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Legislation Review Committee

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

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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. CANTERBURY PARK RACECOURSE (SALE AND REDEVELOPMENT MORATORIUM) BILL 2021*

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

Freedom of contract and property rights

The *Canterbury Park Racecourse (Sale and Redevelopment Moratorium) Bill 2021* prohibits the Australian Turf Club Limited from selling or disposing of any of the 'racing infrastructure' it owns, including land, buildings and facilities located at Canterbury Park Racecourse, for a period of 5 years. Further, it prohibits any development being carried out at the racecourse, including any residential development on land owned by the Australian Turf Club, for the same period of 5 years.

The Australian Turf Club is a public company limited by guarantee. These provisions may impact on the property rights and freedom of contract of individuals with a stake in, or control over the Australian Turf Club (for example, its directors and board members). However, the Committee notes that it is generally concerned with individual rights and liberties in regards to Bills, rather than those associated with corporate ownership. Accordingly, it makes no further comment.

2. HEAVY VEHICLE LEGISLATION AMENDMENT (NATIONAL REGULATOR) BILL 2021

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

Right to privacy

Schedule 1[3] of the Bill provides Transport for NSW (TfNSW) with a general power to transfer to the National Heavy Vehicle Regulator (NHVR) certain information in possession by TfNSW, including personal information, and to obtain and use certain information held by the NHVR. The Committee notes that personal information held by TfNSW that may be provided to NHVR, may infringe upon an individual's right to privacy.

However, in this section, personal information has the same meaning as under section 4 of the Privacy and Personal Information Act 1998 (NSW) (PPIP Act), and is subject to certain privacy protections under that Act regarding the retention, use and disclosure of that information. The Committee also notes that the transfer of information is for the purpose of facilitating the transfer of employees from TfNSW to the NHVR, including details of their employment, superannuation and leave entitlements. In these circumstances, the Committee makes no further comment.

Employee rights

Schedule 2[3] provides for the transfer of employees from TfNSW to the NVHR, including details of their superannuation, leave entitlements and personal information. In doing so, it may impact the rights of those employees being transferred from one agency to another, such as certainty of employment.

However, the Bill contains certain safeguards to provide certainty of employment for transferred employees including that terms and conditions of employment cannot be varied, that the

employment of transferred employees cannot be terminated by the NHVR unless in certain circumstances, providing an employment guarantee period for permanent and temporary staff and the continuity of entitlements of transferred employees including superannuation, accrued annual and sick leave. In these circumstances, 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 Schedules 1-3 commence on a day or days to be appointed by proclamation. These schedules contain amendments to several Acts to facilitate the transfer of certain functions under the *Heavy Vehicle National Law (NSW)* from TfNSW to the NHVR.

The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. However, the Committee notes that a flexible start date may assist with the necessary administrative arrangements with the sector to facilitate the transfer of these functions between agencies. In these circumstances, the Committee makes no further comment.

3. NSW JOBS FIRST BILL 2021*

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

Independence of the Advocate

Section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister, the promotion of the Policy within government and local industry, and working with local industry and employee organisations to help build the future workforce. In addition, section 15 of the Bill states that the Advocate will be subject to the direction and control of the Minister, except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.

With the Advocate being under the direction and control of the Minister, the Advocate's operations and investigations will be subjected to a Minister's direction and not to Parliamentary scrutiny. This may impact on the neutrality and independence of the Advocate, especially considering the Advocate's enforcement powers. The Committee refers this matter to Parliament for its consideration as to whether the provisions relating to Ministerial control of the Advocate are sufficiently subjected to parliamentary scrutiny.

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Non-reviewable decisions of the advocate

The Bill provides that the Advocate may make a determination that a person has failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. The Advocate may also make a recommendation to the Minister that the person be subject to an adverse publicity notice, that must name the person, set out the reasons for the notice, and be tabled in the Parliament.

The Committee acknowledges that these powers of the Advocate and the Minister to make an adverse publicity notice are intended to ensure compliance with the NSW Jobs First Policy. However, as the issuing of such a notice may cause reputational or financial damage. This may be particularly problematic as the Bill does not provide an avenue to appeal or correct an

adverse publicity notice. Given the potential for reputational or financial damage caused by a false adverse publicity notice, the Committee refers these provisions to Parliament to consider whether the powers are reasonable in the circumstances.

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

Matters deferred to the regulations – functions of the Advocate

The Bill defers some matters to the regulations. In particular, the Bill provides that some functions of the NSW Local Jobs Advocate may be prescribed by the regulations. The Committee generally substantive functions of statutory bodies to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the Interpretation Act 1987. As such the Committee makes no further comment.

Wide power of delegation

The Bill grants a wide power of delegation to the Advocate for the exercise of any function of the Advocate to any person employed in the Office of the NSW Local Jobs Advocate. The functions of the Advocate that may be delegated include advising the Minister on various matters related to the NSW Jobs First Policy, working with government agencies, local industry and the private sector, and monitoring and reporting to Parliament on compliance with the NSW Jobs First Policy. In performing these functions, appropriate judgement must be used to assess compliance and advise the Minister on relevant matters.

The Committee notes that the Bill does not contain restrictions on this power to delegate, e.g. restricting delegation to people with certain qualifications or expertise. The Committee also notes that some functions of the Advocate may have an impact on reputational or financial rights or persons subjects to adverse publicity notices, as noted earlier in this report. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers this matter to Parliament for its consideration.

Henry VIII clause

The Bill contains a Henry VIII clause which allows the Regulations made for the purposes of Schedule 2 to amend the Schedule itself to provide for additional or different savings and transitional provisions. This allows the Minister to create regulations that could override the provisions of primary legislation, and thereby to legislate without reference to Parliament.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to amendments of a savings and transitional nature, and permits additional control over the rollout of the amendments contemplated by the Bill, the Committee makes no further comment.

PART TWO – REGULATIONS

1. BIOSECURITY ORDER (PERMITTED ACTIVITIES) AMENDMENT (CATTLE TICK CARRIERS) ORDER 2020

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

Strict liability offence, with executive liability

The *Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020* sets out a number of exceptions to the general prohibition in the *Biosecurity Regulation 2017* on importing cattle tick carriers – including cattle, deer, horses, goats and sheep – into NSW. That prohibition is a 'mandatory measure', breach of which is a category 2 offence and an executive liability offence under the *Biosecurity Act 2015*. Importing cattle tick carriers into NSW without complying with the conditions set out in the Order may attract a maximum penalty of $220,000 for an individual or $440,000 for a corporation. Alternatively, it could be dealt with by penalty notice, with a penalty of $1,000.

Failure to comply with the conditions in the Order is, in effect, a strict liability offence, with additional penalties applicable if the contravention is negligent. The offence only carries a mental element in the context of executive liability, where a director will not be held liable unless they knew or ought to have known, and failed to take reasonable steps to prevent, an offence being committed. The Committee generally comments on strict liability offences, as they depart from the common law principle that *mens rea*, or a mental element, is required to establish liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Although the maximum penalties for this offence are significant, they are monetary, not custodial. The Committee also acknowledges that, without the exemptions provided for in the Order, it would always be an offence to import cattle tick carriers into NSW, regardless of the precautions taken. In these circumstances, the Committee makes no further comment.

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

Restrictions on importing cattle and other animals into New South Wales

The *Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020* sets out a range of conditions with which individuals and businesses must comply, in order to avoid significant penalties for importing cattle tick carriers into NSW.

By restricting the circumstances in which certain livestock can be imported into NSW, the Order may have an adverse impact on agricultural, racing and other businesses. However, the Committee acknowledges that, without the exemptions provided for in the Order, clause 14 of the *Biosecurity Regulation 2017* would impose a blanket prohibition on importing cattle tick carriers into NSW. In these circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

Failure to comply with the requirements for importing cattle tick carriers into NSW, set out in the Order, is an offence under the *Biosecurity Act 2015*, attracting a maximum penalty of $220,000 for an individual or $440,000 for a corporation. Additional penalties apply if the offence was committed negligently, and/or if the offence continues over multiple days. The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight.

In this case, the Committee notes that the offence itself, and details as to the relevant penalties, are contained within the parent Act. However, the Committee considers that matters involving the exemption from an offence in an Act which carries significant maximum monetary penalties

should also be dealt with in primary legislation. While the Order is still subject to disallowance by Parliament, this would provide greater opportunity for parliamentary scrutiny and debate. In these circumstances, the Committee refers the matter to Parliament for its consideration.

2. GREYHOUND RACING AMENDMENT (MISCELLANEOUS) REGULATION 2020

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

Right to a fair trial – penalty notice offences

The *Greyhound Racing Amendment (Miscellaneous) Regulation 2020* expands the list of offences under the *Greyhound Racing Regulation 2019* for which a penalty notice may be issued. In particular, it includes as new 'penalty notice offences' contraventions of clauses 10, 15 and 18 of the *Greyhound Racing Regulation 2019*, which relate to the time periods in which greyhound racing participants must provide certain information – for example, about being charged with an animal cruelty offence – to the Greyhound Racing Commissioner. The amounts payable for the penalty notices are $275 for a first offence and $550 for a second or subsequent offence.

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

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and risk of having a larger penalty imposed. Given the relatively small amounts payable for the new penalty notice offences, the Committee makes no further comment.

3. NATIONAL PARKS AND WILDLIFE AMENDMENT REGULATION 2021

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

Freedom of movement

The *National Parks and Wildlife Amendment Regulation 2021* makes a number of amendments to the *National Parks and Wildlife Regulation 2019,* including inserting new conditions of entry by motor vehicle into national parks. These provisions may impact on individuals' freedom of movement, a right which is recognised in Article 12 of the International Covenant on Civil and Political Rights.

However, Article 12 also recognises that restrictions on the right to freedom of movement may be warranted in certain circumstances – for example, to protect public order. The provisions in the Regulation are in line with similar regulations governing recreational spaces used by the public, and accessible by car. The Committee also acknowledges the benefit of the provisions for the majority of those using national parks, allowing the peaceful enjoyment of the environment and amenities, and the preservation of the natural environment. In these circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

The Regulation expands the list of offences under the *National Parks and Wildlife Regulation 2019* for which a penalty notice may be issued. In particular, it includes as new 'penalty notice offences' contraventions of clauses 10F, 10G and 10I – all new provisions which relate to conditions of entry for motor vehicles. The fee amounts payable for the penalty notices range from $100 to $300.

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

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and risk of having a larger penalty imposed. Given the relatively small amounts payable for the new penalty notice offences, the Committee makes no further comment.

