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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. APPROPRIATION BILL 2021; APPROPRIATION (PARLIAMENT) BILL 2021; ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021; ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021; NSW GENERATIONS FUNDS AMENDMENT BILL 2021

ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021

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

Extraterritorial operation of Act

Section 6 of the Bill provides that the Act is to have extraterritorial application, as far as the legislative powers of the State permit, in relation to zero or low emission vehicles registered in NSW that travel on roads in other States or Territories.

This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee recognises that the intent of the provision is the ensure that vehicles registered in New South Wales that may travel on roads in other State or Territories are still subject to the zero or low emission requirements. As the vehicles subject to the laws are required to be registered in NSW, the Committee understands that it is a responsibility of the vehicle owner to be aware of the relevant laws that apply at the time and place of registration. In these circumstances, the Committee makes no further comment.

Strict liability offences

The Bill contains provisions that impose penalties for failure to comply with certain requirements regarding the registration of a relevant zero or low emissions vehicle. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, the registered operator does not need to have intended to not comply with the registration requirements to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to incentive registered owners to register their vehicle on time. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.

Penalty notice offences – Right to a fair trial

Section 26 enables offences against the proposed Act and offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In this instance, the penalty notice offences are in regards to road user charges and registration an associated requirements. In these circumstances, the Committee makes no further comment.

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

Enforcement powers

The Bill provides that Transport for NSW may require a person to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges. Where a person does not comply with this requirement, and does not have a reasonable excuse, a maximum penalty may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

This is a broad administrative power to the production of documents and information. However, the Committee recognises that these powers enable TfNSW to do carry out their functions under the Act regarding road user charges. It also recognises that the clause allows for where a person may have a reasonable excuse for not having complied with this clause and therefore allows an degree of discretion. In these circumstances, the Committee makes no further comment.

Information sharing powers

The Bill provides that TfNSW may enter into information sharing arrangements with another government sector agency, head of government sector agency, or an agency of another State or territory. The provisions does not specify what types of information can be disclosed, and does not require that TfNSW seek consent from or notify individuals who may be affected. This provisions may impact on an individual's right to privacy.

However, the Committee acknowledges that information sharing is limited to government agencies. The Committee also notes the objective of the provision, as outlined in the explanatory notes, to enable TfNSW to enter into an information sharing arrangement in relation to information relevant to road user charges or equivalent or similar charges under the law of another State or Territory. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill allows certain matters to be deferred to the regulations. This includes payment options for road user charges for registered operators of a relevant zero or low emissions vehicle

(sections 15 and 16). The Bill also provides for a general regulation-making power of the Governor to make regulations under the Act, including the creation of offences punishable by a penalty notice of up to 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body corporate.

The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters. In this case, as the provisions relate to the payment options, exemptions and concessions, refunds and discounts, calculation and assessment and penalties of road user charges. In these circumstances, the Committee makes no further comment.

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021

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

Removal of community participation plan requirements

The Bill amends the Act to provide that certain planning authorities are not are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, regarding development contributions. This includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations.

The Committee notes that this may limit existing rights of community members to participate in, or object to, elements of planning agreements. The Committee refers this provision to the Parliament for its consideration of whether it impacts on the rights community members by limiting participation.

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

Ministerial powers

The Bill provides the Minister with the power to make Ministerial directions and approvals for a number of matters under the Act, including matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal. Other matters also include time at which monetary contributions or levies must be paid to existing development consents in certain circumstances, and provision for the preparation and approval of contributions plans by councils and for the making, amendment or repeal of contributions plans by the Minister.

The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. However, the Committee notes that in this case, the matters that may be subject to a Ministerial direction or approval are regarding preparation of a contributions plan by a council, and the time at which monetary contributions or levies must be paid. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill allows a number of matters to be deferred to the regulations, including that the regulations may make provision about local infrastructure contributions and about the making of contributions plans by councils.

The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters.

In this case, as the provisions relate to local infrastructure contributions and the making of contributions plans by councils, these are matters that may impact on local governments' and councils' ability to make certain contributions regarding public goods. The Committee refers these provisions to the Parliament for their consideration of whether they inappropriately delegates legislative powers.

PART TWO – REGULATIONS

1. CHARITABLE FUNDRAISING REGULATION 2021

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

Strict liability offences

The *Charitable Fundraising Regulation 2021* repeals and replaces the *Charitable Fundraising Regulation 2015.* It contains clauses that require prescribed collectors participating in fundraising appeals to display identification or disclose that they are employed for the purpose of the fundraising appeal. A prescribed collector is defined as a person who participates in a fundraising appeal other than as a face-to-face collector including through the telephone, email, or mail and receives a wage, commission or fee for participating in the fundraising appeal. Failure to comply with these requirements can incur a penalty of 5 penalty units ($550).

The Committee notes that these are strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory setting to encourage compliance, particularly relating to providing disclosures that a collector is a part of charitable organisation when participating in fundraising event or function. Further, the Committee notes that the provisions impose monetary penalties, and provides a financial incentive for collectors to comply with disclosure requirements, to ensure transparency and promote community confidence in charity fundraising events or functions. 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

Reporting requirements

The Regulation contains a number of reporting requirements for charities, including information that must be provided about annual returns, details of the authority holder, and information about fundraising appeals such as its charitable purpose and beneficiaries. The Regulation also requires that annual returns are accompanied by certain financial documents, including Auditor reports, financial statements, and statements of compliance.

The Committee notes that these reporting requirements may be onerous for charitable organisations to maintain and provide the annual returns and the requisite documents. However, the Committee also notes the effect of these provisions is to ensure accountability measures are in place to promote greater transparency in the charitable organisation's financial activities and to enhance public confidence in the conduct of charitable organisations. In these circumstances, the Committee makes no further comment.

2. CROWN LAND MANAGEMENT (PLAN OF MANAGEMENT) REGULATION 2021

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

Limited rights of objection from the community

The Regulation exempts local councils from the requirement to hold public hearings in relation to proposed plans of management for certain land. The removal of the requirement for public hearings limits community consultation and the ability for the community to object where the proposed plans of management may directly impact their place of residence or neighbourhood.

However, the Committee notes that this exemption is in regards to land that is to be categorised as a natural area, sports ground, a park, an area of cultural significance or a general community area. Despite the exemption, councils must still comply with other requirements regarding proposed plans of management, including giving public notice of the draft plan of management, and making it available for public inspection. 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

Henry VIII

The Regulation inserts a new clause 70B, which noted that section 40 of the *Local Government Act 1993* is modified under the *Crown Land Management Act* to require a council manager to obtain the written consent of the Minister to adopt a plan of management. In effect, this allows the provisions of the Act to be modified by the regulation, and thereby acts as a Henry VIII clause.

Henry VIII clauses allow subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. 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.

Nonetheless regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. Given this safeguard, and the fact that it may be more administratively efficient to proceed by regulation when updating a list of premises subject to special conditions, the Committee makes no further comment.

3. FAIR TRADING AMENDMENT (CODE OF CONDUCT FOR SHORT-TERM RENTAL ACCOMMODATION INDUSTRY) REGULATION 2021

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

Penalty notice offences – Right to a fair trial

The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code of Conduct establishes 21 offences for the purposes of section 57 of the *Fair Trading Act 1987*. Those provisions are penalty notice offences for the purposes of section 67 of the Act.

Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. 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.

However, the Regulation does not remove the right of individual to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, the Committee makes no further comment.

Vicarious liability

The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code includes clauses which could potentially result in people being subject to disciplinary action or penalty for the conduct of others that was not within their control.

For example, clause 2.5.8 of the Code makes a guest responsible for the actions of any visitors they invite onto the premises during their period of occupancy and requires guests to ensure that any visitors comply with Clause 2.5.2 of the Code. Further, Clause 2.4.8 requires a host to take reasonable steps to ensure that guests comply with their obligations under section 2.5.2 and 2.5.8 of the Code.

