

Legislation Review Committee



PARLIAMENT OF  
NEW SOUTH WALES

Correspondence received in response  
to the Legislation Review Committee  
Digest No. 39 – 22 February 2022



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**The Hon. James Griffin MP**  
Minister for Environment and Heritage

Your ref: D21/60937  
Our ref: MD22/792

Mr Dave Layzell MP  
Chair  
Legislation Review Committee  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

By email: [legislation.review@parliament.nsw.gov.au](mailto:legislation.review@parliament.nsw.gov.au)

Dear Chair, *Dave,*

Thank you for your correspondence to the Hon. Matt Kean, Treasurer and Minister for Energy, about the *Environment Legislation Amendment Bill 2021*. I appreciate the Legislation Review Committee's feedback and comments. Your letter was referred to me in my role as Minister for the Environment and Heritage, as the responsible Minister for the Bill.

As you would be aware the Bill was introduced into Parliament on 24 November 2021. It was debated in, and passed by, the Legislative Assembly on 17 February 2022 and the Legislative Council on 24 February 2022, and received assent on 4 March 2022.

Regarding the specific issues in your correspondence I can advise the following:

**Executive liability offences – broad extension of criminal liability, widely defined term, standard of proof and additional punishment**

The offence of receiving monetary benefits addresses a regulatory loophole which has enabled certain persons such as directors, managers and related bodies corporate to financially benefit from environmental crimes without being held appropriately accountable for the harm caused by these offences to the wider community.

The amendments are not about pursuing innocent parties, as the Committee has noted, they are designed to ensure that the most culpable persons cannot hide behind corporate facades or complex corporate structures in order to benefit from their crimes. The amendments will act as a strong deterrent for possible offenders and incentivise related entities to ensure that the companies they direct or manage take proper steps to comply with environmental laws.

The NSW Environment Protection Authority (EPA) will apply its prosecution guidelines and use its regulatory discretion in determining whether it is appropriate to commence proceedings against a director, manager or related body corporate under these provisions.

Additionally, the amendments will enable the EPA to recover monetary benefits in separate civil proceedings against directors, managers and related bodies corporate of a convicted offender. The EPA will determine whether it will take criminal or civil recovery proceedings depending on the EPA's assessment of the culpability of the people involved and the particular circumstances of each case.

## Retrospectivity

Some new notice provisions and broadened court orders will be retrospective. Even though a person may be subject to extended enforcement powers or may have broader orders imposed on them by the court which were not available at the commencement of proceedings, this is reasonable in the circumstances to ensure accountability for the harm caused by environmental crimes to the wider community.

The broadened court orders under the *Contaminated Land Management Act 1997* and *Pesticides Act 1999* are consistent with existing orders that may be made under the *Protection of the Environment Operations Act 1997* and will enable the Court to tailor a sentence to the circumstances of a case and better achieve the deterrent and restorative purpose of a prosecution.

## Prescription of 'environmental protection legislation'

The change to the definition of "environment protection legislation" is consistent with the way natural resources management legislation is defined in section 3(1) of the *Natural Resources Access Regulator Act 2017*. The change would align with the EPA being a "modern and flexible regulator" and facilitate the EPA assuming responsibility for regulatory action under other Acts if government were to decide to expand the EPA's responsibilities at any stage.

Any regulation prescribing an Act or part of an Act as environment protection legislation may only be made with the concurrence of the Minister responsible which provides an additional layer of scrutiny. The Ministers could undertake public or targeted consultation, if it is appropriate to do so, before legislation is prescribed in this way.

Thank you again for your considered review of the Bill.

Yours sincerely



**James Griffin MP**  
Minister for Environment and Heritage

23/3/22





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Our reference: COR-01037-2022  
Your reference: D21/59661

Mr David Layzell MP  
Chair  
Legislation Review Committee  
Parliament of New South Wales  
By email: [legislation.review@parliament.nsw.gov.au](mailto:legislation.review@parliament.nsw.gov.au)

Dear Chair

**Digest No. 39/57 of the Legislation Review Committee**

Thank you for your invitation to respond to issues raised by the Committee relating to the *Electronic Conveyancing (Adoption of the National Law) Amendment Bill 2022*.

***Power of Registrars to contravene privacy or confidentiality laws***

The proposed inclusion of section 43 in the Electronic Conveyancing National Law (ECNL) will allow Registrars to share compliance and regulatory information with other Registrars who are members of the Australian Registrars National Electronic Conveyancing Council (ARNECC).

