Committee on
Legislation Review

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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

1.1 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 section 8A(1)(b) of the *Legislation Review Act 1987* (**LRA**).

Comment on Regulations

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

Summary of Conclusions

PART ONE – BILLS

1. HEALTH LEGISLATION (MISCELLANEOUS) AMENDMENT BILL 2022

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

Enforcement powers and COVID-19 penalty notice offences

The Bill amends section 135 of the *Public Health Act 2010* to extend the operation of provisions authorising police officers to exercise the powers under sections 112 and 118. These official powers include requiring a person suspected of contravening the Act or regulations to give their full name and address, and the power to issue penalty notices.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57, and when they were initially extended, in its Digest No. 27/57. Consistent with those comments, the extended expansion of 'officers' who can demand identification information to include police officers may impact on a person's right to privacy and privilege against self-incrimination.

In conjunction with the extended authorisation of police officers to issue penalty notices, the extended operation of these enforcement powers enables police officers to issue on-the-spot fines for suspected contraventions of the Act or the regulations. 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 acknowledges that the Bill seeks to extend provisions intended to facilitate the efficient enforcement of public health measures responding to the extraordinary circumstances created by the COVID-19 pandemic. It also recognises that individuals retain the right to have their matters heard and decided by a court and acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of on-the-spot fines, including deterring contravention of public health measures intended to protect the community from the risks of COVID-19 transmission. Given that the provisions are time-limited to repeal on 30 September 2022, the Committee makes no further comment.

Procedural fairness – mental health examination by AVL

The Bill amends section 203 of the *Mental Health Act 2007* to extend the operation of that provision to 30 June 2022. This would extend the ability of qualified medical practitioners or accredited persons to conduct mental health examinations of involuntarily admitted persons by AVL, where they are satisfied that it is necessary to do so because of the COVID-19 pandemic. Under the Act, the determination of these mental health examinations may subject the patient to ongoing detention in a mental health facility.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 15/57, and when they were initially extended, in its Digest No. 28/57. Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in examinations which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour.

However, it acknowledges that the provisions are an extraordinary measure to ensure that mental health examinations can be safely conducted, in light of the risks posed by COVID-19 to patients and staff within mental health facilities and the public. It further notes that the conduct of these examinations by AVL are subject to safeguards, including limiting such examinations only where necessary due to the COVID-19 pandemic and requiring the examiner ascertain the examination can be sufficiently conducted by AVL. Given these safeguards and that the provisions are time limited to 30 June 2022, the Committee makes no further comment.

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

Henry VIII clauses

The Bill amends section 4 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that amendments made to the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) do not apply as law in New South Wales until a regulation is made to apply that amendment, with or without modification. Proposed subsection (3) provides that a regulation providing for the modified application of a Queensland amendment may amend the Schedule to the Act for that purpose. The Committee notes that this provision allows the Executive to amend the Act by way of regulation without reference to the Parliament.

Proposed subsection (2) further provides that a regulation's provisions may commence from the date that the relevant Queensland amendment was passed, even if that date is prior to the date of publication on the NSW legislation website, contrary to section 39 of the *Interpretation Act 1987*. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Committee notes that this provision also amounts to a Henry VIII clause, allowing the Executive to legislate and amend the operation of an Act by way of regulation. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, these amendments are intended to strengthen parliamentary oversight of the NRAS, by no longer permitting amendments passed in another jurisdiction to automatically apply as law in New South Wales. In the circumstances, the Committee makes no further comment in respect to subsections (2) and (3).

Proposed subsections (5)-(6) provide that such a regulation is repealed on the day after all provisions have commenced, however the substantive operation of those provisions continue to apply despite their repeal. These provisions thereby extend the application of the regulations beyond their repeal.

The Committee notes that these provisions also amount to Henry VIII clauses, allowing regulations to alter the operation of provisions contained in the parent Act after its repeal. This may make it difficult for affected persons to ascertain what laws apply to them at any given time. Additionally, by legislating for the automatic repeal of these regulations which are to have continued application, these provisions may not be subject to a disallowance motion by a member of Parliament and thereby subvert a level of parliamentary scrutiny. For these reasons, the Committee refers these provisions to Parliament for its consideration.

2. MAJOR EVENTS AMENDMENT BILL 2022; MOTOR SPORTS BILL 2022

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

Right to compensation

The Major Events Amendment Bill 2022 inserts section 62A into the principal Act, which provides that individuals cannot seek compensation for economic loss that arises due to an act done in

good faith for a major event-related matter by the promotor, their employees or agents (together defined as a *protected person*).

The Committee usually comments on bills that impose restrictions on an individual's right to seek compensation through a court of competent jurisdiction. The Committee notes that the proposed Bill may impact the rights of an individual or business to have the matter reviewed by a court to consider whether compensation would be appropriate.

The Committee however notes that the Bill specifically excludes the provision of compensation for economic loss, and individuals are not barred from seeking compensation for death, personal injury or damage to property. Further, if a protected person does not act in good faith or takes action not sufficiently related to the major event that results in economic loss, individuals may also be able to seek compensation. Given these limits on the circumstances in which compensation is not payable, the Committee makes no further comment.

Freedom of movement

The Motor Sports Bill provides that individuals may be excluded from the race area during the event, and that failing to comply with certain directions may also lead to their exclusion from the area and a maximum penalty of 50 units ($5,500). Major motor race events covered by the Motor Sports Bill happen largely on public roads, which may border individual's homes, businesses and property. The Motor Sports Bill provides that individual's may be excluded for a time from accessing their land using the adjacent public infrastructure that they commonly rely on for access.

The Committee acknowledges that the provisions may assist in preventing anti-social and disruptive behaviour in a race area, which could be dangerous for race participants and spectators. However, by excluding individuals from certain areas, the provisions may impact on their freedom of movement to access public land or potentially private property. The Committee refers the matter to Parliament for its consideration.

Self-incrimination

The Motor Sports Bill states at section 62(1) that a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The Motor Sports Bill thereby impacts on the right to silence and the right against self-incrimination.

The Committee notes that the Motor Sports Bill includes some safeguards including that the compelled information is not admissible in evidence against the person in criminal proceedings unless the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory, or if they were warned and objected to providing the information. However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990,* Part 5A or certain offences under the Motor Sports Bill.

The Committee acknowledges the right to silence and right against self-incrimination are well-established legal principles. The Committee refers the matter to Parliament to consider whether the Motor Sports Bill unduly trespasses on these rights.

Risk of arbitrary search - property

The Motor Sports Bill allows authorised officers to enter a private premises or conduct a search without a warrant for the purposes of obliterating or removing any advertising material that does not comply with the Act, and for investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act. This thereby expands the search powers of authorised officers connected to a motor race event. As authorised officers are not required to

obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Motor Sports Bill allows authorised officers who enter the premises of a business to search the property and question persons present in order to monitor the administration of the Motor Sports Bill. This may potentially include persons who are not in breach of the Motor Sports Bill and not involved in criminal activities. The Motor Sports Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges that large public gatherings, which often occur at motor races, may give rise to security challenges that require sufficient search powers. However, the search powers contained in the Motor Sports Bill provide that the authorised officer may do what is reasonably necessary for the authorised purpose during a search which may allow a wide power of search specifically for motor race events. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Risk of arbitrary search - persons

The Motor Sports Bill allows authorised officers to search persons who wish to attend the area where a motor race is being held. This includes a physical search of their outer clothing, possessions and vehicle. This search can be undertaken without the authorised officer needing to suspect that the person is likely to be in breach of the Motor Sports Bill or pose any threat to themselves or others.

The Committee notes that while this power allows all patrons to be searched, the physical aspects of the allowable search is limited to their outer clothing and possessions, and recognises that the power to search must be balanced against the protection of public safety. In these circumstances, the Committee makes no further comment.

The Motor Sports Bill contains executive liability offences under section 66. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is required to prove actual knowledge of the offence on the part of the accused.

The Committee notes that this is a high threshold for the mental element in a regulatory context. The Committee also notes that the while the maximum penalty for an individual is a significant value of 250 penalty units ($27,500), it does not include a term of imprisonment. For these reasons, the Committee makes no further comment.

Freedom of contract and right to carry on a lawful business

The Motor Sports Bill provides under section 53 that restrictions can be placed on the display of advertising materials within the advertising controlled site during the event by way of a notification published in the Gazette. A failure to comply with these restrictions may lead to a significant fine with a maximum penalty of 250 penalty units ($27 500) for individuals, or 500 penalty units ($55 000) for corporations. Further, section 54 allows authorised advertising enforcement officers to enter commercial premises to obliterate or remove advertising material. There is no requirement for the officers to have a warrant to do so.