Circumstances might arise in which a guest is found to be in breach of the Code of Conduct as a result of the conduct of a visitor. Similarly, circumstances might arise in which a host is found to be in breach of the Code of Conduct as a result of the conduct of a guest.

However, the Code includes safeguards to minimise the risk of unfairness to those subject to disciplinary action. Firstly, the Commissioner has a duty to afford procedural fairness before finding a participant to be in breach of the Code (Clause 4.1.5); second, the Commissioner must consider evidence and submissions from participants as well as complainants before making a decision in relation to a complaint (See Clauses 3.1.10, 3.1.11 and 3.1.12); thirdly, people subject to disciplinary action have the right to apply to the Secretary for review (Clause 4.3). In addition, people or corporations issued with a penalty notice under section 54C of the Act have the right to elect to go to court to defend themselves. In view of the measures included in the Code to ensure fairness to people subject to disciplinary action, the Committee makes no further comment.

Restriction on rights of people listed on the Exclusion Register to participate in the short-term accommodation industry

The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code seeks to balance the rights and obligations of participants with the industry with the rights of occupants of neighbouring properties. The Code of Conduct establishes an Exclusion Register, whereby a person or corporation can be excluded from participating in the Short-Term Accommodation Industry for a period of five years for breaching the code two or more times.

There may be circumstances where exclusion from participating in the industry is an infringement of a person's individual rights. However, the Commissioner is required to afford procedural fairness to participants before recording a strike against a participant, and participants who are excluded from the industry have a right to apply to the Secretary for review.

In addition, the Code aims to balance the rights of people who may be excluded from the short-term rental accommodation industry against the rights of occupants of properties neighbouring premises used for short-term rental accommodation. Disciplinary measures are included in the Code in order to protect the rights of occupants of neighbouring properties from undue noise and disruption. In the circumstances, the Committee makes no further comment.

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

Additional obligations on small business

The Code of Conduct for the Short-term Rental Accommodation Industry establishes obligations for individuals or corporations who offer residential properties for short-term rental, including the requirement to hold insurance and the requirement to ensure the property is placed on the Premises Register. However, the Committee recognises that the obligations may be proportionate to the aim of protecting the rights of occupants of neighbouring properties from unreasonable noise or disruption. Under the circumstances, the Committee makes no further comment.

4. HEALTH ADMINISTRATION AMENDMENT (REPORTABLE INCIDENTS) REGULATION 2021

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

Privacy of personal information and medical records

The Regulation allows the relevant health service organisations to notify or exchange information with other relevant health service organisations or private health facilities about a reportable incident if it assists the other organisation perform their functions under the *Health Administration Act 1982* or the *Private Health Facilities Act 2007*.

The information exchanged relates to the response and the investigation of incidents. An incident is an unplanned event that results in, or has the potential for injury, damage or loss. The sharing of such information may infringe on a person's privacy and confidentiality of medical records if the information relates to personal and medical details of a patient.

However, the Committee recognises the intention of sharing information to health organisations to assist in learning from incidents and provide a consistent and effective response to similar incidents in the future. The Committee also acknowledges that the HA Act

and the PHF Act contain limits on the sharing of this information, including that the public interest to disclose the information outweighs the protection of confidentiality and privacy of the person. The Committee also notes that the Act contains monetary penalties or imprisonment for persons that disclose confidential information outside the administration of the Act. In these circumstances, the Committee makes no further comment.

5. HEAVY VEHICLE (ADOPTION OF NATIONAL LAW) AMENDMENT (PENALTIES) REGULATION 2021

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

Right to fair trial

The *Heavy Vehicle (Adoption of National Law) Amendment (Penalties) Regulation 2021* amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013*. The Regulation increases the financial penalties applicable to a number of infringement notice offences under the *Heavy Vehicle National Law (NSW)* (the National Law). Infringement notices can be issued by authorised officers who reasonably believe that a person has committed a prescribed offence. Such an infringement notice acts as an alternative to prosecution for the offence in court.

The Committee notes that this may impact a person's right to a fair trial as the infringement notice does not allow the individual an opportunity to respond to offences made against them. Similar to strict liability offences, it removes the requirement for the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence.

However, the Committee notes that infringement notices and strict liability offences are not uncommon in regulatory setting to encourage compliance. In the current case, the offences are designed to proactively promote road safety with compliance to heavy vehicle mass, dimensions and loading standards, fatigue management, and the requirement for drivers to maintain documentation such as permits. In these circumstances, the Committee makes no further comment.

6. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 2) 2021

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

Penalty notice offences – right to a fair trail

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 2) 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, 30/57 and 32/57, the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order No 2 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57, 25/57, 30/57, and 32/57 the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.

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

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

Operator may increase recurrent charges

The Regulation amends 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 its comments on the Retirement Villages Amendment (Exit Entitlement) Regulation 2021, in Digest 29 on 4 May 2021, regarding clause 26AA and concerns that it may retrospectively impact on freedom of contract for the parties to choose the contractual terms and obligations to which they are subject.

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

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

Increase to the administrative burden on operators

The Regulation requires operators to obtain the written opinion of an auditor or independent qualified quantity surveyor as to whether the plan contains the matters specified in clauses 26D and 26F of the Retirement Villages Regulation, and to attach the independent assessment to the asset management plan. This places an additional obligation on the operators of retirement villages when preparing asset management plans and may increase the costs incurred by operators in complying with the Retirement Villages Regulation.

However, the Committee notes that the additional obligation imposed by the Regulation will contribute to protecting the rights of occupants and potential occupants of retirement villages. The rights of operators should be balanced against those of occupants. In the circumstances, the Committee makes no further comment.

8. STATE INSURANCE AND CARE GOVERNANCE REGULATION 2021

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Delegation of functions to authorised officers

Under section 26 of the Act, the State Insurance Regulatory Authority (SIRA) may delegate to an authorised person any of the chief executive's functions under the Act, other than this power of delegation. This Regulation provides that an authorised person includes a statutory officer, and/or a Public Service employee within the meaning of the *Government Sector Employment Act 2013*.

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 SIRA chief executive includes to collect and analyse information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation and the *Home Building Act 1989*, as well as functions conferred on it by other Acts. Delegation of the more significant tasks regarding confidential information about individuals and workers compensation or motor accidents may warrant clarity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

9. WATER SUPPLY (CRITICAL NEEDS) (WYANGALA DAM AND DUNGOWAN DAM) REGULATION 2021

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

Henry VIII Clauses

The Regulation amends the *Water Supply (Critical Needs) Act 2019*. Such amendments are authorised by Part 1(3) of Schedule 3 of the *Act*. In permitting the Regulation to amend the Act, these clauses operate as a Henry VIII clause, which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the amendments made to the *Water Supply (Critical Needs) Act 2019* by the Regulation are of a minor or machinery nature, including minor changes to definitions. Under the circumstances, the Committee makes no further comment.

Part One – Bills

1. Appropriation Bill 2021; Appropriation (Parliament) Bill 2021; Electric Vehicles (Revenue Arrangements) Bill 2021; Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021; NSW Generations Funds Amendment Bill 2021

Date introduced	22 June 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrotet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

Appropriation Bill 2021

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2021–22 financial year for the services of the Government, including—

   (a) Departments of the Public Service, and

   (b) various special offices.

2. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.

3. This Bill—

   (a) appropriates a single sum for the services of each agency, including recurrent services, capital works and services, and debt repayment, and

   (b) contains an additional appropriation which allocates revenue raised in connection with gaming machine taxes to the Minister for Health and Medical Research for spending on health related services, and

   (c) contains provision for transfer payments from the Commonwealth to non-government schools and local government, and

   (d) provides for appropriation for the whole of the 2021–22 financial year.

Appropriation (Parliament) Bill 2021

4. The object of this Bill is to appropriate from the Consolidated Fund a sum for the services of the Legislature during the 2021–22 financial year, including recurrent services, capital works and services and debt repayment.

Electric Vehicles (Revenue Arrangements) Bill 2021

5. The objects of this Bill are to—

(a) impose a distance-related road user charge on registered operators of certain zero and low emissions vehicles, and

6. (b) exempt certain zero and low emissions vehicles from the payment of duty under the *Duties Act 1997*, Chapter 9.

Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021

7. The object of this Bill is to amend the Environmental Planning and Assessment Act 1979 and other instruments as follows—

(a) to enable a contributions plan to identify land in a land value contributions area for the purpose of requiring a land value contribution for the land,

(b) to establish a regional infrastructure contributions scheme,

(c) to make further provision for existing local infrastructure contributions,

(d) to make other consequential amendments.

NSW Generations Funds Amendment Bill 2021

8. The objects of this Bill are—

(a) to require the Treasurer to table a report in each House of Parliament whenever a payment is made out of the Debt Retirement Fund, and

(b) to require the Treasurer to include a report in the Budget Papers about activities involving the Debt Retirement Fund, and

(c) to permit the Treasurer to direct money to be paid into the Debt Retirement Fund from revenue of a class prescribed by the regulations, and

(d) to limit the purposes for which a payment may be made out of the Debt Retirement Fund, and

(e) to include savings and transitional provisions.

BACKGROUND

9. These Bills give effect to the 2021-22 NSW State Budget.

10. Although they are separate Acts when operative, the Appropriation Bill 2021, Appropriation (Parliament) Bill 2021, Electric Vehicles (Revenue Arrangements) Bill

2021, Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021, and the NSW Generations Funds Amendment Bill 2021 are cognate bills and were introduced together. Therefore, all five Bills have been considered in the one report.

11. In the second reading speech the Treasurer noted that the 2021 budget contained three core objectives; keeping NSW safe and accelerate recovery from the impacts of COVID-19, investing in people, and transforming the state.

12. The Treasurer further stated:

> These are the foundations of a future that will be brighter if we dare to do things differently. For a decade we have kept the State's finances secure and our economy strong. We have invested to build the best services in the nation, laying the groundwork for our pandemic response. This has fuelled confidence, spurred our recovery, and ignited our economy and boosted our finances. And as we look to the future, we do so from a position of strength, in control of our Budget and in control of our destiny.
>
> This Budget keeps NSW safe, and accelerates our recovery. It invests in our people. It transforms our State. Today, other governments are raising taxes and cutting wages, sacrificing growth to save their Budgets. But the future that we imagine is not built on austerity. This is a Budget for prosperity. And the next decade of delivery has already begun. This Budget gets NSW dressed for success.

13. These Bills were introduced in the Legislative Assembly on 22 June. On 24 June, the Leader of the House and Attorney General, the Hon Mark Speakman SC MP, moved to consider the Appropriation Bill 2021 and the Appropriation (Parliament) Bill 2021 bills separately. These bills were passed by the Legislative Assembly on 24 June under special arrangements to accommodate the COVID-19 restrictions on Parliament House following an announcement that a Minister had tested positive to COVID-19. The Bills were then introduced and passed without amendment in the Legislative Council that same day.

14. The Electric Vehicles (Revenue Arrangements) Bill 2021, Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021, and the NSW Generations Funds Amendment Bill 2021 remain to be debated and passed by either House.

15. However, the Committee makes no comment on the Appropriation Bill 2021 and the Appropriation (Parliament) Bill 2021 and NSW Generations Funds Amendment Bill 2021 in respect of the issues set out in section 8A of the Legislation Review Act 1987. The Committee considered issues identified in the Electric Vehicles (Revenue Arrangements) Bill 2021 and the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 to the extent that they engage with the issues set out in section 8A of the Legislation Review Act 1987.

ISSUES CONSIDERED BY COMMITTEE

ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021

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

Extraterritorial operation of Act

16. Proposed section 6 provides that this Act is intended to have extraterritorial application as far as the legislative powers of the State permit, including in relation to zero or low emissions vehicles registered in New South Wales that travel on roads in other States or Territories.

> **Section 6 of the Bill provides that the Act is to have extraterritorial application, as far as the legislative powers of the State permit, in relation to zero or low emission vehicles registered in NSW that travel on roads in other States or Territories.**
>
> **This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.**
>
> **However, the Committee recognises that the intent of the provision is the ensure that vehicles registered in New South Wales that may travel on roads in other State or Territories are still subject to the zero or low emission requirements. As the vehicles subject to the laws are required to be registered in NSW, the Committee understands that it is a responsibility of the vehicle owner to be aware of the relevant laws that apply at the time and place of registration. In these circumstances, the Committee makes no further comment.**

Strict liability offences

17. Section 17 provides that a registered operator of a relevant zero or low emissions vehicle who is using the post-paid option to pay the road user charge payable in relation to the vehicle must give Transport for NSW a current odometer reading for the vehicle at the intervals prescribed by the regulations. Failure to do so can result in a maximum penalty of 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

18. Section 18 provides that an odometer reading for a relevant zero or low emissions vehicle must be given to Transport for NSW, in the way approved by Transport for NSW at the time the vehicle is registered, renewed, or otherwise disposed. Failure to do so can result in a maximum penalty of 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

> **The Bill contains provisions that impose penalties for failure to comply with certain requirements regarding the registration of a relevant zero or low emissions vehicle. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.**

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, the registered operator does not need to have intended to not comply with the registration requirements to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to incentive registered owners to register their vehicle on time. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.

Penalty notice offences – Right to a fair trial

19. Section 26 allows an authorised officer to issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence against the Act or its regulations.

Section 26 enables offences against the proposed Act and offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In this instance, the penalty notice offences are in regards to road user charges and registration an associated requirements. In these circumstances, the Committee makes no further comment.

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

Enforcement powers

20. Section 22 provides that Transport for NSW may require a person, by written notice, to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges.

21. The person must comply with the notice unless the person has a reasonable excuse. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

The Bill provides that Transport for NSW may require a person to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges. Where a person does not comply with this requirement, and does not have a reasonable excuse, a

maximum penalty may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

This is a broad administrative power to the production of documents and information. However, the Committee recognises that these powers enable TfNSW to do carry out their functions under the Act regarding road user charges. It also recognises that the clause allows for where a person may have a reasonable excuse for not having complied with this clause and therefore allows an degree of discretion. In these circumstances, the Committee makes no further comment.

Information sharing powers

22. Section 23 provides that Transport for NSW may enter into an arrangement with another government sector agency, head of a government sector agency, or an agency of another state to Territory, about sharing relevant information.

The Bill provides that TfNSW may enter into information sharing arrangements with another government sector agency, head of government sector agency, or an agency of another State or territory. The provisions does not specify what types of information can be disclosed, and does not require that TfNSW seek consent from or notify individuals who may be affected. This provisions may impact on an individual's right to privacy.

However, the Committee acknowledges that information sharing is limited to government agencies. The Committee also notes the objective of the provision, as outlined in the explanatory notes, to enable TfNSW to enter into an information sharing arrangement in relation to information relevant to road user charges or equivalent or similar charges under the law of another State or Territory. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

23. Section 15 sets out 2 options for the payment of the road user charges by a registered operator of a relevant zero or low emissions vehicle. The registered operator may either pay the road user charge for the kilometres to be travelled by the vehicle before the vehicle travels the kilometres (the pre-paid option) or, if provided for by the regulations, pay the road user charge for the kilometres travelled after the vehicle travels the kilometres (the post-paid option).

24. Section 16 sets out the obligations of a registered operator who pays the road user charges payable for a relevant zero or low emissions vehicle by the pre-paid option. The registered operator must pay the road user charge for each 1,000 kilometres, or multiple of 1,000 kilometres, the vehicle travels before the vehicle travels the kilometres, or otherwise in accordance with the regulations. The registered operator must give TfNSW a current odometer reading for the vehicle, in the way approved by TfNSW, before paying the charge.

25. Subsection 16(6) provides that a registered operator of a relevant zero or low emissions vehicle who is using the pre-paid option to pay the road user charges payable in relation to the vehicle must ensure the vehicle does not travel a number of kilometres that is

more than the number of kilometres for which the road user charge for the vehicle has been paid, unless the operator has a reasonable excuse. The maximum penalty for this offence is 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body corporate. However, a reasonable excuse for this offence may be prescribed by the regulations.