ARNECC was constituted under an Intergovernmental Agreement to facilitate the implementation and ongoing management of the regulatory framework for electronic conveyancing in Australia. As Electronic Lodgment Network Operators (ELNOs) operate in various states and territories, Registrars need to be able to share information to mitigate the risk of regulatory gaps and ensure that ELNOs offer services that are secure, efficient and fit-for-purpose across all operating jurisdictions. I acknowledge the important safeguard that privacy and confidentiality laws offer to individuals and businesses. However, as the Committee notes, this power is needed to enable Registrars to effectively regulate eConveyancing and to ensure that public confidence is upheld in the NSW land title system.

***Subdelegation of the Registrars powers and functions***

The proposed inclusion of section 37(2) in the ECNL will allow a Registrar, via an instrument of delegation, to authorise a person to whom a power or function is delegated, to subdelegate that power or function.

The ECNL forms the basis for a national applied law scheme. This proposed amendment is needed by some States to allow them to effectively manage their compliance examination processes. This flexibility will lead to improved compliance assessment efforts, and ensure that regulatory oversight remains stringent, particularly during this crucial period in the interoperability reform and in anticipation of the changes the reform will bring to the eConveyancing market.

Importantly, as the Committee acknowledges, the Bill places appropriate restrictions on the above powers and the circumstances in which these powers can be used.

If you would like more information or have any queries please contact Leanne Hughes, Director, Policy and Legislation, Office of the Registrar General on [REDACTED] or via email at [REDACTED]

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Yours sincerely

A handwritten signature in blue ink, appearing to read 'Victor Dominello', with a stylized flourish at the end.

**The Hon. Victor Dominello MP**

Minister for Customer Service and Digital Government

Date: 24/03/22



**The Hon. Anthony Roberts MP**  
Minister for Planning  
Minister for Homes

Your ref: D22/06921  
Our ref: MDPE22/259

Mr Dave Layzell MP  
Member for Upper Hunter  
Chairman  
Legislation Review Committee

By email: [Legislation.Review@parliament.nsw.gov.au](mailto:Legislation.Review@parliament.nsw.gov.au)

Dear Mr  Layzell

Thank you for your correspondence regarding the matters identified by the Legislation Review Committee (Committee), in its Legislation Review Digest No.39/57, in relation to the *Environmental Planning and Assessment Amendment (Owner's Consent and BASIX Certificates) Regulation 2021* and the *Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation (No 2) 2021*.

I note the Committee's concerns regarding the regulations. I have reviewed the matters raised in your review and have outlined my comments below.

### **Real property rights**

I acknowledge the Committee's concerns regarding potential impacts on landowners' rights to consent to land-use changes.

I am advised the *Environmental Planning and Assessment Amendment (Owner's Consent and BASIX Certificates) Regulation 2021* (the Regulation) applies existing State Significant Development (SSD) mining landowner consent provisions to mining projects that are State Significant Infrastructure (SSI). These changes mean that the same landowner consent and public notification requirements apply to mining and mining related development regardless of whether the projects are assessed under SSD or SSI.

Until recently, mining projects had not been assessed under the SSI approval pathway and the related landowner consent provisions for SSI applied primarily to linear transport and utility infrastructure. Following a parliamentary motion by the Hon. Mark Latham (which was passed in May 2021), the Dendrobium Coal Mine was declared to be an SSI project in December 2021. The declaration has meant that regulation changes around landowner consent and public notification were necessary in order to align SSI application processes with those already existing for SSD mining projects.

It is important to note that the Regulation does not change the application of landowner's consent provisions for mining projects. Instead, it carries over similar landowner consent provisions that currently exist for SSD mining projects and applies them to the SSI approval pathway. As with SSD mining projects, the Regulation also requires public notification of SSI mining applications and modification requests.

Any matters regarding landowner rights in relation to access to properties for mining development are generally dealt with under the *Mining Act 1992*.

Should the Committee have any questions, you are welcome to contact Mr Ben Lusher, Executive Director, Strategic Services at the Department of Planning and Environment on [REDACTED]

### **Strict liability offence**

I note the Committee's comments regarding registration, fire safety requirements and associated penalty offenses.