These sections may undermine the capacity for a businesses within the advertising controlled site to fulfil contractual obligations in regards to the display of advertising. These obligations may arise prior to the Minister providing authorisation for a motor race to take place in the area, and therefore operates in a manner that could be considered retrospective. The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Motor Sports Bill seeks to retrospectively remove rights or impose obligations.

The Committee notes that the period where advertising may have to be removed during a race is likely to be short, and that the intent of the Motor Sports Bill is to ensure that motor races can effectively seek sponsorship agreements which commonly require other advertising to be removed. Considering these policy reasons and the small period of time in which businesses are likely to be effected, the Committee makes no further comment.

Quiet use and enjoyment of land

The Motor Sports Bill proposes some measures to reduce the impact on businesses and residents that live and work adjacent to a motor race event area, including the requirement to undertake consultation with the affected parties (section 13). However, neither the Minister nor the government coordinating agency is bound by the Motor Sports Bill to minimise the impact on affected persons, though the Minister and government coordinating agency does have the power to imposed conditions on the promoter that could functionally serve to protect these interests.

Section 17(2) provides that works approval must only authorise carrying out works to the extent that they are reasonably necessary for the purpose of the motor race, associated events and ancillary activities. Section 20 further provides that the promoter must remove rubbish and undertake reinstatement works within a reasonable time after the event period, and if they fail to do so the government coordinating agency may do so instead and recover the costs from the promoter in a court of competent jurisdiction. The Committee notes that these sections seek to limit the scope of works and ensure remediation to limit the impact on the environment and affected persons.

The Committee also notes that motor race events typically run for a small number of days and therefore the disruption is inherently minimised. However, the Committee notes that infrastructure including lights, telecommunications infrastructure and large structures may create a significant disturbance. However, the Committee further notes that the Motor Sports Bill limits the avenues by which affected persons may have their concerns addressed. Section 49 specifically provides that the promoter cannot be held liable in nuisance for any works undertaken lawfully in accordance with the *Motor Sports Bill*. Taking action in nuisance allows for an individual to enforce their established common law right to the quiet use and enjoyment of their land. Removing this common law right without providing a statutory equivalent has an impact on property rights. The Committee refers these matters to Parliament for its consideration of whether the possible impacts on property rights are reasonable in the circumstances.

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

Wide power – declaration of major event area

The Major Events Amendment Bill 2022 inserts section 4B to the principal Act, which provides that the Minister may declare an area to be a major event area for a major event. The Minister may not make such an order unless they consider that the whole of the proposed major event area is necessary to enable the conduct of the major event, however this is not a significant limitation on the Minister's powers.

Areas that have been declared as major event areas can be subject to a range of measures under the Major Events Amendment Bill 2022, such as road closures (under section 28). Further, certain behaviour that would regularly be lawful, may attract a penalty if undertaken within a major event area. This means that individuals and businesses who reside or operate within a major event area may be subject to both the inconveniences of a major event, as well as additional rules within that area for the duration of the major event.

The Committee notes that this power of the Minister to declare a major events area is limited to where it is necessary to enable the conduct of the major event, and therefore may allow flexibility to declare major event areas in a way that responds to the unique needs of each event and those who reside in those areas, and therefore somewhat limited. In these circumstances, the Committee makes no further comment.

Wide power – conditions for event promoters

The Motor Sports Bill provides that the government coordinating agency, the Minister and the Premier have powers in regards to authorising major motor race events, providing orders in relation to major motor events and take action to ensure the administration of the Motor Sports Bill.

These powers, including the powers of a government coordinating agency to authorise a works order, have effect despite any environmental planning instrument or development consent (section 46). Additionally, section 7(1) grants the Minister with the power to impose conditions on the promoter of a major motor event. A promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250 000, or for a corporation, $1 000 000. Considering the broad scope of possible conditions and the significant impact they may have on the promoter and other affected parties (including persons whose property is adjacent to the proposed race area), the Motor Sports Bill may grant the government coordinating agency a wide and ill-defined administrative power.

The Committee acknowledges that the provisions are designed to allow the Minister and the government coordinating agency to work flexibly to adapt the major motor race event to its particular location. While not an exhaustive list, section 7(1) provides the Minister with guidance on what conditions may be imposed and section 16 requires the government coordinating agency to consult with local councils and affected persons prior to authorising work orders. Further, the provisions are time limited, only applying for a maximum of 12 months after motor races typically occur over a short period of days which limits the impact on the broader community. However, given the scope of such powers, the Committee refers the matter to Parliament for further consideration of whether they are proportionate in the circumstances.

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

Matters deferred to the regulations

The Motor Sports Bill enables regulations to be made under the proposed Act for the effective operation of the Motor Sports Bill, including regulations that can create offences and impose penalties. These regulations may be about a broad range of matters including the fees and charges that can be imposed, access to an event area or motor race, the provision of services for a motor race and the conduct of persons and their exclusion from an area or a motor race.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially when dealing with specific or technical information, that is not required to be in the primary legislation. However, the Committee notes that section 10(4) and 69(3) provide that regulations may contain offences with a maximum penalty of 110 units ($11 000). Section 10(4) provides that the regulations may create both a condition of a particular kind that a promoter must comply with, and an offence for failing to comply with that condition. Section 56 also provides that the regulations may require a promoter to pay a fee for the exercise of any function of the Minister or a government sector agency under Part 2 in relation to a motor race.

The Committee prefers that provisions containing offences and penalties be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may impose new and onerous conditions on a promoter after they have accepted the position, including the payment of unspecified fees. The Committee considers that these regulations may have an impact on the rights or obligations of promoters that could not be anticipated when committing to promote a major motor race event. However the Committee does note the defences available to promoters under section 10(6). The Committee refers this matter to Parliament for its consideration.

PART TWO – REGULATIONS

1. DESIGN AND BUILDING PRACTITIONERS AMENDMENT (MISCELLANEOUS) REGULATION (NO 2) 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 clause

The Regulation amends the *Design and Building Practitioners Act 2020* to extend the period over which certain savings and transitional provisions contained in Schedule 1 of the Act applies. This amendment is made by way of a Henry VIII clause set out in Schedule 1 of the parent Act.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, it notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. It further acknowledges that it may be more administratively efficient to amend defined transitional periods within the Act by regulation. Given that the amendments only concern legislative provisions of a savings or transitional nature, the Committee makes no further comment.

2. DISTRICT COURT CRIMINAL PRACTICE NOTE 23 - RESUMPTION OF JURY TRIALS AND IN PERSON APPEARANCES IN JUDGE ALONE TRIALS

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

Barrier to jury participation

The Practice Note requires that an individual must be vaccinated against COVID-19 and consent to undergoing rapid antigen screening (RAS) in order to participate as a juror in criminal trials heard in the District Court of New South Wales. While a potential juror has the right to decline providing their vaccination status, it appears that doing so prevents that person from becoming a member of a jury panel either in-person or by AVL as an alternative because the Practice Note does not make any exceptions to the vaccination requirement for all jurors.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the operation of these provisions may be discriminatory against non-vaccinated people, including individuals who are unable to be vaccinated for medical reasons or those who have received a vaccine other than those approved under NSW Public Health Orders. By limiting the eligibility of individuals to participate as jurors based on their vaccination status, these provisions may also impact the rights of accused persons to have their criminal charges determined fairly and independently by a jury of their peers.

The Committee acknowledges these provisions are intended to manage the risks of COVID-19 to and protect the health and safety of court participants. However, it notes that jury duty is a central feature of the criminal justice system and allows members of the community to participate in the administration of justice. For these reasons, the Committee refers this issue to the Parliament for its consideration.

Open justice

The Practice Note prohibits the attendance of members of the media or the public from attending trials in person. If person who is not a court participant wishes to view a trial, they may make an email request to the trial Judge's Associate to access the virtual courtroom.

The Committee reported on the prohibition of in-person attendance of members of the public in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the prohibitions may create a barrier to the principles of open justice. That is, that the administration of justice takes place in open court subjected to public and professional scrutiny.

However, the Committee acknowledges that these measures are implemented in response to the risks arising from the COVID-19 pandemic and intended to protect the health and safety of court participants. It further notes that members of the public and the media can request to attend by alternative virtual means, which provides a degree of scrutiny by the community on criminal trials in the District Court. In the circumstances, the Committee makes no further comment.

