



Legislation Review Committee

LEGISLATION REVIEW DIGEST

NO. 28/57 – 23 March 2021



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

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2020, 47pp 30cm

Chair: Felicity Wilson MP

23 March 2021

ISSN 1448-6954

1. Legislation Review Committee – New South Wales
2. Legislation Review Digest No. 28 of 57

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 28 of 57

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

Contents

Membership	ii
Guide to the Digest	iii
Conclusions	iv
PART ONE – BILLS	1
1. CIVIL LIABILITY AMENDMENT (CHILD ABUSE) BILL 2021	1
2. COVID-19 RECOVERY BILL 2021	6
3. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (PUBLICATION OF MINISTERIAL REGISTER OF INTERESTS) BILL 2021*	13
4. LOCAL GOVERNMENT AMENDMENT BILL 2021	15
5. MUTUAL RECOGNITION (NEW SOUTH WALES) AMENDMENT BILL 2021	19
6. REAL PROPERTY AMENDMENT (CERTIFICATES OF TITLE) BILL 2021	22
7. SOUTH32 DENDROBIUM EXTENSION PROJECT APPROVAL BILL 2021*	26
PART TWO – REGULATIONS	28
1. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION (NO 2) 2020	28
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	31

Membership

CHAIR	Ms Felicity Wilson MP, Member for North Shore
DEPUTY CHAIR	The Hon Trevor Khan MLC
MEMBERS	Mr Lee Evans MP, Member for Heathcote Mr David Mehan MP, Member for The Entrance The Hon Leslie Williams MP, Member for Port Macquarie Ms Wendy Lindsay MP, Member for East Hills The Hon. Shaoquett Moselmanne MLC Ms Abigail Boyd MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 2226 / 02 9230 3382
FACSIMILE	02 9230 3309
E-MAIL	legislation.review@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/lrc

Guide to the Digest

COMMENT ON BILLS

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

COMMENT ON REGULATIONS

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

Conclusions

PART ONE – BILLS

1. CIVIL LIABILITY AMENDMENT (CHILD ABUSE) BILL 2021

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

Retrospectivity

The *Civil Liability Amendment (Child Abuse) Bill 2021* amends the *Civil Liability Act 2002* (the Act) to insert a new Part 1C. The provisions in this Part give a court the power to set aside certain agreements on the application of a person who is prevented from commencing civil proceedings relating to child abuse. This includes agreements made before the commencement of Part 1C.

Further, the Bill inserts a new section in Part 2A of the Act, which provides that Part 2A 'does not apply, and is take never to have applied to, an injury resulting from child abuse'. Finally, the Bill includes amendments to Schedule 1 to the Act, which give courts the power to set aside judgments by previous courts relating to child abuse which occurred in custody.

Through the operation of these provisions, the Bill has significant retrospective effect. The Committee generally comments on provisions that operate retrospectively, as they contravene the rule of law principle that a person is entitled to know the law that applies to him or her at any given time.

However, the Committee acknowledges the object of these provisions, being to improve access to justice for victims of child abuse, despite the legal barriers that may have existed at the time they entered into any agreement relating to a cause of action arising from their abuse. The Committee also acknowledges the safeguards included in the Bill – for example, the power to set aside is limited to certain types of agreements, the court must be satisfied that it is 'just and reasonable' to exercise the power, and the Bill sets out a non-exhaustive list of issues that the court may have regard to in making its decision. In the circumstances, the Committee makes no further comment.

Freedom of contract

Section 7D of the Bill gives the court power to set aside an agreement which prevents an applicant from commencing an action for damages relating to child abuse, if the court considers it is just and reasonable to do so. Further, section 7E provides that the court can set aside related instruments that give effect to an agreement, such as a contract or deed. These amendments may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject, and to later rely on those terms, without outside interference by the state.

Further, the Committee notes the potentially asymmetrical impact of setting aside such agreements, as any money already paid to an applicant under a void agreement will not be recoverable, unless it is offset against compensation sought by the applicant in legal proceedings.

However, the Committee notes that the freedom of contract is not absolute. The Committee acknowledges the object of this Bill, in particular, to improve access to justice for survivors of

child abuse. The Committee also acknowledges that this reform is consistent with the approach taken in other states, and builds on previous reforms aimed at removing legal barriers to seeking compensation.

The Committee also notes the safeguards included in the Bill, including the requirement that a Court consider it 'just and reasonable' to set aside an agreement, and the provision that the Court may have regard to the relative bargaining positions of the parties, and their conduct in coming to the agreement. In these circumstances, the Committee makes no further comment.

Res judicata – principle of finality of litigation

Part 2A of the Act places a number of restrictions on claims relating to injuries suffered while a person was in custody – for example, limiting the circumstances in which damages can be awarded. As noted above, proposed section 26B(2A), which this Bill seeks to enact, would exclude claims arising from child abuse from the operation of that Part.

The Bill also introduces provisions which allow for a court to set aside judgments or settlements recognised by an earlier court, if they were affected by the provisions of Part 2A of the Act at the time. This would include judgments previously made on the merits of an individual's claim, as well as consent orders (i.e. judicially recognised settlements). As well as operating retrospectively, these provisions could impact upon defendants' right to depend on the principle of finality of litigation, or the principle of '*res judicata*'.

'*Res judicata*' refers to the principle that a cause of action cannot be re-litigated once it has been judged on the merits. It is also referred to as 'claim preclusion'. This is related, but not synonymous with the right not to be tried or punished more than once for the same offence, sometimes referred to as 'double jeopardy', contained in Article 14(6) and (7) of the International Covenant on Civil and Political Rights.

However, the Committee recognises the safeguards included in these provisions, including the requirement that a court only set aside an earlier judgment if it considers it 'just and reasonable to do so'. As above, the Committee also recognises the objectives of these provisions, to remove restrictions on damages recoverable by victims of child abuse which occurred in custody. In the circumstances, the Committee makes no further comment.

2. COVID-19 RECOVERY BILL 2021

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

Examination by audio-visual link, risk of arbitrary detention

The *COVID-19 Recovery Bill 2021* extends the operation of provisions in various Acts allowing certain activities, such as mandatory questioning by authorised officers, to occur by video link rather than in person. This includes the extension of provisions under the *Mental Health Act 2007* for medical practitioners to examine patients by video link, in order to help decide whether those patients should be detained in a mental health facility. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57.

Consistent with the Committee's previous comments, the extension of these provisions in the *Mental Health Act* may impact the extent to which individuals are able to fully participate in a process which could result in their involuntary detention. They also have the potential to impact upon the accuracy of the examination process, as they reduce the ability of medical practitioners

to assess a patient's demeanour. In turn, this may impact on the right of individuals not to be arbitrarily detained.

However, the provisions remain an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions also contain certain safeguards, including a requirement that examination only be carried out over video link if it is necessary, and 'can be carried out with sufficient skill or care so as to form the required opinion about the [patient]'. In these circumstances, the Committee makes no further comment.

Freedom of contract and property rights

The Bill includes amendments to schedule 1 to the *Residential Tenancies Act 2010*, which will come into force on the repeal of Part 13 of that Act on 26 March 2021. These amendments include the introduction of new provisions relating to the negotiation of repayment plans between landlords and tenants who have been financially affected by the COVID-19 pandemic. For example, clause 27 of the proposed Part 9 of schedule 1 to the *Residential Tenancies Act* prohibits a landlord from evicting a tenant for non-payment of rent, unless the tenant has failed on two occasions to comply with the terms of a repayment plan.

Further, it must be 'fair and reasonable in circumstances' for the landlord to issue a termination notice or seek a termination order in the Tribunal. If the parties have not agreed to a repayment plan, the landlord cannot terminate the lease unless they have 'participated in good faith' in a formal arrears repayment negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to seek termination.

These provisions are distinct from previous amendments to the *Rental Tenancies Act* which prevented landlords from seeking termination on the basis on non-payment of rent. The Committee has commented on those amendments, contained in Part 13 of the *Rental Tenancies Act*, in previous issues of the Committee Digest – for example, Digest No. 15/57. However, similar to the provisions in Part 13, the provisions in Part 9 of schedule 1 continue to impact on landlords' freedom of contract, specifically their ability to enforce their rights under contracts they have entered into with tenants. Further, by continuing to limit the extent to which landlords can enforce their rights under tenancy agreements – such as the right to evict tenants for non-payment of rent – the provisions in Part 9 impact on landlords' property rights.

However, the Committee notes that these provisions are an extraordinary measure that seeks to respond to the ongoing impacts of the economic crisis created by the COVID-19 pandemic. Further, they will apply for a limited time period, as they are due to be repealed in September 2021. The Committee also notes that landlords retain the right to negotiate repayment plans with tenants, and to enforce those repayment plans. In the circumstances, the Committee makes no further comment.