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

Important matters in subordinate legislation – creation of new offences

The Committee notes that the Regulation introduces a number of offences regarding conditions of entry to a national park. While the individual fee amounts are relatively small in size, most ranging from $100 to $300 for individual offences, in the case that the fee is not paid, the offences under these clauses would each attract a penalty of 30 penalty units (or $3,300).

The Committee generals prefers that provisions which introduce new offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration through regulations. Given the maximum penalty is monetary rather than any terms of imprisonment, and an individual has the opportunity to challenge such a penalty notice at court, the Committee makes no further comment.

4. POINT TO POINT TRANSPORT (TAXIS AND HIRE VEHICLES) AMENDMENT (MISCELLANEOUS) REGULATION 2020

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

Significant increase in penalty

The Regulation amends the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* to increase a penalty for a taxi standing in a non-taxi zone on a road or road related area adjacent to tram tracks located on George Street in the Sydney Central Business District. The regulation increases the penalty from $150 to $850 for this specific penalty notice offence.

The Committee notes that this is a significant increase in the financial penalty for this type of penalty notice offence and may have an adverse impact on the taxi business community. However, the Committee notes that the penalty is aimed at deterring taxis from standing on tram tracks and to facilitate the running of public transport. Additionally, the increase is specific to George Street in the Sydney CBD. Given the public interest considerations and limited

geographic area in which the increased penalty applies, the Committee makes no further comment.

5. PUBLIC HEALTH AMENDMENT (SCHEDULED MEDICAL CONDITIONS – ASBESTOSIS) REGULATION 2020

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

Privacy

The Regulation amends the *Public Health Regulation 2012* to insert a new clause 37(h). That clause provides that, for the purposes of section 54(2)(a) of the *Public Health Act 2010*, the prescribed particulars a medical practitioner is required to record and disclose to the Secretary in relation to asbestosis are those 'required to be included in the Asbestosis Notification Form published by the Ministry of Health'.

While the requirement to disclose details of a patient's asbestosis diagnosis to the Secretary is contained in the parent Act, clause 37(h) of the Regulation may delegate the specification of those details to the Ministry of Health. This has the potential to impact on individuals' right to privacy. This is particularly the case as there is no requirement in the Regulation, or in the parent Act, for a medical practitioner to inform their patient that their details will be disclosed.

The Committee acknowledges the public health objectives of this scheme. However, given the apparent lack of safeguards and the potential impact to an individual's privacy concerning personal information, the Committee refers the matter to the Parliament for its consideration.

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

Regulations incorporating standards of external entities that will not be subject to disallowance

As noted above, clause 37(h) of the Regulation refers to an external document, the 'Asbestosis Notification Form', to determine what particulars of a patient's condition a medical practitioner is required to record and disclose to the Secretary under section 54 of the *Public Health Act 2010*. This document is published by the Ministry of Health, and may presumably be altered from time to time. Unlike regulations, there is no requirement for this form to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*.

The Committee generally prefers that provisions which may impact on individuals' rights, such as the right to privacy, be subject to Parliamentary scrutiny. While the Committee notes that the same approach is taken to details of other diagnoses which are required to be disclosed under clause 37 (such as AIDS and heart disease), given the privacy implications of personal information, the Committee refers the matter to Parliament for its consideration.

6. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION (NO 3) 2020

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

Retrospectivity, property rights and freedom of contract

Like its predecessors, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The remade Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each.

The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualified for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 12 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

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

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 28 March 2021.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

7. RETIREMENT VILLAGES AMENDMENT (ASSET MANAGEMENT PLANS) REGULATION 2021

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

Barriers to access documents

The Regulation creates requirements for retirement village operators (operators) to prepare and maintain an asset management plan for each retirement village that the operator manages or controls. The Regulation also provides that the operator must make the asset management plan available for viewing by residents, and that a resident is entitled to give the operator comments on the asset management plan. For each comment received, the operator must state in its

report whether the operator revised the draft asset management plan in response to the comment and, if so, in what respect, or the reason why the operator did not revise the draft asset management plan in response to the comment.

The Committee notes that the Regulation only requires the operator to make the asset management plan available for viewing at the village or at a place of business during reasonable hours. It does not require the operator to provide the plan to the residents directly or make it publicly available, such as via email or a website. Additionally, the Regulation does not provide that the report containing the operator's responses to residents' comments is to form part of the asset management plan or require that this report is provided to the residents. These provisions may create a barrier for residents to access the asset management plan and related documents that deals with their place of residence.

The Committee notes that certain appeal processes are available to residents by application to the NSW Civil and Administrative Tribunal. For example in regards to orders directing the operator to maintain or replace items of capital (section 96 of the Act), as well in relation to any retirement village contract that the resident considers harsh, oppressive, unconscionable or unjust. However, the Act does not provide a specific avenue for residents to appeal the asset management plan or in relation to their access to view the plan and related report responding to resident comments. The Committee refers the matter to the Parliament for its consideration of the impact of these provisions on residents.

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

Onus on operators

The Regulation places several requirements on retirement village operators (operators) for preparing and maintaining asset management plans, including the frequency of the reports, specific matters that reports must contain, and providing the proposed asset management plan for the viewing and comment of residents. Operators must also respond to every comment received by residents and note whether the plan has been revised in response to the comment, or provide reasons for why the plan was not revised in response to the comment.

This places responsibility on operators to prepare and maintain these records for each retirement village they operate, and respond to individual comments by residents. This may have an impact on the business community of retirement village operators if these new measures require significant additional resources to prepare and manage these records in the correct form.

However, the Committee notes the such operators are businesses (often companies or associations) that already have statutory requirements to complete certain annual financial reporting records and may therefore have financial reporting procedures in place that may assist with the additional regulatory requirements. The Committee also notes that it is not uncommon for regulations to prescribe financial reporting requirements on certain businesses to encourage accurate recording of their financial transactions and financial position. In these circumstances, the Committee makes no further comment.

8. RETIREMENT VILLAGES AMENDMENT (EXIT ENTITLEMENT) REGULATION 2021

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

Economic rights – Delay or exemption of application to order payment of exit entitlements

The Regulation inserts provisions to provide that a former occupant of a retirement village may apply to the Secretary for the payment of their exit entitlement by the retirement village operator where it has not been paid within the prescribed period and where the operator has unreasonably delayed the sale of the premises. The Regulation also provides that the prescribed period will depend on which local government area (LGA) the retirement village is located. For a retirement village listed in Schedule 5A, the prescribed period is 6 months. For all other areas, the prescribed period is 12 months.

The Committee notes that Schedule 5A lists 35 of the 128 LGAs in NSW, which means that residents living outside those prescribed LGAs will need to wait an additional 6 months before being able to apply to the Secretary for payment of their exit entitlement. This may create a barrier that impacts a resident's economic right to the payment of their exit entitlement where it has been unreasonably delayed by the operator.

The Committee also notes that a village contract may be exempt from such an application to the Secretary if the retirement village to which the contract applies is held in trust by a trustee and the trustee holds each unit in the retirement village in trust for the benefit of a resident in the retirement village. This may also restrict the avenues available to residents who are seeking payment of their exit entitlements for retirement villages held in trust.

The Committee refers these provisions to the Parliament for their consideration of the impact on a former resident's economic rights regarding payment of relevant exit entitlements.

Freedom of contract and retrospectivity

The Regulation inserts clause 26AA, which provides that an operator of a retirement village may increase the recurrent charges payable by residents of the retirement village in certain circumstances. The Committee notes that this Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The Regulation also has retrospective effect, in that the changes will apply to existing contracts between operators and former occupants.

However, the Committee recognises that the new clause will only apply in certain circumstances. This includes where the increase occurs as part of an approved annual budget for the next financial year after the former occupant’s liability is ceased, and where the approved annual budget specifies the manner in which the increase was calculated and that the increase occurred for the purposes of this clause.

The Committee also notes that parties may vary the terms of a contract by agreement. In this case, it must form part of the approved annual budget, which is resolved by consent of the residents of the retirement village. The Committee also notes that residents may apply to the NSW Civil and Administrative Tribunal in relation to any retirement village contract that the resident considers harsh, oppressive, unconscionable or unjust. In this case, the Committee makes no further comment.

Access to premises

The Regulation provides that an operator may enter a residential premises in certain circumstances. This clause applies to a former occupant of residential premises in a retirement village in relation to whom an exit entitlement order has been made by the Secretary under the Act. This may infringe on a person's right to control entry and access to their premises, and may create issues of trespass.

However, the Committee notes that an operator may only enter a premises of a former occupant in certain circumstances, including for the purposes of facilitating the sale of the premises and only if the prescribed former occupant has agreed in writing. In these circumstances, the Committee makes no further comment.

Part One – Bills

1. Canterbury Park Racecourse (Sale and Redevelopment Moratorium) Bill 2021*

Date introduced	25 March 2021
House introduced	Legislative Assembly
Member responsible	Ms Sophie Cotsis, MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of the *Canterbury Park Racecourse (Sale and Redevelopment Moratorium) Bill 2021* is to provide for a 5 year moratorium on the sale or disposal of certain infrastructure at Canterbury Park Racecourse and the carrying out of certain redevelopment activities on Canterbury Park Racecourse land.

BACKGROUND

2. As Ms Sophie Cotsis MP stated in the second reading speech, the Bill 'ultimately… intends to prohibit the sale or disposal of any racing infrastructure within Canterbury racecourse during the moratorium period'.

3. The second reading speech also refers to a moratorium previously imposed in 1997, and legislated for a further 10 years in section 23 of the *Australian Jockey and Sydney Turf Clubs Merger Act 2010*. That moratorium 'protected the racecourse's land, buildings and other facilities from being sold or disposed of, meaning the community could retain the recreational use of its beloved park'. The 10 year moratorium is due to expire this year.

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of contract and property rights

4. Section 4(1) of the Bill provides that the Australian Turf Club Limited may not, during the moratorium period, sell or otherwise dispose of any of the racing infrastructure of Canterbury Park Racecourse.

5. Section 4(2) defines the 'racing infrastructure' as including the lands, buildings or other facilities, including racetracks, training grounds, spectator or member stands, stabling areas and car parks owned by the Australian Turf Club at the time the Bill is enacted. Section 4(3) further provides that the regulations may make provision for the kinds of lands, buildings, etc. that are or are not taken to be 'racing infrastructure' for the purposes of the moratorium.