26. Section 27 enables the Governor to make regulations for the purposes of the proposed Act and specifies matters for which the regulations may provide.

> **The Bill allows certain matters to be deferred to the regulations. This includes payment options for road user charges for registered operators of a relevant zero or low emissions vehicle (sections 15 and 16). The Bill also provides for a general regulation-making power of the Governor to make regulations under the Act, including the creation of offences punishable by a penalty notice of up to 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body corporate.**
>
> **The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters. In this case, as the provisions relate to the payment options, exemptions and concessions, refunds and discounts, calculation and assessment and penalties of road user charges. In these circumstances, the Committee makes no further comment.**

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021

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

Removal of community participation plan requirements

27. Schedule 1[3], inserts section 2.23 which provides that certain planning authorities are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, which sets out the provisions for development contributions.

28. Proposed section 2.23 provides that a planning authority, includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations to be a planning authority for the purposes of Division 7.1.

> **The Bill amends the Act to provide that certain planning authorities are not are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, regarding development contributions. This includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations.**

The Committee notes that this may limit existing rights of community members to participate in, or object to, elements of planning agreements. The Committee refers this provision to the Parliament for its consideration of whether it impacts on the rights community members by limiting participation.

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

Ministerial powers

29. The Bill amends the Environmental Planning and Assessment Act to provide the Minister with the power to give written directions and approval for a number of matters under the Act.

30. Proposed section 7.17 provides that the Minister may, generally or in a particular case, or class of cases, direct a consent authority in relation to various matters, including the matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal.

31. Proposed sections 7.17(1A) provides that the Minister may extend a direction to an existing development consent that was granted before the direction was given, and that is subject to a condition imposing a monetary contribution or levy that has not been paid or has not become due.

32. Proposed section 7.17(1B) provides that an existing development consent to which subsection (1A) applies is taken to be modified to make it consistent with the direction if the direction specifies a later time for payment than is specified in the consent.

33. Proposed section 7.19 provides that the Minister may give a written direction to a council to prepare, approve, amend, exhibit or repeal a contributions plan or joint contributions plan with one or more councils.

The Bill provides the Minister with the power to make Ministerial directions and approvals for a number of matters under the Act, including matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal. Other matters also include time at which monetary contributions or levies must be paid to existing development consents in certain circumstances, and provision for the preparation and approval of contributions plans by councils and for the making, amendment or repeal of contributions plans by the Minister.

The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. However, the Committee notes that in this case, the matters that may be subject to a Ministerial direction or approval are regarding preparation of a contributions plan by a council, and the time at which monetary contributions or levies must be paid. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

34. The Bill inserts section 7.16A, which provides that the regulations may make provision about local infrastructure contributions, including:

    a) the way in which local infrastructure contributions must be determined,

    b) the indexation of monetary contributions and levies,

    c) when and how monetary contributions and levies must be paid,

    d) reporting on contributions or levies received by consent authorities, the circumstances in which a consent authority may refuse to consider development applications for development on land for which a land value contribution has not been satisfied.

35. Proposed section 7.18A provides that the regulations may make provision about the making of contributions plans by councils, including:

    a) the preparation, exhibition and approval of contributions plans,

    b) the format, structure and content of contributions plans,

    c) the way in which land must be identified in contributions plans,

    d) the way in which a land value contribution must be calculated for a land value contributions area or part of a land value contributions area,

    e) the way in which the value of land in a land value contributions area must be determined,

    f) the maximum percentage of the total amount of land in a land value contributions area that may be required as a land value contribution.

    The Bill allows a number of matters to be deferred to the regulations, including that the regulations may make provision about local infrastructure contributions and about the making of contributions plans by councils.

    The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters.

    In this case, as the provisions relate to local infrastructure contributions and the making of contributions plans by councils, these are matters that may impact on local governments' and councils' ability to make certain contributions regarding public goods. The Committee refers these provisions to the Parliament for their consideration of whether they inappropriately delegates legislative powers.

Part Two – Regulations
1. Charitable Fundraising Regulation 2021

Date tabled	LA: 22 June 2021 LC: 22 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, with amendments, the *Charitable Fundraising Regulation 2015*, which would otherwise be repealed on 1 September 2021 by the *Subordinate Legislation Act 1989*, section 10(2).

2. This Regulation provides for the following—

   (a) the organisations and persons that may conduct fundraising appeals without holding an authority under the *Charitable Fundraising Act 1991* (the Act),

   (b) the additional grounds on which the Secretary may refuse an application for an authority,

   (c) the circumstances in which a person may be found not to be a fit and proper person,

   (d) the grounds on which the Secretary may suspend or cancel an authority, the matters to be included in a notice suspending or cancelling an authority and the administrative review of the suspension or cancellation,

   (e) the determination of what constitutes a lawful and proper expense in connection with a fundraising appeal,

   (f) the identification of payments relating to fundraising appeals made into and out of accounts held by authority holders and the circumstances in which receipts must be issued to donors,

   (g) the requirement for persons who conduct fundraising appeals to keep and maintain certain records,

   (h) the requirement for authority holders to include certain information in annual returns lodged with the Secretary and for the annual returns to be accompanied by certain documents,

   (i) the persons and organisations exempt from the requirement to have accounts audited,

(j) certain matters that do not constitute a fundraising appeal for the purposes of the Act,

(k) the standard conditions to which an authority to conduct a fundraising appeal is subject and, for an appeal involving child participants, the standard conditions relating to the participation of children to which an authority is subject,

(l) the religious bodies or organisations exempt from the Act,

(m) other matters of a minor, consequential or ancillary nature.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability offences

3. The Regulation repeals and replaces the *Charitable Fundraising Regulation 2015* and places a number of restrictions on persons who participates in fundraising appeals and receives a wage, commission or fee for that participation (a prescribed collector).

4. Under Clause 28, a face-to-face collector participating in a fund-raising appeal must prominently display their identification card or badge which is issued by the authority holder.

5. Under Clause 29, a prescribed collector (other than a face-to-face collector) must disclose to the person being solicited that they are receiving a wage, commission or fee for participating in the fundraising appeal. The person must also name the purpose of the fundraising appeal.

6. Failure to comply with these requirements carries a maximum penalty of 5 penalty units ($550).

The *Charitable Fundraising Regulation 2021* repeals and replaces the *Charitable Fundraising Regulation 2015.* It contains clauses that require prescribed collectors participating in fundraising appeals to display identification or disclose that they are employed for the purpose of the fundraising appeal. A prescribed collector is defined as a person who participates in a fundraising appeal other than as a face-to-face collector including through the telephone, email, or mail and receives a wage, commission or fee for participating in the fundraising appeal. Failure to comply with these requirements can incur a penalty of 5 penalty units ($550).

The Committee notes that these are strict liability offences. The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence.

However, the Committee notes that strict liability offences are not uncommon in regulatory setting to encourage compliance, particularly relating to providing disclosures that a collector is a part of charitable organisation when participating in fundraising event or function. Further, the Committee notes

that the provisions impose monetary penalties, and provides a financial incentive for collectors to comply with disclosure requirements, to ensure transparency and promote community confidence in charity fundraising events or functions. 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

Reporting requirements

7. The Regulation contains a number of reporting requirements to charitable organisations.

8. Division Three of the Regulation provides the following accounting requirements for charities:

- Payments made into and out of the account relating to fundraising must be identified, (Clause 15)
- The Authority holder must issue a receipt to a donor for all money received from the donor except through the supply of goods or services; or through a payroll deduction scheme, (Clause 16)
- Records of income, expenditure, and additional records must be appropriately kept, maintained and made accessible (Clause 17, Clause 19) and,
- Records of income and expenditure must be audited (Clause 18).