Retrospectivity

Section 5 of the Bill provides that, if an amendment in the Bill which extends a 'prescribed period' commences after the prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued on. This 'savings provision' may mean that the amendment to the length of certain 'prescribed periods' in various Acts and regulations will have retrospective effect. This could have the effect that individuals who may have presumed certain provisions were not in force after they were due to expire were in fact bound by those provisions.

The Committee generally comments on provisions that have retrospective effect, as they run counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee acknowledges the practical objectives of this provision, to ensure consistency within the legislative schemes affected by the Bill's amendments. Insofar as it extends 'prescribed periods' under various pieces of legislation, the Bill does not create new provisions, but extends the operation of old provisions introduced because of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

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

Henry VIII clauses

In extending the operation of emergency provisions in various Acts and regulations, the Bill contains a number of Henry VIII clauses. For example, numerous amendments to existing Acts delay the repeal date or extend the 'prescribed period' for the operation of certain provisions for six months, or until a 'later day... prescribed by the regulations'. This is the case for the amendments made to the *Industrial Relations Act 1996* and the *Retirement Villages Act 1999*, among others. The Committee notes that these provisions allow for regulations to amend Acts in respect of the repeal date, or period of operation, of certain emergency provisions.

The Bill also amends the *Retail Leases Act 1994* to provide that certain protections will continue to apply, subject to exemptions provided for by the regulations. Again, this allows for regulations to alter the effect of provisions contained in their parent Act.

Unlike primary legislation, regulations are subordinate legislation – they are not required to be passed by Parliament, and the Parliament does not control when they commence. While either House of Parliament can pass a resolution disallowing a regulation (under section 41 of the *Interpretation Act 1987*), the regulation may operate for some time before disallowance can occur.

However, the Committee notes that, to the extent that it delegates power to regulations, the Bill only seeks to extend the operation of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Treasurer suggested in the second reading speech, in 'recognising the uncertainty of the duration of the pandemic'. In these circumstances, the Committee makes no further comment.

3. INDEPENDENT COMMISSION AGAINST CORRUPTION AMENDMENT (PUBLICATION OF MINISTERIAL REGISTER OF INTERESTS) BILL 2021*

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

Confidential information

The Bill amends the *Independent Commission Against Corruption Regulation 2017* to provide that the Premier must cause the Ministerial Register of Interests (the Register) to be published on the Department of Premier and Cabinet website, and tabled in both Houses of Parliament. Changes to the Register are also to be published on the website within 30 days of the change, and tabled in both Houses of Parliament within 30 sitting days.

The Committee notes that the *Government Information (Public Access) Act 2009* provides that there is conclusively presumed to be an overriding public interest against the disclosure of the

Register. Disclosure of this information would then disclose confidential information that has been deemed against the public interest to disclose.

The Committee acknowledges that the Bill is intended to provide transparency of the interests of Ministers, especially where it may conflict with their role and functions. However, given the existing presumption of confidentiality, the Committee refers the matter to the Parliament for its consideration of whether it is appropriate.

4. LOCAL GOVERNMENT AMENDMENT BILL 2021

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

Commencement by proclamation

Section 2 provides that the Act commences on assent except for specified provisions under Schedule 1.1. These amending provisions relate to the local government rating system, particularly regarding categories of ordinary rates and land.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes a flexible start date may assist with the necessary administrative arrangements required to implement the new legal framework for special rates and levies across NSW councils. The Committee also notes that the majority of the Bill's provisions commence on assent. In these circumstances, the Committee makes no further comment.

Matters deferred to regulations/Regulations may modify the application of the Act

The Bill provides that certain matters will be delegated to the regulations. For example, regulatory restrictions on categories of land may be subject to the regulations, as well as factors for determining a sub-category of land, and public consultation requirements.

In particular, proposed section 529(5)(b) of the Bill provides that the regulation may make provision for or with respect to public consultation requirements to be followed by councils in determining sub-categorisation, including by applying, with or without modification, provisions of the Act, the regulations or guidelines. The Committee notes that this may allow the provisions of the Act to be applied with modification.

The Committee generally prefers key concepts to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights of individuals to promotion may be affected. As the matters subject to regulatory requirements may affect the categorisation of land or public consultation requirements, and may modify the application of the Act's provisions, the Committee refers the matter to the Parliament for its consideration.

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

Minister may issue guidelines and directions not subject to disallowance

The Bill provides that the Minister may issue guidelines for the determination of ordinary rates for rateable land in contiguous urban areas and may issue written directions to councils concerning the factors that may or may not be used to determine a residential subcategory. The Committee notes that these provisions are intended to facilitate a flexible and timely response for local government councils to settle matters of residential sub-categorisation.

However, the Committee notes that, unlike regulations, there is no requirement that such guidelines or directions be tabled in Parliament and therefore are not subject to disallowance. This may subject such guidelines and directions to insufficient parliamentary scrutiny. The Committee therefore refers this matter to Parliament for its consideration.

Non-reviewable decisions

Schedule 1.1[3] creates a non-reviewable decision in that it creates a mechanism for a special rate increase that are not reviewable by IPART. The Committee refers the matter to the Parliament for consideration.

5. MUTUAL RECOGNITION (NEW SOUTH WALES) AMENDMENT BILL 2021

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

Termination of references by proclamation

The Bill makes amendments to enact uniform legislation, applying throughout Australia, to recognise regulatory standards adopted regarding goods and occupations.

Proposed subsection 5B(2) of the Bill provides that the Governor may, at any time, by proclamation published on the NSW legislation website, fix a day on which references made by section 4(1)(a) of the Act, section 5A(1) of the Bill, or both, would be terminated. The Committee prefers legislation that may affect individual rights and liberties to be enacted on assent or on a fixed date to provide certainty to affected persons.

However, the Committee notes the safeguards contained in the Bill, providing that if an amendment reference terminates before the reference made by section 4(1)(a) of the Act, it will not affect laws that were made under that reference before the termination, or the continued operation in the State and Commonwealth Act immediately before that termination or as subsequently amended.

The Committee also recognises that such amending references are administrative in nature to enable State Parliaments to refer matters to the Commonwealth Parliament for amendment. In these circumstances, the Committee makes no further comment.

6. REAL PROPERTY AMENDMENT (CERTIFICATES OF TITLE) BILL 2021

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

Disposal of records

The Bill provides that, subject to the *State Records Act 1998*, the Registrar-General may destroy a paper document that the Registrar-General is not under a duty to deliver or issue to a person, whether or not it is part of the Register. Alternatively, the Registrar-General may instead deliver a paper document, that they are empowered to destroy, to a person who in the Registrar-General's opinion intends to preserve it for historical purposes.

The Committee notes that the destruction of records may impact a person who has matters that are relevant to the documents marked for destruction or disposal, particularly where it relates to property rights. However, the Committee notes the safeguards in the Bill that the Registrar-General must make a reproducible copy of the document, which means a copy of a document that is captured and kept in a way that enables the document to be reproduced.

The Committee recognises that the object of the Bill is to move away from a paper-based system and towards an electronic one. In these circumstances, and given that the Registrar General is required to make a reproducible copy of the document, the Committee makes no further comment.

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

Commencement by proclamation

Section 2 provides that the majority of the Bill will commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes a flexible start date may assist with the implementation of necessary administrative arrangements required to move from a paper-based system to an electronic one regarding certificates of title. The Committee also notes that the Minister stated that date of abolition of certificates of title will be formalised in consultation with the industry to ensure their processes can be adjusted appropriately, with a view to implement the changes before the end of the year. In these circumstances, the Committee makes no further comment.

7. SOUTH32 DENDROBIUM EXTENSION PROJECT APPROVAL BILL 2021*

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

Significant matters in subordinate legislation

Section 7 of the Bill provides that conditions for the operation of the Dendrobium Mine are to be made and issued by the Minister for Planning and Public Spaces by regulation.

In doing so, the Bill may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. Therefore, the Committee refers the matter to Parliament to determine whether the matter is reasonable under the circumstances.

Commencement by proclamation

Section 2 of the Bill provides that this Act commences on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation may affect individual rights or obligations. The Committee refers this provision to the Parliament to consider whether it is reasonable in the circumstances.

