Part 2), subdivide and create lots in the scheme (proposed Part 3), and requirements for development contracts – that is, a binding disclosure document that gives details of future development for schemes that will be completed in stages (proposed Part 7).



35. For example, to establish a scheme under proposed Part 2, a person must register a scheme plan and proposed section 12 sets out the requirements for such plans, specifically that they:
- must comply with proposed schedule 1,
  - must include a location plan, detail plan and association property plan,
  - must be accompanied by a management statement for the scheme plan that complies with proposed schedule 2,
  - must be accompanied by any documents prescribed by the regulations.
36. Similarly, under proposed Part 7, proposed section 46 sets out what a development contract must include. Again, a number of required inclusions are in the Bill, but subsection 46(4)(e) also provides that the development contract must include “any documents or other particulars, information or matter prescribed by the regulations”.
37. Regarding the *Community Land Management Bill 2020*, proposed Schedule 1 provides that the regulations may make provision for or with respect to the means of voting (other than in person) that may be adopted by an association, the procedures for voting by those means, and prohibiting the use of specified means of voting (sub clause 27 (2)). Proposed Schedule 1 also provides for the regulations to make provision for or with respect to the procedures for a secret ballot (sub clause 28(2)). In the second reading speech, the Minister noted:
- [At the advent of the COVID-19 restrictions earlier in 2020] While many strata schemes had already adopted electronic means of meeting and voting following the 2015 reforms, this option simply was not available to community schemes. All of them were required to conduct meetings and votes in the old in-person and paper-based way. The Government moved quickly to enact emergency enabling legislation, which allowed for regulations to temporarily override the Act in limited areas. The bill makes permanent those modern options for the governance of community schemes. The management bill recognises email, video or teleconferencing, postal and electronic voting as all valid and permitted methods of managing a scheme, and allows associations to choose the methods that best suit their needs and members. The regulations will allow schemes to choose to distribute papers and hold records electronically, and clause 28 of schedule 1 will introduce procedures for conducting secret ballots.
38. Proposed section 129 of the *Community Land Management Bill 2020* also sets out provisions for occupancy limits within an association scheme by-law. Proposed subsection 129(5) states that the regulations may provide for the circumstances when a person is a resident of a lot for the purposes of a by-law made under the section.

**The *Community Land Development Bill 2020* and the *Community Land Management Bill 2020* delegate certain matters to the regulations. For example, proposed section 12 of the *Community Land Development Bill 2020* sets out the required documents to register a scheme plan to establish a community, precinct or neighbourhood scheme, including “any documents prescribed by the regulations”. Similarly, proposed section 46 sets out what a development contract must contain, including “any documents or other particulars, information or matter prescribed by the regulations”. The Committee notes that these are significant matters affecting the establishment**

of schemes, and the disclosure of details of future developments for schemes. However, they are also administrative in nature that the regulations may afford flexibility to address. Given this, the Committee considers it is reasonable, as is the case here, to provide for the requirements in primary legislation, whilst also allowing for the regulations to provide for additional requirements.

Regarding the *Community Land Management Bill 2020*, proposed Schedule 1 would allow the regulations to make provision for or with respect to the means of voting (other than in person) that may be adopted by an association, the procedures for voting by those means, and prohibiting the use of specified means of voting (proposed sub clause 27(2)); and the procedures for a secret ballot (proposed sub clause 28(2)). Again, the Committee considers that these are predominantly administrative matters that the regulations may afford flexibility to address, and makes no further comment in respect of these provisions.

However, the Committee also notes that proposed section 29 of the *Community Land Management Bill 2020* would permit the regulations to provide for the circumstances when a person is a resident of a lot for the purposes occupancy limits within an association scheme by-law. This definition would impact those subject to these occupancy limits, and may thereby affect their living arrangements. It may therefore be more suitably dealt with in primary legislation to foster a greater level of parliamentary oversight over the requirements set. The Committee refers this section to the Parliament for its consideration.

## 2. Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi's Law) Bill 2020\*

Date introduced	24 September 2020
House introduced	Legislative Assembly
Member responsible	Ms Anna Watson MP
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. An Act to amend the *Crimes (Domestic and Personal Violence) Act 2007* to create an offence of engaging in conduct that constitutes coercive control in a domestic relationship.

### BACKGROUND

2. In the second reading speech, Ms Anna Watson MP told Parliament that the Bill would create a new domestic abuse offence of “coercive control” to cover behaviour that cannot be easily prosecuted under the existing law:

The bill amends and improves the Crimes (Domestic and Personal Violence) Act 2007 by ensuring that criminal law reflects that domestic abuse can often be conduct which takes place over a sustained period of time. The offence is a general offence of “domestic abuse” and is intended to cover a wide range of conduct that can make up a pattern of abusive behaviour within a relationship. That behaviour amounts to psychological abuse or coercive control, which either cannot be, or cannot easily be, prosecuted using existing criminal laws.

3. Ms Watson further stated that the new offence would better reflect how victims experience domestic abuse, and change the justice system to bring the incidence of domestic violence down:

By enabling abuse of various types which takes place over a period of time to be prosecuted as a single course of conduct within a new offence of domestic abuse, the criminal law will better reflect how victims actually experience such abuse...The bill changes the justice system so it is better able to facilitate the early detection and prosecution of domestic abuse and coercive controlling behaviours. The main benefits of doing this are to create an informed social and legal environment, reduce offending and re-offending, and bring the incidence of domestic violence down.

### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Lack of certainty*

4. Schedule 1 to the Bill seeks to insert a new section 14A into the *Crimes (Domestic and Personal Violence) Act 2007* (the Act) to create an offence of engaging in conduct that

constitutes “coercive control” of another person with whom the person has, or has had, a domestic relationship. The offence would have a maximum penalty of imprisonment for 5 years, or a \$5,500 fine, or both.

5. Proposed section 14A(2) defines such “coercive control” to include conduct that has, or is reasonably likely to have, one or more of the following effects:
  - (a) making the other person dependent on, or subordinate to, the person,
  - (b) isolating the other person from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring the other person’s day to day activities,
  - (d) depriving the other person of, or restricting the other person’s, freedom of action,
  - (e) depriving the other person of, or restricting the other person’s, access to support services, including the services of health practitioners and legal practitioners,
  - (f) frightening, humiliating, degrading or punishing the other person.
6. Further, schedule 1 of the Bill seeks to insert a new section 14B into the Act to create an offence of coercive control in “circumstances of aggravation”. This offence would carry the same definition of “coercive control” as above, and a maximum penalty of imprisonment for 10 years, or a fine of \$13,200, or both. A person would commit the offence in “circumstances of aggravation” if:
  - (a) all or part of the conduct that constitutes the coercive control of another person:
    - i. is directed at a child of the other person, or
    - ii. makes use of a child of the other person in directing the conduct at the other person, or
    - iii. takes place in the presence or hearing of a child of the other person, and
  - (b) the conduct has, or is reasonably likely to have, a serious adverse effect on the child.
7. Schedule 1 would also insert a new section 14D into the Act which would provide that in proceedings brought against a person for an offence under section 14A or 14B, it would be a defence that the conduct was reasonable in the circumstances.

**Schedule 1 to the Bill seeks to insert a new section 14A into the *Crimes (Domestic and Personal Violence) Act 2007* to create an offence of engaging in conduct that constitutes “coercive control” of another person with whom the person has, or has had, a domestic relationship. The offence would have a maximum penalty of imprisonment for 5 years, or a \$5,500 fine, or both. If it were committed in circumstances of aggravation it would have a maximum penalty of imprisonment for 10 years, or a fine of \$13,200 or both (proposed section 14B).**

**Proposed section 14A(2) defines such “coercive control” broadly to include conduct that has, or is reasonably likely to have, certain effects including “making the other person dependent on, or subordinate to, the person”; “controlling, regulating or monitoring the other person’s day to day activities”; “depriving the other person of, or restricting the other person’s, freedom of action”; and “frightening, humiliating, degrading or punishing the other person”.**

**The Committee notes that these are quite vague concepts. The Committee would prefer offence provisions, particularly those with potential terms of imprisonment attached, to be drafted with sufficient specificity so that their scope and content is clear. This enables people a clear idea of the conduct outlawed so that they may regulate their conduct accordingly. The Committee acknowledges that proposed section 14D creates a defence of reasonableness to the new offences, and that the Bill aims to reduce rates of domestic abuse. However, the Committee refers the Bill to Parliament to consider whether the broadly defined new offences would impact unduly on principles of legal certainty.**

### 3. Government Sector Employment Amendment (Teleworking) Bill 2020\*

Date introduced	24 September 2020
House introduced	Legislative Assembly
Member responsible	Mr Roy Butler MP
	*Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Government Sector Employment Act 2013 to require the Public Service Commissioner to do the following—
  - (a) make government sector employment rules to facilitate the use of teleworking arrangements for government sector employees,
  - (b) establish a website providing certain information to government sector employees in connection with teleworking arrangements.

#### BACKGROUND

2. In his second reading speech, Mr Roy Butler MP noted that much of the NSW public service was now working from home in some capacity as a result of the COVID-19 pandemic. In this context, he expanded on the rationale and object of the Bill:

Moving positions deemed suitable for telework one at a time is easy. We have seven months of evidence using 150,000 public servants to show that it works. The bill will require the Public Service Commissioner to establish sector-wide rules that facilitate teleworking and create a remote working portal online with resources and information for public servants working remotely. The Public Service Commissioner would be required to evaluate positions for their suitability for telework. If suitable, they would be advertised as such. People from anywhere in the State could apply for these roles on merit.

3. Mr Butler also noted in his speech that the Bill, if passed, would bring particular economic and social benefits to regional communities across NSW.

#### ISSUES CONSIDERED BY THE COMMITTEE

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

##### *Matters deferred to the rules*

4. Schedule 1, item 4 of the Bill seeks to amend the *Government Sector Employment Act 2013* (the Act) to insert several new provisions, including proposed section 74B. That section provides that the Public Service Commissioner must, within 12 months of the date of assent to the proposed Act, make government sector employment rules for teleworking arrangements dealing with various matters. These include the content and

form of such arrangements, suitability criteria (including in relation to performance and work health and safety), requirements for monitoring and review of employees, and the termination of teleworking arrangements. The rules may also deal with any other matters prescribed by the regulations.

5. The proposed section also provides that rules made for the purpose of the section prevail to the extent of any inconsistency with the regulations, despite section 88(2)(b) of the Act. That section provides that the regulations prevail in the event of any inconsistency with the rules.
6. Under section 40(1) of the *Interpretation Act 1987* written notice of the making of a “statutory rule” must be tabled in each House of Parliament within 14 sitting days of that House after the day on which it is published on the NSW legislation website. Further, section 41(1) provides that either House of Parliament may pass a resolution disallowing a “statutory rule”.
7. Section 21 of the *Interpretation Act 1987* defines “statutory rule” as a regulation, by-law, rule or ordinance (i) that is made by the Governor, or (ii) that is made by a person or body other than the Governor, but is required by law to be approved or confirmed by the Governor.
8. Regulations are made by the Governor under section 88 of the Act. However, section 12 of the Act provides that the government sector employment rules are to be made by the Commissioner and there appears to be no requirement for these rules to be approved or confirmed by the Governor.