Procedural fairness

The Practice Note provides that any court participant who declines to provide their vaccination status or does not consent to rapid antigen screening (RAS) will not be allowed to attend in-person. Where that person is participating as a witness or defence expert, it provides for that evidence to be given by audio visual link (AVL). Where that person is a solicitor, counsel or the accused, the Court may vacate and relist the trial or make a direction to enable the accused person to appear by AVL.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the appearance of the accused person or giving of evidence from witnesses by AVL may limit the ability of the Court to closely monitor the conduct of witnesses while they are giving evidence, including ensuring the witness is not referring to materials, recording their evidence or otherwise being assisted by another person in the room. It may also affect the consistency in the quality of evidence given by any particular witness appearing by AVL. This may impact the accused person's rights to a fair trial, particularly their right to procedural fairness.

However, the Committee notes that the use of AVL in criminal trials has practical benefits and may enhance the ability of witnesses to participate in criminal trials. It also acknowledges that these measures are in response to the risks arising from COVID-19 and intended to protect the health and safety of court participants and staff. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date or a fixed date for review. It provides that it will continue to be reviewed as may be necessary.

The Committee reported on similar provisions in the previous iteration of the Practice Note, in its Digest No. 37/57. Consistent with the Committee's previous comments, the Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact of the Practice Note on an accused person's right to procedural fairness, jury participation and open justice, the Practice Note may also benefit from the inclusion of an end date. The Committee also notes that repeal or expiry dates have been included in legislation responding to COVID-19. For these reasons, the Committee refers this issue to the Parliament for its consideration.

3. DISTRICT COURT CRIMINAL PRACTICE NOTE 26 - WALAMA LIST SENTENCING PROCEDURE

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

Equal treatment of all persons before courts and tribunals

The Practice Note establishes the Walama List, which provides for an alternative sentencing pathway to eligible Aboriginal or Torres Strait Islander persons who have been committed for sentencing in the District Court. By providing for distinctive sentencing procedures and practices, the provisions differentiate the treatment of Aboriginal and/or Torres Strait Islander offenders and non-Aboriginal and/or Torres Strait Islander offenders within the criminal justice system in New South Wales.

However, the Committee notes that the Walama List is intended reduce the overrepresentation of Aboriginal and Torres Strait Islander persons in custody in NSW. It further notes that the Practice Note aims to enhance Aboriginal and Torres Strait Islander community participation within the criminal justice system, and to provide more culturally appropriate programs and supports to address risk factors and underlying issues relevant to Aboriginal or Torres Strait Islander persons that may contribute to non-compliance and breaches of court orders in the circumstances, the Committee considers this may fit within the exceptions for special measures to meet the particular needs of a specific group under state and federal laws, and does not constitute discrimination on the basis of race.

4. ELECTORAL AMENDMENT (COVID-19) 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 clause

The Regulation inserts a Henry VIII clause into the *Electoral Regulations 2018*, allowing subordinate legislation to amend the principal Act. Specifically, by extending the timeframes for preliminary scrutiny of postal ballot papers for by-elections held from 17 December 2021 to 17 June 2022. This clause intends to respond to the COVID-19 pandemic.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, to foster an appropriate level of parliamentary oversight. However, in this case the delegation of Parliament's legislative powers is envisaged in the principal Act. The general regulation-making power in the *Electoral Act 2017* allows the regulations to extend applicable time limits if the time allowed to do an act is insufficient and the extension of time is necessary. Additionally, the Committee notes that the clause applies for a limited duration of six months, intends to respond to the extraordinary circumstances of the pandemic, which may increase the volume of postal votes and necessitate a longer scrutiny period, and that the statutory timeframes do not appear to be excessively extended. In the circumstances, the Committee makes no further comment.

5. ELECTORAL AMENDMENT (COVID-19) REGULATION 2022

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 and significant matters not subject to Parliamentary scrutiny

The Regulation inserts Schedule 2 into the *Electoral Regulation 2018* which enables the Electoral Commissioner to declare electors of a certain electoral district as COVID-19 affected electors for a by-election conducted before 30 June 2022, where the Commissioner believes it necessary to comply with a public health order or to reduce the risk of COVID-19. That declaration entitles all COVID-19 affected electors to vote by post in the by-election.

This amendment is made by way of a Henry VIII clause set out in section 274 of the parent Act. The Committee reported on the amendments to the *Electoral Act 2017*, which introduced section 274, in its Digest No. 38/57. Consistent with the Committee's previous comments, this amendment allows the Executive to legislate and amend the operation of an Act by way of regulation without reference to the Parliament.

The Committee generally prefers amendments to the operation of an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the declaration-making power of the Commissioner may facilitate the safe and flexible conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It further notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment in respect to the exercise of the regulation-making power under section 274 of the Act.

Clauses 2(1) and (2) requires that such a declaration made by the Commissioner must be published on the Electoral Commission's website and may be published in any other ways the Commissioner considers necessary to bring it to the attention of relevantly declared COVID-19 affected electors. As the declarations dealt with by the website have bearing on the entitlements of electors legally required to cast votes in parliamentary by-elections, the Committee would prefer that they were dealt with by subordinate legislation. This would foster an appropriate level of parliamentary oversight as, under the *Interpretation Act 1987*, statutory rules must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.

The Committee acknowledges that the provisions enable the flexible exercise of the Commissioner's declaration-making powers and provides for publications in discretionary manners intended to bring the declaration to relevantly affected persons. However, it notes that these declarations impact the entitlements of certain electors in the exercise of their democratic voting rights, and further notes that failure to effectively exercise that right may subject individuals to monetary penalties per section 245 of the *Commonwealth Electoral Act 1918* (Cth). For these reasons, the Committee refers this matter to Parliament for its consideration.

6. ELECTRICITY SUPPLY AMENDMENT (RENEWABLE FUEL SCHEME) REGULATION 2021

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

Right to a fair trial and double punishment – penalty notice offences

The scheme included in the Regulation allows a compliance officer to issue a penalty notice if it appears to the officer that a person has committed a penalty notice offence. There is no requirement that the compliance officer's view be "reasonable", noting that such threshold would limit the circumstances in which a penalty notice can be issued under the clause.

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 an individual retains the right to elect to have their matter heard and decided by a court. It 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.

The relevant penalty notice provision also provides that the clause does not limit the operation of another provision of, or made under, this or another Act relating to proceedings that may be taken for offences. It appears that this could result in a person receiving a penalty notice in addition to being subject to proceedings for an offence. The Committee refers this matter to the Parliament for its consideration.

Real property rights – power of compliance officers to enter premises

The scheme included in the Regulation permits a compliance officer to enter premises of an accredited service provider for the purpose of investigating the provider's compliance with the scheme. While at the premises, the compliance officer may do anything that, in the opinion of the officer, is necessary for the purposes of the investigation.

There is no requirement that the compliance officer's opinion be "reasonable", noting that this threshold would limit the actions an officer may take at the premises under the clause. A penalty also applies where an individual hinders or obstructs the compliance officer in the exercise of their power, effectively limiting the actions an individual may take under pain of penalty.

The Committee considers that this power of a compliance officer to enter and do a broad range of things on land, along with the penalty, may interfere with the real property rights of accredited service providers. However, it also understands the importance of adequate investigation powers in regulatory settings to ensure compliance. The Committee refers this matter to the Parliament for its consideration.

Extraterritorial operation of scheme

The scheme included in the Regulation provides that the scheme rules may provide for the creation of certificates in relation to an activity that produces renewable fuel in another jurisdiction, if an approved corresponding scheme is in operation in that jurisdiction. An "approved corresponding scheme" is a scheme approved by the Minister by order published in the Gazette.

This extends the legislative jurisdiction of activities forming part of scheme beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory. It also appears that the creation of certificates for an activity in another jurisdiction may allow compliance officers to enter a premises used in connection with an activity for which the certificate has been created in that other jurisdiction, for the purpose of an investigating an accredited certificate provider's compliance with the scheme. The Committee refers this issue to the Parliament for its consideration.

Right to privacy

The scheme included in the Regulation permits information sharing in certain circumstances. While the Committee acknowledges that information sharing is required to administer and ensure compliance with the scheme, it considers that certain provisions may impede relevant persons' right to privacy.

Clause 213 authorises the Scheme Administrator and a relevant agency are to request, share and disclose information to the other party "despite any other Act or law". Information which may be shared concerns offences, alleged offences and investigations, the administration of the scheme and other matters prescribed by the regulations. This may limit protections upholding persons' right to privacy or otherwise cut across provisions regarding information sharing included in any other Act or law.

Clause 227 permits the Scheme Administrator to keep information about offences or alleged offences, and collected in the administration of the Act, with a person or body undertaking functions similar to its own in another State or Territory or for the Commonwealth, and a government sector agency. The clause does not limit the time for which the Scheme Administrator may keep this information.