PART TWO – REGULATIONS

1. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION (NO 2) 2020

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

Henry VIII Clause

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. For

example, the Regulation extends the time limits for compliance with certain provisions of the *Strata Schemes Management Act 2015*, and provides that electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act. Pursuant to subsection 271A(5) of the Act, this Regulation also extends the operation of section 271A itself, delaying its repeal date from 13 November 2020 to 13 May 2021.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Civil Liability Amendment (Child Abuse) Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General, Minister for the Prevention of Domestic Violence

PURPOSE AND DESCRIPTION

1. The objects of the *Civil Liability Amendment (Child Abuse) Bill 2021* are —
 - (a) to enable courts to set aside certain agreements that settled claims for child abuse where it is just and reasonable to do so in circumstances where there were certain legal barriers to the victim of the child abuse being fully compensated through a legal cause of action, and
 - (b) to ensure that Part 2A of the *Civil Liability Act 2002*, which deals with personal injury claims by offenders in custody, does not restrict awards of damages for child abuse.

BACKGROUND

2. In the second reading speech for this Bill, the Attorney-General, the Hon. Mark Speakman SC, MP, outlined the background to its introduction, including the findings made by the Royal Commission into Institutional Responses to Child Sexual Abuse in 2015, and the NSW Government's 2016 and 2018 reforms in this area.
3. In March 2020, the NSW government published a discussion paper outlining and inviting feedback on potential reforms relating to settlement agreements for child abuse claims.¹ Submissions in response to the discussion paper closed in April 2020.²
4. The Attorney-General also referred to the 'targeted consultation' on the draft Bill from November 2020 to January 2021, the response to which was 'overwhelmingly supportive'.³
5. In emphasising the lengthy process of developing the Bill, the Attorney-General said:

¹ NSW Government, [Discussion paper – setting aside settlement agreements for past child abuse claims](#), 2020.

² NSW Government – [Department of Communities & Justice, 'Setting aside settlement agreements for past child abuse'](#), 2020.

³ NSW Government – [Department of Communities & Justice, 'New bill to address unfair child abuse payouts'](#), 29 November 2020.

This bill is the culmination of extensive consultation and consideration. The New South Wales Government's reforms in 2016 and 2018 were important in providing a clear pathway for access to justice for survivors of child abuse. This bill builds on those reforms. It clearly and unambiguously provides that the courts may set aside settlement agreements for claims that were either impacted by the expiry of the limitation period or where an organisation was not incorporated and there was therefore no proper defendant to the cause of action, or both, if just and reasonable to do so. The bill goes beyond the royal commission's recommendations by ensuring that those survivors who came forward and gave evidence about the unfair and unjust settlements that they had entered into prior to the royal commission have a pathway to justice.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity

6. Schedule 1 to the Bill inserts a new Part 1C into the *Civil Liability Act 2002* (the Act), the object of which is to provide a way for individuals to seek to have an agreement set aside if –
 - (a) the agreement settled a claim for child abuse perpetrated against them, and
 - (b) at the time of the agreement, there were certain legal barriers to the person being fully compensated through a legal cause of action.
7. Section 7D in Part 1C provides that a Court may set aside an affected agreement, on the application of a person who is prevented by that agreement from commencing a cause of action, if it is 'just and reasonable to do so'.
8. Pursuant to section 7C, an 'affected agreement' is an agreement that prevents the exercise of an action on certain causes of action to which section 6A of the *Limitation Act 1969* applies.⁴ This includes agreements which occurred before the commencement of section 6A of the *Limitation Act 1969* (which commenced in March 2016) or Part 1B of the *Civil Liability Act 2002* (which commenced in October 2018).
9. In addition to enacting Part 1C, the Bill also seeks to insert a section 26B(2A) into Part 2A of the Act. This section provides that the 'special provisions for offenders in custody' in Part 2A do not apply, and are 'taken never to have applied to' an injury arising from child abuse. The effect of this retrospective exclusion is discussed further in the section below.
10. The Bill also seeks to insert a new Part 16 into Schedule 1 to the Act. This Part would allow a court to set aside judgments and settlements made by previous courts relating to child abuse which occurred in custody, if the court considers it 'just and reasonable to do so'. The effect of this Part is discussed further in the sections below.

The *Civil Liability Amendment (Child Abuse) Bill 2021* amends the *Civil Liability Act 2002* (the Act) to insert a new Part 1C. The provisions in this Part give a court the power to set aside certain agreements on the application of a person who is prevented from commencing civil proceedings relating to child abuse. This includes agreements made before the commencement of Part 1C.

⁴ Section 6A of the *Limitation Act 1969* relates to actions for damages relating to death or personal injury resulting from child abuse.

Further, the Bill inserts a new section in Part 2A of the Act, which provides that Part 2A 'does not apply, and is take never to have applied to, an injury resulting from child abuse'. Finally, the Bill includes amendments to Schedule 1 to the Act, which give courts the power to set aside judgments by previous courts relating to child abuse which occurred in custody.

Through the operation of these provisions, the Bill has significant retrospective effect. The Committee generally comments on provisions that operate retrospectively, as they contravene the rule of law principle that a person is entitled to know the law that applies to him or her at any given time.

However, the Committee acknowledges the object of these provisions, being to improve access to justice for victims of child abuse, despite the legal barriers that may have existed at the time they entered into any agreement relating to a cause of action arising from their abuse. The Committee also acknowledges the safeguards included in the Bill – for example, the power to set aside is limited to certain types of agreements, the court must be satisfied that it is 'just and reasonable' to exercise the power, and the Bill sets out a non-exhaustive list of issues that the court may have regard to in making its decision. In the circumstances, the Committee makes no further comment.

Freedom of contract

11. As noted above, section 7D in the proposed Part 1C gives a court the power to set aside an 'affected agreement' if it is 'just and reasonable to do so', including agreements made before the Bill comes into force.
12. In the second reading speech, the Attorney-General noted that the 'just and reasonable' test was adopted on the recommendation of the majority of stakeholders who responded to the government's discussion paper, and is consistent with the test in other Australian jurisdictions.
13. Subsection 7D(3) sets out a number of matters which the Court 'may consider' in deciding whether to set aside an affected agreement, including the amount paid to the applicant under the agreement, the bargaining position of the parties to the agreement, and the parties' conduct in coming to the agreement.
14. The Attorney-General noted that these criteria are informed by the Royal Commission's findings and by stakeholder feedback to the discussion paper. Further, the Attorney-General emphasised the importance of the criteria being non-exhaustive, 'as the courts will be best placed to consider the factors in each application and the circumstances relevant to the affected agreement that might make it just and reasonable to set it aside'.
15. Section 7E further provides that, if a court decides to set aside an affected agreement, it may also set aside other things that give effect to the agreement, such as a contract, deed, or order or judgment of a court. There are some exceptions to this power to set aside, including deeds of release signed in accepting an offer under the National Redress Scheme, insurance contracts, and other agreements to the extent they settle cross-claims between defendants.
16. As noted in the second reading speech, this exception is included because the National Redress Scheme is included in Commonwealth legislation, overriding any State law. Other

exceptions are included 'to ensure an application to set aside a settlement agreement can only be brought by survivors and their representatives', who are the people the reforms are intended to benefit.

17. Section 7F provides for the effect of setting aside an agreement. In particular, it provides that an agreement which is set aside is void to the extent that it relates to the applicant, and that any amount paid under the agreement is not recoverable. In the second reading speech, the Attorney-General explained that this is because it 'would not be in the interests of justice for an applicant to be able to apply to have an affected agreement set aside and then have to repay the amount paid under the agreement while they pursue further compensation'.
18. However, such an amount may be taken into account by a court in determining compensation for a cause of action which the applicant brings after the agreement is set aside, in order to avoid 'double compensation'.

Section 7D of the Bill gives the court power to set aside an agreement which prevents an applicant from commencing an action for damages relating to child abuse, if the court considers it is just and reasonable to do so. Further, section 7E provides that the court can set aside related instruments that give effect to an agreement, such as a contract or deed. These amendments may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject, and to later rely on those terms, without outside interference by the state.

Further, the Committee notes the potentially asymmetrical impact of setting aside such agreements, as any money already paid to an applicant under a void agreement will not be recoverable, unless it is offset against compensation sought by the applicant in legal proceedings.

However, the Committee notes that the freedom of contract is not absolute. The Committee acknowledges the object of this Bill, in particular, to improve access to justice for survivors of child abuse. The Committee also acknowledges that this reform is consistent with the approach taken in other states, and builds on previous reforms aimed at removing legal barriers to seeking compensation.

The Committee also notes the safeguards included in the Bill, including the requirement that a Court consider it 'just and reasonable' to set aside an agreement, and the provision that the Court may have regard to the relative bargaining positions of the parties, and their conduct in coming to the agreement. In these circumstances, the Committee makes no further comment.