**The Bill amends the *Government Sector Employment Act 2013* to require the Public Service Commissioner to make government sector employment rules regarding teleworking arrangements within 12 months of the proposed Act receiving assent. The rules would deal with a number of matters including the suitability criteria which apply (including in relation to work health and safety), requirements for monitoring and review of employees, and termination of teleworking arrangements.**

**The Bill may thereby insufficiently subject the exercise of legislative power to parliamentary scrutiny. Unlike the regulations, which are made by the Governor, there appears to be no requirement under the *Interpretation Act 1941* for the rules relating to teleworking arrangements to be tabled in Parliament and subject to disallowance. Of particular note is the fact that the Bill also provides that the rules relating to teleworking arrangements prevail to the extent of any inconsistency with regulations under the Act.**

**The Committee acknowledges the administrative convenience of deferring appropriate matters to the rules, noting that the existing *Government Sector Employment Rules 2013* appear to deal with similar issues, such as merit-based assessments and performance management. However, the rules may affect the working conditions of a large workforce and should be subject to an appropriate level of parliamentary scrutiny. In the circumstances, the Committee refers these matters to Parliament for consideration, particularly the provision allowing the rules to prevail over the regulations to the extent of any inconsistency.**

## 4. Health Legislation (Miscellaneous Amendments) Bill 2020

Date introduced	23 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are as follows:

- a) to make various amendments to the *Health Care Complaints Act 1993*, including to:
  - i create a new category of health organisation, being a relevant health organisation, and provide for the Health Care Complaints Commission (the Commission) to deal with complaints relating to relevant health organisations, including by making prohibition orders in relation to relevant health organisations, and
  - ii enable the Commission to take action, including exercising entry and search and information gathering powers, to assess a person's compliance with prohibition orders and other matters, and
  - iii modify the circumstances in which an authorised officer of the Commission may exercise certain entry, search and seizure powers, and
  - iv provide the Commission with additional options for referral following the assessment of a complaint, and
  - v extend existing protections against disclosure to information exchanged between the Commission and a professional council for a health profession established under the Health Practitioner Regulation National Law (NSW) (a Council), and
  - vi make other minor or related amendments,
- b) to make various amendments to the *Health Practitioner Regulation (Adoption of National Law) Act 2009*, including to:
  - i provide that a Council is, with certain exceptions, subject to the control and direction of the Minister, and
  - ii provide that a Council, when exercising its functions in relation to a complaint about a registered health practitioner or student, may have regard to certain matters about the practitioner or student including previous complaints or findings, and



- iii specify certain conduct as unsatisfactory professional conduct of a registered health practitioner, and
  - iv impose various notification requirements on National Boards and Councils relating to specified matters and events concerning practitioners and students, and
  - v make other minor or related amendments,
- c) to make various amendments to the *Health Services Act 1997*, including to prevent a person being compelled to disclose documents and information relating to certain inquiries by the Secretary of the Ministry of Health (the Secretary) and to enable the Secretary to remove an appointed member of the Ambulance Service Advisory Board from office,
  - d) to amend the *Human Tissue Act 1983* to insert a regulation-making power to prescribe specified bodily materials as, or exclude specified bodily materials from being, tissue and to enable a coroner to provide consent, before a person's death, to the removal of tissue from the person's body after death,
  - e) to amend the *Private Health Facilities Act 2007* to require registered health practitioners practising at private health facilities to report certain criminal and disciplinary matters to the licensee of the facility and to enable proceedings for offences under that Act to be dealt with summarily before the Supreme Court,
  - f) to make various amendments to the *Public Health Act 2010*, including to enable the Secretary to direct a person known to have a Category 4 or 5 medical condition to undergo a related medical examination or test, to provide for the regulations to prescribe a code of conduct for the provision of health services by relevant health organisations, and to introduce related offences,
  - g) to amend the *Public Health (Tobacco) Act 2008* to regulate e-cigarette liquids and to provide for the seizure and disposal of smokeless tobacco products,
  - h) to amend the *Saint Vincent's Hospital Act 1912* to replace the trustees of the trust relating to St Vincent's Hospital, Darlinghurst and to modify the trustees' powers relating to leases over land subject to the trust,
  - i) to enact other minor and consequential provisions,
  - j) to make miscellaneous amendments to other Acts.

## BACKGROUND

2. In the second reading speech, the Hon Brad Hazzard MP, Minister for Health and Medical Research told Parliament of the three aspects to the Bill. First, it implements recommendations from a report by Ms Gail Furness SC into the processes of the Medical Council of NSW with respect to Emil Gayed ("the Furness Review").<sup>3</sup> Secondly, it

<sup>3</sup> See Gail B Furness SC, *Review of documentary material in relation to the appointment of Dr Gayed, management of complaints about Dr Gayed and compliance with conditions imposed on Dr Gayed by local health districts*, 21 January 2019, <https://www.health.nsw.gov.au/patients/inquiry/gayed/Documents/gayed-report.pdf> viewed 2 October 2020.

implements recommendations of the NSW Parliament's Joint Committee on the Health Care Complaints Commission (HCCC) arising from its inquiry into cosmetic health service complaints in NSW, which reported in November 2018.<sup>4</sup> Thirdly it "makes a number of other amendments to health-related legislation to ensure that it remains up to date".

3. In relation to the Furness Review, the Minister told Parliament that it followed the disqualification of an obstetrician and gynaecologist, Emil Gayed:

Mr Gayed was an obstetrician and gynaecologist prior to the NSW Civil and Administrative Tribunal disqualifying him as a medical practitioner in June 2018. Mr Gayed was disqualified as a medical practitioner following the substantiation of a number of serious complaints concerning his performance. Following the disqualification of Mr Gayed, the Furness review was undertaken. The review looked at the processes of the Medical Council under the Health Practitioner Regulation National Law (NSW).

4. The Minister then explained how the Health Practitioner Regulation National Law (NSW) operates to regulate registered health practitioners in NSW:

The Health Practitioner Regulation National Law (NSW) regulates registered health practitioners, such as medical practitioners and nurses. The Health Practitioner Regulation National Law (NSW) is an applied law scheme. New South Wales applies, via the Health Practitioner Regulation (Adoption of National Law) Act 2009, the schedule to the Health Practitioner Regulation National Law (Queensland).

5. The Minister continued:

Under the Health Practitioner Regulation National Law, there are 15 national boards that register practitioners and, in jurisdictions other than New South Wales, deal with complaints against practitioners. New South Wales is a co regulatory jurisdiction and does not apply the complaints part of the Queensland national law. Rather, New South Wales retains its own complaints processes, utilising the Health Care Complaints Commission and the health professional councils, such as the Medical Council of New South Wales. The combined law of the Health Practitioner Regulation National Law (Queensland) and the New South Wales specific provisions is known as the Health Practitioner Regulation National Law (NSW).

6. The Minister stated that the Furness Review made a number of recommendations to increase the amount of information that the Medical Council of NSW makes available to employers, and to strengthen requirements for practitioners to notify employers about adverse professional findings. In addition, it "recommended amendments to ensure that the Medical Council properly considers all relevant matters when dealing with a complaint".

7. The Minister told Parliament that the Bill will implement most of the Furness Review recommendations:

The bill will amend the Health Practitioner Regulation National Law (NSW) to require a health professional council to notify employers when the council suspends a practitioner. While the councils do routinely notify employers, it is not a requirement to do so. The bill will also allow a

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<sup>4</sup> See Joint Committee on the Health Care Complaints Commission, *Cosmetic Health Service Complaints in NSW*, <https://www.parliament.nsw.gov.au/ladocs/inquiries/2476/Final%20Report%20-%20Cosmetic%20Health%20Service%20Complaints%20in%20New%20South%20Wales.PDF> 20 November 2018, viewed 2 October 2020.

health professional council to notify an employer if a practitioner is not complying with conditions on their registration. Such a notification will allow employers to decide if they need to take any action in a workplace to protect patients; and it will require councils to consider the matters in section 410, such as a practitioner's complaints history, in all decision-making in relation to complaints.

8. The Minister also stated that in line with the Furness Review recommendations, the Bill would amend the Private Health Facilities Act 2007 to align requirements for private health facilities with certain requirements that already apply in the public sector to protect patients and the public:

In line with the Furness recommendations, the bill will also amend the Private Health Facilities Act 2007 to require a registered health practitioner engaged by a private health facility to notify the licensee if the practitioner has been charged with, or convicted of, a serious sex offence or violence offence, or if a finding of unsatisfactory professional conduct, or professional misconduct, has been made against the practitioner. This change will bring private health facilities into line with the requirements applying in the public sector under the Health Services Act 1997 (NSW) and will allow an employer to decide if they need to take any necessary action to protect patients and the public.

9. With regard to implementing the recommendations of the report of the NSW Parliament's Joint Committee on the HCCC ("the JPC Report") following its inquiry into cosmetic health service complaints, the Minister told Parliament that the Bill makes a number of amendments to the Health Practitioner Regulation National Law (NSW), the Health Care Complaints Act 1993, and the Public Health Act 2010 to do so. In particular, the Minister stated that the Bill would implement changes around public warnings, prohibition orders, and the HCCC's search and entry powers:

The JPC report followed the committee's inquiry into cosmetic health service complaints and stemmed from increasing community concerns about the safety of cosmetic health procedures.

One of the recommendations of the JPC report was that the Minister for Health and Medical Research review the powers and functions of the Health Care Complaints Commission to ensure that the HCCC can sufficiently protect patients using health services. In particular, the JPC report recommended that: the HCCC have the power to issue public warnings about specific health service providers and health organisations; the HCCC have the power to issue prohibition orders in relation to specific health organisations; and the HCCC's search and entry powers apply to all complaints and that authorised persons have the power to enter premises if the premise is a public place and the entry is made when the place is open to the public. The bill implements those recommendations.

10. With regard to the other amendments that the Bill makes to health-related legislation, the Minister noted that these included:

- amendments to the *Health Services Act 1997* to allow the Secretary of NSW Health to remove a member of the Ambulance Service Advisory Board from office,
- changes to the *Public Health Act 2010* and the *Public Health (Tobacco) Act 2008* "designed to help better protect the public",
- changes to the changes to the *Human Tissue Act 1983* following the 2018 Report on the Statutory Review of the Human Tissue Act 1983 allowing regulations to be made to include, or exclude, certain matter from the definition of "human tissue"

and allowing the Coroner to give consent to the donation of organs either before or after death, allowing organ donation to proceed after death,

- amendments to update the *Saint Vincent's Hospital Act 1912* which establishes a trust to run St Vincent's Hospital.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Procedural fairness – public warnings*

11. Schedule 1, item 1 of the Bill would amend section 4 of the *Health Care Complaints Act 1993* to create a new category of health organisation called a “relevant health organisation”, defined as a person that is a health organisation other than a public health organisation, a public hospital or a private health facility.<sup>5</sup>
12. Schedule 1, item 3 of the Bill would amend section 7 of the *Health Care Complaints Act 1993* to provide that a complaint can be made under the Act concerning an alleged breach by a “relevant health organisation” of a code of conduct under the *Public Health Act 2010* or an alleged breach of Part 7, Division 1 or 3 of that Act.
13. Schedule 1, item 23 of the Bill would amend section 80 of the *Health Care Complaints Act 1993* so that the HCCC has functions to receive and deal with complaints about “relevant health organisations”. This would mean that the HCCC could deal with such a complaint under the Act’s existing framework for dealing with complaints.
14. Currently, under Part 2, Division 6A of the *Health Care Complaints Act 1993*, the HCCC can make interim prohibition orders and prohibition orders against non-registered health practitioners, and issue public statements giving warnings or information about the health practitioner or services provided by the health practitioner. Schedule 1, item 21 of the Bill would insert a new Division 7A into Part 2 of the Act to largely replicate Division 6A of Part 2 so that the HCCC would also be able to make interim prohibition orders, prohibition orders and public statements in relation to a “relevant health organisation”.
15. The HCCC would be able to make a prohibition order against a “relevant health organisation” if it:
  - has complied with Division 7 of the Act in relation to an investigation of a complaint against a relevant health organisation,
  - finds that it has breached a “code of conduct for relevant health organisations” or has been convicted of certain offences, and
  - finds that it poses a risk to the health and safety of the public (proposed section 45C).
16. Similarly, if this criteria were satisfied, the HCCC could also make a public statement giving warnings or information about the “relevant health organisation” and health

<sup>5</sup> A note to this provision states that the *Interpretation Act 1987* defines “person” to include an individual, a corporation and a body corporate or politic.

services provided by it (proposed section 45A). A “code of conduct for relevant health organisations” is defined as “a code of conduct prescribed by the regulations made under section 100(1)(c) of the *Public Health Act 2010*” (proposed section 45A).

17. A prohibition order would prohibit a relevant health organisation from providing a health service or impose conditions relating to the provision of health services (proposed section 45C). The HCCC would have to give reasons for making a prohibition order or a public statement (proposed section 45D) and the relevant health organisation could apply to the NSW Civil and Administrative Tribunal for the review of a decision to make an interim prohibition order or prohibition order against it; or to issue a public statement in respect of it (proposed section 45E).
18. As noted, these provisions largely replicate what is in Part 2, Division 6A of the *Health Care Complaints Act 1993* – and in making interim prohibition orders, prohibition orders and public statements in relation to non-registered health practitioners, Division 6A contains the same protections. That is, currently to make a prohibition order or public statement in respect of a non-registered health practitioner, the HCCC must have:
  - complied with Division 6 with respect to an investigation of a complaint;
  - found that the health practitioner breached a code of conduct for non-registered health practitioners or has been convicted of a relevant offence; and
  - determined it is of the opinion that the health practitioner poses a risk to the health and safety of members of the public (section 41A).
19. Further, the HCCC must provide reasons for making a prohibition order or a public statement about a non-registered health practitioner (section 41B); and a non-registered health practitioner can apply to the NSW Civil and Administrative Tribunal for the review of a decision to make an interim prohibition order or prohibition order against him or her; or to issue a public statement in respect of him or her (section 41C).
20. Schedule 1, item 25 of the Bill would also amend sections 94A(1) and (1A) of the *Health Care Complaints Act 1993* to enable the HCCC to issue warnings about particular health service providers to protect public health or safety. This would mean that individual practitioners or organisations could be the subject of a warning, not just a generic industry or health care service (as is currently the case under section 94A) and in the second reading speech the Minister explained:
 

The Bill amends section 94A of the Health Care Complaints Act 1993 to extend the HCCC’s existing power to issue public warnings against treatments or health services to specific health practitioners and health service organisations.
21. In particular, the changes would provide that:
  - if, during an investigation, the HCCC is of the view that issuing a public statement about a health service provider is necessary to protect public health or safety and that any further delay in issuing the statement poses a risk to an individual or to public health or safety, the HCCC would be able to cause a public statement to be issued in a manner determined by the HCCC identifying and giving warnings or information about the health service provider; and

- if, following an investigation, the HCCC is of the view that a particular health service provider poses a risk to public health or safety, the HCCC would be able to cause a public statement to be issued in a manner determined by the HCCC identifying and giving warnings or information about the treatment, health service or health service provider.
22. However, unlike the current and proposed provisions relating to prohibition orders and public statements (Part 2, Division 6A, and proposed Part 2, Division 7A discussed above), these provisions relating to warnings do not contain a right of review in the NSW Civil and Administrative Tribunal nor an obligation on the HCCC to provide reasons for its decision to issue such a warning. Further, the proposed section 94A would allow the HCCC to make a public statement or warning about a particular health service provider during an investigation without having completed the investigation of a complaint, or finding that a code had been breached or an offence had been committed.