6. Section 5 further prohibits development for any purpose that would prevent the future use of the racecourse for conducting race meetings. For the avoidance of doubt, this includes any residential development on land owners by the Australian Turf Club.

> **The *Canterbury Park Racecourse (Sale and Redevelopment Moratorium) Bill 2021* prohibits the Australian Turf Club Limited from selling or disposing of any of the 'racing infrastructure' it owns, including land, buildings and facilities located at Canterbury Park Racecourse, for a period of 5 years. Further, it prohibits any development being carried out at the racecourse, including any residential development on land owned by the Australian Turf Club, for the same period of 5 years.**
>
> **The Australian Turf Club is a public company limited by guarantee. These provisions may impact on the property rights and freedom of contract of individuals with a stake in, or control over the Australian Turf Club (for example, its directors and board members). However, the Committee notes that it is generally concerned with individual rights and liberties in regards to Bills, rather than those associated with corporate ownership. Accordingly, it makes no further comment.**

2. Heavy Vehicle Legislation Amendment (National Regulator) Bill 2021

Date introduced	23 March 2021
House introduced	Legislative Assembly
Minister introducing	The Hon. Paul Toole MP
Ministers responsible	The Hon. Andrew Constance MP The Hon. Paul Toole MP
Portfolios	Transport and Roads Regional Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Bill is to give effect to the transfer of certain functions under the *Heavy Vehicle National Law (NSW)* from Transport for NSW (TfNSW) to the National Heavy Vehicle Regulator (the NHVR).

2. This Bill—

   (a) enables TfNSW to obtain and use, in the exercise of its statutory functions, information held by the NHVR, and to provide the NHVR with certain information, and

   (b) provides for the transfer of certain members of staff of TfNSW to the NHVR, and

   (c) enables the Minister to direct, by written order, that specified assets, rights or liabilities of TfNSW be transferred to the NHVR, and

   (d) makes other amendments to the *Fines Act 1996*, the *Heavy Vehicle (Adoption of National Law) Act 2013*, the *Passenger Transport Act 2014*, the *Road Transport Act 2013* and the *Transport Administration Act 1988*.

BACKGROUND

3. This Bill was introduced in the Legislative Assembly by the Hon. Paul Toole MP in his capacity as the Minister for Regional Transport and Roads. The Hon. Andrew Constance MP as the Minister for Transport and Roads also has joint administration of this Bill and the Acts it amends, the *Heavy Vehicle (Adoption of National Law) Act 2013* and the *Transport Administration Act 1998*.[1]

[1] See *Allocation of the Administration of Acts 2001*, Minister for Transport and Roads and Minister for Regional Transport and Roads

4. The *Heavy Vehicle Legislation Amendment (National Regulator) Bill 2020* would transfer certain functions under the Heavy Vehicle National Law (HVNL) from Transport for NSW to the National Heavy Vehicle Regulator (NHVR).

5. The NHVR is Australia's independent Regulator for all vehicles over 4.5 tonnes of Gross Vehicle Mass. The NHVR administers one set of laws under the HVNL and deliver a range of services under this regulatory framework.

6. The HVNL and Regulations took effect on 10 February 2014. To support the national reform process to a single national regulator, the NSW Government would transfer the delivery of NSW's HVNL regulatory services to the NHVR.[2]

7. In his second reading speech, the Minister for Regional Transport and Roads noted the purpose of the Bill:

> The principal objectives of the bill are to provide for the transfer of certain members of staff from Transport for NSW to the National Heavy Vehicle Regulator and to safeguard their employment conditions, as well as to enable the Minister to direct by written order that specified assets, rights or liabilities of Transport for NSW be transferred to the National Heavy Vehicle Regulator. The bill will also enable Transport for NSW to obtain and use, in the exercise of its statutory functions, information held by the National Heavy Vehicle Regulator and to provide the regulator with certain information to enable it to undertake its functions in New South Wales.
>
> The transfer of New South Wales' heavy vehicle regulatory functions to the National Heavy Vehicle Regulator is the final significant step in a more than 10-year national reform journey. The aim of these reforms was to improve safety and reduce costs and regulatory burden for Australian transport companies operating between States. The establishment of national regulatory regimes for rail safety and domestic commercial vessel safety is now complete.

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to privacy

8. Schedule 1[3] amends section 25 of the *Heavy Vehicle (Adoption of National Law) Act 2013* to provide general powers for Transport for NSW (TfNSW) to provide the Regulator with assistance, advice or the following information, as reasonably required by the Regulator:

   (a) information, including information given in confidence, in the possession or control of TfNSW,

   (b) information, including personal information, kept in a register maintained by TfNSW under the road transport legislation

   (c) other information prescribed by the regulations.

[2] Transport for NSW, National Heavy Vehicle Regulator, 18 December 2020

9. Subsection 25(2) provides that the Regulator may, at the request of TfNSW, disclose information to TfNSW, as is reasonably required by TfNSW to exercise its functions under this Act, the Heavy Vehicle National Law (NSW) or another law.

10. Subsection 25(3) provides that TfNSW may use information disclosed under this section for a purpose relating to the exercise of its functions, including its delegated functions, under this Act, the Heavy Vehicle National Law (NSW) or another law.

11. Subsection 25(4) provides that nothing done, or authorised to be done, under this section –

    a) constitutes a breach of, or default under, an Act or another law, or

    b) constitutes a breach of, or default under, a contract, agreement, understanding or undertaking, or

    c) constitutes a breach of duty of confidence, whether arising by contract, in equity, by custom or otherwise, or

    d) constitutes a civil or criminal wrong, or

    e) terminates an agreement or obligation or fulfils a condition that allows a person to terminate an agreement or obligation, or gives rise to another right or remedy, or

    f) releases a surety or another obligee wholly or in part from an obligation.

12. Subsection 25(5) provides that, in this section, *personal information* has the same meaning as in section 4 of the *Privacy and Personal Information Protection Act 1998* (PPIP Act).

13. Section 4 of the PIPP Act defines personal information as 'information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion. Personal information also includes such things as an individual's fingerprints, retina prints, body samples or genetic characteristics.[3] Under the PIPP Act, there are limits on the retention, use and disclosure of personal information held by public sector agencies.[4]

    Schedule 1[3] of the Bill provides Transport for NSW (TfNSW) with a general power to transfer to the National Heavy Vehicle Regulator (NHVR) certain information in possession by TfNSW, including personal information, and to obtain and use certain information held by the NHVR. The Committee notes that personal information held by TfNSW that may be provided to NHVR, may infringe upon an individual's right to privacy.

    However, in this section, personal information has the same meaning as under section 4 of the Privacy and Personal Information Act 1998 (NSW) (PPIP Act), and is subject to certain privacy protections under that Act regarding the retention,

[3] *Privacy and Personal Information Act 1998*, section 4.

[4] *Privacy and Personal Information Act 1998*, sections 12, 17 and 18.

use and disclosure of that information. The Committee also notes that the transfer of information is for the purpose of facilitating the transfer of employees from TfNSW to the NHVR, including details of their employment, superannuation and leave entitlements. In these circumstances, the Committee makes no further comment.

Employee rights

14. Schedule 2[2] inserts section 105A into the *Transport Administration Act 1988* (NSW) (TAA Act). Proposed section 105A(1) provides that the Minister may, by written order, direct that the assets, rights or liabilities be transferred from TfNSW to the NVHR, including the transfer of employees.

15. Schedule 2[5] of the Bill inserts Schedule 7 to the TAA Act, which makes provisions consequent on the transfer of functions to the National Heavy Vehicle Regulator. Schedule 7(1) provides that the Minister may, be written order, transfer the employment of the relevant employee to the employment of the NVHR.

16. The proposed Schedule 7 also provides the following:

- an employment guarantee period of 2 years after the transfer date for permanent staff, and for remainder of the current term of employment for temporary staff.

- the terms and conditions of employment cannot be varied during an employment guarantee period except by agreement entered into by or on behalf of a majority of the transferred employees, or in accordance with the industrial instrument or the terms of local arrangements, if any, approved in accordance with the industrial instrument.

- The employment of a transferred employee with the National Heavy Vehicle Regulator cannot be terminated by the National Heavy Vehicle Regulator during an employment guarantee period for the transferred employee, except for serious misconduct, as a result of the proper application of reasonable disciplinary procedures, or by agreement with the employee.

- The continuity of entitlements for transferred employees including superannuation, accrued annual and sick leave.

Schedule 2[3] provides for the transfer of employees from TfNSW to the NVHR, including details of their superannuation, leave entitlements and personal information. In doing so, it may impact the rights of those employees being transferred from one agency to another, such as certainty of employment.

However, the Bill contains certain safeguards to provide certainty of employment for transferred employees including that terms and conditions of employment cannot be varied, that the employment of transferred employees cannot be terminated by the NHVR unless in certain circumstances, providing an employment guarantee period for permanent and temporary staff and the continuity of entitlements of transferred employees including superannuation, accrued annual and sick leave. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

17. Section 2 provides that Schedules 1-3 commence on a day or days to be appointed by proclamation.

18. These Schedules contain amendments to several Acts to facilitate the transfer of certain functions under the *Heavy Vehicle National Law (NSW)* from TfNSW to the NHVR. These Acts include the *Heavy Vehicle (Adoption of National Law) Act 2013*, *Transport Administration Act 1988, Fines Act 1996, Passenger Transport Act 2014*, and the *Road Transport Act 2013*.

> **Section 2 provides that Schedules 1-3 commence on a day or days to be appointed by proclamation. These schedules contain amendments to several Acts to facilitate the transfer of certain functions under the *Heavy Vehicle National Law (NSW)* from TfNSW to the NHVR.**
>
> **The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. However, the Committee notes that a flexible start date may assist with the necessary administrative arrangements with the sector to facilitate the transfer of these functions between agencies. In these circumstances, the Committee makes no further comment.**

3. NSW Jobs First Bill 2021*

Date introduced	25 March 2021
House introduced	Legislative Assembly
Member responsible	Ms Yasmin Catley MP
	*Private member's bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to—

   (a) promote investment in local industry and job creation by encouraging the use of locally manufactured materials and the use of local service providers, and

   (b) promote investment in education and training by requiring the use of local apprentices, trainees and cadets on major projects, and

   (c) establish the NSW Local Jobs Advocate to undertake a range of functions to promote local employment and training.

BACKGROUND

2. In the second reading speech, Ms Yasmin Catley MP noted that the Bill intended to increase the proportion of jobs retained in NSW under a new legislative framework and establishes a NSW Local Jobs Advocate to implement this framework.