Finally, clauses 189 and 191 require the Minister to provide information on request to the Scheme Regulator and Scheme Administrator regarding compliance by scheme participants and accredited certificate providers with the scheme, respectively. There is no requirement that the request be "reasonable".

The scope of the information which may be requested, shared, kept or disclosed, as the case may be, appears to be quite broad, and includes information relation to offences and alleged offences. Taking this factor and the considerations outlined above into account, the Committee refers this issue to Parliament for its consideration.

Vicarious liability

The scheme provides that a director or person concerned with the management of a corporation may be ordered to pay a monetary penalty if the person knowingly authorised or permitted the corporation to contravene a civil penalty provision; such provision prescribed by the regulations. The amount payable is no more than the penalty notice amount for the provision.

The Committee generally comments on vicarious liability offences as they depart from the common law principle that the *mens rea*, or the mental element of an offence, is a relevant factor in establishing liability for an offence. The Committee notes that vicarious liability offences are not uncommon in regulatory settings to encourage compliance. 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

Strict liability offences with significant penalties

The scheme included in the Regulation includes various strict liability offences. Some of these offences, including for improper creation of a certificate, incur significant penalties of 2 000 penalty units ($220 000). Some other offences, including failure to notify the Scheme Regulator of certain information necessary to administer the scheme or contravention of a scheme rule, incur a penalty of 100 penalty units ($11 000) for an individual and 250 penalty units ($27 500) for a corporation. This may adversely impact on the business community.

The Committee generally comments on strict liability offences as they depart from the common law principle that the *mens rea,* or the mental element of an offence, is relevant to the imposition of liability. It also generally prefers that provisions which create offences be included in the primary rather than subordinate legislation to facilitate an appropriate level of

parliamentary oversight. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In the 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 clause

The Regulation amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act, to include the scheme in Schedule 4A of the Act. This is an inappropriate delegation of legislative power. The Committee considers that primary legislation should not be changed by subordinate legislation because it reduces parliamentary scrutiny of those changes.

Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs. The Committee refers this matter to Parliament for further consideration.

Matters to be included in primary legislation

The scheme refers various matters to the Minister and to the regulations. For example, the scheme refers the approval of the scheme rules to the Minister, and penalties and investigations by compliance officers may arise for non-compliance. It also permits the Scheme Regulator and Scheme Administrator to delegate the exercise of their functions, with the Minister's approval. The scheme refers other decisions of the Scheme Regulator and Scheme Administrator, as well as other types of information that may be shared under an information sharing arrangement, to the regulations.

The Committee acknowledges that the referral of matters to regulations and Minister builds flexibility into the regulatory framework. However, it considers that certain matters referred are significant to the administration of the scheme, offences under it and the proper delegation of legislative power. Additionally, referring matters to the regulations which may impact on the right to privacy and administrative review matters generates uncertainty around the extent to which individuals' rights may be impacted by the scheme.

The Committee generally prefers such matters be included in the primary rather than the subordinate legislation in order to facilitate an appropriate level of parliamentary oversight. The Committee refers this issue to the Parliament for its consideration.

7. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (HOUSING) 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

Incorporation of policies and guidelines not subject to disallowance

The Regulation incorporates certain policies and guidelines regarding conditions for affordable housing developments.

Specifically, it incorporates requirements set out in and related to the *State Environmental Planning Policy (Housing) 2021* (the SEPP) and the *NSW Affordable Housing Ministerial Guidelines* (the Guidelines). Under the Regulation, a registered community housing provider who manages an affordable housing component, boarding house or affordable housing dwellings during the prescribed period must apply the Guidelines.

There is no requirement that the SEPP or the Guidelines (or its updates) be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. They are therefore not subject to parliamentary scrutiny.

However, the Committee acknowledges that the regulation-making power under the *Environmental Planning and Assessment Act 1979* contemplates the means for determining matters relating to affordable housing, including costs payable for affordable housing, being included in the regulations. The SEPP and Guidelines appear to be incorporated for this purpose and its inclusion in the Regulation may therefore maintain the intent of the primary legislation. In the circumstances, the Committee makes no further comment.

The regulation duplicates, overlaps or conflicts with any other regulation or Act: s 9(1)(b)(vi) of the LRA

Consistency of terms – meaning of 'relevant period'

The Regulation incorporates provisions set out in the *State Environmental Planning Policy (Housing) 2021* (SEPP), and includes related provisions which do not align with the SEPP.

The SEPP includes requirements for affordable housing components, affordable housing dwellings and boarding houses in sections. The Regulation functionally incorporates certain requirements regarding these developments within clauses 98G, 98I and 98H respectively, inserted by the Regulation into the *Environmental Planning and Assessment Regulation 2000*. This facilities parliamentary scrutiny of the incorporated SEPP requirements, which would otherwise not be subject to this scrutiny.

The 'relevant period' for the requirements under clauses 98I and 98G (including those SEPP requirements incorporated into the *Environmental Planning and Assessment Regulation 2000* by the Regulation) do not appear to align with the applicable periods set out in the SEPP. That is, because clause 98I provides that the 'relevant period' runs for 10 years, while section 40 of the SEPP indicates it runs for a period of 15 years.

Noting that the SEPP is not a statutory rule and it appears the *Environmental Planning and Assessment Regulation 2000* (as amended) prevails over the SEPP, the Committee refers the non-alignment of SEPP and Regulation provisions to the Parliament for its consideration.

8. PESTICIDES AMENDMENT REGULATION 2021

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

Review of shorter licence term

The Regulation includes a new provision into the *Pesticides Regulation 2017* allowing the EPA to grant or renew a licence for a shorter term than the nominated term if satisfied that it is in the public interest to do so. This may impact, or otherwise create uncertainty regarding, the obligations of those individuals subject to a shorter licence term.

Additionally, the Regulation does not create a specific avenue of review regarding the EPA's decision to grant a shorter licence term. The Committee notes that a specific review process is provided in relation to the cancellation or suspension of a licence under section 52 of the *Pesticides Act 1999*, which requires the EPA to provide prior notice to the licence holder, consider representations made by the licence holder and provide reasons for suspension or cancellation.

However, the Committee acknowledges that a traditional avenue of review through the NSW Civil and Administrative Tribunal appears to be available to applicants, and that the shorter term may only be applied for a public interest purpose. In the circumstances, the Committee makes no further comment.

Property rights – limitation of notice requirements

The Regulation limits the circumstances in which notice must be given prior to and during certain pest management technician work in the common area of a residential complex or a sensitive place. Specifically it provides that notice is not required if the work is pest management technician work or timber pest management technician work, and the work is to be carried out by a licenced contractor for the purpose of installing, replacing, repairing, altering or maintaining a waterproofing barrier than contains pesticides. A sensitive place is defined as a school, pre-school, kindergarten or childcare centre, hospital, community health centre or nursing home, and any place declared to be a sensitive place by the EPA by order published in the Gazette.

This limits the right of residents of residential complexes to receive notice before and while certain pesticides are used in the common areas of their complexes. It also limits the circumstances in which sensitive places including schools, childcare centres and nursing homes are notified before certain pesticides are used near those places.

The Committee acknowledges that the circumstances where notice is not required to be given appear to be specific. The work must be pest management technician work, must be carried out by certain persons and must be for specified purposes related to waterproofing products containing pesticides. However given the proximity to residential areas and sensitive places that would ordinarily require notice, the Committee refers this issue to the Parliament for consideration of whether appropriate safeguards are in place to limit any potential damage to property or vulnerable individuals.

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

Meaning of 'reasonable time'

The Regulation inserts clauses 56A and 56B into the *Pesticides Regulation 2017*, which provide exemptions under section 117 of the *Pesticides Act 1999* to the operation of Act's requirements not to possess unauthorised pesticides and use unauthorised pesticides, respectively. The exemptions cease to apply if the unregistered pesticide is not lawfully disposed of within a reasonable time after its registration ended or was suspended or cancelled. The maximum penalty for breach of each of these requirements is $60 000 for an individual and $120 000 for a corporation, with executive liability applying for a director or other person involved in the management of the corporation.

The period of a "reasonable time" is not defined in the legislation. This may create ambiguity as to an individual's obligations, how long they have to dispose of the unregistered pesticide, and whether they may be subject to any penalties. The Committee acknowledges that this timeframe may provide flexibility to allow for safe and lawful disposal of the pesticide. However, given the significant penalties for non-compliance, it refers to the Parliament the question of whether the term "reasonable time" should be defined or replaced with a definitive time period.

9. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES—AIR TRANSPORTATION QUARANTINE) 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 *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound

arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

The Committee has previously commented on other regulations related to managing the COVID-19 pandemic that allow for the issue of penalty notices. Consistent with its previous comments, the Committee notes that penalty notices allow an individual or corporation to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person or corporation'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 in regards to the penalty for an individual, that $5 000 is a significant monetary amount to be imposed by way of penalty notice.

However, the Committee notes that individuals retain the right to elect to have their matter heard and decided by a Court. There are also 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 *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

Consistent with previous comments in regards to penalty notice offences being included in regulations, 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.

Given the severe circumstances surrounding the COVID-19 pandemic, 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 circumstances, the Committee makes no further comment.

10. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 7) 2021

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

Penalty notice offence – right to a fair trial

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. Specifically, the Regulation replaces reference of the predecessor public health order in the *Public Health*

Regulation 2012 with a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

Directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* include, but are not limited to, the requirement to self-isolate after being diagnosed with COVID-19, for close contacts of a person diagnosed with COVID-19 to self-isolate where directed and provide information to specified persons including workplaces, employers and police.

Penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may therefore impact on a person's right to a fair trial, specifically any automatic right to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee acknowledges that the Regulation does not remove an individual's right 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.

In the circumstances and considering the extraordinary context of COVID-19, including the need to maintain public health by restricting the movement of persons diagnosed with COVID-19 or in contact with those persons, the Committee makes no further comment.

Penalty notice offence – freedom of movement

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*, which includes directions for persons diagnosed with COVID-19 or close contacts to self-isolate.

The requirement to self-isolate or otherwise be issued with a penalty notice may effectively limit the freedom of movement of persons diagnosed with COVID-19 and close contacts for the duration they are required to isolate. Article 12 of the International Covenant on Civil and Political Rights provides that freedom of movement may be restricted where, provided by law, it is necessary to protect public health and consistent with other rights recognised by the Covenant.

The Committee notes that the right is only limited for persons diagnosed with COVID-19 and close contacts only until the person is medically cleared or otherwise for a specified duration (of 7 days if fully vaccinated or 14 days if not), respectively. The Order also specifies circumstances in which they can leave or allow people to enter their residence or place where they are isolating, including for medical or emergency purposes. In the circumstances and considering the extraordinary context of COVID-19, the Committee makes no further comment.

11. PUBLIC HEALTH AMENDMENT (RAPID ANTIGEN TESTS) REGULATION 2022

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

Penalty notice offence – right to a fair trial

The Regulation provides that penalty notices of up to $1 000 can be issued for an offence of failing to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test (failure to give notification offence). The Regulation creates an exception to schedule 4(d) of the Public Health Regulation 2012 to

distinguish between penalties under the Public Health (COVID-19 Self-Isolation) Order (No 4) 2021 and that of failing to give notification offences.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $1 000 for an individual are significant monetary amounts to be imposed by way of penalty notice, particularly in the extraordinary circumstances of the COVID-19 pandemic.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19 court backlogs, the Committee makes no further comment.

12. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT (IMPACTED LESSEES) REGULATION 2021

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

Property rights and freedom of contract

The *Retail and other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021* imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The Regulation requires lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation extends the rights of lessees that were previously deemed impacted lessees to make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. As the Committee noted in digest 27/57, the requirement for lessors to engage in renegotiation of rent in this Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation, like the previous version, only applies to cases involving lessees that were previously deemed to be 'impacted lessees' (i.e. lessees that qualified for certain grants or payments and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking other prescribed actions. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

13. STRATA SCHEMES MANAGEMENT AMENDMENT (INFORMATION) REGULATION 2021

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

Penalty notice offences – right to fair trial

The *Strata Schemes Management Amendment (Information) Regulation 2021* expands the list of offences for which a penalty notice may be issued. Penalty notices allow a person or owners corporation to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee however recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person or owners corporation from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed. However, considering the size of the penalties that may be issued by penalty notice (a maximum of $220), 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

The *Strata Schemes Management Amendment (Information) Regulation 2021* creates several offences. For example, subclause 43(1) provides that an owners corporation must provide prescribed information about the strata scheme it manages to the Secretary on an annual, ongoing basis. The maximum penalty that applies in respect of any of these offences is a $5 500 fine.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context, it may be more administratively efficient to proceed by regulation (e.g. if changes are required to keep pace with developments in the industry) and the penalties are relatively modest. On this basis the Committee makes no further comment.

14. SURVEILLANCE DEVICES AMENDMENT (BODY-WORN RECORDING DEVICES) REGULATION 2021

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

Right to privacy

The Regulation extends the trial period during which ambulance officers will be exempt from certain requirements under the *Surveillance Devices Act 2007*, for a further 2 years. The Committee previously comments on the first version of this regulation in its Digest 20/57 (16 February 2021).

This exemption, and its extension by the Regulation, has the potential to impact individuals' right to privacy, as it permits ambulance officers to record people using video or audio equipment without their consent in certain circumstances; for example, if the ambulance officer believes there is a significant risk of harm to themselves or another person. The Committee notes that different ambulance officers may have different interpretations of what constitutes a significant risk. Both the original and amending regulations appear to be silent on what constitutes a significant risk in the circumstances. Relevantly, ambulance officers are likely to interact with vulnerable members of the public – for example, those who are sick or injured. Further, it is unclear from the regulation how recordings captured by body worn surveillance devices will be stored, or for how long, or how they can be used.

However, the Committee acknowledges that the exemption is associated with a trial in three locations and as such only some ambulance officers in NSW will have access to the surveillance devices. There are also safeguards accompanying the exemption, including that the exemption does not apply unless the ambulance officer informs a person that they might be recorded or the recording is accidental. It is further anticipated that officers with access to these devices will have training and regulatory guidance on circumstances which may constitute a significant risk. In addition, the Committee recognises the public interest in deterring violence and anti-social

behaviour towards ambulance officers. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Health Legislation (Miscellaneous) Amendment Bill 2022

Date introduced	23 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

1.1 The objects of this Bill are as follows—

(a) to amend the *Health Practitioner Regulation (Adoption of National Law) Act 2009*, which adopts, with modifications, the Health Practitioner Regulation National Law as set out in the Schedule (the *Queensland Schedule*) to the *Health Practitioner Regulation National Law Act 2009* of Queensland as a law of New South Wales, to ensure better parliamentary oversight by providing that future amendments to the Queensland Schedule do not take effect as law in New South Wales unless a regulation is made in New South Wales adopting, with or without modification, the amendments,

(b) to amend the *Health Services Act 1997* to update the definitions of Council of Australian Governments *(**COAG**)* and ***Standing Council on Health*** to reflect the current composition of those entities,

(c) to amend the *Mental Health Act 2007* to—

(i) extend, until 30 June 2022, a COVID-19 related provision that enables certain examinations and observations to be conducted using an audio visual link, and

(ii) update the written statements of rights given to persons detained in, and voluntary patients of, mental health facilities to list LawAccess NSW as a service through which a person may seek help or advice instead of Legal Aid's Mental Health Advocacy Service,

(d) to amend the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* to update the certificate that a medical practitioner is required to complete when issuing an order to transfer a person imprisoned in, or a forensic patient detained in, a correctional centre or detention centre to a mental health facility, to include the place where the examination took place, and the name of the correctional centre or detention centre where the

person is detained if that place is not the same as where the examination took place,

(e) to amend the *Private Health Facilities Act 2007* to extend the following COVID-19 related provisions until 30 June 2022—

(i) section 12A, which allows the Secretary of the Ministry of Health to impose conditions on a private health facility licence to protect the health and safety of the public, manage resources or ensure the provision of balanced and coordinated health services throughout the State,

(ii) section 70, which allows the Secretary of the Ministry of Health to exempt a licensee or a class of licensees from a condition of a licence or a requirement relating to the medical advisory committee for a facility operated by the licensee,

(f) to amend the *Public Health Act 2010* to—

(i) clarify that an authorised medical practitioner may only require a person who is the subject of a public health order to undergo a medical examination or test that relates to the condition for which the order was made, and

(ii) require that an authorised medical practitioner making a public health order give a person subject to the order information about the duration of the order, the person's rights of review and any other information prescribed by the regulations. It also provides that failure to give the information does not invalidate the order, and

(iii) clarify that a person takes reasonable precautions against spreading a sexually transmissible notifiable disease or scheduled medical condition if the person acts in accordance with any information, if provided, relating to the means of minimising the risk of infecting other people prescribed in the regulations that must be given by a medical practitioner to the person in relation to the disease or condition, and

(iv) extend the following COVID-19 emergency measures provisions until 30 September 2022—

(A) section 112(2), which enables a police officer to direct a person suspected of contravening a provision of the *Public Health Act 2010* or the regulations made under it to provide the person's name and residential address,

(B) section 118(6) and (7), which enable police officers to issue penalty notices under the *Public Health Act 2010* in addition to other authorised officers, and enable the Minister to impose conditions of the exercise of those powers by authorised officers, including police officers, under that Act,

(v) to amend the *Subordinate Legislation Act 1989* to postpone the repeal of the *Poisons and Therapeutic Goods Regulation 2008* to 1 September 2024.