**Schedule 1, item 25 of the Bill builds on the existing warning mechanism in section 94A of the *Health Care Complaints Act 1993* which allows the Health Care Complaints Commission (HCCC) during or after an investigation to issue a public statement about a particular treatment or health service, identifying and giving warnings or information about that treatment or health service which the HCCC believes is necessary to protect public health or safety. The Bill would introduce a modified s94A which would allow the HCCC to specifically name a health care practitioner or health service organisation in such a warning.**

**Part 2, Division 6A of the *Health Care Complaints Act 1993* currently has a number of protections in place for health practitioners who are the subject of prohibition orders and public statements under section 41A. An investigation must be completed before such orders or statements are made (section 41A); reasons must be given (section 41B); and health practitioners can seek review of decisions in the NSW Civil and Administrative Tribunal (section 41C).**

**In contrast, proposed section 94A would attract none of these protections. As a result, health service providers who are the subject of such a warning may not have access to procedural fairness for allegations made against them which is inconsistent with other provisions in the Act. In particular, an early and inaccurate warning could harm the health provider's reputation and financial health, with no opportunity to test any allegations or belief held by the HCCC before a competent Court or Tribunal.**

**The Committee acknowledges that in certain circumstances swift action may be required to ensure that the public is aware that a particular health service provider may pose a danger. Further, the amendments in question follow findings by the NSW Parliament's Joint Committee on the HCCC ("the Joint Committee") as part of its inquiry into cosmetic health service complaints that the HCCC should have power to issue warnings about specific health service providers to protect the public. However, given the potential for reputational and financial damage caused by public ventilation of a false warning, the Committee refers the provisions in question to Parliament to consider whether the powers are reasonable in the circumstances, and whether the provisions as drafted adequately safeguard rights to procedural fairness.**

*Procedural fairness – notification to employers of possible contravention*

23. Schedule 2, item 6 of the Bill proposes to insert a new section 176BB into the *Health Practitioner Regulation (Adoption of National Law) Act 2009* which would require a health professional Council to notify each employer and accreditor of a registered health practitioner of a decision by the Council to suspend the registered health practitioner's registration (proposed section 176BB(1)).
24. Similarly, it would provide that if a Council "reasonably believes" that a registered health practitioner has contravened a condition imposed on the practitioner's registration, the Council may, if it considers appropriate, give written notice of the alleged contravention to each employer or accreditor of the practitioner (proposed section 176BB(2)).
25. Currently, under section 150A of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* a practitioner can apply to a Council for a review of a decision of the Council under section 150 to suspend his or her registration, or to impose conditions on the registration or alter the conditions so imposed. However, there is no similar provision for a practitioner to appeal an action taken by the Council under proposed section 176BB(2). That is, a practitioner can appeal a decision by the Council to suspend his or her registration, but the practitioner could not appeal or interject where a Council notified his or her employer or accreditor that the Council "reasonably believes" a condition on their registration has been breached under proposed section 176BB(2).
26. The changes contained in schedule 2, item 6 of the Bill seek to implement recommendations of the Furness Review. As noted earlier, in the second reading speech the Minister stated that the review made a number of recommendations to increase the amount of information that the Medical Council of NSW makes available to employers, and to strengthen requirements for practitioners to notify employers about adverse professional findings. In particular, the Minister stated:

The bill will amend the Health Practitioner Regulation National Law (NSW) to require a health professional council to notify employers when the council suspends a practitioner. While the councils do routinely notify employers, it is not a requirement to do so. The bill will also allow a health professional council to notify an employer if a practitioner is not complying with conditions on their registration. Such a notification will allow employers to decide if they need to take any action in a workplace to protect patients...

**Schedule 2, item 6 of the Bill proposes to insert a new section 176BB into the *Health Practitioner Regulation (Adoption of National Law) Act 2009* which would require a health professional Council to notify each employer and accreditor of a registered health practitioner if the Council suspends the registered health practitioner's registration (proposed section 176BB(1)). Similarly, it would provide that if a Council "reasonably believes" that a registered health practitioner has contravened a condition imposed on the practitioner's registration, the Council may, if it considers appropriate, give written notice of the alleged contravention to each employer or accreditor of the practitioner (proposed section 176BB(2)).**

The amendments contained in proposed section 176BB(2) may impact on a practitioner's right to procedural fairness. Currently, under section 150A of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* a practitioner can apply to a Council for a review of a decision of the Council

under section 150 to suspend his or her registration. In contrast, the practitioner could not appeal or interject where a Council notified his or her employer or accreditor that the Council “reasonably believes” a condition on their registration has been breached under proposed section 176BB(2). Such a notification could cause reputational or financial damage, similar to any damage caused by notification about a suspension.

However, the Committee notes that in certain circumstances swift action may be required to ensure that employers and accreditors are aware of practitioners who may pose a danger to the public, and that it may be beneficial if Councils can notify employers and accreditors of suspected breaches without having to undertake a time consuming process. Further, the amendments seek to implement recommendations of the Furness Review which reported in January 2019, and increase the amount of information that health professional Councils provide to employers. Due to the fact that the notification would be insulated within the employer/accreditor/practitioner circle (and not made public), the risk of reputational and financial damage is minimised. In the circumstances, the Committee makes no further comment.

*Procedural fairness – access to documentation*

27. Schedule 1, item 29 of the Bill would amend section 99A of the *Health Care Complaints Act 1993* to provide that a health professional Council, or a person exercising functions on behalf of a Council, cannot be compelled in legal proceedings to give evidence about, or produce documents containing, information exchanged between a Council and the Commission under the *Health Care Complaints Act 1993* or the *Health Practitioner Regulation National Law (NSW)*.
28. Schedule 1, items 30 and 31 of the Bill would provide certain exceptions to this provision. In particular, schedule 1, item 31 would insert a new section 99A(3)(d)(e) into the *Health Care Complaints Act 1993* to provide that a Council could be compelled to produce documents in proceedings under the *Health Practitioner Regulation National Law (NSW)* if the professional Council is a party to the proceedings and the information is necessary for the just and equitable resolution of the proceedings.

**Schedule 1, item 29 of the Bill would amend the *Health Care Complaints Act 1993* to provide that a health professional Council, or a person exercising functions on behalf of a Council, cannot be compelled in legal proceedings to give evidence about, or produce documents containing, information exchanged between a Council and the HCCC under the *Health Care Complaints Act 1993* or the *Health Practitioner Regulation National Law (NSW)*.**

This may impact on the right of practitioners to procedural fairness. Where a practitioner cannot access evidence relevant to an allegation made against him or her in legal proceedings, his or her right to a fair hearing may be impacted. However, schedule 1, item 31 would insert a new section 99A(3)(d)(e) into the Act to provide an exception so that a Council could be compelled to produce documents in proceedings under the *Health Practitioner Regulation National Law (NSW)* if the professional Council is a party to the proceedings and the information is necessary for the just and equitable resolution of the proceedings. Given this safeguard, the Committee makes no further comment.



*Search without warrant*

29. Schedule 1, items 13, 14 and 16 of the Bill, would amend sections 32 and 33 of the *Health Care Complaints Act 1993* to modify the circumstances under which an authorised officer of the HCCC could exercise certain entry, search and seizure powers for the purposes of the investigation of a complaint by the HCCC.
30. Section 32 currently provides that an authorised person may not enter any premises and exercise the search and seizure functions under section 33 except with the consent of the owner or occupier of the premises or under the authority of a search warrant. The amendments contained in schedule 1, item 13 of the Bill would mean that an authorised person would still require the occupier's consent or a search warrant to enter residential premises and exercise their search and seizure powers under section 33. However, Schedule 1, items 13, 14 and 16 of the Bill would remove the requirement for consent or a search warrant to exercise these powers with respect to all other forms of premises.
31. As noted earlier, in the second reading speech the Minister stated that the JPC report recommended that "the HCCC's search and entry powers apply to all complaints and that authorised persons have the power to enter premises if the premise is a public place and the entry is made when the place is open to the public". The Minister further noted that the Bill implements those recommendations.
32. Schedule 1, item 22 of the Bill would also amend the *Health Care Complaints Act 1993* to insert a new Part 3A. Under the new Part, the HCCC could exercise search and entry powers to assess a person's compliance with a "relevant matter" (proposed section 63E). A relevant matter is defined to include:
  - an interim prohibition order or a prohibition order, or
  - a recommendation made by the HCCC in a report under section 42(1)(b), or
  - a prohibition order made under section 149C(5) of the *Health Practitioner Regulation National Law (NSW)*, or
  - another matter prescribed by the regulations for the purposes of the definition (proposed section 63A).
33. Again, an authorised person could not enter residential premises and exercise the search and seizure powers conferred under the new Part 3A except with the consent of the occupier or under the authority of a search warrant (proposed section 63D), but there appears to be no such requirement in respect of other premises.
34. In the second reading speech the Minister noted:
 

Another change will include a new part 3A in the Health Care Complaints Act 1993 to give the HCCC powers of entry, and the power to require the production of documents and the answering of questions when the HCCC is assessing compliance with prohibition orders and recommendations made by the HCCC. Currently the HCCC can only exercise its functions when there is a complaint. The new part 3A will ensure that the HCCC is able to proactively ensure compliance with orders and recommendations.

Schedule 1, items 13, 14 and 16 of the Bill, would amend sections 32 and 33 of the *Health Care Complaints Act 1993* to modify the circumstances under which an authorised officer of the HCCC could exercise certain entry, search and seizure powers for the purposes of the investigation of a complaint by the HCCC.

Section 32 currently provides that an authorised person may not enter any premises and exercise the search and seizure functions under section 33 except with the consent of the owner or occupier of the premises or under the authority of a search warrant. The amendments would mean that an authorised person would still require the occupier's consent or a search warrant to enter residential premises and exercise their search and seizure powers under section 33. However, they would no longer require a warrant or such consent with respect to all other forms of premises.

Schedule 1, item 22 of the Bill would also amend the *Health Care Complaints Act 1993* to insert a new Part 3A. Under the new Part, the HCCC could exercise search and entry powers to assess a person's compliance with a "relevant matter" (proposed section 63E). A relevant matter is defined to include an interim prohibition order or a prohibition order, or certain recommendations made by the HCCC. Again, an authorised person could not enter residential premises and exercise the search and seizure powers conferred under the new Part 3A except with the consent of the occupier or under the authority of a search warrant (proposed section 63D), but there appears to be no such requirement in respect of other premises.

By broadening the circumstances under which authorised officers can exercise their powers of entry and search and seizure, and providing that a warrant or consent is not required for non-residential premises, the Bill may impact on property and privacy rights and the right to be free from arbitrary interference. The requirement for a warrant to be issued before entry, search and seizure of goods occurs is designed to ensure there is just cause for the exercise of such powers.

The Committee acknowledges that there would still be a requirement to obtain a warrant, or the occupier's consent, to exercise the powers in respect of residential premises. Further, the amendments around warrants implement recommendations of the Joint Committee as part of its inquiry into cosmetic health service complaints. However, the Committee refers the matter to Parliament for consideration.

*Privilege against self-incrimination and right to silence*

35. As noted, Schedule 1, item 22 of the Bill would amend the *Health Care Complaints Act 1993* to insert a new Part 3A. In addition to giving the HCCC powers of entry in relation to a "relevant matter" (i.e. to assess compliance with prohibition orders and recommendations made by the HCCC), the new Part 3A would also give the HCCC the power to require the production of documents and the answering of questions for this purpose (proposed section 63G).
36. In short, under the proposed new section 63G, it would be an offence, punishable by a maximum penalty of a \$22,000 fine, to fail without reasonable excuse to give the HCCC

information or evidence, or to produce documents to the HCCC when required to do so to assist the HCCC's assessment of compliance with a "relevant matter".