3. Ms Catley further stated the aims of the Bill to support local jobs:

> We want to see taxpayers get value expressed through high-quality, good workmanship and the best materials available. We want to see taxpayer value understood as being more than just a price tag but as the social and economic value of supporting local jobs and giving local businesses an opportunity to do their very best work.

4. This is the second time this bill has been introduced by Ms Catley in the 57th Parliament, and was previously introduced as the NSW Jobs First Bill 2020 which has since lapsed.

5. The Legislation Review Committee reported on the NSW Jobs First Bill 2020 in LRC Digest 23/57. The Committee notes that the content of the Bills are substantially the same, and therefore raises similar concerns as in the Committee's report on the 2020 Bill.

ISSUES CONSIDERED BY THE COMMITTEE

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

Independence of the Advocate

6. Proposed section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister on various matters related to the NSW Local jobs First Policy, promotion of the Policy within government and local industry, and working with local industry, employee organisations and the education and training sector to facilitate

and strengthen collaboration between industry and the education and training sector to help build the future workforce.

7. Proposed section 15 of the Bill provides that the Advocate is "subject to the direction and control of the Minister", except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.

8. Part 5 of the Bill sets out provision for the information and enforcement powers of the advocate, including the power to request information (section 17), request a government agency to conduct an audit (section 18), require information from persons and issue compliance notices (sections 19 and 20), and the recommendation of issuing adverse publicity notices (section 22).

> **Section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate, including advising the Minister, the promotion of the Policy within government and local industry, and working with local industry and employee organisations to help build the future workforce. In addition, section 15 of the Bill states that the Advocate will be subject to the direction and control of the Minister, except in relation to the preparation and contents of a report that the Advocate is required by the Bill if passed, or any other Act, to provide to Parliament.**
>
> **With the Advocate being under the direction and control of the Minister, the Advocate's operations and investigations will be subjected to a Minister's direction and not to Parliamentary scrutiny. This may impact on the neutrality and independence of the Advocate, especially considering the Advocate's enforcement powers. The Committee refers this matter to Parliament for its consideration as to whether the provisions relating to Ministerial control of the Advocate are sufficiently subjected to parliamentary scrutiny.**

Makes rights, liberties or obligations unduly dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

Non-reviewable decisions of the advocate

9. Sections 22 and 23 of the Bill set out the Advocate's powers to make determinations and adverse publicity notices.

10. Subsections 22(1)-(2) provide that the Advocate may make a determination that a person had failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. Subsection 22(3)(a) provides that the Advocate may recommend to the Minister that that the person be issued with an adverse publicity notice. Subsection 22(4) provides that the person may, within 7 days after the Advocate has advised the person of the determination and recommendation, respond to the Advocate about the recommendation that an adverse publicity notice be issued by the Minister. Under subsection 22(5), the Advocate has qualified privilege in proceedings for defamation arising out of a determination or recommendation made under this section.

11. Section 23 of the Bill provides that the Minister may issue an adverse publicity notice about a person after receiving a recommendation under section 22(3)(a). Subsection 23(2) provides that an adverse publicity notice must name the person to whom the

adverse publicity notice relates, and set out the reasons the notice is issued, and be tabled by the Minister in Parliament.

12. The Bill does not contain provisions to appeal or correct an adverse publicity notice once it has been issued.

> **The Bill provides that the Advocate may make a determination that a person has failed to comply with an information notice, the NSW Jobs First Policy, a local industry development plan, or a major projects skills development plan. The Advocate may also make a recommendation to the Minister that the person be subject to an adverse publicity notice, that must name the person, set out the reasons for the notice, and be tabled in the Parliament.**
>
> **The Committee acknowledges that these powers of the Advocate and the Minister to make an adverse publicity notice are intended to ensure compliance with the NSW Jobs First Policy. However, as the issuing of such a notice may cause reputational or financial damage. This may be particularly problematic as the Bill does not provide an avenue to appeal or correct an adverse publicity notice. Given the potential for reputational or financial damage caused by a false adverse publicity notice, the Committee refers these provisions to Parliament to consider whether the powers are reasonable in the circumstances.**

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

Matters deferred to the regulations – functions of the Advocate

13. Proposed section 14 of the Bill sets out the functions of the NSW Local Jobs Advocate to include, among other functions, to advise the Minister matters related to the development of the NSW Jobs First Policy, to promote the NSW Jobs First Policy within government and local industry, to advocate in favour of government agencies and the private sector procuring goods and services from local industry based in New South Wales and to monitor and report to Parliament on compliance with the NSW Jobs First Policy including exemptions granted by the Minister from compliance with the NSW Jobs First Policy.

14. Subsection 14(1)(k) also provides that the Advocate also has "any other functions prescribed by the regulations for the purposes of this section."

> **The Bill defers some matters to the regulations. In particular, the Bill provides that some functions of the NSW Local Jobs Advocate may be prescribed by the regulations. The Committee generally substantive functions of statutory bodies to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations of individuals may be affected. However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the Interpretation Act 1987. As such the Committee makes no further comment.**

Wide power of delegation

15. Proposed section 16 of the Bill provides that the exercise of any function of the Advocate (other than this power of delegation) may be delegated by the Advocate to any person employed in the Office of the NSW Local Jobs Advocate.

16. The functions of the advocate are set out in section 14 (as noted above) and include, among other things, advising the Minister on various matters related to the NSW jobs First Policy, promoting the NSW Jobs First Policy, advocate in favour of government agencies and the private sector, to work with local industry, employee organisations and the education and training sector, and to monitor and report to Parliament on compliance with the NSW Jobs First Policy

> **The Bill grants a wide power of delegation to the Advocate for the exercise of any function of the Advocate to any person employed in the Office of the NSW Local Jobs Advocate. The functions of the Advocate that may be delegated include advising the Minister on various matters related to the NSW Jobs First Policy, working with government agencies, local industry and the private sector, and monitoring and reporting to Parliament on compliance with the NSW Jobs First Policy. In performing these functions, appropriate judgement must be used to assess compliance and advise the Minister on relevant matters.**
>
> **The Committee notes that the Bill does not contain restrictions on this power to delegate, e.g. restricting delegation to people with certain qualifications or expertise. The Committee also notes that some functions of the Advocate may have an impact on reputational or financial rights or persons subjects to adverse publicity notices, as noted earlier in this report. Given this, the Committee considers the Bill should provide more clarity about the persons to whom the functions can be delegated. In the circumstances, the Committee refers this matter to Parliament for its consideration.**

Henry VIII clause

17. Schedule 2 (Savings, transitional and other provisions) to the Bill sets out savings, transitional and other provisions. Subclause 1(4) provides that the Regulations made for the purposes of this clause may amend this Schedule to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations.

> **The Bill contains a Henry VIII clause which allows the Regulations made for the purposes of Schedule 2 to amend the Schedule itself to provide for additional or different savings and transitional provisions. This allows the Minister to create regulations that could override the provisions of primary legislation, and thereby to legislate without reference to Parliament.**
>
> **The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight. However, as the amendment is limited to amendments of a savings and transitional nature, and permits additional control over the rollout of the amendments contemplated by the Bill, the Committee makes no further comment.**

Part Two – Regulations

1. Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Adam Marshall, MP
Portfolio	Agriculture and Western NSW

PURPOSE AND DESCRIPTION

1. The *Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020* (the Order) was made by Sarah Britton, Group Director Animal Biosecurity and Chief Veterinary Officer, Regional NSW, with delegated authority and in pursuance of section 404A of the *Biosecurity Act 2015*.

2. The Order amends the *Biosecurity Order (Permitted Activities) Order 2019* to set out the circumstances in which, despite clause 14 of the *Biosecurity Regulation 2017*, a person may import 'cattle tick carriers' into New South Wales.

ISSUES CONSIDERED BY THE COMMITTEE

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

Strict liability offence, with executive liability

3. As noted above, the Order amends the *Biosecurity Order (Permitted Activities) Order 2019* to provide for exceptions to the prohibition in clause 14 of the *Biosecurity Regulation 2017*.

4. Clause 14 of the Regulation provides that a person must not import any 'cattle tick carriers' into the State, including cattle, horses, camels, deer, goats and sheep. According to clause 5 of the Regulation, this is a 'mandatory measure'.

5. Under section 25 of the *Biosecurity Act 2015,* a person who deals with biosecurity matter or a carrier in contravention of any mandatory measures is guilty of a category 2 offence, and an executive liability offence.

6. Under section 280 of the Act, the maximum penalty for a category 2 offence is $220,000 for an individual, or $440,000 for a corporation, with additional penalties for each day the offence continues. If the offence is committed negligently, the maximum penalties are increased to $1,100,000 for an individual, and $2,200,000 for a corporation. Further,

according to schedule 6 to the Regulation, an offence under section 25 is a penalty notice offence, with a penalty of $1,000 attached.

7. Since the offence under section 25 is an executive liability offence, section 306 of the Act provides that, where a corporation commits an offence, a director or manager of that corporation can be held liable if –

   a) they knew or ought to have known that the offence would be or was being committed, and

   b) failed to take all reasonable steps to prevent or stop the commission of the offence.

8. The Order sets out a number of circumstances in which 'primary cattle tick carriers' (meaning cattle or deer) may be imported into NSW without contravening the Regulation, including –

   a) where the carrier is imported from an unrestricted property in a cattle tick free zone that transits through an infested area – if the carrier was not off-loaded from the vehicle, no additional cattle-tick carriers were loaded onto the vehicle, and a 'record of movement' is provided (clause 27), and

   b) where the carrier is imported from a property in an infested area, or from a restricted property – if a 'carrier biosecurity certificate' and 'record of movement' are provided, among other requirements (clause 28).

9. The Order also sets out circumstances in which a 'secondary cattle tick carrier' (meaning camels, horses, goats or sheep) can be imported into NSW without contravening the Regulation, including –

   a) where the carrier will be in the State for over 7 days or has spent time on 'low risk Queensland land' – if the carrier has undergone a manual inspection, been found free of cattle ticks, and undergone a chemical treatment (clause 28A, Table 1),

   b) where the carrier is a horse being imported for the purpose of racing, or after having attended a race in an infested area – if a 'record of movement' is provided declaring a number of conditions are met, including that the horse is a thoroughbred or standardbred, and has been visually inspected and found to be tick free (clause 29, Table 2).

10. Further exemptions are made for feedlots and abattoirs (clause 30) and for agricultural shows (clause 31), where specified procedures are followed – for example, ensuring that feedlots are surrounded by a 'buffer zone' of 10 metres.