9. In addition, Section 20 provides that charitable organisations must include the following information in their annual returns including:

- The details of the authority holder including the holder's name, trading or business name, business address, telephone number, email address, website address and an address for service specified by the authority holder,
- Whether or not the authority holder is incorporated or unincorporated,
- If the holder is incorporated – the legislation under which the authority is,
- Information about fundraising appeals, including the charitable purpose, duration and the beneficiaries of the appeal,
- The details of the trader engaged by the authority holder in relation to the appeal.

10. Clause 21 provides that the annual returns must be accompanied by certain documents including:

- An annual financial statement – the statement must contain an income statement that summarises the income and expenditure of each fundraising appeal conducted in a financial year,
- An Auditor's report prepared for the purposes of the Act, section 24 and,

- A statement of compliance.

11. An authority holder is defined as a person or organisation that holds authority to conduct the appeal.

12. When announcing the changes to fundraising laws, the Minister for Better Regulation and Innovation, the Hon Kevin Anderson MP, noted the changes are aimed to enhance public confidence in charitable organisations and to ensure there are strict accountability measures in place.[1]

> Our new reforms are not about dampening fundraising, instead we're driving accountability and transparency in the industry to keep the disreputable players out and ensure consumers can give with confidence.
>
> When you donate you want to be sure where your money is going, and these new rules mean that donors can be certain of how those funds are being used.

The Regulation contains a number of reporting requirements for charities, including information that must be provided about annual returns, details of the authority holder, and information about fundraising appeals such as its charitable purpose and beneficiaries. The Regulation also requires that annual returns are accompanied by certain financial documents, including Auditor reports, financial statements, and statements of compliance.

The Committee notes that these reporting requirements may be onerous for charitable organisations to maintain and provide the annual returns and the requisite documents. However, the Committee also notes the effect of these provisions is to ensure accountability measures are in place to promote greater transparency in the charitable organisation's financial activities and to enhance public confidence in the conduct of charitable organisations. In these circumstances, the Committee makes no further comment.

[1] NSW Government, Landmark Changes to Charity laws, viewed on 21 July 2021

2. Crown Land Management (Plan of Management) Regulation 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Planning and Public Spaces

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows—

(a) to exempt local councils from the requirement to adopt a plan of management for dedicated or reserved Crown land by 1 July 2021 and enable councils to grant or renew certain leases and licences over the land until the first plan of management is adopted,

(b) to exempt local councils from the requirement to hold public hearings in relation to proposed plans of management for the land,

(c) to require local councils to obtain the consent of the Minister to adopt plans of management for the land.

ISSUES CONSIDERED BY COMMITTEE

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

Limited rights of objection from the community

2. The Regulation amends the *Crown Land Management Regulation* 2018, and is made under the *Crown Land Management Act 2016* (the Act), which set out the statutory framework for the ownership, use and management of Crown Land in New South Wales.

3. Clause 3(5) of the Regulation inserts clause 70A, which exempts a council manager of dedicated or reserved Crown Land from the certain requirements under section 3.32(6) of the Act and section 40A of the *Local Government Act 1993.*

4. Section 40A of the Local Government Act requires the council to hold a public hearing in respect of a proposed plan of management if it would have the effect of categorising, or altering the categorisation of, community land as a natural area, sports ground, a park, an area of cultural significance or a general community area.

5. The Local Government Act also contains other public notice requirements regarding draft plans of management, including that the council must give public notice of a draft plan of management, with a period of exhibition not less than 28 days (section 38), and

that a plan of public management must be available for inspection during ordinary office hours (section 43).

The Regulation exempts local councils from the requirement to hold public hearings in relation to proposed plans of management for certain land. The removal of the requirement for public hearings limits community consultation and the ability for the community to object where the proposed plans of management may directly impact their place of residence or neighbourhood.

However, the Committee notes that this exemption is in regards to land that is to be categorised as a natural area, sports ground, a park, an area of cultural significance or a general community area. Despite the exemption, councils must still comply with other requirements regarding proposed plans of management, including giving public notice of the draft plan of management, and making it available for public inspection. 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

Henry VIII

6. The Regulation inserts clause 70B, which provides that section 40 of the *Local Government Act 1993* is modified under the *Crown Land Management Act* to require a council manager to obtain the written consent of the Minister to adopt a plan of management.

The Regulation inserts a new clause 70B, which noted that section 40 of the *Local Government Act 1993* is modified under the *Crown Land Management Act* to require a council manager to obtain the written consent of the Minister to adopt a plan of management. In effect, this allows the provisions of the Act to be modified by the regulation, and thereby acts as a Henry VIII clause.

Henry VIII clauses allow subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive. 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.

Nonetheless regulations must be tabled in Parliament and they are subject to disallowance under the *Interpretation Act 1987*. Given this safeguard, and the fact that it may be more administratively efficient to proceed by regulation when updating a list of premises subject to special conditions, the Committee makes no further comment.

3. Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	To be determined
Minister responsible	The Hon Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the Fair Trading Regulation 2019 to replace the current code of conduct applying to short-term rental accommodation industry participants with a new code.

2. The Regulation amends the Fair Trading Regulation 2019 in order to declare the Code of Conduct for the Short-term Rental Accommodation Industry that was published in the Gazette on 28 May 2021 for the purposes of Section 54B(1) of the *Fair Trading Act 1987*. Section 54B(1) of the *Fair Trading Act 1987* states that the regulations may declare that a code of conduct specified or referred to in the regulations is a code of conduct applying to short-term rental accommodation industry participants. Section 54B(2) lists the matters that may be included in the code.

3. The code was initially declared by the Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2020. However, that declaration was repealed by the Fair Trading (Code of Conduct for Short-term Rental Accommodation Industry) Repeal Regulation 2020 after consultation with stakeholders. The Fair Trading Amendment (Code of Conduct for Short-term Rental Accommodation Industry) Regulation 2020 was considered by the Legislation Review Committee in 2020 but consideration was discontinued when the Regulation was repealed (see digest 13/57 – No.13, 5 May 2020, p18).

4. The Code of Conduct for Short-term Rental Accommodation Industry regulates the behaviour of participants in the short-term rental accommodation industry, including that of guests, hosts, agents and online booking platforms. The aim of the code is to balance the rights and obligations of industry participants with the rights of occupants of neighbouring properties. The Code is particularly intended to ensure that occupants of properties neighbouring premises used for short-term rental accommodation are not unduly impacted by excessive noise or other disruption. The code makes provision for the handling of complaints and for enforcement action.

5. The two key components of the Code of Conduct are the Premises Register and the Exclusion Register. From the date that the Premises Register becomes available (1 November 2021), it will be mandatory for online booking platforms to ensure that a

premises and its host are both registered on the premises register before the premises can be advertised on the booking platform. (Clause 2.2.5 of the Code of Conduct).

6. The Exclusion Register is a list of guests and hosts who have been excluded from participating in the short-rental accommodation industry (Clause 4.2 of the Code of Conduct). Hosts or guests can be excluded from the industry if they are found by NSW Fair Trading to have committed two serious breaches (strikes) of the Code of Conduct in a two year period (Clause 4.2.4 of the Code of Conduct).

7. The Commissioner of NSW Fair Trading can record a strike against an industry participant after finding that they have contravened the code or being satisfied that it would be appropriate in the circumstances (Clause 4.1.3 of the Code of Conduct).

8. Once listed on the Exclusion Register, the person or premises is prohibited from participating in the short-term rental accommodation industry for five years (Clause 4.2.4 of the Code of Conduct).

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – Right to a fair trial

9. The Code of Conduct includes 21 clauses which state that they are offence provisions under section 54C of the *Fair Trading Act 1987*.[2]

10. Section 54C of the *Fair Trading Act 1987* states that a short-term rental accommodation industry participant who contravenes a provision of a code of conduct that is identified by the code as an offence provision is guilty of an offence and that the maximum penalty for such an offence is 1,000 penalty units in the case of a corporation or 200 penalty units in any other case.

11. Section 54C is included as a penalty notice offence in Schedule 1 of the Fair Trading Regulation, carrying a penalty of $550 for an individual or $1,100 for a corporation. Under section 67 of the Act a person who receives a penalty notice may elect to pay the penalty rather than defend the matter in court.