Background

1.2 The Hon. Brad Hazzard MP, Minister for Health, stated in his second reading speech to the Bill that it "makes a range of amendments across the Health portfolio to ensure that legislation remains current and fit for purpose". These amendments seek to update New South Wales' approach to the National Registration and Accreditation Scheme ('**NRAS**'), manage existing COVID-19 legislative provisions and update other miscellaneous provisions in health legislation.

1.3 Relevantly, the Bill amends the following Acts:

(a) *Health Practitioner Regulation (Adoption of National Law) Act 2009*;

(b) *Health Services Act 1997*;

(c) *Mental Health Act 2007*;

(d) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*;

(e) *Private Health Facilities Act 2007*;

(f) *Public Health Act 2010*; and

(g) *Subordinate Legislation Act 1989*.

1.4 In respect to the *Health Practitioner Regulation (Adoption of National Law) Act 2009* (the '**Adoption of National Law Act**'), the Act sets out the legislative framework for the operation of the NRAS in New South Wales. The Act also provides for the adoption of the Health Practitioner Regulation National Law, set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) (the '**Queensland Law**'), in New South Wales.

1.5 The Minister further highlighted the importance of the NRAS as the national scheme for the registration and accreditation of health practitioners working across jurisdictions. The Bill amends the Adoption of National Law Act to explicitly require amendments to the Queensland Law be adopted by regulations, with or without modification, in order to take effect in New South Wales.

1.6 Additionally, the Bill seeks to extend the operation of time-limited provisions in the *Private Health Facilities Act 2007*, the *Public Health Act 2010* and the *Mental Health Act 2007* which were introduced in response to the COVID-19 pandemic. The Minister emphasised in his speech that, while New South Wales has achieved high rates of vaccinations against COVID-19 and appears to have passed the worst of the recent wave from the Omicron variant:

> … there is still a risk of further waves of COVID-19 infection in New South Wales as a result of a combination of the possibility of a new variant of concern, waning immunity, increased social participation and seasonal impacts. This means that some

of the COVID-19 provisions will need to remain on the statute book beyond March 2022.

1.7 Finally, the Bill amends various other legislation within the Health portfolio to make miscellaneous updates to legislative references to interstate health regulatory bodies and legal referral services, mental health medical examination certifies for inmates and extending the operation of the *Poisons and Therapeutic Goods Regulation 2008*. The Bill also proposes a number of miscellaneous amendments to the *Public Health Act 2010* that were previously included in the *Statute Law (Miscellaneous Provisions) Bill 2021*, which was reported on by this Committee in Digest No. 30/57 (11 May 2021).[1]

1.8 The Committee notes that that the Bill seeks to extend provisions introduced by the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* which received assent on 25 March 2020 and was reported on by this Committee in its Digest No. 12/57 (22 April 2020).[2] This report draws upon the analysis of those provisions in the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020* bill report.

Issues considered by the Committee

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

Enforcement powers and COVID-19 penalty notice offences

1.9 The Bill amends section 135 of the *Public Health Act 2010*, which provides for the repeal of legislative measures introduced in the Act in response to the COVID-19 pandemic. These amendments clarify the repeal date for the following COVID-19 emergency measures provisions, being:

(a) sections 63(2A) and (2B), 64(7) and 71A, which remain to be repealed on a date no later than 26 March 2022, as prescribed by the regulations; and

(b) sections 112(2) and 118(6) and (7), which are to be repealed on 30 September 2022.

1.10 Section 112 empowers an officer authorised under the Act to direct a person to provide their full name and residential address where they are suspected of contravening or having involvement with the contravention of the Act or the regulations. Relevantly, under section 113, failure to comply with a direction without reasonable excuse is an offence carrying a maximum penalty of a $5 500 fine, as is providing false or misleading information which carries a maximum penalty of 6 months imprisonment and/or a $11 000 fine.

1.11 Section 118 also enables an authorised officer to issue a penalty notice to a person who appears to have committed a penalty notice offence under the Act or the regulations. The offences under the Act or the regulations set out in Schedule 4 of the *Public Health Regulation 2012* are prescribed as penalty notice offences.

[1] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 30/57*, 11 May 2021.

[2] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020.

1.12 In his second reading speech to the Bill, the Minister noted that the Government "has been progressively scaling back its suite of public health orders and will be continuing to do so as circumstances permit". However, in speaking to the rationale for extending the authorisation of police officers to exercise these powers, he stated that:

> There are existing public health orders, and there may be a continuing need for such orders, assuming that the criteria is met under the Act. … While there are public health orders in place, it makes sense to ensure that police officers can assist with the compliance and enforcement of them.

The Bill amends section 135 of the *Public Health Act 2010* to extend the operation of provisions authorising police officers to exercise the powers under sections 112 and 118. These official powers include requiring a person suspected of contravening the Act or regulations to give their full name and address, and the power to issue penalty notices.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57,[3] and when they were initially extended, in its Digest No. 27/57.[4] Consistent with those comments, the extended expansion of 'officers' who can demand identification information to include police officers may impact on a person's right to privacy and privilege against self-incrimination.

In conjunction with the extended authorisation of police officers to issue penalty notices, the extended operation of these enforcement powers enables police officers to issue on-the-spot fines for suspected contraventions of the Act or the regulations. 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 acknowledges that the Bill seeks to extend provisions intended to facilitate the efficient enforcement of public health measures responding to the extraordinary circumstances created by the COVID-19 pandemic. It also recognises that individuals retain the right to have their matters heard and decided by a court and acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of on-the-spot fines, including deterring contravention of public health measures intended to protect the community from the risks of COVID-19 transmission. Given that the provisions are time-limited to repeal on 30 September 2022, the Committee makes no further comment.

Procedural fairness – mental health examination by AVL

1.13 The Bill amends the *Mental Health Act 2007*, which legislates for the care and treatment of mental health illnesses and disorders in New South Wales. Chapter 3 of the statute sets out the legislative framework for the involuntary admission and treatment of individuals inside and outside of mental health facilities in New South Wales. A person involuntarily admitted in a mental health facility under this regime

[3] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 12/57*, 22 April 2020.
[4] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 27/57*, 16 March 2021.

may be subject to ongoing detention if medical examinations, conducted in accordance with section 27, determine that person to be a "mentally ill" or "mentally disordered person".

1.14 Section 203 of the Act enables that mental health examination to occur by audio visual link ('**AVL**') during the prescribed period, where the relevant qualified examiner is satisfied that conduct of the examination by AVL both:

(a) is necessary because of the COVID-19 pandemic; and

(b) can be carried out with sufficient skill or care using AVL so as to form the required opinion about the patient.

1.15 Relevantly, the Bill amends section 203(5) which defines the prescribed period for the purposes of conducting AVL mental health examinations in accordance with that section. Specifically, it extends the prescribed period so that it ends three months later, on 30 June 2022.

1.16 In speaking to the extension of this repeal date of section 203, the Minister noted that enabling the conduct of mental health examinations by AVL:

> … can assist in reducing the risk of transmitting COVID-19 to others by reducing the requirement to conduct face-to-face examinations where appropriate. It also supports mental health examinations to be carried out while a person is in isolation or quarantine.

1.17 The Minister also addressed, in his second reading speech, that the *COVID-19 and Other Legislation Amendment (Regulatory Reforms) Bill 2022* (the '**Regulatory Reforms Bill**'), a separate bill recently introduced by the Treasurer, seeks to repeal section 203. Clarifying the conflict which may be perceived between both bills, the Minister highlighted that the relevant amendments to the *Mental Health Act 2007* proposed by the Regulatory Reforms Bill "are not tied to audiovisual links being necessary because of the COVID-19 pandemic" and rather intended to enable more flexible use of AVL mental health examinations. He further stated that the amendments proposed by the Regulatory Reforms Bill:

> … will only commence on proclamation, once accompanying guidelines are developed. … Therefore, to ensure there is no gap in the availability of audiovisual link assessments, the Health Legislation (Miscellaneous) Amendment Bill 2022 proposes to extend the repeal date of section 203 of the Act to 30 June 2022.