The *Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020* sets out a number of exceptions to the general prohibition in the *Biosecurity Regulation 2017* on importing cattle tick carriers – including cattle, deer, horses, goats and sheep – into NSW. That prohibition is a 'mandatory measure', breach of which is a category 2 offence and an executive liability offence under the *Biosecurity Act 2015*. Importing cattle tick carriers into NSW without complying with the conditions set out in the Order may attract a

maximum penalty of $220,000 for an individual or $440,000 for a corporation. Alternatively, it could be dealt with by penalty notice, with a penalty of $1,000.

Failure to comply with the conditions in the Order is, in effect, a strict liability offence, with additional penalties applicable if the contravention is negligent. The offence only carries a mental element in the context of executive liability, where a director will not be held liable unless they knew or ought to have known, and failed to take reasonable steps to prevent, an offence being committed. The Committee generally comments on strict liability offences, as they depart from the common law principle that *mens rea*, or a mental element, is required to establish liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. Although the maximum penalties for this offence are significant, they are monetary, not custodial. The Committee also acknowledges that, without the exemptions provided for in the Order, it would always be an offence to import cattle tick carriers into NSW, regardless of the precautions taken. In these circumstances, the Committee makes no further comment.

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

Restrictions on importing cattle and other animals into New South Wales

11. The Order sets out a range of conditions with which companies and individuals must comply if they import cattle tick carriers into NSW. Failure to comply with these conditions is a category 2 offence, attracting significant monetary penalties. Pursuant to section 25 of the *Biosecurity Act 2015,* it is also an executive liability offence.

The *Biosecurity Order (Permitted Activities) Amendment (Cattle Tick Carriers) Order 2020* sets out a range of conditions with which individuals and businesses must comply, in order to avoid significant penalties for importing cattle tick carriers into NSW.

By restricting the circumstances in which certain livestock can be imported into NSW, the Order may have an adverse impact on agricultural, racing and other businesses. However, the Committee acknowledges that, without the exemptions provided for in the Order, clause 14 of the *Biosecurity Regulation 2017* would impose a blanket prohibition on importing cattle tick carriers into NSW. In these circumstances, the Committee makes no further comment.

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

Matters that should be included in primary legislation

12. As outlined above, the Order provides for a range of exemptions to clause 14 of the Regulation, by setting out the limited circumstances in which cattle tick carriers, including horses, sheep and cattle, can be imported into NSW.

13. Importing cattle tick carriers into NSW outside of these circumstances – for example, without arranging a manual inspection or chemical treatment for ticks where required, or

providing a 'complete record of movement' – constitutes contravention of a 'mandatory measure' under the *Biosecurity Regulation 2017*, which is a category 2 offence under section 25 of the *Biosecurity Act 2015*.

Failure to comply with the requirements for importing cattle tick carriers into NSW, set out in the Order, is an offence under the *Biosecurity Act 2015*, attracting a maximum penalty of $220,000 for an individual or $440,000 for a corporation. Additional penalties apply if the offence was committed negligently, and/or if the offence continues over multiple days. The Committee prefers offences which set significant penalties to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight.

In this case, the Committee notes that the offence itself, and details as to the relevant penalties, are contained within the parent Act. However, the Committee considers that matters involving the exemption from an offence in an Act which carries significant maximum monetary penalties should also be dealt with in primary legislation. While the Order is still subject to disallowance by Parliament, this would provide greater opportunity for parliamentary scrutiny and debate. In these circumstances, the Committee refers the matter to Parliament for its consideration.

2. Greyhound Racing Amendment (Miscellaneous) Regulation 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Kevin Anderson, MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of the *Greyhound Racing Amendment (Miscellaneous) Regulation 2020* are as follows—

   (a) to clarify the terminology used to describe certain persons who are greyhound racing industry participants for the purposes of the *Greyhound Racing Act 2017*,

   (b) to provide that a decision of the Greyhound Welfare and Integrity Commission to vary or revoke a registration condition may be internally reviewed by a Commissioner of the Commission or certain members of staff of the Commission,

   (c) to further provide for the offences that may be dealt with by way of penalty notice and the penalty amounts payable.

2. This Regulation is made under the *Greyhound Racing Act 2017*, including –

   (a) section 3(1)(e) and (f) (regarding the definition of greyhound racing industry participant),

   (b) section 91(1)(a)(iv) (regarding the prescription of reviewable decisions),

   (c) section 91(3)(c) (regarding the prescription of requirements for internal review applications),

   (d) section 96 (regarding the prescription of penalty notice offences), and

   (e) section 101 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Right to a fair trial – penalty notice offences

3. Among other amendments to the *Greyhound Racing Regulation 2019*, the *Greyhound Racing Amendment (Miscellaneous) Regulation 2020* makes a number of additions to

Schedule 1, which sets out penalty notice offences for the purposes of section 96 of the *Greyhound Racing Act 2017*.

4. Accordingly, the Regulation provides that penalty notices may be issued for the following additional offences –

   a) Greyhound racing industry participants failing to comply with the requirement in clause 10(3) to provide information to the Commissioner, including about the death of a greyhound or change in ownership of a greyhound, within certain time periods.

   b) Greyhound racing industry participants failing to comply with the requirement in clause 15(3) to provide information to the Commissioner, including about changes of address and animal cruelty charges, within certain time periods.

   c) Proprietors of greyhound trial tracks failing to comply with the requirement in clause 18(3) to provide information to the Commissioner, including about changes of address and animal cruelty charges, within certain time periods.

5. For each of the above, the amount payable for the penalty notice is $275 for a first offence and $550 for a second or subsequent offence.

6. Absent a penalty notice, the offences under clauses 10(3), 15(3) and 18(3) would attract a penalty of 20 penalty units (or $2,200).

The *Greyhound Racing Amendment (Miscellaneous) Regulation 2020* expands the list of offences under the *Greyhound Racing Regulation 2019* for which a penalty notice may be issued. In particular, it includes as new 'penalty notice offences' contraventions of clauses 10, 15 and 18 of the *Greyhound Racing Regulation 2019*, which relate to the time periods in which greyhound racing participants must provide certain information – for example, about being charged with an animal cruelty offence – to the Greyhound Racing Commissioner. The amounts payable for the penalty notices are $275 for a first offence and $550 for a second or subsequent offence.

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

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and risk of having a larger penalty imposed. Given the relatively small amounts payable for the new penalty notice offences, the Committee makes no further comment.

3. National Parks and Wildlife Amendment Regulation 2021

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy and Environment

PURPOSE AND DESCRIPTION

1. The objects of the *National Parks and Wildlife Amendment Regulation 2021* are as follows—

(a) to insert a new Division into Part 2 of the *National Parks and Wildlife Regulation 2019* to provide for the imposition and collection of fees and charges for entry to parks, and roads traversing parks, by motor vehicles, including provisions that—

(i) enable the Secretary of the Department of Planning, Industry and Environment (the Secretary) to determine fees and charges for entry to a park by motor vehicle and impose conditions relating to the payment of fees and charges, and

(ii) require determinations made by the Secretary to be published on the website of the Department of Planning, Industry and Environment, and

(iii) make it a condition of entry to a park by motor vehicle that a person must ensure the motor vehicle is removed from the park by a specified time and date or before the expiry of a specified period of time, and

(iv) require the applicable fees and charges to be displayed on a sign adjacent to the entrance to the relevant park or relevant part of the park, and

(v) create offences of failing to pay the applicable fee or charge or failing to ensure the motor vehicle by which a person entered the park is removed from the park by a specified time and date or before the expiry of a specified period of time, and (vi) enable the Secretary to waive the requirement for a person or a class of persons to pay all or part of a fee or charge, and

(vi) create an offence of failing to display a valid receipt, ticket or pass to show that an applicable fee or charge has been paid,

(b) to update references relating to the Secretary and the Secretary of the Department of Premier and Cabinet,

(c) to prescribe additional offences as penalty notice offences and to prescribe persons employed in Service NSW and persons engaged by Service NSW or Transport for NSW under a contract for services as persons authorised to serve penalty notices,

(d) to clarify that Mutawintji land includes the Mutawintji State Conservation Area,

(e) to make consequential amendments.

2. This Regulation is made under the *National Parks and Wildlife Act 1974*, including sections 154 (the general regulation-making power), 155, 156 and 192(1) and (6).

ISSUES CONSIDERED BY THE COMMITTEE

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

Freedom of movement

3. The Regulation makes a number of amendments to the *National Parks and Wildlife Regulation 2019* relating to the conditions of entry, including fees and charges for entry, to national parks.

4. The Regulation inserts a new Division 2A into the *National Parks and Wildlife Regulation 2019*. Division 2A contains a range of provisions relating to conditions of entry, including:

i. Clause 10B – which provides that the Secretary may determine fees or charges payable for motor vehicles entering a park, and may also determine the time period within which the motor vehicle must leave the park.

ii. Clause 10C – which provides that it is a condition of entry that a motor vehicle must be removed from the park within the applicable time period. Further, it provides that the Secretary may impose other conditions of entry on persons entering a park by motor vehicle.

iii. Clause 10F – which provides that is an offence to enter a park by motor vehicle without paying the fee or charge, with a maximum penalty of 30 penalty units ($3,300).

iv. Clause 10G – which provides that it is an offence for a person entering a park by motor vehicle not to comply with a condition of entry, including the requirement to remove the vehicle after the applicable time period. The maximum penalty for this offence is also 30 penalty units ($3,300).

v. Clause 10H – which provides that the Secretary may, for time to time, waive the requirement for a person or class or persons to pay a fee or charge.

vi. Clause 10I – which provides that it is an offence for a person who parks a motor vehicle in a park not to ensure that the vehicle clearly displays a valid ticket or pass, showing that the fee or charge has been paid (with some exceptions). The maximum penalty for this offence is also 30 penalty units ($3,300).

The *National Parks and Wildlife Amendment Regulation 2021* makes a number of amendments to the *National Parks and Wildlife Regulation 2019,* including inserting new conditions of entry by motor vehicle into national parks. These provisions may impact on individuals' freedom of movement, a right which is recognised in Article 12 of the International Covenant on Civil and Political Rights.

However, Article 12 also recognises that restrictions on the right to freedom of movement may be warranted in certain circumstances – for example, to protect public order. The provisions in the Regulation are in line with similar regulations governing recreational spaces used by the public, and accessible by car. The Committee also acknowledges the benefit of the provisions for the majority of those using national parks, allowing the peaceful enjoyment of the environment and amenities, and the preservation of the natural environment. In these circumstances, the Committee makes no further comment.