Res judicata – principle of finality of litigation

19. As mentioned above, the Bill also proposes to insert a new section 26B(2A) into Part 2A of the Act. Section 26B(2A) provides that the 'special provisions for offenders in custody' in Part 2A do not apply, and have never applied, to an injury arising from child abuse.
20. Without this exclusion, the provisions in Part 2A would restrict civil claims arising from child abuse which occurred in custody in various ways – for example, preventing damages from being awarded unless the injury results in death or a permanent impairment of at

least 15%.⁵ In some cases, as the Attorney-General acknowledged in his second reading speech, this has previously resulted in victims of child abuse with 'otherwise ... strong claims' being unable to obtain damages for purely psychological injury.

21. Related to this insertion, the Bill also amends Schedule 1 to the Act to insert a new Part 16. It provides that a victim may commence an action relating to child abuse which occurred in custody, despite any earlier judgment or settlement made before the commencement of section 26B(2A). Further, it provides that a court hearing such an action can set aside judgments or settlements made by a previous court, if it considers it 'just and reasonable to do so'.
22. In commenting on these provisions in the second reading speech, the Attorney-General noted that, 'as the reform is retrospective, individuals with claims that were previously limited by the part 2A provisions will be able to have their claims reassessed without the restrictions in place.'

Part 2A of the Act places a number of restrictions on claims relating to injuries suffered while a person was in custody – for example, limiting the circumstances in which damages can be awarded. As noted above, proposed section 26B(2A), which this Bill seeks to enact, would exclude claims arising from child abuse from the operation of that Part.

The Bill also introduces provisions which allow for a court to set aside judgments or settlements recognised by an earlier court, if they were affected by the provisions of Part 2A of the Act at the time. This would include judgments previously made on the merits of an individual's claim, as well as consent orders (i.e. judicially recognised settlements). As well as operating retrospectively, these provisions could impact upon defendants' right to depend on the principle of finality of litigation, or the principle of '*res judicata*'.

'*Res judicata*' refers to the principle that a cause of action cannot be re-litigated once it has been judged on the merits. It is also referred to as 'claim preclusion'. This is related, but not synonymous with the right not to be tried or punished more than once for the same offence, sometimes referred to as 'double jeopardy', contained in Article 14(6) and (7) of the International Covenant on Civil and Political Rights.⁶

However, the Committee recognises the safeguards included in these provisions, including the requirement that a court only set aside an earlier judgment if it considers it 'just and reasonable to do so'. As above, the Committee also recognises the objectives of these provisions, to remove restrictions on damages recoverable by victims of child abuse which occurred in custody. In the circumstances, the Committee makes no further comment.

⁵ See section 26C, Part 2A, *Civil Liability Act 2002*.

⁶ United Nations Human Rights – Office of the High Commissioner, [International Covenant on Civil and Political Rights](#), Article 14(6) and (7)

2. COVID-19 Recovery Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of the *COVID-19 Recovery Bill 2021* is to temporarily remake or extend the operation of certain measures implemented in response to the COVID-19 pandemic.
2. Schedule 1 to the Bill amends the following Acts and regulations –
 - (a) *Annual Holidays Act 1944*,
 - (b) *Annual Holidays Regulation 2016*,
 - (c) *Associations Incorporation Act 2009*,
 - (d) *Associations Incorporation Regulation 2016*,
 - (e) *Biodiversity Conservation Act 2016*,
 - (f) *Biodiversity Conservation Regulation 2017*,
 - (g) *Community Land Management Act 1989*,
 - (h) *Community Land Management Regulation 2018*,
 - (i) *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*,
 - (j) *Crown Land Management Act 2016*,
 - (k) *Crown Land Management Regulation 2018*,
 - (l) *Environmental Planning and Assessment Act 1979*,
 - (m) *Environmental Planning and Assessment Regulation 2000*,
 - (n) *Fisheries Management Act 1994*,
 - (o) *Home Building Act 1989*,
 - (p) *Industrial Relations Act 1996*,
 - (q) *Long Service Leave Act 1955*,
 - (r) *Long Service Leave Regulation 2016*,

- (s) *Mental Health Act 2007*,
- (t) *Mental Health Regulation 2019*,
- (u) *Mining Act 1992*,
- (v) *Protection of the Environment Operations Act 1997*,
- (w) *Protection of the Environment Operations (General) Regulation 2009*,
- (x) *Residential Tenancies Act 2010*,
- (y) *Retail Leases Act 1994*,
- (z) *Retirement Villages Act 1999*,
- (aa) *Retirement Villages Regulation 2017*,
- (ab) *Strata Schemes Management Act 2015*,
- (ac) *Strata Schemes Management Regulation 2016*,
- (ad) *Waste Avoidance and Resource Recovery Act 2001*,
- (ae) *Water Management Act 2000*,
- (af) *Water Management (General) Regulation 2018*.

BACKGROUND

3. In his second reading speech, the Treasurer, the Hon. Dominic Perrottet MP, set out the reasons underpinning the introduction of this Bill, including the need to 'extend temporary support for those who need it' in response to the ongoing challenges presented by the COVID-19 pandemic.
4. The Treasurer referred to previous legislation introduced to address these challenges, and the need for 'existing protections [to be] coupled with new conditions to ensure that protection does not become a disincentive to recovery'.
5. Accordingly, the Treasurer highlighted proposals in the Bill to 'temporarily extend existing emergency measures by up to 12 months', in order to 'help with continued management of the pandemic as well as our longer-term economic recovery'. Those extended emergency measures include amendments to the *Associations Incorporation Act 2009*, *Strata Schemes Management Act 2015*, *Biodiversity Conservation Act 2016*, *Crown Land Management Act 2016*, *Mental Health Act 2007*, and others, to extend provisions for conducting meetings, medical examinations, and mandatory questioning by audio or video link.
6. Other amendments in the Bill extend emergency provisions for only six months, with a possibility of further extension by regulation – for example, certain other sections of the *Long Service Leave Act 1955* and *Annual Holidays Act 1944*, as well as the *Industrial Relations Act 1996* and *Retirement Villages Act 1999*.

7. These emergency measures were introduced in previous omnibus amendment Bills which the Committee has reported on, such as Digests No. 12/57 and No. 15/57.⁷
8. The Bill also includes provisions designed to 'support the transition back to normal commercial and residential tenancy laws' following the repeal of previous emergency measures. These include certain preserved protections for commercial tenants under the *Retail Leases Act 1994*, as well as new amendments to the *Residential Tenancies Act 2010*, outlined below.

ISSUES CONSIDERED BY THE COMMITTEE

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

Examination by audio-visual link, risk of arbitrary detention

9. As mentioned above, a number of amendments in the Bill extend the operation of provisions in various Acts which allow individuals to make decisions, answer questions, or be examined by audio visual link, rather than in person, as a result of the COVID-19 pandemic.
10. For example, schedule 1.19 to the Bill extends the operation of provisions in the *Mental Health Act 2007* from 26 March 2021 until 31 March 2022, which permit a medical practitioner to examine a person by video link to determine whether the person is a mentally ill or mentally disordered person. Such examination, as provided by sections 18 and 27 of that Act, is an essential step in the process of determining whether a person should be detained in a mental health facility.
11. As noted above, provisions relating to giving evidence or answering questions by video link are also extended in the *Crown Land Management Act 2016*, the *Environmental Planning and Assessment Act 1979*, the *Mining Act 1992*, the *Protection of Environmental Operations Act 1997*, and others.

The *COVID-19 Recovery Bill 2021* extends the operation of provisions in various Acts allowing certain activities, such as mandatory questioning by authorised officers, to occur by video link rather than in person. This includes the extension of provisions under the *Mental Health Act 2007* for medical practitioners to examine patients by video link, in order to help decide whether those patients should be detained in a mental health facility. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57.⁸

Consistent with the Committee's previous comments, the extension of these provisions in the *Mental Health Act* may impact the extent to which individuals are able to fully participate in a process which could result in their involuntary detention. They also have the potential to impact upon the accuracy of the examination process, as they reduce the ability of medical practitioners to assess

⁷ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 12/57](#), 22 April 2020; Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 15/57](#), 2 June 2020.

⁸ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 12/57](#), 22 April 2020.

a patient's demeanour. In turn, this may impact on the right of individuals not to be arbitrarily detained.

However, the provisions remain an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions also contain certain safeguards, including a requirement that examination only be carried out over video link if it is necessary, and 'can be carried out with sufficient skill or care so as to form the required opinion about the [patient]'. In these circumstances, the Committee makes no further comment.