37. Further, proposed section 63G(3) would apply section 37A of the *Health Care Complaints Act 1993* in respect of the new powers, meaning that while a person could not object to giving the HCCC information or evidence, or producing documents, on the grounds this may incriminate the person or expose them to a penalty:
  - any information or answer given in compliance with a requirement under proposed section 63G would not be a admissible in evidence against the person in any civil or criminal proceedings (except disciplinary proceedings or proceedings for an offence under this Part) if: (a) the person objected at the time to doing so on the ground that it might incriminate the person, or (b) the person was not warned on that occasion that the person may object to giving the information or answer on the ground that it might incriminate the person.
38. In contrast, any document produced by a person in compliance with a requirement under proposed section 63G would not be inadmissible in evidence against the person in any proceedings on the ground that the document might incriminate the person (see section 37A(3)).
39. Sections 21A and 34A of the *Health Care Complaints Act 1993* already contain similar provisions, stipulating that it is an offence to fail without reasonable excuse to give the HCCC information or evidence, or to produce documents to the HCCC when required to do so to assist the HCCC's assessment or investigation of a complaint.
40. Schedule 2, item 3 of the Bill would also amend schedule 1[13], section 139B(1)(e) of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that breach by a registered health practitioner of section 21A or proposed section 63G of the *Health Care Complaints Act 1993* is unsatisfactory professional conduct.
41. In the second reading speech, the Minister stated:
 

Section 21A and the new section 63G allow the HCCC to require the production of information and documents for the purpose of assessing a complaint or determining compliance. It is an offence to not comply. Section 21A and section 63G are similar to the power of the HCCC when investigating a complaint under section 34A. Currently only a breach of section 34A is considered to constitute unsatisfactory professional conduct. The bill will ensure that similar failure to provide information under section 21A or the new section 63G is also considered unsatisfactory professional conduct.
42. In NSW, individuals can object to giving "particular evidence" or "evidence on a particular matter" on the grounds that the evidence given may tend to prove that the witness has committed an offence against or arising under an Australian law, or is liable to a civil penalty. This objection is a privilege established under section 128(1) of the *Evidence Act 1995*.
43. Further, under section 89 of the *Evidence Act 1995*, no unfavourable inference can be drawn against a person who does not respond to a question or representation put to them by a person investigating the possible commission of an offence (unless it is a serious indictable offence pursuant to section 89A). High Court authority has also enshrined an individual's right to silence in *Petty v The Queen* (1991) 173 CLR 95 at 97.

Persons exercising investigative powers are obliged to inform a suspect that they do not have to answer any questions and to ensure that they understand this. This is known as a “caution”.

As noted, Schedule 1, item 22 of the Bill would amend the *Health Care Complaints Act 1993* to insert a new Part 3A. In addition to giving the HCCC powers of entry to assess compliance in relation to a “relevant matter” Part 3A would also give the HCCC the power to require the production of documents and the answering of questions for this purpose (proposed section 63G).

In short, under the proposed new section 63G, it would be an offence, punishable by a maximum penalty of a \$22,000 fine, to fail without reasonable excuse to give the HCCC information or evidence, or to produce documents to the HCCC when required to do so to assist the HCCC’s assessment of compliance with a “relevant matter”. Further, Schedule 2, item 3 of the Bill would provide that breach by a registered health practitioner of proposed section 63G would be unsatisfactory professional conduct.

In addition, the operation of proposed section 63G(3) would mean that a person could not object to giving the HCCC information or evidence, or producing documents on the grounds this may incriminate the person or expose them to a penalty.

These provisions impact on the privilege against self-incrimination and the right to silence. In noting this, the Committee acknowledges that forced production of information may have benefits for the public as regards health and safety. Further, certain safeguards apply because of the operation of proposed section 63G(3). While a person could not object to giving the HCCC information or evidence, or producing documents on the grounds this may incriminate the person, any information or answer given in compliance with a requirement under proposed section 63G would not generally be admissible in evidence against the person in any civil or criminal proceedings if the person raises an objection or was not warned appropriately that s/he could object.

However, any document produced by a person in compliance with a requirement under proposed section 63G would not be inadmissible in evidence against the person in any proceedings on the ground that the document might incriminate the person. In the circumstances, the Committee refers the provisions in question to Parliament to consider whether they appropriately protect the right to silence and privilege against self-incrimination.

*Right to personal physical integrity - forced medical testing*

44. Schedule 6, items 3 to 5 of the Bill would amend section 61 of the *Public Health Act 2010*. If so amended, the relevant provisions would state:

- (1) This section applies if the Secretary:
  - (a) knows, or suspects on reasonable grounds that a person has a Category 4 or 5 condition, and

- (b) considers that the person may, on that account be a risk to public health, and
  - (c) considers that the nature of the condition warrants medical examination or testing relating to the condition.
- (2) In these circumstances, the Secretary may, by notice in writing, direct the person concerned to undergo, within a specified period, a specified kind of medical examination or test relating to the Category 4 or 5 condition:
- (a) by a registered medical practitioner in general practice, or
  - (b) by a registered medical practitioner practising in a specified field.
- (3) If the person fails to comply with a direction under subsection (2), the Secretary may, by further notice in writing, direct the person to undergo the specified kind of medical examination or test, at a specified time and place, by a specified registered medical practitioner.
45. Further, under section 61(4) of the *Public Health Act 2010* a person must not, without reasonable excuse, fail to comply with a direction under subsection (3) or they could be liable to a maximum penalty of a \$5,500 fine.
46. The “Secretary” is defined as the Secretary of the Ministry of Health (section 5 of the *Public Health Act 2010*).
47. Schedule 1 of the *Public Health Act 2010*, provides a list of Category 4 and Category 5 conditions. Category 4 conditions include:
- Avian influenza in humans;
  - COVID-19 (also known as Novel Coronavirus 2019);
  - Middle East respiratory syndrome coronavirus;
  - Severe Acute Respiratory Syndrome;
  - Tuberculosis;
  - Typhoid; and
  - Viral haemorrhagic fevers.
48. The only condition to be defined as a Category 5 condition is the Human Immunodeficiency Virus (HIV) infection.
49. The second reading speech states that:
- The bill amends section 61 of the *Public Health Act 2010* to allow the Secretary of NSW Health to order a person with a category 4 or category 5 condition—such as HIV, tuberculosis or COVID-19—to undergo a medical examination and tests to determine their risk to the public. This will assist in determining whether a public health order is necessary.

50. Under section 62 of the *Public Health Act 2010* an authorised medical practitioner may make a public health order in respect of a person if satisfied, on reasonable grounds, that the person has a Category 4 or 5 condition and because of the way the person behaves may, as a consequence of that condition, be a risk to public health. Such a public health order can require such things as the person refraining from certain conduct, undergoing certain treatment, or being detained at a specified place for the duration of the order.
51. Article 7 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states: “No one shall be subjected, without his free consent, to medical or scientific experimentation”.
52. Further, a NSW Health Directive entitled “Your Health Rights and Responsibilities” dated 20 April 2011 contains a section on consent which states:

Patients must give consent before receiving treatment. In most cases this will be verbal consent. It is NSW Health policy that written consent is given for some procedures, such as surgery. Patients have the right to withhold consent. In this case they will not receive treatment. In a life-threatening emergency where the patient is too ill or unconscious, consent is not required.<sup>6</sup>

**Schedule 6, items 3 to 5 of the Bill would amend section 61 of the *Public Health Act 2010*. If so amended, section 61 would apply if the Secretary of the Ministry of Health knows, or suspects on reasonable grounds that a person has a Category 4 or 5 condition; and considers that the person may, on that account be a risk to public health; and considers that the nature of the condition warrants medical examination or testing relating to the condition.**

**In these circumstances, the Secretary may, by notice in writing, direct the person concerned to undergo, within a specified period, a specified kind of medical examination or test relating to the Category 4 or 5 condition. Failure to do so can expose the person to a maximum penalty of a \$5,500 fine. Category 4 conditions are defined to include a range of conditions including COVID-19 and tuberculosis. A category 5 condition is defined to mean the Human Immunodeficiency Virus (HIV) infection.**

**By requiring a person to submit to a medical examination or test, the provisions may unduly trespass on the right to personal physical integrity. The Committee acknowledges that the provisions are intended to protect public health by assisting to determine whether a public health order is necessary in respect of a person. However, Article 7 of the International Covenant on Civil and Political Rights, to which Australia is a signatory, states that “no one shall be subjected, without his free consent, to medical or scientific experimentation”. This approach is broadly reflected in NSW Health’s policy directives which place an emphasis on the consent of the patient. The Committee refers the provisions in question to Parliament to determine whether they are reasonable and proportionate in the circumstances.**

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<sup>6</sup> NSW Health, “Your Health Rights and Responsibilities”

[https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2011\\_022.pdf](https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2011_022.pdf), 20 April 2011, viewed 2 October 2020.

*Strict liability offences and increased maximum penalties*

53. A number of provisions in the Bill would increase maximum penalties for various offences. For example, schedule 1 item 7 of the Bill would amend the *Health Care Complaints Act 1993* to increase maximum penalties from a \$2,200 fine (20 penalty units), to a \$22,000 fine (200 penalty units) for:

- failure to comply with an HCCC requirement to provide information, documents or evidence to assist it to assess a complaint (section 21A(3));
- failure to comply with an HCCC requirement to provide information, documents or evidence to assist it to investigate a complaint (section 34A(4)); and
- furnishing false or misleading information to the HCCC (section 99).

54. Regarding such penalty increases, the second reading speech noted:

The Ministry of Health, in consultation with the HCCC, and following the JPC report, also considered whether other changes are needed in respect of the HCCC's powers. A number of changes were identified which the bill seeks to implement. The first change is to increase the maximum penalty for a number of offences in the *Health Care Complaints Act* to 200 penalty units, currently equivalent to \$22,000. The current low penalties of generally 20 penalty units, currently the equivalent of \$2,200, do not appropriately reflect the seriousness of the offences.

55. Similarly, schedule 6, item 16 of the Bill would amend section 102(3) of the *Public Health Act 2010* to increase the maximum penalty for the offence of providing a health service in contravention of a prohibition order. Currently, the maximum penalty for this offence is a \$22,000 fine (200 penalty units), 12 months' imprisonment, or both. Maximum penalties proposed under the Bill are, for an individual, a \$60,500 fine (550 penalty units), imprisonment for 3 years, or both. This is a tripling of the maximum custodial penalty and a near tripling of the maximum monetary penalty for individuals.

**The Bill significantly increases existing maximum penalties for strict liability offences under the *Health Care Complaints Act 1993* and the *Public Health Act 2010*. 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.**

**The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Further, it appreciates that penalties have been increased under the Bill in response to concerns that the current penalties did not reflect the seriousness of certain offences. For example, furnishing false or misleading information to the HCCC currently attracts a maximum penalty of a \$2,200 fine under section 99 of the *Health Care Complaints Act 1999*. This would be increased to a maximum penalty of a \$22,000 fine under schedule 1, item 7 of the Bill.**

**However, the Committee also notes that some of the strict liability offences in question carry a custodial sentence. In particular, schedule 6, item 16 of the Bill would amend section 102(3) of the *Public Health Act 2010* to triple the maximum custodial penalty for the offence of providing a health service in contravention of a prohibition order. The Committee refers these matters to**

**Parliament to consider whether the significantly increased penalties under the Bill are reasonable and proportionate in the circumstances, particularly as they relate to strict liability offences and custodial sentences.**



## 5. Liquor Amendment (Right to Play Music) Bill 2020\*

Date introduced	23 September 2020
House introduced	Legislative Council
Member responsible	The Hon. John Graham MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are—
  - (a) to amend the *Liquor Act 2007* to prevent licence conditions restricting or prohibiting music, and
  - (b) to provide that when designating premises as a high risk venue, the Secretary must not take into account the presence of a dance floor or area ordinarily used by patrons for dancing, and
  - (c) to require the Independent Liquor and Gaming Authority constituted under the *Gaming and Liquor Administration Act 2007* to consider the availability of employment opportunities for musicians in exercising its functions, and
  - (d) to amend the *Environmental Planning and Assessment Act 1979* to enable a council to publish a notice to modify conditions by declaring that conditions of development consents that restrict or prohibit music at licensed premises do not apply.

### BACKGROUND

2. In the second reading speech, the Hon. John Graham MLC noted the NSW Parliament's Joint Select Committee on Sydney's Night Time Economy, which reported in September 2019, and its findings about the effect of various licensing restrictions on live music venues and musicians in NSW:

That parliamentary inquiry found that 669 venues in New South Wales had these historic conditions on their licences. Many of them ban music or types of music or have other restrictions. They make it hard to run a venue and hard to get a gig as a musician.

3. Mr Graham also noted the effect of the COVID-19 pandemic on the music industry, and stated that the Bill may assist venues to survive by removing restrictions:

...our night-time economy and the music industry have been some of the sectors hardest hit by this pandemic. This is a jobs bill; these are jobs measures. Removing these restrictions is one thing that we can do to make sure that our venues survive. It will not be enough but it is a very good place to start before we reopen.

4. Mr Graham stated that the Joint Select Committee had taken the view that noise and risky venues should be regulated but that music should not be banned, and that the Bill follows this approach:

The committee took a very nuanced view that noise should be regulated and risky venues should be regulated – sometimes heavily – but that music should not be banned. That is the view that this bill takes. It would not change the regulation of noise in New South Wales. It does not amend legislation relating to noise, including the Liquor Act and the Environmental Planning and Assessment Act. The bill would not remove any condition that imposes a noise level such as “must not exceed 90 decibels”.