Right to a fair trial – penalty notice offences

5. The Regulation makes a number of additions to Schedule 1 to the *National Parks and Wildlife Regulation 2019*, which sets out penalty notice offences for the purpose of section 192 of the *National Parks and Wildlife Act 1974.*

6. Accordingly, the Regulation provides that penalty notices may now be issued for the following additional offences:

   i. Clause 10F(1) – Entering a park by motor vehicle without paying the fee or charge. The fee amount payable under a penalty notice for this offence is $100.

   ii. Clause 10G(1) – Parking a motor vehicle in a park after the allowable period of time has expired. The fee amount payable under a penalty notice for this offence is $100 for less than a day, $200 for 3 days or less, $300 for more than 3 days, $100 for a period that cannot be determined by an authorised officer.

   iii. Clause 10G(2) – Failing to comply with another condition of entry determined by the Secretary. The fee amount payable under a penalty notice for this offence is $100.

   iv. Clause 10I(1) – Parking a motor vehicle in a park without ensuring that the vehicle clearly displays a valid ticket or pass, showing that the fee or charge has been paid. The fee amount payable under a penalty notice for this offence is $100.

7. In the case that the fee is not paid, the offences under these clauses would each attract a penalty of 30 penalty units (or $3,300).

The Regulation expands the list of offences under the *National Parks and Wildlife Regulation 2019* for which a penalty notice may be issued. In particular, it includes as new 'penalty notice offences' contraventions of clauses 10F, 10G and 10I – all new provisions which relate to conditions of entry for motor vehicles. The fee amounts payable for the penalty notices range from $100 to $300.

Penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic

right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and risk of having a larger penalty imposed. Given the relatively small amounts payable for the new penalty notice offences, the Committee makes no further comment.

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

Important matters in subordinate legislation – creation of new offences

8. As mentioned above, the amendments made to the *National Parks and Wildlife Regulation 2019* include the introduction of a number of new offences.

9. Specifically, the Regulation makes it an offence –

   i. To enter a national park without paying the fee or charge required (clause 10F(1)),

   ii. To park a motor vehicle in a park after the period of time allowed (clause 10G(1)),

   iii. To fail to comply with another condition of entry determined by the Secretary (clause 10G(2)),

   iv. To park a motor vehicle in a park without clearly displaying a valid ticket or pass, showing that the relevant fee or charge has been paid – unless the fee or charge has been waived, or the ticket or pass was issued electronically (clause 10I(1)).

10. The maximum penalty for each of the above offences is 30 penalty units ($3,300).

The Committee notes that the Regulation introduces a number of offences regarding conditions of entry to a national park. While the individual fee amounts are relatively small in size, most ranging from $100 to $300 for individual offences, in the case that the fee is not paid, the offences under these clauses would each attract a penalty of 30 penalty units (or $3,300).

The Committee generals prefers that provisions which introduce new offences to be included in primary rather than subordinate legislation, to facilitate an appropriate level of parliamentary oversight. The Committee recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration through regulations. Given the maximum penalty is monetary rather than any terms of imprisonment, and an individual has the opportunity to challenge such a penalty notice at court, the Committee makes no further comment.

4. Point to Point Transport (Taxis and Hire Vehicles) Amendment (Miscellaneous) Regulation 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are—

(a) to amend the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* to preserve the conditions that applied to an ordinary taxi licence of class TXHAP immediately before the commencement of Part 4 of the Act, being 1 November 2017, and

(b) to amend the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* as follows—

(i) to provide that the sign that must be fitted to a taxi may display the word "TAXI", "CAB" or "CABS",

(ii) to require providers of a taxi service who download a video recording, or part of a video recording, from a video recording made by the security camera system installed in the taxi, to dispose of the downloaded video recording not less than 30 days and not more than 90 days after it was downloaded,

(iii) to expand the offences under the *Crimes Act 1900* that disqualify a person from driving a taxi or hire vehicle, if the person has been found guilty of one of those offences, to include certain offences against the person (under Part 3 of that Act) and certain public justice offences (under Part 7 of that Act),

(iv) to expand the offences that disqualify a person from driving a taxi or hire vehicle to include offences under repealed provisions that correspond, or substantially correspond, to certain provisions of the Road Transport Act 2013 or the statutory rules under that Act,

(v) to omit as offences that disqualify a person from driving a taxi or hire vehicle, offences under section 110(2) or 111 of the *Road Transport Act 2013* that have been dealt with by way of penalty notice,

(vi) to include affiliated providers as responsible persons for the purposes of compliance with the safety standards specified in clauses 24 and 25, (vii) to clarify that persons who drive a taxi or hire vehicle that is being used to provide a passenger service must hold a current unrestricted Australian driver licence and have held an unrestricted Australian driver licence for a total of 12 months in the preceding 2 years,

(viii) to expand the list of offences that, if committed by individuals who are applicants for authorisation to provide a taxi service or booking service, or nominated directors, managers or close associates of applicants, disqualify the applicant from being granted the authorisation to include offences involving credentials under section 127 of the Act,

(ix) to apply clause 55, which requires payment of fares for the hiring of a taxi after the hiring is terminated, to hirings that result from a booking,

(x) to increase the maximum penalty for the offence of permitting a taxi to stand otherwise than in a taxi zone in the case of an offence committed on a road or road related area adjacent to tram tracks located on George Street in the Sydney Central Business District to 30 penalty units, and to provide for a penalty notice amount of $850,

(xi) to prescribe as relevant agencies for the purposes of section 149 of the Act, being agencies with which the Point to Point Transport Commissioner may enter into information sharing arrangements, the Commercial Passenger Vehicle Commission of Victoria, the Queensland Department of Transport and Main Roads, the Secretary of the Department of Communities and Justice, Service NSW and the Transport Canberra and City Services Directorate of the Australian Capital Territory,

(xii) to insert a transitional provision in relation to the amendments that expand the list of disqualifying offences,

(xiii) to update a legislative reference.

This Regulation is made under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, including sections 20, 32, 149(5) (paragraph (g) of the definition of relevant agency) and 158 (the general regulation-making power) and clauses 3–5, 7 and 9 of Schedule 1 and clauses 1 and 3 of Schedule 2 to the Act.

ISSUES CONSIDERED BY THE COMMITTEE

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

Significant increase in penalty

2. Schedule 2[18] amends Schedule 2 of the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* to increase the penalty in relation to clause 75 of that regulation. Clause 75 provides that the driver of a taxi must not permit the taxi to stand otherwise than in a taxi zone, except while hired, while note available for hire, while loading or unloading luggage or goods or taking up or setting down passengers, or at the direction or with the consent of a police officer.

3. The amending regulation amends the penalty for contravening clause 75, and increases the penalty from $150 to $850 in the case of an offence committed on a road or road related area adjacent to tram tracks located on George Street in the Sydney Central Business District, and $150, in any other case.

The Regulation amends the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* to increase a penalty for a taxi standing in a non-taxi zone on a road or road related area adjacent to tram tracks located on George Street in the Sydney Central Business District. The regulation increases the penalty from $150 to $850 for this specific penalty notice offence.

The Committee notes that this is a significant increase in the financial penalty for this type of penalty notice offence and may have an adverse impact on the taxi business community. However, the Committee notes that the penalty is aimed at deterring taxis from standing on tram tracks and to facilitate the running of public transport. Additionally, the increase is specific to George Street in the Sydney CBD. Given the public interest considerations and limited geographic area in which the increased penalty applies, the Committee makes no further comment.

5. Public Health Amendment (Scheduled Medical Conditions – Asbestosis) Regulation 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Brad Hazzard, MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Public Health Regulation 2012* to prescribe the particulars that are required to be notified by a medical practitioner when attending a person with asbestosis.

2. This Regulation is made under the *Public Health Act 2010*, including sections 54(2)(a) and 134 (the general regulation-making power).

3. According to SafeWork NSW:[5]

> 'NSW Health will provide notifications to SafeWork NSW, to undertake workplace health and safety (WHS) investigations at the current or previous workplaces of the person with asbestosis. If a workplace falls under a different WHS regulator including the NSW Resources Regulator or Comcare, the information will be shared with them so WHS investigations can take place.'

4. Further, SafeWork NSW has noted that 'information will be transmitted, received and stored securely to maintain patient privacy'.

5. That form includes details about the patient/worker, their diagnosis, their relevant work history, and the current and previous employers' details.

ISSUES CONSIDERED BY THE COMMITTEE

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

Privacy

6. Section 54(2) of the *Public Health Act 2010* provides that, if a medical practitioner attends a person with a category 1 or category 2 condition, they must, as soon as practicable –

[5] SafeWork NSW, 'Notification of an asbestosis diagnosis', https://www.safework.nsw.gov.au/legal-obligations/medical-practitioners-obligation-to-notify-of-a-disease/notification-of-an-asbestosis-diagnosis

(a) record particulars about the person's medical condition as prescribed by the regulations, and

(b) sent to the Secretary a certificate of those particulars.

7. Schedule 1 to the *Public Health Act 2010* provides that asbestosis is a category 2 condition.

8. The *Public Health Amendment (Scheduled Medical Conditions— Asbestosis) Regulation 2020* amends the *Public Health Regulation 2012* to insert a new clause 37(h). That clause provides that, for the purposes of section 54(2)(a) of the *Public Health Act 2010*, the prescribed particulars a medical practitioner is required to record and disclose to the Secretary in relation to asbestosis are those 'required to be included in the *Asbestosis Notification Form* published by the Ministry of Health'.

9. The Asbestosis Notification Form includes personal details of the patient and their diagnosis, including the language the patient speaks at home, whether they are Aboriginal or Torres Strait Islander, their age and gender, their contact details, and their employment history.[6]

10. According to SafeWork NSW, it is 'recommended the worker is informed that the notification will be made and that the relevant WHS regulator may investigate their current or former workplace.'[7] However, there is no requirement in the Regulation that this occur.

11. The Committee notes that other subclauses in clause 37 – for example, relating to diagnoses of silicosis, AIDS, cystic fibrosis and heart disease – also refer to forms published by the Ministry of Health to prescribe the particulars required to be disclosed.

The Regulation amends the *Public Health Regulation 2012* to insert a new clause 37(h). That clause provides that, for the purposes of section 54(2)(a) of the *Public Health Act 2010*, the prescribed particulars a medical practitioner is required to record and disclose to the Secretary in relation to asbestosis are those 'required to be included in the Asbestosis Notification Form published by the Ministry of Health'.