> **The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code of Conduct establishes 21 offences for the purposes of section 57 of the *Fair Trading Act 1987*. Those provisions are penalty notice offences for the purposes of section 67 of the Act.**
>
> **Penalty notices allow a person to pay the amount specified for an offence within a certain amount of time should he or she not wish to have the matter determined by the court. The fine payable under a penalty notice is usually less than the maximum penalty that would otherwise apply. 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.**

[2] See Clauses 2.1.3; 2.1.4; 2.1.5; 2.2.5; 2.2.6; 2.2.7; 2.2.8; 2.2.9; 2.3.5; 2.3.6; 2.3.7; 2.3.10, 2.4.11; 2.4.12; 2.4.13; 2.4.14; 2.5.2; 2.5.4; 2.5.6; 2.5.7; and 2.6.3 of the Code.

However, the Regulation does not remove the right of individual to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. Given these factors, the Committee makes no further comment.

Vicarious liability

12. The Code of Conduct includes clauses which could potentially result in people being subject to disciplinary action or penalty for the conduct of others that was not within their control.

13. Clause 2.4.8 requires a host to take reasonable steps to ensure that guests comply with their obligations under section 2.5.2 and 2.5.8 of the Code.

14. Under Clause 2.5.2(a) of the Code guests are prohibited from creating noise likely to harm, offend or unreasonably disrupt or interfere with the peace and comfort of neighbours or other occupants. Other obligations under Clause 2.5.2 include not causing damage to property; and not interfering unreasonably with use of common property by neighbours.

15. Clause 2.5.8 of the Code makes a guest responsible for the actions of any visitors they invite onto the premises during their period of occupancy and requires guests to ensure that any visitors comply with Clause 2.5.2 of the Code.

16. Circumstances might arise in which a guest is found to be in breach of the Code of Conduct as a result of the conduct of a visitor. Similarly, circumstances might arise in which a host is found to be in breach of the Code of Conduct as a result of the conduct of a guest.

17. However, the Code includes safeguards to minimise the risk of unfairness to those subject to disciplinary action. Firstly, the Commissioner has a duty to afford procedural fairness before finding a participant to be in breach of the Code (Clause 4.1.5); second, the Commissioner must consider evidence and submissions from participants as well as complainants before making a decision in relation to a complaint (See Clauses 3.1.10, 3.1.11 and 3.1.12); thirdly, people subject to disciplinary action have the right to apply to the Secretary for review (Clause 4.3). In addition, people or corporations issued with a penalty notice under section 54C of the Act have the right to elect to go to court to defend themselves.

The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code includes clauses which could potentially result in people being subject to disciplinary action or penalty for the conduct of others that was not within their control.

For example, clause 2.5.8 of the Code makes a guest responsible for the actions of any visitors they invite onto the premises during their period of occupancy and requires guests to ensure that any visitors comply with Clause 2.5.2 of the Code. Further, Clause 2.4.8 requires a host to take reasonable steps to ensure that guests comply with their obligations under section 2.5.2 and 2.5.8 of the Code.

Circumstances might arise in which a guest is found to be in breach of the Code of Conduct as a result of the conduct of a visitor. Similarly, circumstances might arise in which a host is found to be in breach of the Code of Conduct as a result of the conduct of a guest.

However, the Code includes safeguards to minimise the risk of unfairness to those subject to disciplinary action. Firstly, the Commissioner has a duty to afford procedural fairness before finding a participant to be in breach of the Code (Clause 4.1.5); second, the Commissioner must consider evidence and submissions from participants as well as complainants before making a decision in relation to a complaint (See Clauses 3.1.10, 3.1.11 and 3.1.12); thirdly, people subject to disciplinary action have the right to apply to the Secretary for review (Clause 4.3). In addition, people or corporations issued with a penalty notice under section 54C of the Act have the right to elect to go to court to defend themselves. In view of the measures included in the Code to ensure fairness to people subject to disciplinary action, the Committee makes no further comment.

Restriction on rights of people listed on the Exclusion Register to participate in the short-term accommodation industry

18. The Code of Conduct provides the Commissioner with the power to take disciplinary action against people who breach the Code. Where the Commissioner finds that a participant in the short-term accommodation industry has breached the Code, he or she may record a strike in the Exclusion Register. Where two strikes have been recorded against a participant on the Exclusion Register within a two year period they are excluded from participating in the industry for a period of five years (Clause 4.2.4 of the Code).

19. There may be circumstances where being excluded from participating in the short-term accommodation industry could infringe the personal rights of the person excluded, either by denying them access to accommodation or by denying them the right to make a living from their property.

20. However, the risk of such infringement is mitigated by the Commissioner's obligation to afford procedural fairness before taking any disciplinary action (Clause 4.1.5 of the Code of Conduct), including the requirement to provide a statement of reasons for decisions (Clause 4.1.6 of the Code of Conduct). In addition, people listed on the Exclusion Register have a right to review by the Secretary (Clause 4.3 of the Code; Clause 11D of the Fair Trading Regulation 2019).

21. In addition, the Code aims to balance the rights of people who may be excluded from the short-term rental accommodation industry against the rights of occupants of properties neighbouring premises used for short-term rental accommodation. Disciplinary measures have been included in the Code in order to protect the rights of occupants of neighbouring properties from undue noise and disruption.

The Regulation introduces a revised Code of Conduct for the Short-Term Accommodation Industry. The Code seeks to balance the rights and obligations of participants with the industry with the rights of occupants of neighbouring properties. The Code of Conduct establishes an Exclusion Register, whereby a person or corporation can be excluded from participating in the Short-Term

Accommodation Industry for a period of five years for breaching the code two or more times.

There may be circumstances where exclusion from participating in the industry is an infringement of a person's individual rights. However, the Commissioner is required to afford procedural fairness to participants before recording a strike against a participant, and participants who are excluded from the industry have a right to apply to the Secretary for review.

In addition, the Code aims to balance the rights of people who may be excluded from the short-term rental accommodation industry against the rights of occupants of properties neighbouring premises used for short-term rental accommodation. Disciplinary measures are included in the Code in order to protect the rights of occupants of neighbouring properties from undue noise and disruption. In the circumstances, the Committee makes no further comment.

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

Additional obligations on small business

22. The Code of Conduct for the Short-term Rental Accommodation Industry establishes obligations for individuals or corporations who offer residential properties for short-term rental. In addition to being required to comply with all planning laws and by-laws, these obligations include:

- being required to hold insurance against liability for third party injuries and deaths occurring on the property (Clause 2.4.3 of the Code of Conduct).
- being required to ensure that property is registered on the Premises Register (Clause 2.4.11)
- being required to take reasonable steps to ensure that guests comply with their obligations under the Code (Clause 2.4.7)
- being required to inform occupants of neighbouring residential premises and the owners corporation for any strata scheme that the property is being used for short-term rental accommodation (Clause 2.4.9)
- being required to take reasonable steps to address concerns about potential contraventions of the code in a timely manner (Clause 2.4.9)

23. While these additional obligations might be inconvenient and amount to an additional administrative burden for small businesses involved in the short-term accommodation industry, they are with the aim of protecting the rights of occupants of neighbouring properties from unreasonable noise or disruption.

The Code of Conduct for the Short-term Rental Accommodation Industry establishes obligations for individuals or corporations who offer residential properties for short-term rental, including the requirement to hold insurance and the requirement to ensure the property is placed on the Premises Register.

However, the Committee recognises that the obligations may be proportionate to the aim of protecting the rights of occupants of neighbouring properties from unreasonable noise or disruption. Under the circumstances, the Committee makes no further comment.

4. Health Administration Amendment (Reportable Incidents) Regulation 2021

Date tabled	25 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow relevant health services organisations to notify, or exchange information with, other relevant health services organisations or private health facilities required to exercise functions under the Act, Part 2A or the *Private Health Facilities Act 2007*, Part 4.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy of personal information and medical records

2. Schedule 1[3] inserts clauses 15A and 15B into the *Health Administration Regulation 2020* allows the relevant health organisations to notify or exchange information with other relevant health service organisations in relation to responding to incidents under the *Health Administration Act 1982* (HA Act), Part 2A, or the *Private Health Facilities Act 2007 (PHF Act)*, Part 4.