The *Environmental Planning and Assessment Amendment (Short-term Rental Accommodation) Regulation (No 2) 2021* commenced on 1 November 2021 as part of a whole of government reform of the short-term rental accommodation industry. A key matter of the reform was to ensure the safety of occupants in short-term rental accommodation. This was addressed by imposing certain minimum fire safety requirements for dwellings used for short-term rental accommodation and through the establishment of a state-wide register of short-term rental accommodation.

Should the Committee have any questions, you are welcome to contact Ms Sandy Chappel, A/Executive Director, Housing and Economic Policy at the Department on [REDACTED].

Thank you for taking the time to bring these matters to the NSW Government's attention.

Yours sincerely



**The Hon. Anthony Roberts MP**  
Minister for Planning  
Minister for Homes





**The Hon. Matt Kean MP**  
Treasurer  
Minister for Energy

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Mr Dave Layzell MP  
Chair  
Legislation Review Committee  
6 Macquarie Street  
SYDNEY NSW 2000

Dear Mr Layzell, *Dave*

Thank you for your correspondence of 24 February 2022, regarding Digest No. 39/57 of the Legislation Review Committee. Which considers the *COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022*.

I thank the Committee for its comments and address the specific concerns raised by the Committee below.

***Re: Procedural fairness – compulsory interview by Audio Visual Link***

The committee has raised concerns regarding procedural fairness and the meaningful participation of individuals under the proposed amendments to various environmental protection legislation in the Bill. These are important issues, which I will address below.

The Bill allows for these interviews to take place electronically as an added option. It is not compulsory to hold interviews via Audio-Visual Link (AVL). Consultation with regulators indicates that the majority of interviews are likely to occur via an in-person method.

Under most Acts, a person will be able to negotiate the time and place these are to be held (including virtually). Unless the request is considered unreasonable, the agency will agree. The exception is for questioning under the *Fisheries Management Act 1994* where the agency has discretion to specify whether the interview will be held virtually or in-person - though in practice, a negotiation will generally follow if necessary.

This gives individuals the opportunity to participate via a method that is most suitable to them, particularly where physical attendance would result in travel and time costs for either party.

There are a number of policies, procedures and work instruction requirements under the relevant Acts to facilitate procedural fairness when interviews or questioning is conducted via AVL. For example, when conducting an interviewing or questioning under the *Mining Act 1992*, the following must occur:

- The interview time, date and location is pre-arranged in consultation with the interviewee and the interviewee is invited to have a support person (or legal representative) present at the interview.
- At the start of the interview, all persons are informed that the interview is being recorded and that a transcript of the recording will be provided to the interviewee as soon as practicable.
- All persons are formally identified
- Interviewees are informed about the inspector's powers to require answers to questions and protection against self-incrimination.
- An internal handbook, standard operating procedures, templates for emails, letters and interview scripts for inspectors must be provided to ensure an interview is carried out in

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accordance with the requirements of the Act, and all interviewees are provided with a package of fact sheets about the inspectors powers and the regulatory framework.

Across the various pieces of legislation, all of the relevant sections proposed to be updated include some statutory protections against self-incrimination. This includes Section 248T of the *Mining Act 1992*, Section 258B of the *Fisheries Management Act 1994*, Section 10.35 of the *Crown Land Management Act 2016*, Section 212 of the *Protection of the Environment Operations Act 1997*, Section 12.23 of the *Biodiversity Conservation Act 2016* and Section 340B of the *Water Management Act 2000*.

It should, however, be noted that the *Crown Land Management Act 2016*, *Protection of the Environment Operations Act 1997*, and the *Biodiversity Conservation Act 2016*, also provide that a person is not excused from answering questions on the ground that the answer may incriminate themselves.

All relevant agencies with legislation included within the Bill have existing procedures, processes and guidelines for investigatory processes, including AVL considerations over the last two years. The Government is willing to commit to working with all the relevant agencies to review and update their procedures and guidance material if necessary.

The Government is confident that with these safeguards in place, the investigatory process will continue to be fair under these Acts, whilst giving agencies and interviewees greater flexibility and time and transport savings where meetings occur online. The ongoing benefits of these measures, in addition to the safeguards, make them suitable for continuation in post-pandemic life.

### ***Re: Civic engagement – meaningful participation in planning hearings***

The Committee has raised the issue of civic engagement on matters of public concern in regard to the proposed amendments to the *Environmental Planning and Assessment Act 1979*. I also note the concerns relating to electronic hearings and liability for offence if there is failure to attend. Again, I understand the importance of these issues, and address these concerns below.