While the requirement to disclose details of a patient's asbestosis diagnosis to the Secretary is contained in the parent Act, clause 37(h) of the Regulation may delegate the specification of those details to the Ministry of Health. This has the potential to impact on individuals' right to privacy. This is particularly the case as there is no requirement in the Regulation, or in the parent Act, for a medical practitioner to inform their patient that their details will be disclosed.

The Committee acknowledges the public health objectives of this scheme. However, given the apparent lack of safeguards and the potential impact to an individual's privacy concerning personal information, the Committee refers the matter to the Parliament for its consideration.

[6] Asbestosis Notification Form, February 2021, https://www.health.nsw.gov.au/Infectious/forms/asbestosis-notification-form.pdf

[7] Ibid.

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

Regulations incorporating standards of external entities that will not be subject to disallowance

12. The *Public Health Amendment (Scheduled Medical Conditions— Asbestosis) Regulation 2020* amends the *Public Health Regulation 2012* to insert a new clause 37(h).

13. That clause provides that, for the purposes of section 54(2)(a) of the *Public Health Act 2010*, the prescribed particulars a medical practitioner is required to record and disclose to the Secretary in relation to asbestosis are those 'required to be included in the *Asbestosis Notification Form* published by the Ministry of Health'.

14. The Asbestosis Notification Form includes personal details of the patient and their diagnosis, including the language the patient speaks at home, whether they are Aboriginal or Torres Strait Islander, their age and gender, their contact details, and their employment history.[8]

15. The Committee notes that other subclauses in clause 37 – for example, relating to diagnoses of silicosis, AIDS, cystic fibrosis and heart disease – also refer to forms published by the Ministry of Health to prescribe the particulars required to be disclosed.

> **As noted above, clause 37(h) of the Regulation refers to an external document, the 'Asbestosis Notification Form', to determine what particulars of a patient's condition a medical practitioner is required to record and disclose to the Secretary under section 54 of the *Public Health Act 2010*. This document is published by the Ministry of Health, and may presumably be altered from time to time. Unlike regulations, there is no requirement for this form to be tabled in Parliament and subject to disallowance under the *Interpretation Act 1987*.**
>
> **The Committee generally prefers that provisions which may impact on individuals' rights, such as the right to privacy, be subject to Parliamentary scrutiny. While the Committee notes that the same approach is taken to details of other diagnoses which are required to be disclosed under clause 37 (such as AIDS and heart disease), given the privacy implications of personal information, the Committee refers the matter to Parliament for its consideration.**

[8] Asbestosis Notification Form, February 2021, https://www.health.nsw.gov.au/Infectious/forms/asbestosis-notification-form.pdf

6. Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Damien Tudehope MP
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* (the remade Regulation) is made under the *Retail Leases Act 1994*, including sections 85 and 87, and under section 202 of the Conveyancing Act 1919.

2. The object of the remade Regulation is to repeal and remake, with amendments, the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* (the second Regulation) to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until 28 March 2021. The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (the first Regulation) was introduced in July 2020, and repealed by the second Regulation in October 2020.

3. Accordingly, the remade Regulation will continue to give effect to the National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19 adopted by the National Cabinet on 7 April 2020. Like the fist Regulation, the remade Regulation—

    a. prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and

    b. requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

4. The provisions of the remade Regulation are largely the same as the first two Regulations, as amended in July 2020 and October 2020.

5. This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

6. When introduced in April 2020, the first Regulation applied for a 'prescribed period' of 6 months, the time limit for regulations made under section 87 of the Retail Leases Act 1994. The second Regulation extended the prescribed period until 31 December 2020. The remade Regulation extends this period until 28 March 2021. However, the remade Regulation itself will not be repealed until 6 months after it commences, on 18 June 2021 (clause 12).

7. 'Impacted lessees' continue to be defined as those who are eligible for JobKeeper payments, although it now applies to businesses that had less than $5 million in turnover in the 2018-19 financial year (instead of $50 million, as noted by the first and second regulation) (clause 4).

8. During the prescribed period, a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of (clause 7):

    a. a failure to pay rent,

    b. a failure to pay outgoings, or

    c. the business operating under the lease not being open for business during the hour specified in the lease.

9. 'Prescribed actions' include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent, among other actions (clause 3).

10. Further, a lessor cannot take a prescribed action against a lessee because of a failure to pay rent unless the lessor has, if requested by the lessee, renegotiated the rent payable (and other terms) under the lease in good faith (clause 7(4)(a)). This was also a requirement under the first and second Regulations. The remade regulation retains the requirement that the lessor commence renegotiations within 14 days of receiving a request by an impacted lessee, unless another timeframe is agreed.

11. However, nothing in the remade Regulation prevents a lessor from taking a prescribed action against a lessee on grounds unrelated to the COVID-19 pandemic (clause 10).

12. Further, parties are not prevented from agreeing to a prescribed action, including termination of an impacted lease (clause 6(6)).

> **Like its predecessors, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.**

The remade Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each.

The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualified for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 12 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

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

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

13. As noted above, the remade Regulation limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

14. The remade Regulation extends the prescribed period for which these limitations are imposed, which was initially due to end on 31 December 2020 until 28 March 2021.

15. While the previous Regulation was in force, the Committee notes that financial mortgage assistance was made available for eligible lessors to defer business loan repayments for a period of 6 months.[9] Following any 6-month loan repayment deferral, lessors experiencing ongoing financial difficulty may now be able to restructure or vary their loan, or be eligible for a 4-month deferral extension.[10]

[9] Australian Banking Association, 'Commercial Landlord Relief Package', https://www.ausbanking.org.au/banks-to-help-commercial-landlords-who-help-tenants/

[10] Australian Banking Association, 'COVID-19 support: phase two', https://www.ausbanking.org.au/covid-19-support-phase-two/

16. The NSW Government has also announced that commercial landlords will be able to apply for a land tax concession of up to 25% if they provide rent reductions to eligible tenants from 1 January 2021 to 28 March 2021.[11]

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 28 March 2021.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[11] Service NSW, 'Commercial lease support', https://www.service.nsw.gov.au/campaign/covid-19-help-small-businesses/commercial-lease-support

7. Retirement Villages Amendment (Asset Management Plans) Regulation 2021

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Retirement Villages Regulation 2017* to make provision for—

   (a) the inclusion in a proposed annual budget of a 3-year plan estimating capital maintenance costs and capital replacement costs, and

   (b) matters to be included in asset management plans, and

   (c) obligations of operators, and rights of residents, of retirement villages in relation to the preparation and revision of asset management plans.

2. This Regulation is made under the *Retirement Villages Act 1999*, including sections 20(1)(k), 72A(6), 97(3), 101A, 112(3) and 203 (the general regulation–making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Barriers to access documents

3. Schedule 1[2] inserts Division 2A, which outlines the requirement for operators to prepare an asset management plan every 10 years in relation to each retirement village that the operator manages or controls.

4. Proposed clause 26C of Division 2A provides that in the course of preparing an asset management plan, an operator of a retirement village must:

   (a) notify each resident of the retirement village that a copy of the proposed plan can be inspected at all reasonable times at the village or at a place of business in New South Wales nominated by the operator in the notice, and

   (b) have a copy of the proposed plan available at the village or at a place of business in New South Wales for inspection at all reasonable times by a resident or prospective resident or a person acting on behalf of a resident or prospective resident. This must be complied

with at least 60 days before the day on which the asset management plan is to commence.

2. Subclauses 26C(3)-(5) provides that a resident is entitled to give the operator comments on the asset management plan, that the operator must prepare a report of all comments received. For each comment received, the operator must state in its report whether the operator revised the draft asset management plan in response to the comment and, if so, in what respect, or the reason why the operator did not revise the draft asset management plan in response to the comment.

The Regulation creates requirements for retirement village operators (operators) to prepare and maintain an asset management plan for each retirement village that the operator manages or controls. The Regulation also provides that the operator must make the asset management plan available for viewing by residents, and that a resident is entitled to give the operator comments on the asset management plan. For each comment received, the operator must state in its report whether the operator revised the draft asset management plan in response to the comment and, if so, in what respect, or the reason why the operator did not revise the draft asset management plan in response to the comment.

The Committee notes that the Regulation only requires the operator to make the asset management plan available for viewing at the village or at a place of business during reasonable hours. It does not require the operator to provide the plan to the residents directly or make it publicly available, such as via email or a website. Additionally, the Regulation does not provide that the report containing the operator's responses to residents' comments is to form part of the asset management plan or require that this report is provided to the residents. These provisions may create a barrier for residents to access the asset management plan and related documents that deals with their place of residence.

The Committee notes that certain appeal processes are available to residents by application to the NSW Civil and Administrative Tribunal. For example in regards to orders directing the operator to maintain or replace items of capital (section 96 of the Act), as well in relation to any retirement village contract that the resident considers harsh, oppressive, unconscionable or unjust. However, the Act does not provide a specific avenue for residents to appeal the asset management plan or in relation to their access to view the plan and related report responding to resident comments. The Committee refers the matter to the Parliament for its consideration of the impact of these provisions on residents.

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

Onus on operators

1. The Regulation amends the *Retirement Villages Regulation 2017* to introduce a number of requirements for retirement village operators (operators) in relation to their annual reporting.

2. Schedule 1[1] inserts clause 19A, which requires operators to include a report relating to capital maintenance for major items of capital in the proposed annual budget. This

includes shared major items of capital, for a relevant 3-year period that is extracted from the information contained in the asset management plan current for that period (3-year report). The 3-year report must include:

a) in relation to each item of capital maintenance that is proposed to be carried out—

i. an estimate of the costs of the proposed maintenance, and

ii. the proposed maintenance dates, and

iii. the type of maintenance that is proposed to be carried out, and

iv. an estimate of the costs of any repairs that are proposed to be carried out, and

v. the type of repairs that are proposed to be carried out,

b) the amount of recurrent charges set aside in the capital works fund for capital maintenance

3. The maximum penalty for not complying with this clause is 20 penalty units (or $2,200).

4. Schedule 1[2] inserts Division 2A, which outlines the requirement for operators to prepare an asset management plan every 10 years in relation to each retirement village that the operator manages or controls. The operator is to ensure that the first asset management plan prepared commences on the commencement of the next financial year of the retirement village after the day on which this Division commences.