5. Mr Graham further noted the Government’s *Liquor Amendment (24-hour Economy) Bill 2020*, introduced into Parliament on 16 September 2020, stating that it would remove some restrictions on live music venues:

The Government’s bill will remove some of these restrictions. Section 70(1)(a) of the Government’s 24-hour economy bill removes the restriction on genres; section 70(1)(b) removes restrictions on the number of musicians or acts; and section 70(1)(c) removes restrictions on the types of instruments, but...[t]hese new laws still have a special section where entertainment conditions can be put back. Under section 79, entertainment conditions can be immediately reapplied if there is a complaint. Bans on live music are unchanged. The same conditions can still be applied by local council on a development consent.

6. Mr Graham stated that his Bill would also remove these restrictions but that it would go further:

The Opposition and the Government agree that we do not support regulating genres of music... We all agree that we do not support government regulating band size by insisting on one, two or three musicians to take the stage; or regulating instruments... The Opposition goes further. We do not support banning mirrorballs or telling venue owners how to decorate. We do not support banning dance floors. We do not support the Government determining where that fine line exists between swaying to the music and real, live dancing. We do not support banning original singer-songwriters and insisting on compulsory cover bands.

7. Mr Graham also stated that the Bill would allow councils to remove similar restrictions from council development consents:

Similar conditions are in place in hundreds of venue development consents across the State, put in historically and many of them paper conditions. Councils simply do not know how many are in place or where they are. This bill would give councils the power to strike out those conditions and make them inoperative.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Right of community members to participate in planning decisions*

8. Schedule 2 of the Bill seeks to amend section 4.55 of the *Environmental Planning and Assessment Act 1979* (the Act) by inserting a new subsection 4.55(1B). This subsection would provide that if the consent authority is a council, all conditions of a development consent relating to the performance of music on licensed premises may, by notice published on the council’s website, be modified to declare the conditions do not apply to the local government area, a specified use of land in the local government area, or a

suburb in the local government area. Under proposed subsection 4.55(1C), a notice under proposed subsection 4.55(1B) is taken to have effect the day the notice is published, or a later date specified by the notice.

9. Currently, under subsection 4.55(1A) of the Act, on receiving an application to modify a consent that involves minimal environmental impact, consent authorities cannot make a decision to modify the consent unless they have notified the application in accordance with:
  - the regulations if they so require;
  - a development control plan if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent.
10. Further, the consent authority must consider any submissions made concerning a proposed modification, within any period prescribed by the regulations or provided by the development control plan, before modifying a consent that involves minimal environmental impact.
11. The same notification requirements and requirements around considering submissions also apply before a consent authority can modify a consent under subsection 4.55(2) of the Act.
12. However, schedule 2 of the Bill also seeks to insert subsection 4.55(1D) into the Act to provide that subsections 4.55(1A) and 4.55(2) do not apply to a modification under the new subsection 4.55(1B). This would mean that before making a decision to modify a development consent under subsection 4.55(1B) (so that conditions relating to the performance of music no longer apply), councils would not have to comply with the above notification requirements or consider any submissions made concerning that modification.
13. In the second reading speech, when discussing the fact that the Bill would allow councils to remove entertainment conditions in development consents, Mr Graham noted that:

This bill would give councils the power to strike out those conditions and make them inoperative. It is not compulsory to do that; it is up to the council and it should be decided at a local level. Councils have made it clear that they do not have the power to remove development consents without going to full community consultation on each individual development approval. Without that power, councils will not act—they cannot act. Without those changes this situation cannot change. That is why this bill also seeks a power for councils to strike out entertainment conditions of the sort described in the consents.

**The Bill seeks to amend the *Environmental Planning and Assessment Act 1979* to provide that a consent authority that is a council may modify conditions of a development consent relating to the performance of music on licensed premises by publishing a notice on the council's website. The council may declare that the conditions do not apply to a local government area, a specified use of land in the local government area, or a suburb in the local government area.**

**Further, the Bill would exempt councils from the Act's current community consultation requirements. Councils could modify the conditions in the development consents relating to the performance of music on licensed premises without having to fulfil community notification requirements or requirements to consider any submissions made concerning the proposed modifications. In so doing, the Bill impacts on community rights to participate in decision-making about these local planning matters. The Committee appreciates that the Bill seeks to stimulate the live music industry in NSW, and to create jobs. However, the Committee refers the provisions to Parliament to consider whether they are reasonable and proportionate in the circumstances.**

## 6. Local Land Services Amendment (Land Management and Forestry) Bill 2020\*

Date introduced	23 September 2020
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to ensure that, in the event of an inconsistency, certain provisions of the *Local Land Services Act 2013* that regulate the management of native vegetation, forestry operations and private native forestry operations will prevail over—
  - (a) environmental planning instruments made under the *Environmental Planning and Assessment Act 1979*, and
  - (b) decisions of consent authorities under the *Environmental Planning and Assessment Act 1979*.

### BACKGROUND

2. In the second reading speech the Hon. Mark Banasiak MLC expanded on the object of the Bill:

The object of the bill is quite simple: The Shooters, Fishers and Farmers [SFF] Party is doing what The Nationals should have done nine months ago. It is attempting to clarify matters surrounding native vegetation, private native forestry [PNF] and forestry operations from the diabolical impacts of the State Environmental Planning Policy [SEPP] Koala Habitat Protection 2019 and other environmental planning instruments. When SFF members sought consultation from stakeholder groups, which did not include property developers, on the potential impacts of the koala SEPP, it became obvious that native vegetation, private native forestry and forestry operations would be only some of the victims of the overreaching policy.

3. Mr Banasiak continued:

Where the previous State Environmental Planning Policy No. 44 sought to protect populations of koalas, the new SEPP protects potential koala habitat. "Potential" means that, where there is no trace of koalas, it is assumed they are present.

...

The Government is simply taking more land and locking it up, adding an estimated 6.3 million hectares of privately owned land into the New South Wales informal reserve system.

4. Mr Banasiak also stated that State Environmental Planning Policies (SEPPs) are environmental planning instruments made under the *Environmental Planning and Assessment Act 1979* (EP&A Act), meaning that they cannot be amended by the

Parliament. Mr Banasiak noted that they were “authorised by the Governor in the Executive Council without parliamentary scrutiny” and he raised concerns about the use of environmental planning instruments generally:

Somehow the policy and all the EPIs override legislation and have been used increasingly to undermine Acts, such as the Local Land Service Act, which makes very important decisions regarding native vegetation, private native forestry and forestry operations. That is not good enough.

## ISSUES CONSIDERED BY THE COMMITTEE

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

*Potential to override existing consents or decisions of the Court - rights of applicants and other interested parties*

5. Schedule 1, items 2 and 3 of the Bill seek to amend the *Local Land Services Act 2013* (the LLS Act) to insert provisions which clarify that, in the event of inconsistency between a provision of the relevant part of the Act and a decision of a consent authority under the EP&A Act, the LLS Act will prevail.
6. Schedule 1, item 2 of the Bill or proposed section 60ZPA, relates to native vegetation. It would provide that in the event of an inconsistency between a provision of Part 5A (Land Management (Native Vegetation)) or Schedule 5A (Allowable activities clearing of native vegetation) and a consent granted under the EP&A Act, the provision of Part 5A or Schedule 5A prevails.
7. Part 5A includes many provisions relating to a range of matters such as the native vegetation regulatory map,<sup>7</sup> the regulation of clearing of natural vegetation in regulated rural areas, allowable clearing activities, and clearing of vegetation under the relevant land management code. Schedule 5A outlines further provisions relating to allowable activities for the clearing of native vegetation.
8. Schedule 1, item 3 of the Bill, or proposed section 60ZZD, relates to private native forestry. It would provide that in the event of an inconsistency between a provision of this Part (being Part 5B – Private native forestry) and a consent granted under the EP&A Act, the provision of the Part prevails.
9. Part 5B – Private native forestry includes provisions relating to private native forestry plans<sup>8</sup> and private native forestry codes of practice.
10. Schedule 2 of the Bill also seeks to insert section 3.28A into the EP&A Act. That section would provide that in the event of an inconsistency between a provision of an environmental planning instrument and a provision of Part 5A (Land management (native vegetation)) or Part 5B (Private native forestry) of, or Schedule 5A (Allowable activities clearing of native vegetation) to, the LLS Act, the provision of the LLS Act

<sup>7</sup> Section 60E of the LLS Act provides that the native vegetation regulatory map creates several categories of land, including Category 1 – exempt land, Category 2 – regulated land, and Category 2 – vulnerable regulated land. The category determines the nature of the restrictions which may apply to the clearing of native vegetation on such land.

<sup>8</sup> For instance, section 60ZW of the LLS Act provides that forestry operations are authorised by the Part if they are operations to which a private native forestry plan applies.

prevails. It would also provide that the operation of a provision of Part 5A, Part 5B or Schedule 5A is not subject to a consent of a consent authority under Part 4 of the EP&A Act (Development assessment and consent).

**The Bill seeks to amend the *Local Land Services Act 2013* (LLS Act) so that in the event of an inconsistency between certain provisions of the LLS Act and a consent granted under the *Environmental Planning and Assessment Act 1979* (EP&A Act), the relevant provision in the LLS Act would prevail. Specifically, Parts 5A (Land Management (Native Vegetation)), Part 5B (Private native forestry) and Schedule 5A (Allowable clearing of native vegetation) would prevail in the event of an inconsistency.**

**The Bill could potentially affect existing legal rights relating to development. For instance, in some cases the conditions of a development consent may be determined by a court in the context of an appeal brought by a party who has objected to the original consent on environmental grounds. The Bill could also have some unforeseen implications for developers who have already obtained a consent. It is noted that obtaining a development consent, or contesting or defending a development consent in court proceedings, often takes significant time and resources.**

**Given that many complex and technical provisions of the LLS Act are captured by the new provisions, it is not immediately clear how the rights of developers and environmental groups could be affected. In the circumstances, the Committee refers this matter to the Parliament for consideration.**

## 7. Restart NSW Fund Amendment (Rural and Regional Infrastructure Funding) Bill 2020\*

Date introduced	23 September 2020
House introduced	Legislative Council
Member responsible	The Hon. Walt Secord MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Restart NSW Fund Act 2011* to provide that at least 30 per cent of the total payments from the Restart NSW Fund for infrastructure projects in any financial year and over the life of the Fund are to be made for infrastructure projects in rural and regional areas.

### BACKGROUND

2. In the second reading speech, the Hon. Walt Secord MLC provided the following background about the purpose of the Restart NSW Fund (the Fund), and the way in which it is governed:

The fund is legislatively governed by the Restart NSW Fund Act 2011. Under the Act, Infrastructure NSW is responsible for assessing and recommending Restart NSW projects that improve the economic growth and productivity of New South Wales across all sectors. These funded projects include a mixture of infrastructure projects led by New South Wales Government agencies, as well as local and community infrastructure projects being delivered by local government, non-government organisations and other entities.

3. Mr Secord noted that the Bill seeks to amend the *Restart NSW Fund Act 2011* so that at least 30 per cent of the Fund's total payments for infrastructure projects in any financial year, and over the life of the Fund, are to be made for infrastructure projects in rural and regional areas.

4. In speaking to the reasons for the Bill, Mr Secord stated:

As of June 2019, the New South Wales Government claims that funds deposited into Restart NSW since 2011, including investment earnings, have totalled \$33.3 billion. So far almost \$16 billion has been spent, but only 18.9 per cent has gone to rural and regional New South Wales....

### ISSUES CONSIDERED BY THE COMMITTEE

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



## 8. State Insurance and Care Governance Amendment (Employees) Bill 2020\*

Date introduced	23 September 2020
House introduced	Legislative Council
Member responsible	The Hon. Daniel Moohkey MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—
  - (a) provide that members of staff of Insurance and Care NSW (ICNSW) and the chief executive of ICNSW are not entitled to the payment of a performance-related bonus or incentive payment, and
  - (b) limit ICNSW's responsibility in relation to matters about the employment of staff of ICNSW and the chief executive of ICNSW.

### BACKGROUND

2. Insurance and Care NSW (ICNSW) is constituted under the *State Insurance and Care Governance Act 2015* (the Act), and is for the purposes of any Act, a NSW Government agency (section 4).
3. Under section 10 of the Act, ICNSW's functions are as follows:
  - to act for the Nominal Insurer in accordance with section 154C of the *Workers Compensation Act 1987*,
  - to provide services (including staff and facilities) for any "relevant authority", or for any other person or body, in relation to any insurance or compensation scheme administered or provided by the relevant authority or that other person or body,
  - to enter into agreements or arrangements with any person or body for the purposes of providing services of any kind or for the purposes of exercising the functions of the Nominal Insurer,
  - to monitor the performance of the insurance or compensation schemes in respect of which it provides services,
  - such other functions as are conferred or imposed on it by or under the Act or any other Act.

4. The following are defined as "relevant authorities" for the purposes of section 10:

- the Workers Compensation (Dust Diseases) Authority constituted under the *Workers' Compensation (Dust Diseases) Act 1942*,
- the Lifetime Care and Support Authority of New South Wales constituted under the *Motor Accidents (Lifetime Care and Support) Act 2006*,
- the Sporting Injuries Compensation Authority constituted under the *Sporting Injuries Insurance Act 1978*,
- the NSW Self Insurance Corporation constituted under the *NSW Self Insurance Corporation Act 2004*,
- the Building Insurers' Guarantee Corporation constituted under Part 6A of the *Home Building Act 1989*.