Freedom of contract and property rights

12. Part 13 of the *Residential Tenancies Act 2010* was inserted into that Act in March 2020, and was amended multiple times over the course of 2020. The provisions in that Part, and the regulations made under it, were aimed at protecting tenants who were impacted by the COVID-19 pandemic from eviction during a prescribed 'moratorium period'. Pursuant to section 230 of the *Residential Tenancies Act*, Part 13 will be repealed on 26 March 2021.
13. As the Treasurer noted in his second reading speech, the provisions in this Bill relating to residential tenancies are designed to 'support the transition back to normal commercial and residential tenancy laws following emergency measures introduced at the peak of the pandemic.' Accordingly, the Bill inserts a new Part 9 into schedule 2 to the *Residential Tenancies Act*. Section 2(2) of the Bill specifically provides that the provisions in Part 9 will commence 'on the repeal of Part 13 of the *Residential Tenancies Act*'.
14. Part 9 includes a new clause 27, which provides that a landlord must not take 'prohibited action' to the extent that it relates to rental arrears accrued during the moratorium period by an impacted tenant if the tenant has agreed to a repayment plan, and complied with the terms of that plan. The tenant is taken to have complied with a repayment plan unless they have failed to make 2 consecutive payments by the times required under the plan.
15. Further, clause 27(3) provides that, even if a tenant has not complied with the terms of a repayment plan, a landlord must not take prohibited action unless it is 'fair and reasonable in the circumstances'.
16. If an impacted tenant and their landlord have not agreed to a repayment plan, clause 27(4) provides that the landlord must not take prohibited action unless the landlord has participated 'in good faith' in a formal negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to take the prohibited action.
17. Clause 27(5) sets out the matters that the Tribunal, meaning the NSW Civil and Administrative Tribunal, must have regard to in deciding whether a landlord is authorised to take prohibited action. These include the steps taken by the parties to negotiate a repayment plan, the payments made by the tenant towards the arrears, the nature of any financial hardship experienced by either party, and the availability of reasonable alternative accommodation for the tenant.
18. Similar to the definitions previously included in Part 13 of the Act, 'prohibited action' is defined in clause 27(8) as including giving a termination notice to a tenant or applying to the Tribunal for a termination order on the basis of non-payment of rent.

19. 'Arrears' are defined in clause 26(1) as including rents or charges that were payable by the tenant during the moratorium period, were not paid either with or without the agreement of the landlord, and are still owing.
20. These provisions are time-limited, as clause 27(9) stipulates that clause 27 will cease to have effect on 26 September 2021.
21. Also contained in proposed Part 9 are provisions preventing landlords from issuing a 'no grounds termination' notice (clause 28) or listing personal information about an impacted tenant in a residential tenancy database (clause 31).

The Bill includes amendments to schedule 1 to the *Residential Tenancies Act 2010*, which will come into force on the repeal of Part 13 of that Act on 26 March 2021. These amendments include the introduction of new provisions relating to the negotiation of repayment plans between landlords and tenants who have been financially affected by the COVID-19 pandemic. For example, clause 27 of the proposed Part 9 of schedule 1 to the *Residential Tenancies Act* prohibits a landlord from evicting a tenant for non-payment of rent, unless the tenant has failed on two occasions to comply with the terms of a repayment plan.

Further, it must be 'fair and reasonable in circumstances' for the landlord to issue a termination notice or seek a termination order in the Tribunal. If the parties have not agreed to a repayment plan, the landlord cannot terminate the lease unless they have 'participated in good faith' in a formal arrears repayment negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to seek termination.

These provisions are distinct from previous amendments to the *Rental Tenancies Act* which prevented landlords from seeking termination on the basis on non-payment of rent. The Committee has commented on those amendments, contained in Part 13 of the *Rental Tenancies Act*, in previous issues of the Committee Digest – for example, Digest No. 15/57.⁹ However, similar to the provisions in Part 13, the provisions in Part 9 of schedule 1 continue to impact on landlords' freedom of contract, specifically their ability to enforce their rights under contracts they have entered into with tenants. Further, by continuing to limit the extent to which landlords can enforce their rights under tenancy agreements – such as the right to evict tenants for non-payment of rent – the provisions in Part 9 impact on landlords' property rights.

However, the Committee notes that these provisions are an extraordinary measure that seeks to respond to the ongoing impacts of the economic crisis created by the COVID-19 pandemic. Further, they will apply for a limited time period, as they are due to be repealed in September 2021. The Committee also notes that landlords retain the right to negotiate repayment plans with tenants, and to enforce those repayment plans. In the circumstances, the Committee makes no further comment.

⁹ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 15/57](#), 2 June 2020.

Retrospectivity

22. Section 5 of the Bill provides that, if an amendment made by the Bill to extend a 'prescribed period' commences after the time when prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued as if the amendment had commenced before that time. This provision is included as a 'savings' provision.

Section 5 of the Bill provides that, if an amendment in the Bill which extends a 'prescribed period' commences after the prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued on. This 'savings provision' may mean that the amendment to the length of certain 'prescribed periods' in various Acts and regulations will have retrospective effect. This could have the effect that individuals who may have presumed certain provisions were not in force after they were due to expire were in fact bound by those provisions.

The Committee generally comments on provisions that have retrospective effect, as they run counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee acknowledges the practical objectives of this provision, to ensure consistency within the legislative schemes affected by the Bill's amendments. Insofar as it extends 'prescribed periods' under various pieces of legislation, the Bill does not create new provisions, but extends the operation of old provisions introduced because of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

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

Henry VIII clauses

23. In a number of instances, the Bill provides that emergency provisions be extended by six months, or to a 'later day.... prescribed by the regulations', with a maximum of a twelve month extension.
24. For example, schedule 1.17 to the Bill amends section 15C of the *Long Service Leave Act 1955*, relating to the accrual of long service leave, so that the 'prescribed period' for which that section operates ends on 30 September 2021, or another date prescribed by the regulations, not later than 31 March 2022. This is similar to the previous iteration of section 15C, which provided that the 'prescribed period' would end on 12 September 2020, or another date prescribed by the regulations, not later than 12 March 2021.
25. The Bill similarly defers to regulations the repeal date or the 'prescribed period' of operation of certain provisions in the *Annual Holidays Act 1944*, the *Industrial Relations Act 1996*, the *Retirement Villages Act 1999*, and the *Waste Avoidance and Resource Recovery Act 2001*.
26. Separately, schedule 1.25 of the Bill amends section 88 of the *Retail Leases Act 1994* to provide that certain protections granted during the COVID-19 pandemic will continue to apply, despite their repeal. However, it also provides that 'the regulations may provide for exemptions from this section'.

In extending the operation of emergency provisions in various Acts and regulations, the Bill contains a number of Henry VIII clauses. For example, numerous amendments to existing Acts delay the repeal date or extend the 'prescribed period' for the operation of certain provisions for six months, or until a 'later day... prescribed by the regulations'. This is the case for the amendments made to the *Industrial Relations Act 1996* and the *Retirement Villages Act 1999*, among others. The Committee notes that these provisions allow for regulations to amend Acts in respect of the repeal date, or period of operation, of certain emergency provisions.

The Bill also amends the *Retail Leases Act 1994* to provide that certain protections will continue to apply, subject to exemptions provided for by the regulations. Again, this allows for regulations to alter the effect of provisions contained in their parent Act.

Unlike primary legislation, regulations are subordinate legislation – they are not required to be passed by Parliament, and the Parliament does not control when they commence. While either House of Parliament can pass a resolution disallowing a regulation (under section 41 of the *Interpretation Act 1987*), the regulation may operate for some time before disallowance can occur.

However, the Committee notes that, to the extent that it delegates power to regulations, the Bill only seeks to extend the operation of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Treasurer suggested in the second reading speech, in 'recognising the uncertainty of the duration of the pandemic'. In these circumstances, the Committee makes no further comment.

3. Independent Commission Against Corruption Amendment (Publication of Ministerial Register of Interests) Bill 2021*

Date introduced	18 March 2021
House introduced	Legislative Assembly
Member responsible	Ms Jodi McKay MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the NSW Ministerial Code of Conduct, which is set out in the Appendix to the *Independent Commission Against Corruption Regulation 2017*, to provide for the publication of the Ministerial Register of Interests.
2. The Bill also amends the NSW Ministerial Code of Conduct to require the Premier to cause the Ministerial Register of Interests to be tabled in Parliament.

BACKGROUND

3. The Bill amends the *Independent Commission Against Corruption 2017* and the *Government Information (Public Access) Act 2009* to provide for the publication of the Ministerial Register of Interests.
4. In the second reading speech, Ms Jodi McKay MP stated:

The bill will provide transparency over all current disclosures as well as mandating the publication of future disclosures made by Ministers. It will also require any rulings made by the Premier on ministerial disclosures to be published.
5. Currently, the Ministerial Register of Interests is confidential and held by the Department of Premier and Cabinet on behalf of the Premier. The *Government Information (Public Access) Act 2009* provides that there is a presumption that there is an overriding public interest against disclosure of information contained in the Register.