3. These acts require that an assessor must carry out a preliminary risk assessment of a reportable incident and provide written advice to assist the other organisation to understand the events comprising the incident and the measures required to appropriate manage the incident and remove or mitigate any risk.

4. However, the HA Act places limits on the disclosure of information. Section 23A of the HA Act provides that a health official may disclose the information to another health official if the health official determines that the public interest to disclose the information outweighs the protection of confidentiality and privacy of the person.

5. The health official is defined as a person or body that exercises functions under the *Assisted Reproductive Technology Act 2007,* the *Health Care Complaints Act 1993*, the *Health Practitioner Regulation National Law (NSW)*, the *Poisons and Therapeutic Goods Act 1966*, the *Private Health Facilities Act 2007* and the *Public Health Act 2010*.

6. In addition, the HA Act and PHF Act also has punitive measures including fines and imprisonment. For instance, section 49D of the PHF Act provides that an incident reviewer must not record or divulge any information except in the exercise of the

functions of an incident reviewer. A person that fails to comply is subject to a maximum penalty of 50 penalty units ($5,550).

7. Section 22 of the HA Act provides that if a disclosure is made that is outside the administration of the Act, without the consent of the person and without other lawful excuse, a person that fails to comply is subject to a maximum of 10 penalty units or 6 months imprisonment.

The Regulation allows the relevant health service organisations to notify or exchange information with other relevant health service organisations or private health facilities about a reportable incident if it assists the other organisation perform their functions under the *Health Administration Act 1982* or the *Private Health Facilities Act 2007*.

The information exchanged relates to the response and the investigation of incidents. An incident is an unplanned event that results in, or has the potential for injury, damage or loss. The sharing of such information may infringe on a person's privacy and confidentiality of medical records if the information relates to personal and medical details of a patient.

However, the Committee recognises the intention of sharing information to health organisations to assist in learning from incidents and provide a consistent and effective response to similar incidents in the future. The Committee also acknowledges that the HA Act and the PHF Act contain limits on the sharing of this information, including that the public interest to disclose the information outweighs the protection of confidentiality and privacy of the person. The Committee also notes that the Act contains monetary penalties or imprisonment for persons that disclose confidential information outside the administration of the Act. In these circumstances, the Committee makes no further comment.

5. Heavy Vehicle (Adoption of National Law) Amendment (Penalties) Regulation 2021

Date tabled	LA: 22 June 2021 LC: 22 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Andrew Constance MP
Portfolio	Transport and Roads

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to increase the amounts payable under infringement notices for offences under the *Heavy Vehicle National Law (NSW), Heavy Vehicle (Fatigue Management) National Regulation (NSW*) and *Heavy Vehicle (Mass, Dimension and Loading) National Regulation (NSW)* to ensure the amounts are consistent nationally.

2. This Regulation is made under the *Heavy Vehicle (Adoption of National Law) Act 2013, including sections 12(6) and 28* (the local regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Right to fair trial

3. The Regulation amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013* and increases the amounts for a number of infringement notice offences under the *Heavy Vehicle National Law (NSW)* (the National Law).

4. The object of the National Law is to establish a national scheme for facilitating and regulating the use of heavy vehicles on roads to promote public safety, manage the impact of heavy vehicles on the environment, road infrastructure and public amenity, and efficiency in transport of goods and passengers by heavy vehicle.

5. The amending Regulation inserts a new Schedule 1 which lists the penalty applicable for infringement notices issued under the Heavy Vehicle National Law (NSW) pursuant to section 591. Subsection 591(1) of the National Law provides that an authorised officer who reasonably believes that a person has committed a prescribed offence against this Law may serve the person with an infringement notice issued as an alternative to prosecution in court for the offence.

6. Under the legislation, an authorised officer is defined as a police officer of a participating jurisdiction or a person who holds office under the National Law.

The *Heavy Vehicle (Adoption of National Law) Amendment (Penalties) Regulation 2021* amends the *Heavy Vehicle (Adoption of National Law) Regulation 2013*. The Regulation increases the financial penalties applicable to a number of infringement notice offences under the *Heavy Vehicle National Law (NSW)* (the National Law). Infringement notices can be issued by authorised officers who reasonably believe that a person has committed a prescribed offence. Such an infringement notice acts as an alternative to prosecution for the offence in court.

The Committee notes that this may impact a person's right to a fair trial as the infringement notice does not allow the individual an opportunity to respond to offences made against them. Similar to strict liability offences, it removes the requirement for the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing the liability for an offence.

However, the Committee notes that infringement notices and strict liability offences are not uncommon in regulatory setting to encourage compliance. In the current case, the offences are designed to proactively promote road safety with compliance to heavy vehicle mass, dimensions and loading standards, fatigue management, and the requirement for drivers to maintain documentation such as permits. In these circumstances, the Committee makes no further comment.

6. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order No 2 2021* about intentionally spitting or coughing on a public official or other worker in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The *Public Health (COVID-19 Spitting and Coughing) Order 2021* commenced on 28 May 2021 and repeals and remakes the *Public Health (Spitting and Coughing) Order 2021*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020* commenced on 9 April 2020, and has now been remade five times. These orders are made under section 7 of the *Public Health Act 2010*, and pursuant to section 7(5), must expire after 90 days.

4. The Committee has reported on prior renditions of this regulation in Digests 13/57, 17/57, 25/57, 30/57 and 32/57.[3]

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – right to a fair trail

5. The Regulation amends the Schedule 4 of the *Public Health Regulation 2012* to allow penalty notices to be issued for offences under section 10 of the *Public Health Act 2010,* regarding a contravention of the *Public Health (COVID-19 Spitting and Coughing) Order No 2 2021*.

6. The *Public Health (COVID-19 Spitting and Coughing) Order* (*No 2) 2021*, which commenced on 28 May 2021, directs that a person must not intentionally spit at or cough on public officials or other workers in a way that is likely to cause fear about the spread of COVID-19.

[3] Legislation Review Committee Digests, 13/57 – 5 May 2020, 17/57 – 4 August 2020, 25/57 – 16 February 2021, 30/57 – 11 May 2021, and 32/57 – 22 June 2021.

7. Under subsections 7(1) and (2) of the *Public Health Act 2010*, if the Minister for Health and Medical Research considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

8. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, unless an earlier day is specified in the order.

9. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction. The maximum penalty for doing so is –

    (a) for an individual—100 penalty units ($11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 50 penalty units ($5,500) for each day the offence continues, or

    (b) for a corporation—500 penalty units ($55,000) and, in the case of a continuing offence, a further 250 penalty units ($27,500) for each day the offence continues.

10. The Regulation, like its predecessors, provides that a breach of the Order, resulting in an offence under section 10 of the Act, is an offence for which a penalty notice of $5,000 may be served. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 2) 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, 30/57 and 32/57, the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

11. As noted above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction in clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

> **As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order No 2 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**
>
> **Consistent with its comments in Digests 13/57, 17/57, 25/57, 30/57, and 32/57 the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.**
>
> **The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.**

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

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	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 operators of retirement villages make available to residents and prospective residents the most recent report relating to capital maintenance for major items of capital over a 3-year period (3-year report) and to make further provision as to the matters that 3-year reports must include,

   (b) to modify the definition of a major item of capital, (c) to clarify the circumstances in which operators of retirement villages may increase recurrent charges payable by residents and to apply a cut-off date in relation to those circumstances,

   (d) to extend the time by which the first asset management plans of retirement villages must commence to the start of the village's next financial year after 1 July 2021,

   (e) to provide that operators of retirement villages must attach to proposed asset management plans an independent assessment as to whether the plan contains certain matters required to be included,

   (f) to modify the information that maintenance schedules and asset registers included in asset management plans must contain,

   (g) to make further provision as to the manner of estimating the effective life of items of capital,

   (h) to provide for savings and transitional provisions for obligations imposed on operators by this Regulation.