5. In the second reading speech, the Hon. Daniel Mookhey MLC stated that the Bill would abolish the payment of bonuses to ICNSW executives:

The State Insurance and Care Governance Amendment (Employees) Bill introduced by Labor will abolish the outrageous practice of paying Insurance and Care NSW [icare] executives bonuses. The bill is necessary because in the past two years eight executives at icare were paid \$8 million in salaries and bonuses. Two hundred of the 1,200 staff members at icare were also paid bonuses. In total in the past three years at least \$12 million of money intended to help sick and injured workers, paid for by the employers of New South Wales, has instead been paid in bonuses to icare's top executives and 200 staff members at that organisation.

6. Mr Mookhey also stated that currently under the Act, ICNSW has "the unique privilege not available to any other government agency...to set its own pay and conditions without recourse to any external tribunal or the requirement or permission of the Minister".

7. Further, Mr Mookhey provided the following detail about the changes that the Bill seeks to make:

The bill removes the privilege that icare has to set pay and conditions. It expressly prohibits the payment of performance-related bonuses, instead applying the current provisions of the State Owned Corporations Act to icare. It also introduces a grandfathering arrangement for existing icare staff. We make it clear that no contract that is currently in place at icare needs to be disturbed, except for the payments of any incentive payments. All other base conditions of icare staff are preserved for as long as the existing staff member holds that role. That is what the bill does. The intention of the bill is clear: to restore the rule of law and the application of standard public sector and State-owned corporation employment practices to this extraordinary organisation.

## ISSUES CONSIDERED BY THE COMMITTEE

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

8. As noted above, the Bill seeks to remove the ability of ICNSW to set pay and conditions. In particular, schedule 1.2, item 2 of the Bill seeks to amend the Act by omitting subsections 15(1) and (2). Subsections 15(1) and (2) currently provide that:
  - ICNSW may fix the salary, wages and conditions of employment of its staff insofar as they are not fixed by or under any other law,
  - ICNSW may enter into an agreement with any association or organisation representing a group or class of members of staff of ICNSW with respect to the conditions of employment (including salaries, wages or remuneration) of that group or class in so far as they are not fixed by or under any other law.
9. Schedule 1.2, item 2 of the Bill would instead insert a new subsection 15(1) and (2) to provide that:
  - the regulations can make provision about the employment of staff of ICNSW, including the conditions or employment and discipline of staff, and
  - ICNSW may fix the salary, wages and conditions of employment of staff of ICNSW as far as the salary, wages and conditions are not fixed under the section or by or under another Act or law.
10. Schedule 1.2, item 3 of the Bill would also insert a new subsection 15(4) into the Act to provide that regulations made under the new subsection 15(1) about conditions of employment apply subject to:
  - an award made by a competent industrial tribunal, or
  - an industrial agreement or enterprise agreement to which ICNSW is a party.
11. Similarly, schedule 1.2, item 4 of the Bill seeks to amend the Act by omitting section 16 of the Act, which relates to ICNSW senior executives. In particular, section 16 provides that:
  - a senior executive is to be employed under a written contract of employment signed by the senior executive and chief executive of ICNSW, on behalf of ICNSW, and
  - any State industrial instrument does not have effect in so far as it relates to the employment of senior executives, however this does not prevent the provisions of any such industrial agreement being adopted by reference in the conditions of employment of a senior executive.
12. Further, schedule 1.2, item 5 of the Bill seeks to amend the Act by omitting schedule 2, subclauses 1-3. Schedule 2, subclauses 1-3 currently provide that:

- the ICNSW Board is to fix the conditions of employment of the chief executive of ICNSW,
  - the chief executive of ICNSW is entitled to be paid such remuneration (including travelling and subsistence allowances) as the ICNSW Board may determine,
  - the chief executive of ICNSW is required to enter into a performance agreement with the ICNSW Board.
13. Schedule 1.2, item 5 of the Bill would instead insert new subclauses 2(1) and (2) into schedule 2 of the Act to provide that:
- the ICNSW Board may, with the approval of the Minister, fix the conditions of employment of the chief executive of ICNSW to the extent that the conditions are not fixed by or under any other Act or law,
  - the chief executive of ICNSW is entitled to be paid remuneration, including travelling and subsistence allowances, as the Minister may from time to time decide on the advice of the ICNSW Board.
14. Schedule 1.2, items 8 and 10 of the Bill would also amend schedule 2, clause 5 of the Act to enable the Minister, rather than the ICNSW Board, to appoint, remove and decide the remuneration of a person acting in the office of the chief executive of ICNSW.
15. Schedule 1.1, items 1 and 2 of the Bill also seek to amend the Act to provide that a member of staff of ICNSW, and the Chief Executive of ICNSW are not entitled to the payment of a performance-related bonus or incentive payment.
16. As touched upon above, in the second reading speech, Mr Mookhey stated that ICNSW is alone in its current ability to set pay and conditions:
- ...icare [has] a unique privilege not available to any other government agency—that is, the ability to set its own pay and conditions without recourse to any external tribunal or the requirement or permission of the Minister. To understand just how novel that is, not even Sydney Water or Essential Energy has that power; WestConnex never had that power. No other State-owned corporation or organisation akin to icare has the legal power to set its own pay and conditions without the permission of the Minister.
17. In discussing the fact that the Bill would remove ICNSW's ability to set pay and conditions and prohibit the payment of performance-related bonuses, Mr Mookhey also noted that the Bill applies the provisions of the *State Owned Corporations Act 1989* to ICNSW.
18. The Committee notes that Clause 3 of Schedule 9 to the *State Owned Corporations Act 1989* currently provides:
- A person while acting in the office of a chief executive officer is entitled to be paid such remuneration (including travelling and subsistence allowances) as the portfolio Minister may from time to time determine in respect of the person.

**The Bill proposes to amend the *State Insurance and Care Governance Amendment (Employees) Bill 2020* to give the Minister the ability to determine**

the pay and employment conditions for all employees at Insurance and Care NSW (ICNSW), including senior executives and the Chief Executive. The Minister would have the power to set the pay and conditions of these employees through regulations and other forms of approval provided that the terms set do not breach any industrial agreement, award, enterprise agreement or other law, and notwithstanding any contractual terms negotiated privately between the employee and ICNSW. The Bill would also prohibit any ICNSW employees from earning performance-related bonuses or incentive payments under their contracts.

The Bill may thereby impact on freedom of contract because the Minister, not ICNSW, has the ultimate power to determine pay and conditions for those employed directly by ICNSW; and because ICNSW and employees would no longer be able to negotiate terms involving the prohibited bonuses. The Committee generally comments on restrictions on freedom of contract as they limit the ability of parties to determine the contractual terms to which they are subject. In this case they may have some impact on the ability of ICNSW to compete with the private sector in attracting candidates.

However, the Committee acknowledges that the Bill seeks to ensure Ministerial oversight over employment terms and thereby balance ICNSW's employment costs with other considerations such as minimising workers' compensation premiums for employers and ensuring sufficient funds are available to compensate sick and injured employees. The Committee also notes that limitations on freedom of contract are not uncommon in the area of employment law e.g. the various awards and industrial agreements that exist to define the minimum terms of employment in an industry or occupation.

Similarly, ICNSW is a NSW Government agency and limits on freedom of contract are not uncommon where remuneration for executives who run state owned entities is concerned. For example, the *State Owned Corporations Act 1989* currently provides that, while acting in the office of a chief executive officer, a person is entitled to be paid such remuneration as the Minister may from time to time determine in respect of the person. In the circumstances, the Committee refers the provisions limiting freedom of contract to Parliament to determine whether they are reasonable and proportionate in the circumstances.

#### *Retrospectivity*

19. As above, schedule 1.1, items 1 and 2 of the Bill seek to amend the Act to provide that a member of staff of ICNSW, and the Chief Executive of ICNSW are not entitled to the payment of a performance-related bonus or incentive payment.
20. Schedule 1.1, item 3 of the Bill also seeks to insert a new Part 3 into schedule 4 of the Act. Subclause 14(1) of that Part would provide that despite any agreement made before assent to the amending Act, the above changes to prohibit bonuses and incentive payments to staff and the chief executive extend to:
  - a "current employee" of ICNSW; and
  - the "current chief executive of ICNSW".

21. A “current employee” is defined as a person employed by ICNSW under Part 2, Division 3 of the Act, immediately before the assent; and the “current chief executive of ICNSW” is defined to mean the person employed as Chief Executive of ICNSW, including a person appointed to act in the office of chief executive, immediately before the assent.
22. However, proposed subclause 14(2) to schedule 4 of the Act would also provide that the new clause 14 would cease to apply to a current employee if the employee:
  - is appointed to a different role as a member of staff of ICNSW, or
  - ceases employment with ICNSW.
23. It is unclear how proposed subclause 14(2) would operate and whether it would mean that where current ICNSW employees have accrued bonuses or payments under existing employment contracts, those payments must be paid by ICNSW to those employees if they get appointed to a different role within ICNSW or resign.
24. As noted earlier, Mr Mookhey indicated to Parliament that the purpose of the Bill is to prevent the payment of performance based bonuses or incentive payments accrued under existing employment contracts, and otherwise keep existing agreements in place:

[The Bill] introduces a grandfathering arrangement for existing icare staff. We make it clear that no contract that is currently in place at icare needs to be disturbed, except for the payments of any incentive payments. All other base conditions of icare staff are preserved for as long as the existing staff member holds that role. That is what the bill does.

**The Bill proposes to prohibit the payment of performance-related bonuses or incentive payments to ICNSW employees, including executives and the Chief Executive. These reforms are intended to impact contracts which are already on foot (with some possible exceptions), notwithstanding the fact that those contracts may provide for a bonus or incentive payment to be made. This proposed modification of contracts on foot is a retrospective amendment.**

**The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time, including when contracts are negotiated. This is particularly the case where a Bill seeks to retrospectively remove rights or impose obligations, as is the case here. The Committee acknowledges the objectives of the Bill. That notwithstanding, the Committee refers the element of retrospectivity in the Bill to Parliament to consider whether it is reasonable in the circumstances.**

## 9. Statute Law (Miscellaneous Provisions) Bill 2020

Date introduced	23 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—
  - (a) make minor amendments to various Acts and instruments (Schedule 1), and
  - (b) amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and
  - (c) amend certain other Acts and instruments for the purpose of updating references as a consequence of changes to administrative arrangements of Government (Schedule 3), and
  - (d) amend certain other Acts and instruments for the purpose of updating references as a consequence of the dissolution of Roads and Maritime Services (Schedule 4), and
  - (e) repeal various Acts and an instrument and provisions of an instrument (Schedule 5), and
  - (f) make other provisions of a consequential or ancillary nature (Schedule 6).

### BACKGROUND

2. In the second reading speech, the Hon. Mark Speakman SC MP, Attorney General told Parliament that the Bill continues the Statute Law Revision Program which has been in place for more than 30 years "as an effective method of making minor policy changes and maintaining the quality of the New South Wales statute book".
3. The Bill is divided into six schedules and the Attorney General stated that Schedule 1 seeks to amend various legislation to make minor policy changes:

Schedule 1 to the bill contains policy changes of a minor and non-controversial nature. These changes are proposals that are too inconsequential to warrant the introduction of a separate amending bill. The schedule contains amendments to 44 Acts and related amendments to eight instruments.

4. Schedules 2-6 of the Bill contain amendments of a technical nature e.g. updating references and correcting minor drafting errors. In relation to schedules 2-4, the Attorney General stated:

Schedule 2 to the bill deals with purely statute law matters consisting of minor technical changes to legislation that Parliamentary Counsel considers are appropriate for inclusion in the bill. Examples are corrections of cross-references, typographical errors and terminology. The schedule also includes amendments arising out of the enactment of other legislation. Schedule 3 to the bill contains amendments to a number of Acts and regulations to update references in those Acts and instruments as a consequence of changes to administrative arrangements of government. Schedule 4 to the bill contains amendments to various Acts and regulations for the purpose of updating references in those Acts and instruments as a consequence of the dissolution of Roads and Maritime Services.

5. In relation to schedules 5 and 6 of the Bill, the Attorney General stated:

Schedule 5 to the bill continues the program of repealing Acts and instruments that are redundant or of no practical utility. Schedule 6 to the bill contains general savings, transitional and other provisions. This includes a provision that deals with the effects of amendments on amending provisions. This schedule also includes a provision allowing for regulations to be made that are of a savings or transitional nature.

## ISSUES CONSIDERED BY THE COMMITTEE

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

#### *Industrial rights*

6. Schedule 1.2 to the Bill seeks to extend section 14A of the *Annual Holidays Act 1944*, (which allows a local council and an employee of the local council to agree to the employee receiving a payment in lieu of annual holidays, or taking annual holidays at double or half pay) to county councils and joint organisations and their employees. In the second reading speech, the Attorney General stated:

The amendment will ensure that employee leave entitlements are treated consistently across these entities, recognising that county councils and joint organisations are created to allow councils to work together to deliver services and that employees often transfer between these entities.