ISSUES CONSIDERED BY THE COMMITTEE

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

Confidential information

6. Schedule 1.1[1] of the Bill amends the *Independent Commission Against Corruption Regulation 2017* (the Regulation) to omit the note to the definition of the Ministerial Register of Interests (the Register). Under the Regulation, this note provides:

The Ministerial Register of Interests is a confidential register kept by the Department of Premier and Cabinet on behalf of the Premier. Its contents are made available only to the Premier and the Cabinet for the sole purpose of enabling them to better avoid and manage

potential conflicts of interest. The *Government Information (Public Access) Act 2009* provides that there is conclusively presumed to be an overriding public interest against the disclosure of the Ministerial Register of Interests.

7. The Bill further amends the Regulation to insert clause 13 to the Appendix, which provides that the Premier is to cause the Register to be published on the website on the Department of Premier and Cabinet and be tabled in each House of Parliament.
8. Proposed clause 13(2) provides that the Premier is to cause a change to the Register to be published on the website within 30 days of a change to the Register, and tabled in each House of Parliament within 30 sitting days of the change to the Register.
9. Proposed clause 13(3) provides that to avoid doubt, the Register includes the following:
 - disclosures kept on the Register under clause 6 of the Schedule to this Code,
 - the schedule of disclosures kept on the Register under clause 9 of the Schedule,
 - notices of conflicts of interest disclosed under clause 10 of the Schedule and placed on the Register under clause 11 of the Schedule,
 - notices of private benefit placed on the Register under clause 16 of the Schedule,
 - rulings placed on the Register under clause 27 of the Schedule.
10. Schedule 1.2 of the Bill amends the *Government Information (Public Access) Act 2009* to omit the presumption that there is an overriding public interest against disclosure of information contained in the Register.

The Bill amends the *Independent Commission Against Corruption Regulation 2017* to provide that the Premier must cause the Ministerial Register of Interests (the Register) to be published on the Department of Premier and Cabinet website, and tabled in both Houses of Parliament. Changes to the Register are also to be published on the website within 30 days of the change, and tabled in both Houses of Parliament within 30 sitting days.

The Committee notes that the *Government Information (Public Access) Act 2009* provides that there is conclusively presumed to be an overriding public interest against the disclosure of the Register. Disclosure of this information would then disclose confidential information that has been deemed against the public interest to disclose.

The Committee acknowledges that the Bill is intended to provide transparency of the interests of Ministers, especially where it may conflict with their role and functions. However, given the existing presumption of confidentiality, the Committee refers the matter to the Parliament for its consideration of whether it is appropriate.

4. Local Government Amendment Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993*—
 - (a) to give effect to certain recommendations made by the Independent Pricing and Regulatory Tribunal concerning the local government rating system, and
 - (b) to make miscellaneous changes about local government elections and the terms of office of chairpersons of county councils and joint organisations, and
 - (c) to provide for the payment of superannuation contributions for councillors.

BACKGROUND

2. The Bill amends the *Local Government Act 1993* (the Act), which sets out the legal framework for the system of local government in NSW.
3. In the Minister's second reading speech, the Hon. Shelley Hancock MP noted that the Bill would implement the recommendations of the Independent Pricing and Regulatory Tribunal (IPART) regarding the local government rating system.
4. The IPART report examined the local government rating system and made recommendations to improve the equity and efficiency of the rating system to enhance councils' ability to implement sustainable fiscal policies over the long term. The review made recommendations to allow council to collect revenue more equitably and efficiently from ratepayers.¹⁰
5. The Minister further stated:

The measures in the bill deliver on the Government's commitments to strengthen the rating system. On 18 June last year the Government issued its final response to the Independent Pricing and Regulatory Tribunal [IPART] local government rating review.

...The Government's response reiterated our commitment to maintaining a rating system that protects households and property owners from excessive rate rises yet allows councils to deliver the services and infrastructure communities expect. Importantly, however, it is committed to providing greater flexibility within our rating system. Following the release of the Government's response I released an exposure draft of the rating measures in the bill, together with a consultation guide to explain the proposed changes and assist interested individuals and organisations to provide feedback. While that followed many years of

¹⁰ Independent Pricing and Regulatory Tribunal NSW, [Local Government Rating System](#), December 2016.

extensive public consultation by both the Government and IPART, I wanted to ensure that communities had a further, final say about the proposed reforms and that they are implemented in a fair and reasonable way. I am pleased to advise that over 215 written submissions were received during the consultation period and have been taken into account in finalising the bill.

ISSUES CONSIDERED BY THE COMMITTEE

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

Commencement by proclamation

6. Section 2 provides that the Act commences on assent, except for the following which commence on proclamation:
 1. Schedule 1.1[1] and [5] – [9]
 2. Schedule 1.1[11] – [13] and [15]
 3. Schedule 1.1.[17] – [30]
 4. Schedule 1.1[32]
 5. Schedule 1.1[33]

Section 2 provides that the Act commences on assent except for specified provisions under Schedule 1.1. These amending provisions relate to the local government rating system, particularly regarding categories of ordinary rates and land.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes a flexible start date may assist with the necessary administrative arrangements required to implement the new legal framework for special rates and levies across NSW councils. The Committee also notes that the majority of the Bill's provisions commence on assent. In these circumstances, the Committee makes no further comment.

Matters deferred to regulations/Regulations may modify the application of the Act

7. The Bill provides that certain matters will be delegated to the regulations.
8. In particular, certain categories of land may be subject to regulatory restrictions, which are defined as restrictions imposed by an Act, environmental planning instrument, conservation agreement, or in some other way, specified by the regulations (section 515A and section 529(5)).
9. Proposed section 529(5) of the Bill also provides that the regulation may make provision for or with respect to:
 - the factors that may or may not be taken be taken into account in determining a sub-category for a category of land for which a sub-category may be determined

- public consultation requirements to be followed by councils in determining a sub-category, including by applying, with or without modification, provisions of the Act, the regulations or guidelines concerning preparation, exhibition and publication of strategic council planning documents.

The Bill provides that certain matters will be delegated to the regulations. For example, regulatory restrictions on categories of land may be subject to the regulations, as well as factors for determining a sub-category of land, and public consultation requirements.

In particular, proposed section 529(5)(b) of the Bill provides that the regulation may make provision for or with respect to public consultation requirements to be followed by councils in determining sub-categorisation, including by applying, with or without modification, provisions of the Act, the regulations or guidelines. The Committee notes that this may allow the provisions of the Act to be applied with modification.

The Committee generally prefers key concepts to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights of individuals to promotion may be affected. As the matters subject to regulatory requirements may affect the categorisation of land or public consultation requirements, and may modify the application of the Act's provisions, the Committee refers the matter to the Parliament for its consideration.

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

Minister may issue guidelines and directions not subject to disallowance

10. The Bill inserts section 530 regarding special provisions for residential sub-categories. This section provides that the Minister may, from time to time, issue guidelines for the determination of ordinary rates for rateable land in contiguous urban areas.
11. Subsection 530(3) provides that the guidelines may provide for when an area is, or is not, a contiguous urban area for this section.
12. Subsection 530(4) provides that the highest ordinary rate for rateable land in a contiguous urban area must not exceed the average ordinary rate payable for other rateable land in the area by the factor, if any, prescribed by the regulations.
13. Subsection 530(5) provides that despite subsection (4), the Minister may, by written instrument given to a council on its application determine a factor for the council that is greater than the factor mentioned in subsection (4), and impose conditions in relation to the use of the determined factor.
14. Subsection 530(6) provides that the Minister may, by a further written instrument given to a council, vary or revoke a determination, or a condition of a determination, made or imposed for the council under subsection (5).

15. Subsection 530(7) provides that if a council decides to make a different ordinary rate for residential sub-categories, it must publish the reasons for doing so on its website and the council's statement of revenue policy in its operational plan for the year concerned.
16. Subsection 530(8) provides that the Minister may, from time to time, issue written directions to councils concerning the factors or circumstances that may, or may not, be used by councils in determining a residential sub-category or the ordinary rate for a residential sub-category, and matters to be included in reasons published for subsection (7) above.
17. A council must comply with the guidelines and directions given by the Minister under this section.

The Bill provides that the Minister may issue guidelines for the determination of ordinary rates for rateable land in contiguous urban areas and may issue written directions to councils concerning the factors that may or may not be used to determine a residential subcategory. The Committee notes that these provisions are intended to facilitate a flexible and timely response for local government councils to settle matters of residential sub-categorisation.

However, the Committee notes that, unlike regulations, there is no requirement that such guidelines or directions be tabled in Parliament and therefore are not subject to disallowance. This may subject such guidelines and directions to insufficient parliamentary scrutiny. The Committee therefore refers this matter to Parliament for its consideration.