2. This Regulation is made under the *Retirement Villages Act 1999*, including sections 20(1)(k), 101A, 112(3), 152(3) and 203 (the general regulation-making power) in particular, section 203(4).

3. Most of the provisions of the Regulation are minor, machinery or transitional provisions that seek to clarify existing obligations under the Retirement Villages Regulation 2017.

ISSUES CONSIDERED BY COMMITTEE

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

Operator may increase recurrent charges

4. The Regulation amends clause 26AA, to provide that an operator may increase recurrent charges after a former occupant's liability to pay ceases where the increase occurs as part of the approved annual budget for the financial year immediately following the financial year in which the former occupant's liability ceased, and where the former occupant's liability ceased after 1 January 2021.

> **The Regulation amends 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 its comments on the Retirement Villages Amendment (Exit Entitlement) Regulation 2021, in Digest 29 on 4 May 2021, regarding clause 26AA and concerns that it may retrospectively impact on freedom of contract for the parties to choose the contractual terms and obligations to which they are subject.**
>
> **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**

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

Increase to the administrative burden on operators

5. Operators of retirement villages are already subject to obligations under the Retirement Villages Regulation 2017, as amended by the Retirement Villages Amendment (Asset Management Plans) Regulation 2021 and the Retirement Villages Amendment (Exit Entitlement) Regulation 2021. These previous amendments were considered by the Committee in Digest 29/57, 4 May 2021.

6. This Regulation increases the obligations of operators of retirement villages in relation to asset management plans. Clause 8 of Schedule 1 of the Regulation amends clause

26C(1) of the Retirement Villages Regulation 2017 to insert a new requirement to obtain the written opinion of an auditor or independent qualified quantity surveyor as to whether an asset management plan includes the matters specified in Clauses 26D and 26F of the Retirement Villages Regulation. Clauses 26D and 26F specify the content that must be included in an asset management plan. The independent assessment must be attached to the proposed asset management plan.

The Regulation requires operators to obtain the written opinion of an auditor or independent qualified quantity surveyor as to whether the plan contains the matters specified in clauses 26D and 26F of the Retirement Villages Regulation, and to attach the independent assessment to the asset management plan. This places an additional obligation on the operators of retirement villages when preparing asset management plans and may increase the costs incurred by operators in complying with the Retirement Villages Regulation.

However, the Committee notes that the additional obligation imposed by the Regulation will contribute to protecting the rights of occupants and potential occupants of retirement villages. The rights of operators should be balanced against those of occupants. In the circumstances, the Committee makes no further comment.

8. State Insurance and Care Governance Regulation 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to repeal and remake, with minor amendments, the *State Insurance and Care Governance Regulation 2015*, which would otherwise be repealed on 1 September 2021 by section 10(2) of the *Subordinate Legislation Act 1989*.

2. This Regulation—

   (a) prescribes authorised persons to whom the State Insurance Regulatory Authority, or its chief executive, may delegate functions, and

   (b) provides for repeal, savings and formal matters.

3. This Regulation is made under the *State Insurance and Care Governance Act 2015*, including sections 26 and 30 (the general regulation-making power).

4. This Regulation comprises or relates to matters set out in Schedule 3 to the *Subordinate Legislation Act 1989*, namely matters of a machinery nature.

ISSUES CONSIDERED BY COMMITTEE

The form or intention of the regulation calls for elucidation: s 9(1)(b)(vii) of the LRA

Delegation of functions to authorised officers

5. The Regulation is made under the *State Insurance and Care Governance Act 2015*. Under the Act, State Insurance Regulatory Authority (SIRA) has several functions, including:

   a) to collect and analyse information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation and the Home Building Act 1989,

   b) to encourage and promote the carrying out of sound prudential practices by insurers under that legislation and the Home Building Act 1989,

   c) to evaluate the effectiveness and carrying out of those practices.

6. Section 26 of the Act provides that SIRA may delegate to an authorised person any of the chief executive's functions under this Act, other than this power of delegation.

7. Clause 4 of the Regulation provides that, for the purposes of section 26 of the Act, the following are prescribed as authorised persons –

   a) a Public Service employee within the meaning of the *Government Sector Employment Act 2013*,

   b) a statutory officer.

Under section 26 of the Act, the State Insurance Regulatory Authority (SIRA) may delegate to an authorised person any of the chief executive's functions under the Act, other than this power of delegation. This Regulation provides that an authorised person includes a statutory officer, and/or a Public Service employee within the meaning of the *Government Sector Employment Act 2013*.

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 SIRA chief executive includes to collect and analyse information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation and the *Home Building Act 1989*, as well as functions conferred on it by other Acts. Delegation of the more significant tasks regarding confidential information about individuals and workers compensation or motor accidents may warrant clarity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

9. Water Supply (Critical Needs) (Wyangala Dam and Dungowan Dam) Regulation 2021

Date tabled	LA: 22 June 2021 LC: 22 June 2021
Disallowance date	To be determined
Minister responsible	The Hon Melinda Pavey MP
Portfolio	Water, Property and Housing

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to alter the description of the Wyangala Dam wall raising project and the Dungowan Dam construction project. These projects are taken to be State significant infrastructure and critical State significant infrastructure for the purposes of the *Environmental Planning and Assessment Act 1979*.

2. This Regulation is made under the *Water Supply (Critical Needs) Act 2019*, including section 20 (the general regulation-making power) and Schedule 3, clause 1(2)(a).

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

Henry VIII Clauses

3. Clause 1(1) of Schedule 3 of the *Water Supply (Critical Needs) Act 2019* specifies that certain "development" (as described in Part 2 of Schedule 3) is taken for the purposes of the *Environmental Planning and Assessment Act 1979* (the EPA) to be State significant infrastructure and critical State significant infrastructure, that may be carried out without development consent under Part 4 of the EPA.

4. The Regulation amends Schedule 3 of the *Water Supply (Critical Needs) Act 2019* to insert two new clauses into Part 2, amending the definition of "development" to exclude certain activities relating to assessing the Wyangala dam project and the Dungowan dam project. The amendment also excludes the relocation of the Wyangala Waters Holiday Park from the definition of development. (See Schedule 1 of the Regulation).

5. The practical consequence of the amendments to Schedule 3 of the Act is to remove assessment activities, including test drilling, geotechnical investigations from the definition of "state significant infrastructure" for the purposes of the EPA.

6. The Regulation also amends Clause 4(1)(a) of Schedule 3 of the *Water Supply (Critical Needs) Act 2019* to remove the reference to "the Tamworth Water Treatment Plant" and replace it with "intersect with the pipeline from Chaffey Dam". This change is of a machinery nature.

7. Such amendments are authorised by Part 1(3) of Schedule 3 of the *Water Supply (Critical Needs) Act*, which states that the regulations may amend Part 2 of Schedule 3 of the Act

in order to insert, omit or alter a description of development that relates to construction of a new dam or increase in capacity of existing dam.

The Regulation amends the *Water Supply (Critical Needs) Act 2019*. Such amendments are authorised by Part 1(3) of Schedule 3 of the *Act*. In permitting the Regulation to amend the Act, these clauses operate as a Henry VIII clause, which allows subordinate legislation to amend the Act, thus delegating Parliament's legislative power to the Executive.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the amendments made to the *Water Supply (Critical Needs) Act 2019* by the Regulation are of a minor or machinery nature, including minor changes to definitions. Under the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

1 The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

(b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

i trespasses unduly on personal rights and liberties, or

ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or

iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations

1 The functions of the Committee with respect to regulations are:

(a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

i that the regulation trespasses unduly on personal rights and liberties,

ii that the regulation may have an adverse impact on the business community,

iii that the regulation may not have been within the general objects of the legislation under which it was made,

iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

v that the objective of the regulation could have been achieved by alternative and more effective means,

vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

vii that the form or intention of the regulation calls for elucidation, or

viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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