5. Clause 26C provides that the operator must notify each resident that a copy of the plan can be inspected at least 60 days before the asset management plan is to commence. A resident is entitled to give to the operator their comments on the asset management plan, and the operator must prepare a report of all comments received. For each comment received, the operator must state in the report whether the operator revised the draft asset management plan in response to the comment and, if so, in what respect, or the reason why the operator did not revise the draft asset management plan in response to the comment.

6. Clause 26D provides requirements for the content of the asset management plan, while clause 26E provides requirements for maintaining the currency of the asset management plans. Clause 26F provides that the asset management plan must include an asset register, which lists the major items of capital, including shared major items of capital, as at the commencement of the plan, and specific information for each major item of capital.

The Regulation places several requirements on retirement village operators (operators) for preparing and maintaining asset management plans, including the frequency of the reports, specific matters that reports must contain, and providing the proposed asset management plan for the viewing and comment of residents. Operators must also respond to every comment received by residents and note whether the plan has been revised in response to the comment, or provide reasons for why the plan was not revised in response to the comment.

This places responsibility on operators to prepare and maintain these records for each retirement village they operate, and respond to individual comments by

residents. This may have an impact on the business community of retirement village operators if these new measures require significant additional resources to prepare and manage these records in the correct form.

However, the Committee notes the such operators are businesses (often companies or associations) that already have statutory requirements to complete certain annual financial reporting records and may therefore have financial reporting procedures in place that may assist with the additional regulatory requirements. The Committee also notes that it is not uncommon for regulations to prescribe financial reporting requirements on certain businesses to encourage accurate recording of their financial transactions and financial position. In these circumstances, the Committee makes no further comment.

8. Retirement Villages Amendment (Exit Entitlement) Regulation 2021

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows—

(a) to provide that an operator of a retirement village (an operator) may increase the recurrent charges payable by residents of the retirement village in certain circumstances,

(b) to provide definitions relating to the payment that must be made to a former occupant by an operator following the sale of a former occupant's residential premises, or in other circumstances (an exit entitlement),

(c) to further provide for the information that an order for an exit entitlement must contain,

(d) to provide for the matters that the Secretary of the Department of Customer Service must consider, in relation to an order for an exit entitlement, when determining whether or not an operator has unreasonably delayed the sale of a former occupant's residential premises,

(e) to require an operator who makes payments on behalf of a former occupant to an aged care facility to keep, and provide to the former occupant, certain records,

(f) to enable an operator or other persons to enter the residential premises of a former occupant in certain circumstances relating to the sale of the premises,

(g) to exempt certain village contracts from the provisions of Part 10AA of the Retirement Villages Act 1999,

(h) to make other minor and consequential amendments.

2. This Regulation is made under the *Retirement Villages Act 1999*, including sections 18(2) and (3A), 43(1), 67(2)(g), 69A(7)(a)(viii), 112(3)(a), 152(3), 182AA (definition of prescribed component), 182AB(9) (paragraph (a) of the definition of prescribed period), 182AC(3), 182AD(1)(f), 182AG(5)(a) and (b), 182AK(3)(b), 184(2) and 203 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Economic rights – Delay or exemption of application to order payment of exit entitlements

3. Schedule 1[7] inserts Part 5A to the Regulation, which provides for payments if certain residential premises not sold. Within that Part 5A, clause 33A provides that the words and expressions used in the Part have the same meaning as Part 10AA of the Act, which deals with payments of exit entitlements by retirement village operators to former occupants.

4. Under Part 10AA section 182AA of the Act, *former occupant* includes a resident who is a registered interest holder in respect of residential premises in a retirement village, but does not include an executor or administrator of the estate of a former occupant unless section 182AJ(3) applies.

5. Also under section 182AA, *exit entitlement* means the amount that would be required to be paid by an operator of the retirement village to the former occupant under the Act and the former occupant's village contract—

    (a) following the sale of the premises, or

    (b) for Division 2—if the premises were sold for the agreed valuation.

6. Section 182AB of the Act provides that a former occupant may apply to Secretary to make an order requiring the operator to pay their exit entitlement where it has not been paid within the prescribed period. Section 182AC provides that the Secretary may make an exit entitlement order for a former occupant of residential premises if they are satisfied that an operator of a retirement village has unreasonably delayed the sale of residential premises.

7. The amending Regulation provides that the prescribed period means:

    (a) for a retirement village located in a local government area specified in Schedule 5A—6 months

    (b) for a retirement village located in another local government area—12 months.

8. The Regulation also inserts Schedule 5A, which lists the following 35 local government areas (LGAs): Bayside, City of Blacktown, City of Blue Mountains, Burwood, Camden, City of Campbelltown, Canada Bay, Canterbury-Bankstown, Cumberland, City of Fairfield, Georges River, City of Hawkesbury, Hornsby, Hunter's Hill, Inner West, Ku-ring-gai, Lane Cove, City of Liverpool, Mosman, City of Newcastle, North Sydney, Northern Beaches, City of Parramatta, City of Penrith, City of Randwick, City of Ryde, Strathfield, Sutherland Shire, City of Sydney, The Hills Shire, Waverley, City of Willoughby, Wollondilly, City of Wollongong, and Woollahra.

9. Proposed clause 33D provides list of matters that the Secretary must consider when determining whether or not an operator has unreasonably delayed the sale of the former occupants residential premises. This may include:

(a) whether the operator has taken reasonable steps to facilitate the sale of the premises and the time in which the steps were taken, including carrying out an inspection of the premises and refurbishment of the premises

(b) if the operator is appointed by the former occupant as the selling agent of the premises, whether the operator complied with their requirements under the Act within a reasonable time and arrange for an inspection of the premises for sale within a reasonable time

(c) whether the actions of the operator delayed the provision of use of services of legal practitioner, licensed conveyancer or selling agent

(d) whether the operator complied with other requirements imposed by or under the Act or Regulation in relation to the sale of the premises within a reasonable time

10. The Regulation also inserts clause 51A, which provides that a village contract is exempt from Part 10AA of the Act if the retirement village to which the contract applies is held in trust by a trustee and the trustee holds each unit in the retirement village in trust for the benefit of a resident in the retirement village.

The Regulation inserts provisions to provide that a former occupant of a retirement village may apply to the Secretary for the payment of their exit entitlement by the retirement village operator where it has not been paid within the prescribed period and where the operator has unreasonably delayed the sale of the premises. The Regulation also provides that the prescribed period will depend on which local government area (LGA) the retirement village is located. For a retirement village listed in Schedule 5A, the prescribed period is 6 months. For all other areas, the prescribed period is 12 months.

The Committee notes that Schedule 5A lists 35 of the 128 LGAs in NSW, which means that residents living outside those prescribed LGAs will need to wait an additional 6 months before being able to apply to the Secretary for payment of their exit entitlement. This may create a barrier that impacts a resident's economic right to the payment of their exit entitlement where it has been unreasonably delayed by the operator.

The Committee also notes that a village contract may be exempt from such an application to the Secretary if the retirement village to which the contract applies is held in trust by a trustee and the trustee holds each unit in the retirement village in trust for the benefit of a resident in the retirement village. This may also restrict the avenues available to residents who are seeking payment of their exit entitlements for retirement villages held in trust.

The Committee refers these provisions to the Parliament for their consideration of the impact on a former resident's economic rights regarding payment of relevant exit entitlements.

Freedom of contract and retrospectivity

11. The Regulation inserts clause 26AA, which provides that an operator of a retirement village may increase recurrent charges payable by residents of the retirement village as a

result of the liability incurred by the operator once a former occupant's liability to pay the charges ceases under the Act, only in specific circumstances.

12. These circumstances include if:

    a) the increase occurs as part of an approved annual budget for the next financial year after the former occupant's liability is ceased, and

    b) the approved annual budget, including the proposed annual budget, for the financial year specifies—

        i. the manner in which the increase was calculated, including the total number of former occupants whose liability was ceased in the financial year, and

        ii. that the increase occurred for the purposes of this clause.

13. Under Division 5 of Part 7 of the Act, the operator of a retirement village must seek the consent of the residents of the village to the expenditure itemised in the proposed annual budget (section 114).

14. Section 123 of the Act provides that a resident of a retirement village may apply directly to the Tribunal for an order in relation to any village contract (being a contract to which the resident is a party) that the resident considers to be harsh, oppressive, unconscionable or unjust.

The Regulation inserts clause 26AA, which provides that an operator of a retirement village may increase the recurrent charges payable by residents of the retirement village in certain circumstances. The Committee notes that this Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The Regulation also has retrospective effect, in that the changes will apply to existing contracts between operators and former occupants.

However, the Committee recognises that the new clause will only apply in certain circumstances. This includes where the increase occurs as part of an approved annual budget for the next financial year after the former occupant's liability is ceased, and where the approved annual budget specifies the manner in which the increase was calculated and that the increase occurred for the purposes of this clause.

The Committee also notes that parties may vary the terms of a contract by agreement. In this case, it must form part of the approved annual budget, which is resolved by consent of the residents of the retirement village. The Committee also notes that residents may apply to the NSW Civil and Administrative Tribunal in relation to any retirement village contract that the resident considers harsh, oppressive, unconscionable or unjust. In this case, the Committee makes no further comment.

Access to premises

15. The Regulation inserts clause 46A, which provides that an operator may enter a residential premises in certain circumstances. This clause applies to a former occupant of residential premises in a retirement village in relation to whom an exit entitlement order has been made by the Secretary under section 182AC of the Act.

16. For the purposes of section 67(2)(g) of the Act, an operator of a retirement village or other person authorised by the operator may enter a residential premises of a former occupant in the retirement village for the purposes of facilitating the sale of the premises.

17. However, the operator or other person may enter the premises of a prescribed former occupant only if the operator or other person and the prescribed former occupant agree in writing.

18. In this clause, 'prescribed former occupant' means a former occupant who –

    a) does not intend to move out of the former occupant's residential premises while the premises are for sale, and

    b) has given written notice to the operator of that fact under section 182AB(4)(c) of the Act, and

    c) continues to occupy the premises on the date on which the operator proposes to enter the premises.

The Regulation provides that an operator may enter a residential premises in certain circumstances. This clause applies to a former occupant of residential premises in a retirement village in relation to whom an exit entitlement order has been made by the Secretary under the Act. This may infringe on a person's right to control entry and access to their premises, and may create issues of trespass.

However, the Committee notes that an operator may only enter a premises of a former occupant in certain circumstances, including for the purposes of facilitating the sale of the premises and only if the prescribed former occupant has agreed in writing. In these 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.