**Schedule 1.2 to the Bill seeks to extend section 14A of the *Annual Holidays Act 1944*, (which allows a local council and an employee of the local council to agree to the employee receiving a payment in lieu of annual holidays, or taking annual holidays at double or half pay) to county councils and joint organisations and their employees.**

**By extending the application of a provision that allows an employee to receive payment in lieu of annual holidays, the Bill may impact on industrial rights. In particular, it may encourage some employees, particularly lower paid employees, to forego recreational time for monetary reasons. The Committee also notes that while employees must consent before they are paid in lieu of annual holidays, it is possible that in a particular case an employee could feel pressure from their employer to consent to such an arrangement. The Committee refers these matters to Parliament for consideration.**



*Penalty notice offences – right to a fair trial*

7. Schedules 1.11, 1.32 and 1.36 of the Bill amend the penalty notice provisions in the *Contaminated Land Management Act 1997*; the *Pesticides Act 1999*; and the *Protection of the Environment Operations Act 1997* respectively, to make them consistent with standard provisions in other Acts.
8. In particular, these amendments apply the *Fines Act 1996*, as amended by the *Fines Amendment (Electronic Penalty Notices) Act 2016* to penalty notices issued under the three Acts. If a person is issued with a penalty notice and does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.
9. Some of the amounts payable under such penalty notices could be quite significant. For example, in amending section 224 of the *Protection of the Environment Operations Act 1997*, schedule 1.36 , item 4 of the Bill provides that the amounts payable under a penalty notice issued under the section is the amount prescribed for the alleged offence by the regulations. Further, the *Protection of the Environment Operations (General) Regulation 2009* provides for penalties as high as \$15,000 for penalty notice offences.

**Schedules 1.11, 1.32 and 1.36 of the Bill amend the penalty notice provisions in the *Contaminated Land Management Act 1997*; the *Pesticides Act 1999*; and the *Protection of the Environment Operations Act 1997* respectively. In particular, these amendments apply the *Fines Act 1996*, as amended by the *Fines Amendment (Electronic Penalty Notices) Act 2016* to penalty notices issued under the three Acts. If a person is issued with a penalty notice under the Acts and does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.**

**The Committee identifies that penalty notices may impact on a person's right to a fair trial, notably the automatic right to have their matter heard by an impartial decision maker in public with the opportunity to put forward their side of the case. Further, it notes that some of the amounts payable under the penalty notice provisions in question may be quite significant – as high as \$15,000.**

**However, the Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the Bill does not prevent a person from electing to have their matter proceed to court. In addition, each of the three Acts in question already contain penalty notice provisions – the Bill does not introduce new provisions but is merely updating existing provisions for consistency with other legislation. In the circumstances, the Committee makes no further comment.**

*Procedural fairness*

10. As above, schedules 1.32 and 1.36 to the Bill amend the penalty notice provisions in the *Pesticides Act 1999*; and the *Protection of the Environment Operations Act 1997* respectively. In addition to the matters discussed above, these schedules provide that where a penalty notice is issued under these Acts, it can be so issued by leaving it on a vehicle or at premises in respect of which the offence was committed.

11. The Committee notes that Revenue NSW is the agency that collects debts for the NSW Government. It is understood that if a person does not pay a penalty notice by the due date, it will be sent to Revenue NSW, and that Revenue NSW will in turn send a reminder notice to the person. Further, it is understood persons can elect to pay the fine without any additional penalty, or to go to court, up until that reminder notice has expired.<sup>9</sup>

**As noted, schedules 1.32 and 1.36 to the Bill amend the penalty notice provisions in the *Pesticides Act 1999* and the *Protection of the Environment Operations Act 1997* respectively. In addition to the matters already identified, these schedules provide that where a penalty notice is issued under these Acts, it can be so issued by leaving it on a vehicle or at premises in respect of which the offence was committed.**

**The Bill may thereby have some impact on procedural fairness – it is important that people are appropriately served with the penalty notices so that they might respond, and leaving a notice on a vehicle or at premises may be a less reliable method of service. However, the Committee understands that Revenue NSW sends reminder notices where a person has not paid a fine within the relevant period, and persons can elect to pay the fine without any additional penalty, or to go to court, until that reminder notice has expired. Given these safeguards the Committee makes no further comment.**

#### *Threshold to commence prosecutions*

12. Schedule 1.34, item 1 of the Bill seeks to amend section 8 of the *Prevention of Cruelty to Animals Act 1979* to remove the requirement for the prosecution to obtain advice from both Local Land Services and Regional NSW about the state of a stock animal and the appropriate care for it before commencing proceedings for an offence of failing to provide the animal with food, drink or shelter. Instead, the prosecution will only be required to obtain advice from Local Land Services.

**Schedule 1.34, item 1 of the Bill seeks to amend section 8 of the *Prevention of Cruelty to Animals Act 1979* to remove the requirement for the prosecution to obtain advice from both Local Land Services and Regional NSW about the state of a stock animal and the appropriate care for it before commencing proceedings for an offence of failing to provide the animal with food, drink or shelter. Instead, the prosecution will only be required to obtain advice from Local Land Services.**

**The Bill thereby lowers the threshold to commence prosecutions in these matters. However, the Committee notes that the prosecution would still have to obtain advice from Local Land Services before commencing such a prosecution, and that the Bill does not alter any other provisions relating to the prosecutions, that is, the prosecution would still have to prove all elements of the offence under section 8 before a person can be exposed to any penalty. In the circumstances, the Committee makes no further comment.**

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<sup>9</sup> Law Access NSW,

[https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist\\_fines/lawassist\\_faq\\_fine.aspx](https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_fines/lawassist_faq_fine.aspx) viewed 24 September 2020.

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

*Wide powers of delegation*

13. There are some instances in the Bill where Ministers are granted wide powers of delegation. For example, schedule 1.24, item 1 of the Bill seeks to amend section 21 of the *Health Administration Act 1982* so that the Minister for Health and Medical Research can delegate to any person his or her power under section 23 to approve the disclosure of information obtained in connection with the conduct of research or investigations into morbidity or mortality occurring within NSW.
14. Similarly, schedule 1.42 of the Bill grants the Minister for Better Regulation and Innovation a wide power of delegation. Section 204 of the *Retirement Villages Act 1999* relates to ministerial exemptions for the COVID-19 pandemic. It allows the Minister to exempt retirement villages from complying with specified provisions of the Act or regulations for a prescribed period, and the Minister can attach conditions.
15. Further, under section 205 of the *Retirement Villages Act 1999*, if the Minister reasonably believes a person is failing to comply with a condition of an exemption granted under section 204, the Minister may give the person a notice (a compliance notice) requiring the person to comply with the condition within the period specified in the notice, and failure to comply with that notice would result in a maximum penalty of a \$5,500 fine for an individual.
16. Schedule 1.42 of the Bill seeks to amend section 205 of the *Retirement Villages Act 1999* so that the Minister can delegate this power to issue compliance notices to persons employed in the Department of Customer Service.

**There are some instances in the Bill where Ministers are granted wide powers of delegation. For example, schedule 1.24, item 1 of the Bill seeks to amend section 21 of the *Health Administration Act 1982* so that the Minister for Health and Medical Research can delegate to any person his or her power under section 23 to approve the disclosure of information obtained in connection with the conduct of research or investigations into morbidity or mortality occurring within NSW. The Committee notes that such information may include sensitive details which may have privacy impacts for individuals. Further, there are no restrictions on this power to delegate e.g. restricting delegation to people with certain qualifications or expertise.**

**Similarly, schedule 1.42 of the Bill seeks to amend section 205 of the *Retirement Villages Act 1999* so that the Minister for Better Regulation and Innovation can delegate his or her power to issue certain compliance notices to persons employed in the Department of Customer Service. Again, there are few restrictions on the power to delegate e.g. restricting delegation to employees with a certain level of seniority or expertise. However, in issuing such notices, the person must form a judgment about whether there has been failure to comply with conditions related to ministerial exemptions for retirement villages during the COVID-19 pandemic; and failure to comply with such a notice can result in a penalty of up to \$5,500.**

In short, the exercise of the powers of disclosure and to issue compliance notices may impact on individual rights. Therefore, the Committee refers the provisions in question to Parliament to consider whether the wide powers of delegation contained therein make rights unduly dependent on insufficiently defined administrative powers.

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

*Regulations incorporating standards that are not subject to disallowance*

17. Schedule 1.6, item 2 of the Bill seeks to amend section 35 of the *Building and Construction Industry Security of Payment Act 1999* to enable the regulations to apply, adopt or incorporate any publication as in force at a particular time or as in force from time to time. The Explanatory Note to the Bill states that this would allow for updates to the Continuing Professional Development Guidelines for Adjudicators (CPD Guidelines) and ensure that continuing professional development requirements, as informed by the CPD Guidelines, remain relevant for adjudicators.

Schedule 1.6, item 2 of the Bill seeks to amend section 35 of the *Building and Construction Industry Security of Payment Act 1999* to enable the regulations to apply, adopt or incorporate any publication as in force at a particular time or as in force from time to time. In doing so, the Bill would allow the regulations to incorporate standards that are not subject to disallowance by Parliament. While there is a requirement under the *Interpretation Act 1987* for regulations to be tabled in Parliament and subject to disallowance, there appears to be no such requirement for the publications in question.

The Explanatory Note to the Bill states that the proposed amendment would allow for updates to the Continuing Professional Development Guidelines for Adjudicators (CPD Guidelines) and ensure that continuing professional development requirements, as informed by the CPD Guidelines, remain relevant for adjudicators. However, the Committee notes that the proposed amendment appears to go beyond that with no express limitation. The Committee refers the proposed amendment to Parliament to consider whether it would result in a case where the exercise of legislative power is not sufficiently subjected to parliamentary scrutiny.

*Ministerial orders incorporating standards that are not subject to disallowance*

18. Sections 7, 8 and 9 of the *Public Health Act 2010* enable the Minister for Health and Medical Research by order to give directions to deal with public health risks. For example, section 7 provides that where the Minister 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:
  - take such action and
  - by order give such directions,
 as the Minister considers necessary to deal with the risk and possible consequences.
19. Section 10 of the *Public Health Act 2010* provides that it is an offence not to comply with a Ministerial direction under section 7, 8 or 9 without reasonable excuse, and that the

maximum penalty for this offence is an \$11,000 fine or imprisonment for 6 months or both, and in the case of a continuing offence, a further \$5,500 fine for each day the offence continues.

20. Schedule 1.40 to the Bill seeks to insert a new section 10A into the *Public Health Act 2010* to provide that a direction made by the Minister by order under section 7, 8 or 9 may adopt, and require compliance with, a publication in force for the time being. The Explanatory note to the Bill states that by allowing for the incorporation into a Ministerial order of a publication as in force for the time being, the proposed amendment will promote a flexible and timely response to rapidly evolving public health situations such as the current COVID-19 pandemic, in which scientific knowledge, and the expert medical advice that relies on that knowledge, changes frequently.

**Sections 7, 8 and 9 of the *Public Health Act 2010* enable the Minister for Health and Medical Research by order to give directions to deal with public health risks. Further, section 10 of the *Public Health Act 2010* provides that it is an offence not to comply with a Ministerial direction under section 7, 8 or 9 without reasonable excuse, and that the maximum penalty for this offence is an \$11,000 fine or imprisonment for 6 months or both, and in the case of a continuing offence, a further \$5,500 fine for each day the offence continues.**

**Schedule 1.40 to the Bill seeks to insert a new section 10A into the *Public Health Act 2010* to provide that a direction made by the Minister by order under section 7, 8 or 9 may adopt, and require compliance with, a publication in force for the time being. The Committee notes that unlike regulations, there appears to be no requirement for the ministerial orders in question to be tabled in Parliament or subject to disallowance. Further, the amendment in Schedule 1.40 would mean that such orders could incorporate, and require compliance with, publications in force from time to time and again, there appears to be no requirement for those to be tabled in Parliament or subject to disallowance either.**

**In short, by requiring people to comply with ministerial orders (on pain of quite significant penalties), that incorporate publications in force from time to time, neither of which are subject to tabling requirements or disallowance, schedule 1.40 of the Bill may evidence a scheme under which the exercise of legislative power is subjected to insufficient parliamentary scrutiny.**

**However, the Committee notes further that these provisions are intended to facilitate a flexible and timely response during public health situations, such as the current COVID-19 pandemic. In particular, by allowing ministerial orders to incorporate publications in force, orders can keep pace with rapidly evolving scientific knowledge and medical advice. Having regard to the public health context of the provisions, and the potentially serious consequences should a flexible and timely response not be forthcoming, the Committee makes no further comment.**

## 10. Warnervale Airport (Restrictions) Repeal Bill 2020

Date introduced	24 September 2020
House introduced	Legislative Assembly
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

### PURPOSE AND DESCRIPTION

1. The objects of the Bill are:

- (a) to amend the Warnervale Airport (Restrictions) Act 1996 to remove the daily take off and landing cap for Warnervale Airport immediately, and
- (b) to repeal the whole of the Warnervale Airport (Restrictions) Act 1996 at a future date appointed by proclamation that is no later than 2 years from the date of assent to the proposed Act.