The permanent amendments proposed in this Bill are designed to make participation in these hearings easier. They do this by giving planning bodies the power to continue to hold their public meetings or hearings either online or by audio-visual means, in person, or a hybrid of these arrangements. This does not mean that planning bodies must only conduct their meetings and hearings online. Instead, it gives them flexibility in the way they provide access and participation to the public and may increase the level of participation in these types of hearings.

For example, the *IPC Annual Report 2020-2021* (p18) noted that “Moving these events online during the pandemic has facilitated greater participation in the Commission’s decision-making processes and increased accessibility and transparency – particularly for the most complex and contentious cases, which have generally been held over a number of days”.

These measures have been in place since the beginning of the pandemic and have been operating effectively with appropriate safeguards that were developed to ensure safe public access and participation. These include:

- If an Independent Planning Commission (IPC) public hearing is held online, it must be live streamed so that members of the public can listen to the hearing and/or view it
- During virtual meetings, members who speak must be able to be heard by other members
- Recordings or a transcript are to be made publicly available on the website of the planning body

In addition, the design and delivery of the online format for the public hearings and public meetings has been informed by ongoing qualitative surveys that the Commission has used to

refine its approach as it seeks to encourage and promote participation in its decision-making processes.

I also note the IPC has several guidelines to promote community participation, including its 2019 *Community Participation Plan*, and public hearing guidelines. These guidelines were updated to include additional information on both hearings and meetings held online during the COVID-19 pandemic. For example, the addendum clarifies:

- The technology to be used for each hearing or meeting is selected to maximise its effectiveness for participants based in the area where the project is located.
- Transcripts will be available on the IPC's website post-hearing.
- The IPC will continue to accept written submissions or comments up to one week (7 days) after the public hearing or meeting, providing an additional opportunity for participation outside of the Electronic Public Hearing (EPH) or Electronic Public Meeting (EPM).

In addition, the Sydney District and Regional Planning Bodies also have well-established, long standing operational procedures which aim to maximise public participation regardless of the format of the meeting. This includes the requirements in Schedule 1 of the Sydney District and Regional Planning Panels operational procedures (August 2020) (Panel Procedures Manual) which deal with the procedures for briefings, meetings and decisions, as well as public participation.

These measures have successfully guided planning bodies and its stakeholders through a wide range of hearings and meeting in the last two years. I do, however, appreciate the Committee's concerns about potential disadvantages to members of the public who do not have access to technology or where they are not technological proficient. The Government will work with these Planning Bodies to review and where appropriate, update their guidance material and operational procedures to address these issues.

Thank you for bringing these matters to my attention.

Yours sincerely,



**The Hon. Matt Kean MP**

Treasurer

Minister for Energy

21.4.22.

CC: The Hon. Paul Toole, Deputy Premier, Minister for Regional NSW  
CC: The Hon. James Griffin, Minister for Environment and Heritage  
CC: The Hon. Anthony Roberts, Minister for Planning  
CC: The Hon. Kevin Anderson, Minister for Lands and Water  
CC: The Hon. Dugald Saunders, Minister for Agriculture





**The Hon. Matt Kean MP**  
Treasurer  
Minister for Energy

Your ref: D21/60937  
Our ref: MD22/706

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Dear Mr Layzell *Dave*

Thank you for letter of 24 February 2021 regarding the Legislation Review Committee (Committee) Legislation Review Digest no. 39/57, which considers the *Electricity Infrastructure Investment Amendment (Safeguard) Regulation 2021* (Regulation).

I note the Committee has carefully considered the Regulation's potential implications to a person's right to a fair trial in the context of penalty notice offences under Schedule 2 of the Regulation. I agree with the Committee's comments.

As the Committee notes, the penalty notice offence provisions within the Regulation achieve a balance between procedural fairness and not burdening the administration of justice. Penalty notices reduce the costs and time of resolving matters before a Court, however recipients of a penalty notice may still elect to have their matter heard and decided by a Court.

The Department of Planning and Environment is continuing to develop regulations to support the implementation of the Electricity Infrastructure Roadmap in consultation with energy market bodies, industry and consumer group representatives. I expect further amendments to the Regulation to come before the Committee in due course.

I thank the Committee for bringing this matter to my attention

Yours sincerely

**Matt Kean MP**  
Treasurer  
Minister for Energy

*22.4.22*