1.18 The Committee notes that the Regulatory Reforms Bill was reported on by this Committee in Digest No. 39/57 (22 February 2022).[5]

The Bill amends section 203 of the *Mental Health Act 2007* to extend the operation of that provision to 30 June 2022. This would extend the ability of qualified medical practitioners or accredited persons to conduct mental health examinations of involuntarily admitted persons by AVL, where they are satisfied that it is necessary to do so because of the COVID-19 pandemic. Under the Act,

[5] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 39/57*, 22 February 2022.

the determination of these mental health examinations may subject the patient to ongoing detention in a mental health facility.

The Committee previously reported on these provisions when they were first introduced, in its Digest No. 15/57,[6] and when they were initially extended, in its Digest No. 28/57.[7] Consistent with the Committee's previous comments, the conduct of mental health examinations by AVL may impact the extent to which individuals can fully participate in examinations which concern their involuntary detention. It also may impact the accuracy of the examination process if the use of AVL reduces the ability of examiners to assess a person's demeanour.

However, it acknowledges that the provisions are an extraordinary measure to ensure that mental health examinations can be safely conducted, in light of the risks posed by COVID-19 to patients and staff within mental health facilities and the public. It further notes that the conduct of these examinations by AVL are subject to safeguards, including limiting such examinations only where necessary due to the COVID-19 pandemic and requiring the examiner ascertain the examination can be sufficiently conducted by AVL. Given these safeguards and that the provisions are time limited to 30 June 2022, the Committee makes no further comment.

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

Henry VIII clauses

1.19 The Bill amends section 4 of the Adoption of National Law Act, which provides that the Queensland Law applies as law in New South Wales, as relevantly modified by Schedule 1 in the Act. Proposed subsection (2) would clarify that amendments to the Queensland Law, which are made in that jurisdiction (a '**Queensland amendment**'), do not apply unless or until a regulation is made under the Adoption of National Law Act which applies the amendment with or without modification.

1.20 The Bill also proposes to insert subsections (3) to (6), which deal with a regulation that so applies a Queensland amendment. Specifically, subsection (3) provides that the regulation made under the Adoption of National Law Act applying a Queensland amendment with modification may amend Schedule 1 to the Adoption of National Law Act for that purpose. Furthermore, subsection (5) provides that the regulation is "repealed on the day after all of its provisions have commenced", however, subsection (6) clarifies that this repeal "does not affect the application of the Queensland amendment, with or without modification, provided for by the regulation".

1.21 Section 39 of the *Interpretation Act 1987* sets out the legislative requirements for the making of statutory rules. Relevantly, subsection (1) requires a statutory rule to be published on the NSW legislation website and explicitly provides that the rule commences on the day on which it is so published, or a later date so specified. Subsection (2A) clarifies that a statutory rule is not invalidated because the whole or part of its provisions are expressed to commence on a date earlier than

[6] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 15/57*, 2 June 2020.

[7] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 28/57*, 28 March 2021.

publication. Rather, it provides that those provisions commence on the publication date instead of the earlier date.

1.22 The Bill proposes to insert section 4(4) into the Adoption of National Law Act, which provides that a regulation applying a Queensland amendment may commence on the day that the amendment commences. This subsection clarifies that this commencement date may be earlier than the publication of the regulation, despite section 39 of the *Interpretation Act 1987*.

1.23 The Minister stated in his second reading speech that this "will change the current approach of automatically adopting any changes to the Queensland law". In speaking to the rationale for these amendments, he further highlighted that this current approach:

> … lacks parliamentary oversight and can impact on the distinct nature of the complaints process in this State. … If changes to the Queensland law impact on how New South Wales handles complaints or amends provisions that New South Wales has already modified, New South Wales currently has to expressly pass legislation to modify the application of Queensland law to this State. … This process can delay the implementation of changes to the national law.

The Bill amends section 4 of the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to provide that amendments made to the Schedule to the *Health Practitioner Regulation National Law Act 2009* (Qld) do not apply as law in New South Wales until a regulation is made to apply that amendment, with or without modification. Proposed subsection (3) provides that a regulation providing for the modified application of a Queensland amendment may amend the Schedule to the Act for that purpose. The Committee notes that this provision allows the Executive to amend the Act by way of regulation without reference to the Parliament.

Proposed subsection (2) further provides that a regulation's provisions may commence from the date that the relevant Queensland amendment was passed, even if that date is prior to the date of publication on the NSW legislation website, contrary to section 39 of the *Interpretation Act 1987*. The Committee notes that these provisions allow for regulations to alter the operation of provisions contained in their parent Act by overriding contrary statutory provisions.

The Committee notes that this provision also amounts to a Henry VIII clause, allowing the Executive to legislate and amend the operation of an Act by way of regulation. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, these amendments are intended to strengthen parliamentary oversight of the NRAS, by no longer permitting amendments passed in another jurisdiction to automatically apply as law in New South Wales. In the circumstances, the Committee makes no further comment in respect to subsections (2) and (3).

Proposed subsections (5)-(6) provide that such a regulation is repealed on the day after all provisions have commenced, however the substantive operation of those provisions continue to apply despite their repeal. These provisions thereby extend the application of the regulations beyond their repeal.

The Committee notes that these provisions also amount to Henry VIII clauses, allowing regulations to alter the operation of provisions contained in the parent Act after its repeal. This may make it difficult for affected persons to ascertain what laws apply to them at any given time. Additionally, by legislating for the automatic repeal of these regulations which are to have continued application, these provisions may not be subject to a disallowance motion by a member of Parliament and thereby subvert a level of parliamentary scrutiny. For these reasons, the Committee refers these provisions to Parliament for its consideration.

2. Major Events Amendment Bill 2022; Motor Sports Bill 2022

Date introduced	22 February 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Stuart Ayres MP
Portfolio	Tourism and Sport

Purpose and description

Major Events Amendment Bill 2022

2.1 The objects of this Bill are to amend the *Major Events Act 2009* (the Act) as follows—

(a) to simplify the process for the application of various provisions of the Act to a major event by requiring certain matters to be prescribed by the regulations rather than requiring an order of the Minister to be published in the Gazette,

(b) to insert a new definition of major event area to replace the definition of major event venue or facility,

(c) to enable development for the purposes of a major event to be taken to be exempt development for the purposes of the Environmental Planning and Assessment Act 1979 with the approval of the Minister,

(d) to enable the regulations to place limitations on the delegation of key regulatory functions by a responsible authority to a person outside the government sector,

(e) to reflect technological changes,

(f) to make other minor and consequential amendments.

Motor Sports Bill 2022

2.2 The object of this Bill is to regulate motor sports to—

(a) support the expansion of motor sports in New South Wales, and

(b) facilitate the conduct of major motor sports events in New South Wales

Background

2.3 The *Major Events Amendment Bill 2022* (Events Bill) and the *Motor Sports Bill 2022* (Motor Sports Bill) provide an updated framework for organising and hosting major events, including motor sports, in NSW. The government intends for these Bills to

drive growth in the major events sector in NSW, and streamline the regulations surrounding major motor sport events.

2.4 As these Bills have been introduced together as cognate bills, they will be considered in the one report.

Major Events Amendment Bill 2022

2.5 The Major Events Bill will update the *Major Events Act 2009* (Act) to provide for the organisation and hosting of major events in NSW. In his Second Reading Speech, the Minister for Tourism and Sport the Hon Stuart Ayres MP, described how the Act ensures that:

> …major events are conducted in a manner that is safe and enjoyable for participants and spectators. It also facilitates better coordination of major events and protects event organisers from exploitation, through such things as ambush marketing.

2.6 The Act has been used as a framework for events including the ICC Cricket World Cup 2015, the World Polo Championship 2017 and the Invictus Games Sydney 2018. The Bill seeks to update the Act to ensure it can continue to facilitate these major events, including by:

(i) amending the definition of the location of a major event to ensure the Act can apply to events happening across multiple venue or area,

(ii) streamlining the process of regulating in regards to major events,

(iii) ensuring the Act interacts lawfully with and appropriately with planning and environmental legislation,

(iv) ensuring that compensation is not payable by the event promoter in respect of major event-related matters;

(v) prohibit the delegation of the responsible authority's core regulatory powers, and

(vi) consolidating definitions to provide greater clarity and ensure the legislative framework for events is responsive to social and technological change.