### BACKGROUND

2. According to the second reading speech, the *Warnervale Airport (Restrictions) Act 1996* (the Act) has been the “subject of contention” since it was introduced as a private member’s Bill and assented to in July 1996.

3. The Hon. Rob Stokes MP noted that an independent review of the Act commenced in October 2019 which examined whether the Act remains “relevant and necessary”:

The independent review was initiated in October 2019 ... After months and months of consultation, 939 unique written and verbal submissions were received, 75 per cent of which supported the Act being repealed. The reviewers agreed that the Act was no longer necessary and had little relevance as it did not alleviate or allay community uncertainty and concern about the future operations of the airport. They recommended that the Act be repealed as soon as possible and, particularly, that the limit on the number of daily take offs and landings in section 6 of the Act be suspended immediately.

4. In his speech, the Minister noted that the Act is unusual because no other airports of a similar scale in NSW are regulated by their own statutes. The Minister also elaborated on why the Government was proposing to lift the cap on daily take-offs and landings at the airport:

This amendment is crucial and will provide clarity in operation to local businesses and community groups that use Warnervale Airport and improve its financial viability in providing a reliable airspace. As the review notes, the current limit of 88 aircraft movements appears arbitrary and without explanation. And there is nothing in the provision that allows for an increase or decrease in movements to be applied for or permitted to address operational realities as they change from time to time. Section 6 of the Act is administratively ineffective and its immediate removal is a significant step.

5. The second reading speech also explained the rationale for the proposed repeal provision in the Bill:

The final provision of the bill, clause 4, will repeal the remainder of the Act but, unlike the omission of section 6, this complete repeal will not be done immediately for a very important reason. Subclause (2) of clause 2 provides that this repeal will occur on the earlier of a day to be appointed by proclamation, or the day that is two years after the date of assent to the Act. I am cognisant that there is some work to be done, and to respect the council in getting on and doing this important work. The bill therefore proposed a staged approach to the repeal of the Act. A two-year time frame is deemed reasonable to allow for appropriate local planning controls, and business and operations plans to be prepared and put in place by council to address the future operations and any changes proposed for the airport, prior to the Act being repealed.

#### ISSUES CONSIDERED BY THE COMMITTEE

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

###### *Commencement by proclamation*

6. Clause 2 of the Bill repeals the *Warnervale Airport (Restrictions) Act 1996* on the earlier of:

- (a) a day to be appointed by proclamation, or
- (b) the day that is 2 years after the date of assent to this Act.

**The Bill repeals the *Warnervale Airport (Restrictions) Act 1996* on the earlier of a day to be appointed by proclamation or the day that is 2 years after the date of assent to the amending Act. Generally, the Committee prefers that Acts commence on assent or on a fixed date to provide certainty to affected parties.**

However, the Bill does provide some certainty that the Act effecting the repeal would be commenced, at the latest, 2 years after the date of assent. While the Act could be commenced by proclamation at any time during the preceding period, the second reading speech suggests that the deferred commencement is designed to allow Council sufficient time to implement local planning controls, changes to the airport, and business and operations plans. In the circumstances, the Committee makes no further comment.

## Part Two – Regulations

### 1. Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation 2020

Date tabled	LA: 28 July 2020 LC: 4 August 2020
Disallowance date	LA: 20 October 2020 LC: 20 October 2020
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

#### PURPOSE AND DESCRIPTION

1. The object of the Regulation is to amend the *Workers Compensation Regulation 2016* as the result of the recent enactment of section 19B of the *Workers Compensation Act 1987*.
2. That is, the Act now includes an automatic presumption that certain workers who contract COVID-19 contracted the illness in the course of their employment (unless the contrary is established). This is designed to make it easier for workers who contract COVID-19 to receive workers compensation to support their recovery.<sup>10</sup>
3. For the purposes of the Act, this Regulation:
  - (a) prescribes medical tests for COVID-19 and the results of those tests that must be obtained, and the clinical criteria that must be satisfied, for a worker to be taken to have contracted COVID-19, and
  - (b) modifies the provision of the Act to make the terminology used in the provision consistent with concepts used in a Part of the Act dealing with entitlements to weekly compensation, for the purposes of applying that Part to workers with COVID-19, and
  - (c) provides for certain matters in relation to how the period of incapacity of a worker due to COVID-19 is to be established for the purposes of the Act, and

<sup>10</sup> NSW State Insurance Regulatory Authority, undated, *Presumption for COVID-19 affected workers*, [https://www.sira.nsw.gov.au/resources-library/list-of-sira-publications/coronavirus-covid\\_19/what-you-need-to-know/accordion/presumption-for-covid-19-affected-workers](https://www.sira.nsw.gov.au/resources-library/list-of-sira-publications/coronavirus-covid_19/what-you-need-to-know/accordion/presumption-for-covid-19-affected-workers), viewed 18 August.



- (d) clarifies and makes more detailed provision for the way in which workers who have contracted COVID-19 but in relation to whom the presumption of entitlement to weekly compensation under section 19B is rebutted are to be dealt with under the Act, and
  - (e) prescribes further types of employment as prescribed employment.
4. This Regulation is made under the *Workers Compensation Act 1987*, including sections 19B and 280 (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**

#### *Restricting right to compensation – types of prescribed employment*

5. Schedule 1, item 3 inserts new clause 5D into the *Workers Compensation Regulation 2016*. Clause 5D prescribes additional types of employment to the definition of "prescribed employment" in section 19B(9) of the *Workers Compensation Act 1987*.
6. Section 19B(1) of the Act provides that if a worker, during a time when the worker is engaged in prescribed employment, contracts COVID-19, there is a rebuttable presumption for the purposes of the Act that:
  - (1) ...
    - (a) the disease was contracted by the worker in the course of the employment, and
    - (b) the employment—
      - (i) in the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease,<sup>11</sup> or
      - (ii) in any other case—was the main contributing factor to contracting the disease.
7. The remainder of section 19B establishes the relevant medical testing criteria for a worker to be deemed to have COVID-19 and other presumptions about the date of injury and duration of the period in which they are incapable of work.
8. Section 19B(9) prescribes various types of employment for the purposes of applying the relevant presumptions. These types of employment include in the retail industry (other than businesses providing only online retail); the health care sector; disability and aged care facilities; educational institutions; police and emergency services; restaurants, clubs and hotels; and the cleaning industry, among others.
9. New clause 5D adds cafes, supermarkets, funeral homes and childcare facilities to the forms of prescribed employment.
10. Other potential high risk settings for COVID-19 do not appear to be prescribed under clause 5D or section 19B(9). For example, under the Stage 4 restrictions in Victoria,

<sup>11</sup> Clause 25 of Part 19H of Schedule 6 of the Act applies certain savings and transitional provisions to police officers, paramedics and firefighters.

industries that were deemed to be high risk but which could continue operating subject to the conditions of a “High Risk COVIDSafe Plan” included: construction, meat processing, medical and pharmaceutical supply, supermarket distribution and warehousing and distribution.<sup>12</sup>

11. Another potential high-risk workplace setting which may not be captured relates to security guards or other personnel involved in hotel quarantine.

**Clause 5D of the Regulation prescribes certain additional forms of employment for the purpose of establishing a presumption under the Act that a worker contracted COVID-19 in the course of their employment.**

**Although both section 19B(9) of the Act and clause 5D of the Regulation prescribe many different types of employment to which the presumption applies, some workplaces which have been considered high-risk settings for contracting COVID-19 in Victoria appear to be omitted. For example, it is not clear that the following forms of employment are captured: meat processing, medical and pharmaceutical supply, supermarket distribution and warehousing and distribution. It is also not clear that security and other staff involved in hotel quarantine are captured.**

**While it is possible that some of the identified industries may be classified as “retail”, which is a prescribed form of employment, the Committee notes that the potential omissions or lack of clarity may restrict access to compensation for some workers. Accordingly, the Committee refers this matter to the Parliament.**

#### *Restricting right to compensation – types of tests*

12. Schedule 1, item 3 of the Regulation inserts clause 5B(1) and (2) in the *Workers Compensation Regulation 2016*. The clause provides as follows:
  - (1) For the purposes of section 19B(2) of the 1987 Act, a result set out in Column 3 of Part 2 of Schedule 2 in relation to COVID-19, if obtained by means of a medical test the requirements of which are set out opposite that result in Column 2 of that Part in relation to the disease, is a result prescribed in respect of the disease.
  - (2) For the purposes of section 19B(3) of the 1987 Act, the clinical criteria prescribed for the purpose of making a classification of COVID-19 are the obtaining of a result prescribed under section 19B(2) of the 1987 Act in respect of the disease by means of a medical test that complies with the requirements prescribed under that subsection in relation to the disease.
13. As discussed at paragraphs 6 – 8 above, section 19B establishes a rebuttable presumption that, among other things, certain workers contracted COVID-19 in the course of their employment. It also sets out the medical testing criteria for a worker to be deemed to have COVID-19.
14. Clause 5B(1) appears to relate to the medical tests required to establish that a worker has COVID-19. Clause 5B(3) provides that the clinical criteria for diagnosing COVID-19 are obtaining a result using the same medical tests required by clause 5B(1). The effect

<sup>12</sup> Business Victoria, undated, *High Risk COVIDSafe Plan*, <https://www.business.vic.gov.au/disputes-disasters-and-succession-planning/covid-safe-business/high-risk-covid-safe-plan>, viewed 19 August.

of the clause therefore appears to be that a worker may only be deemed to have COVID-19 if one of the following two tests prescribed in Part 2 of Schedule 2 of the Regulation have returned a positive result:

**Part 2 – Medical tests and results – COVID-19**

Column 1	Column 2	Column 3
COVID-19	Nucleic acid testing of any specimen using a specific SARS-CoV-2 nucleic acid test that is listed in the Australian Register of Therapeutic Goods	Detection of SARS-CoV-2
	A laboratory culture of any specimen, with confirmatory testing using a PCR test that is listed in the Australian Register of Therapeutic Goods	The isolation of SARS-CoV-2, confirmed with PCR

15. Other than the above tests, there appear to be no separate clinical criteria – such as symptoms - which may enable a diagnosis of COVID-19 (for the purposes of workers compensation).
16. The two tests prescribed for the purpose of classifying workers as having COVID-19 appear to both be types of nucleic acid testing.<sup>13</sup> PCR tests, which appear to be referred to in the above Schedule, are described by the Therapeutic Goods Administration (TGA) as the current "gold standard" for diagnosing COVID-19.
17. However, there are several different tests which can be used to diagnose COVID-19. For instance, serological testing may be used to find that a person has already had COVID-19, but is generally not able to detect active infections.<sup>14</sup> False negatives are also possible, and may be influenced by the timing of a test.<sup>15</sup> The TGA has also noted that several SARS-Cov-2 tests have undergone an "expedited assessment" and that there is currently "limited evidence available to assess the accuracy and clinical utility" of COVID-19 tests.<sup>16</sup>

**Clause 5B of the Regulation prescribes certain tests which may be used to classify a worker as having COVID-19 for the purposes of workers compensation. Other than the nominated tests, there appear to be no clinical criteria – such as the presence of symptoms – which may enable a diagnosis of COVID-19. There also appear to be other tests which are not included in the Regulation. For instance, the Regulation appears to omit tests that may detect past rather than active infections, such as serological testing.**

<sup>13</sup> Commonwealth Department of Health, Therapeutic Goods Administration, 15 September 2020, *COVID-19 testing in Australia – information for health professionals*, <https://www.tga.gov.au/covid-19-testing-australia-information-health-professionals>, viewed 23 September 2020.

<sup>14</sup> Ibid.

<sup>15</sup> Slezak, M., 15 July 2020, *COVID-19 testing not as accurate missing coronavirus cases grow*, <https://www.abc.net.au/news/2020-07-15/covid-19-testing-not-as-accurate-missing-coronavirus-cases-grow/12455076>, viewed 23 September 2020.

<sup>16</sup> Commonwealth Department of Health, Therapeutic Goods Administration, 15 September 2020, *COVID-19 testing in Australia – information for health professionals*, <https://www.tga.gov.au/covid-19-testing-australia-information-health-professionals>, viewed 23 September 2020.

**According to the Therapeutic Goods Administration (TGA), there is limited evidence to assess the accuracy and utility of COVID-19 tests generally. They have also noted that several SARS-Cov-2 tests have been assessed on an expedited basis.**

**In light of the emerging evidence around tests, the potential for false negatives, and the possibility of ongoing complications from COVID-19 after an active infection, the testing and clinical criteria for determining that a worker has COVID-19 may appear to be quite narrow. Although the TGA notes that PCR testing, which appears to be included in the Regulation, is the "gold standard" for COVID-19 diagnosis, it is possible that the current classification criteria may result in some active infections or past infections being missed. In limited circumstances, this may operate to restrict the access of some workers to compensation. In the circumstances, the Committee refers this matter to Parliament for its consideration.**

# Appendix One – Functions of the Committee

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

## 8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
  - a) to consider any Bill introduced into Parliament, and
  - b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    - vi trespasses unduly on personal rights and liberties, or
    - vii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - viii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - ix inappropriately delegates legislative powers, or
    - x 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.