Non-reviewable decisions

18. Schedule 1.1[3] creates a non-reviewable decision in that it creates a mechanism for a special rate increase that are not reviewable by IPART.

Schedule 1.1[3] creates a non-reviewable decision in that it creates a mechanism for a special rate increase that are not reviewable by IPART. The Committee refers the matter to the Parliament for consideration.

5. Mutual Recognition (New South Wales) Amendment Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

1. In 1992, New South Wales and Queensland (the initial referring States) referred the matter of the enactment of the text of a uniform mutual recognition Act to the Parliament of the Commonwealth for the purposes of the Constitution of the Commonwealth, section 51(xxxvii) (the existing reference).
2. The Commonwealth enacted the *Mutual Recognition Act 1992* of the Commonwealth (the Commonwealth Act) based on the references made by the initial referring States. South Australia, Tasmania, Victoria and Western Australia subsequently adopted the Commonwealth Act for the purposes of the Constitution of the Commonwealth, section 51(xxxvii).
3. The Commonwealth Act applies to the Australian Capital Territory and the Northern Territory by virtue of the Constitution of the Commonwealth, section 122. All States and Territories are currently participating jurisdictions for the purposes of the Commonwealth Act.
4. The initial referring States and Tasmania also referred the matter of the amendment of the Commonwealth Act to the Parliament of the Commonwealth (the existing amendment reference).
5. The objects of this Bill are to amend the *Mutual Recognition (New South Wales) Act 1992 (the NSW Act)* to—
 - (a) terminate the existing amendment reference, and
 - (b) replace the existing amendment reference with a new reference to enable the Commonwealth Parliament to make express amendments of the Commonwealth Act with respect to certain matters relating to the mutual recognition of occupations and goods (the new amendment reference).
6. The proposed Act will be enacted for the purposes of the Constitution of the Commonwealth, section 51(xxxvii), which enables State Parliaments to refer matters to the Commonwealth Parliament.

BACKGROUND

7. The *Mutual Recognition (New South Wales) Amendment Bill 2021* amends the *Mutual Recognition (New South Wales) Act 1992* (the Act).
8. The object of the Act is to enable the enactment of legislation applying uniformly throughout Australia for the recognition of regulatory standards adopted in Australia regarding goods and occupations.
9. Section 51 (xxxvii) of the *Australian Constitution* enables State Parliament to refer matters to the Commonwealth Parliament.
10. In the second reading speech of the Bill, the Hon. Dominic Perrottet MP, Treasurer, noted that the COVID-19 pandemic brought into sharper focus the regulatory burdens of cross-border workers, even without the threat of broader closures.
11. The Treasurer further stated:

Under the current scheme workers still need to apply for recognition of their home licence and pay another fee to work in another State or Territory. The existing mutual recognition scheme also relies on schedules to specify equivalent occupational registrations between jurisdictions. These schedules are complex and cumbersome and have not been updated fully since 2009, meaning they are not up to date with current qualifications and licences. The Commonwealth, States and the Northern Territory have all come together and agreed to the new automatic mutual recognition scheme for occupational registrations. In December 2020 the Premier and all First Ministers, except the Australian Capital Territory, signed an intergovernmental agreement which commits signatories to implementing a national automatic mutual recognition scheme by 1 July 2021.

The core principle of this new framework is that a person can automatically perform the same activities that they are licensed to perform in their home jurisdiction in a second jurisdiction without seeking permission or paying additional registration fees. Automatic mutual recognition will make it easier and less expensive for businesses and workers to operate across jurisdictions.

ISSUES CONSIDERED BY THE COMMITTEE

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

Termination of references by proclamation

12. In his second reading speech, the Treasurer noted:

New South Wales is leading the way by updating the referral powers to enable the Commonwealth to pass legislation to give effect to automatic mutual recognition. This will have flow-on effects for other States. Should future Commonwealth amendments not be supported by Parliament, the updated referral power can be terminated by proclamation by the New South Wales Governor.

13. Proposed subsection 5B(2) of the Bill provides that the Governor may, at any time, by proclamation published on the NSW legislation website, fix a day on which the references made by section 4(1)(a) of the Act and 5A(1) of the Bill terminate.

14. Section 4(1)(a) of the Act provides that the enactment of the uniform recognition legislation are referred to the Parliament of the Commonwealth to commence on the enactment of the Act and end on a day fixed by proclamation of the Governor at any time.
15. Subsection 5A(1) of the Bill provides that mutual recognition matters are referred to the Parliament of the Commonwealth, but to only to the extent of making the laws with respect to those matters by making express amendments of the Commonwealth Act.
16. Subsection 5B(3) provides that the Governor may, by proclamation published on the NSW legislation website, revoke a proclamation published under subsection (2), in which case the revoked proclamation is taken to have been published.
17. Section 5C of the Bill provides that if the reference made by the proposed section 5A(1) (the amendment reference) is terminated before the reference made by section 4(1)(a), the termination of the amended reference does not effect:
 - The laws made under the amended reference before the termination whether or not the laws came into operation or;
 - The continued operation in State of the Commonwealth Act as in operation immediately before that termination.

The Bill makes amendments to enact uniform legislation, applying throughout Australia, to recognise regulatory standards adopted regarding goods and occupations.

Proposed subsection 5B(2) of the Bill provides that the Governor may, at any time, by proclamation published on the NSW legislation website, fix a day on which references made by section 4(1)(a) of the Act, section 5A(1) of the Bill, or both, would be terminated. The Committee prefers legislation that may affect individual rights and liberties to be enacted on assent or on a fixed date to provide certainty to affected persons.

However, the Committee notes the safeguards contained in the Bill, providing that if an amendment reference terminates before the reference made by section 4(1)(a) of the Act, it will not affect laws that were made under that reference before the termination, or the continued operation in the State and Commonwealth Act immediately before that termination or as subsequently amended.

The Committee also recognises that such amending references are administrative in nature to enable State Parliaments to refer matters to the Commonwealth Parliament for amendment. In these circumstances, the Committee makes no further comment.

6. Real Property Amendment (Certificates of Title) Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Real Property Act 1900* to remove—
 - (a) the requirement for the Registrar-General to issue certificates of title for real property, and
 - (b) requirements for the Registrar-General to make recordings on certificates of title, and
 - (c) the Registrar-General’s powers to require the production of certificates of title, and
 - (d) requirements for land owners to produce and rely on certificates of title in conveyancing transactions, and
 - (e) provisions that restrict the use of electronic conveyancing.
2. The Bill also makes consequential amendments to other Acts and regulations.

BACKGROUND

3. The Bill amends the *Real Property Act 1900*, which sets out the legislative framework for titles of land and the facilitation of its transfer.
4. In the second reading speech, the Minister noted that the Bill will complete the transition of the land title system in New South Wales away from a paper process and towards a digital one.
5. The Minister further noted that the Bill will align NSW’s land title system with those of other States and Territories:

Other jurisdictions have abolished paper titles as they also move to a wholly electronic land title system. South Australia started in 2016, Queensland in 2019 and the Australian Capital Territory in 2020. I am informed by the Office of the Registrar General that Victoria and Western Australia are looking to follow suit soon. While those jurisdictions begin to transition to an electronic system, New South Wales will be the first jurisdiction to mandate a 100 per cent eConveyancing system. In doing so, New South Wales is the leader in providing a safe, secure and entirely electronic conveyancing system.

ISSUES CONSIDERED BY THE COMMITTEE

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

6. Schedule 1.1[39] inserts an additional Part (the *Real Property Amendment (Certificates of Title) Act 2021*) into Schedule 3 of the *Real Property Act 1900*. This Part sets out provisions to the cessation of issue of certificates of title and related matters.
7. This Part also provides for the disposal of documents in relation to the *State Records Act 1998*. Subject to that Act, the Registrar-General may:
 - destroy a paper document that the Registrar-General is not under a duty to deliver or issue to a person, whether or not it is part of the Register, or
 - deliver a paper document that the Registrar-General is empowered to destroy under paragraph (a) to a person who, in the Registrar-General's opinion, intends to preserve it for historical purposes.
8. Before destroying a document under the above clause, the Registrar-General must make a reproducible copy of the document if:
 - for a document is part of the Register—it evidences a subsisting interest, or
 - for a document that is not part of the Register—the Registrar-General would, but for subclause (1)(a), have a duty to preserve it.
9. The Registrar-General must preserve a reproducible copy of a document for as long as the interest evidenced by the document subsists or for as long as the Registrar-General would have had a duty to preserve the document.
10. If a reproducible copy of a document is preserved under subclause (3) and that document would, if it had not been destroyed under subclause (1)(a), be part of the Register, whether for all purposes or for the purpose only of section 96B, the reproducible copy is part of the Register for all purposes or for that purpose.
11. Section 96B of the Act provides that the Register shall be a public record and information therein shall be made available at the prescribed times, in the prescribed manner and upon payment of the prescribed fee, if any.
12. Under the provisions of the amending Bill, a reproducible copy means a copy of a document that is captured and kept in a way that enables the document to be reproduced.

The Bill provides that, subject to the *State Records Act 1998*, the Registrar-General may destroy a paper document that the Registrar-General is not under a duty to deliver or issue to a person, whether or not it is part of the Register. Alternatively, the Registrar-General may instead deliver a paper document, that they are empowered to destroy, to a person who in the Registrar-General's opinion intends to preserve it for historical purposes.

The Committee notes that the destruction of records may impact a person who has matters that are relevant to the documents marked for destruction or disposal, particularly where it relates to property rights. However, the Committee notes the safeguards in the Bill that the Registrar-General must make a reproducible copy of the document, which means a copy of a document that is captured and kept in a way that enables the document to be reproduced.

The Committee recognises that the object of the Bill is to move away from a paper-based system and towards an electronic one. In these circumstances, and given that the Registrar General is required to make a reproducible copy of the document, the Committee makes no further comment.

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

Commencement by proclamation

13. Subsection 2(1) provides that the Act will commence on a day or days to be appointed by proclamation, except as provided by subsection 2(2).
14. Subsection 2(2) provides that Schedule 1.2[9] commences on the date of assent to this Act. Schedule 1.2[9] amends section 90 of the *Real Property Act 1900* to insert subsection (2A), which provides that an application regarding transmission of bankruptcy, must include evidence, in the form approved by the Registrar-General, that identifies the bankrupt, within the meaning of the Commonwealth Act, as the registered proprietor of the land to which the application relates.
15. In the second reading speech, the Minister stated:

Schedules 2 and 3 make consequential amendments to 27 other Acts and regulations to remove references to certificates of title. Acts such as the Conveyancing Act, Crown Lands Management Act and Strata Schemes Management Act will no longer reference certificates of title once the bill comes into effect. The Office of the Registrar General will work closely with those agencies that may be affected by the changes that the bill makes. Once passed, the bill allows the Registrar General to announce the date on which certificates of title will cease to be issued and will cease to have effect. This day, referred to in the Act as the cessation day, must be notified by publication in the *Government Gazette* at least three months beforehand. In consultation with industry, we will formalise the date of abolition over the next few months, with a view to eliminating certificates of title before the end of the year. This will give time for industry to adjust their processes so that the change can be made seamlessly.

Section 2 provides that the majority of the Bill will commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes a flexible start date may assist with the implementation of necessary administrative arrangements required to move from a paper-based system to an electronic one regarding certificates of title. The Committee also notes that the Minister stated that date of abolition of certificates of title will be formalised in consultation with the industry to ensure their processes can be adjusted appropriately, with a view to implement the

changes before the end of the year. In these circumstances, the Committee makes no further comment.

7. South32 Dendrobium Extension Project Approval Bill 2021*

Date introduced	17 March 2021
House introduced	Legislative Council
Member responsible	The Hon. Mark Latham MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *South32 Dendrobium Extension Project Approval Bill 2021* is:
 - 1) To secure 20,000 mining and manufacturing jobs (directly and indirectly) in the Illawarra, NSW, through access to an essential coking coal resource.
 - 2) To provide investment certainty for the private sector in the post-Covid NSW economic recovery.
 - 3) To allow the Minister for Planning and Public Spaces to implement acceptable environmental safeguards for the project by regulation.

BACKGROUND

2. The Bill sets out provisions in relation to the Dendrobium Mine in the Illawarra region of New South Wales, which is an existing underground mine, primarily producing metallurgical coal for steelmaking. South32 Limited had sought permission to extract an additional 78 million tonnes of metallurgical coal from the mine until 31 December 2048.
3. In the second reading speech, the Hon. Mark Latham MLC indicated that the Bill intended to approve and grant development consent for the South32 Dendrobium Extension Project and allow the Minister for Planning and Public Spaces to implement environmental safeguards for the project by regulation.
4. In the report of the Independent Planning Commission, the proposal had not been approved due to the level of risk assessed:

The Commission concluded that the level of risk posed by the Project has not been properly quantified and based on the potential for long-term and irreversible impacts – particularly on the integrity of a vital drinking water source for the Macarthur and Illawarra regions, the Wollondilly Shire and Metropolitan Sydney – it is not in the public interest.¹¹

¹¹ NSW Independent Planning Commission, [Dendrobium Extension Project \(SSD 8194\) Statement of Reasons for Decision](#), 5 February 2021, p1.

ISSUES CONSIDERED BY THE COMMITTEE

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA*Significant matters in subordinate legislation*

5. Section 7 of the Bill provides that conditions for the operation of the Dendrobium Mine are to be made and issued by the Minister for Planning and Public Spaces by regulation.

Section 7 of the Bill provides that conditions for the operation of the Dendrobium Mine are to be made and issued by the Minister for Planning and Public Spaces by regulation.

In doing so, the Bill may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight. Therefore, the Committee refers the matter to Parliament to determine whether the matter is reasonable under the circumstances.

Commencement by proclamation

6. Section 2 of the Bill provides that this Act commences on a day or days to be appointed by proclamation.

Section 2 of the Bill provides that this Act commences on a day or days to be appointed by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent to provide certainty for affected persons, particularly where the legislation may affect individual rights or obligations. The Committee refers this provision to the Parliament to consider whether it is reasonable in the circumstances.

Part Two – Regulations

1. Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020

Date tabled	LA: 17 November 2020 LC: 17 November 2020
Disallowance date	LA: 4 May 2021 LC: 5 May 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* is to provide for the following matters under the *Strata Schemes Management Act 2015* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic –
 - a. altered arrangements for convening, and voting at, meetings of an owners corporation of a strata committee,
 - b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
 - c. the extension, to 6 months, of the time periods within which—
 - i. the first annual general meeting of an association must be convened and held, and
 - ii. a levy must be determined to reimburse an amount paid or transferred from an administrative fund or a capital works fund.
2. This Regulation also postpones the date of repeal of section 271A of the Act, which confers the special regulation-making power to provide for the above matters.
3. This Regulation is made under the *Strata Schemes Management Act 2015*, including sections 271 (the general regulation-making power) and 271A.

4. The Committee published a report on the *Strata Schemes Management Amendment (COVID-19) Regulation 2020*, the predecessor to this Regulation, in Digest 17/57.¹² That regulation commenced on 5 June 2020, and expired 6 months after its commencement, pursuant to section 271A(4) of the *Strata Schemes Management Act 2015*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Henry VIII Clause

5. The *Strata Schemes Management Act 2015* (the Act) sets out legislative framework for the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.
6. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including:
 - altered arrangements for convening and voting at a relevant strata meeting,
 - an alternative to affixing the seal of the owners corporation, and
 - extension of a time period in which a thing is required to be done under the Act.
7. Subsections 271A(3) and (4) further provide that regulations made under the section:
 - can override a provision of the Act, and
 - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.
8. Subsection 271A(5) provides for section 271A to be repealed on:
 - 13 November 2020, or
 - a later day, not later than 13 May 2021, prescribed by the regulations.
9. This Regulation is made under section 271A and section 271 (the general regulation-making power) and, like its predecessor, amends the *Strata Schemes Management Regulation 2016* to:
 - provide for altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee,

¹² Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 17/57](#), 4 August 2020.

- allow instruments, instead of being affixed with an owners corporation's seal in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
 - extend certain time periods – for example, extending the time within which the first annual general meeting of an owners corporation must be convened and held under section 14 of the Act from 2 months to 6 months after the 'initial period'.
10. In particular, clause 71(1) of schedule 1 to this Regulation provides that certain means of voting, including voting by teleconference, videoconference or email, can be used to determine matters at a strata meeting even if the owners corporation or strata committee has not resolved to adopt those means of voting.
 11. Further, clause 71(4)(a) provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person.
 12. Pursuant to section 271A(5)(b) of the Act, clause 74 of schedule 1 to the Regulation also postpones the repeal date of the regulation-making power in section 271A from 13 November 2020 until 13 May 2021.

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. For example, the Regulation extends the time limits for compliance with certain provisions of the *Strata Schemes Management Act 2015*, and provides that electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act. Pursuant to subsection 271A(5) of the Act, this Regulation also extends the operation of section 271A itself, delaying its repeal date from 13 November 2020 to 13 May 2021.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to Regulations

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

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

2 Further functions of the Committee are:

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

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