Motor Sports Amendment Bill 2022

2.7 The Motor Sports Bill seeks to replace current event-specific legislation that governs individual motor racing events in NSW, providing instead a state-wide framework for motor racing events. The Motor Sports Bill does not govern motor racing that takes place on established racetracks, which are private facilities.

2.8 The Motor Sports Bill repeals and replaces the *Mount Panorama Act 1989,* the *Motor Racing (Sydney and Newcastle) Act 2008* and the *Motor Sports (World Rally Championship) Act 2009*, which operate to provide for motor racing events in specified geographical areas of NSW. The Motor Sports Bill will allow the Sports Minister to make an order under section 5 and 6 to establish an event anywhere in NSW. Promoters will then be invited to organise and host that event. Under section

6, the Minister may provide ongoing authorisation for a motor race for a period of up to 5 years.

2.9 The Motor Sports Bill also provides for the appointment of a government coordinating agency for each event. This agency will work to coordinate other government agencies to support the event, including police, Transport, Health and local government. The Motor Sports Bill acknowledges that works must take place to provide infrastructure for an event, and provides the government coordinating agency with the power to authorise any required works, which must be presented to stakeholders such as councils and affected persons for their comment before being authorised. In his Second Reading speech, the Minister described the benefits of the central coordination of events as created in the Bill:

> The Bill will provide one set of powers and a consistent approach to similar activities across motorsport events; the ability to account for the unique characteristics of an event and its location… a consistent approach to track safety inspections… clear articulation of the roles and responsibilities of various government and non-government stakeholders to improve event oversight; and a streamlined and efficient approvals pathway for authorisations across the events.

2.10 The government coordinating agency will also ensure the promoter selected to hold the event fulfils its obligations, which are outlined in section 7 of the Motor Sports Bill. These obligations include providing plans to be authorised by the government coordinating agency regarding public safety, environmental and heritage protection and noise management. Under section 10, a promoter that fails to meet its obligations may be fined a maximum penalty of $1 million. Further, under sections 10 and 11 the government coordinating agency and the Premier may take action to cancel a motor race if the promoter fails to fulfil certain obligations.

2.11 The Motor Sports Bill does allow for major motor sport events to override the noise provisions of the *Protection of the Environment Operations Act* as well as some additional environmental legislation, however unlike the *Motor Sports (World Rally Championship) Act 2009*, the Motor Sports Bill does not provide the capacity to override laws relating the National parks and State conservation areas which are set out in the *National Parks and Wildlife Act 1974*.

2.12 The Motor Sports Bill also provides security-related provisions and establishes new offences. In Part 3 the Motor Sports Bill establishes a category of enforcement officers with a range of powers including removing disruptive individuals from the race area (Part 4, Division 2) and refusing entry to and searching persons who are attempting to enter the event area (Division 4). The Motor Sports Bill also creates traffic offences that facilitate the closure of roads for major motor sport events, and allows for searches without a warrant of businesses involved with the administration of a motor race event. In his Second Reading speech, the Minister acknowledges that:

> … motorsport events have the potential to temporarily affect some residents, businesses and communities during the preparation work and during the event itself.

2.13 However, the Minister went on to explain how the Bill is designed to minimise these impacts, describing how 'conditions may include matters related to public safety and environmental protection, particularly things like noise.'

Issues considered by the Committee

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

Right to compensation

2.14 The Major Events Amendment Bill 2022 inserts section 62A into the principal Act, which provides that compensation is not payable by or on behalf of a protected person for economic loss arising because of an act done in good faith for a major event-related matter. A protected person is defined as a promoter of the event or any of their employees or agents.

2.15 Section 62A does not apply to acts of the protected person that cause death or personal injury, or damage to property, nor does it affect compensation payable by a protected person under an indemnity or other agreement.

The Major Events Amendment Bill 2022 inserts section 62A into the principal Act, which provides that individuals cannot seek compensation for economic loss that arises due to an act done in good faith for a major event-related matter by the promotor, their employees or agents (together defined as a *protected person*).

The Committee usually comments on bills that impose restrictions on an individual's right to seek compensation through a court of competent jurisdiction. The Committee notes that the proposed Bill may impact the rights of an individual or business to have the matter reviewed by a court to consider whether compensation would be appropriate.

The Committee however notes that the Bill specifically excludes the provision of compensation for economic loss, and individuals are not barred from seeking compensation for death, personal injury or damage to property. Further, if a protected person does not act in good faith or takes action not sufficiently related to the major event that results in economic loss, individuals may also be able to seek compensation. Given these limits on the circumstances in which compensation is not payable, the Committee makes no further comment.

Freedom of movement

2.16 Under section 37 of the Motor Sports Bill, individuals must comply with a sign or direction regarding entry to a race area, and failing to comply carries a maximum penalty of 20 units ($2,200). There are a number of grounds for which can individual can be directed to leave the race area, including:

(a) failing to comply with a direction from an authorised officer given for the purpose of securing good order and enjoyment of the area (section 40);

(b) failing to produce a ticket (section 41); and

(c) if an authorised officer believes on reasonable grounds that (section 43(1)):

(i) the person has, or is about to, contravene the Act;

(ii) the person has committed an offence; or

(iii) the person is causing significant disruption or is endangering themselves or another person.

2.17 Under section 43, failing to comply with a direction to leave carries a maximum penalty of 50 units ($5,500) and reasonable force may be used to removed persons who fail to comply.

The Motor Sports Bill provides that individuals may be excluded from the race area during the event, and that failing to comply with certain directions may also lead to their exclusion from the area and a maximum penalty of 50 units ($5,500). Major motor race events covered by the Motor Sports Bill happen largely on public roads, which may border individual's homes, businesses and property. The Motor Sports Bill provides that individual's may be excluded for a time from accessing their land using the adjacent public infrastructure that they commonly rely on for access.

The Committee acknowledges that the provisions may assist in preventing anti-social and disruptive behaviour in a race area, which could be dangerous for race participants and spectators. However, by excluding individuals from certain areas, the provisions may impact on their freedom of movement to access public land or potentially private property. The Committee refers the matter to Parliament for its consideration.

Self-incrimination

2.18 Under section 62(1) of the Motor Sports Bill a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The compelled information is not admissible in evidence against the person in criminal proceedings unless:

(a) the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory; or

(b) if they were warned and objected to providing the information.

2.19 However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990*, Part 5A or certain offences under the Motor Sports Bill.

The Motor Sports Bill states at section 62(1) that a person is not excused from the requirement to provide the information on the ground that it may incriminate themselves. The Motor Sports Bill thereby impacts on the right to silence and the right against self-incrimination.

The Committee notes that the Motor Sports Bill includes some safeguards including that the compelled information is not admissible in evidence against the person in criminal proceedings unless the person was not warned at the time that they could object to giving the information on the grounds that it was self-incriminatory, or if they were warned and objected to providing the information. However, this safeguard does not apply to any civil proceedings, or offences under the *Crimes Act 1990,* Part 5A or certain offences under the Motor Sports Bill.

The Committee acknowledges the right to silence and right against self-incrimination are well-established legal principles. The Committee refers the matter to Parliament to consider whether the Motor Sports Bill unduly trespasses on these rights.

Risk of arbitrary search - property

2.20 The Motor Sports Bill provides that an authorised officer can enter a private premises or conduct a search without a warrant under two circumstances.

2.21 Firstly, section 54 provides that the government coordinating agency for a motor race may authorise a person as an advertising enforcement officer for the motor race for the purposes of this section. Under this section, authorised advertising enforcement officers may enter land and obliterate or remove any advertising material that is in breach of the obligations in section 53 to not have advertising displayed in certain areas during a race event. The officers must not enter residential premises and must cause as little damage as possible, however these restrictions leave significant scope for imposition on private property and no warrant is required to undertake this search.

2.22 Secondly, section 59 provides that authorised officers may enter premises if they are:

(a) investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act;

(b) obtaining information for purposes connected with the administration of this Act; or

(c) enforcing, administering or executing this Act.

2.23 Authorised officers may enter premises at a reasonable time during the day or when business is being carried out on a premises and undertake activities including searching, inspecting documents and seizing evidence. Under section 59(3)(g) an officer can not only conduct a physical search, but also require a person to answer questions or otherwise give information. Officers may not enter a residential premises without a search warrant or permission of the occupier.

2.24 Failing to comply with a requirement to give information, giving false information or obstructing or interfering with an officer undertaking their duties in accordance with section 54 or 59 carries a maximum penalty of 50 units ($5,500).

The Motor Sports Bill allows authorised officers to enter a private premises or conduct a search without a warrant for the purposes of obliterating or removing any advertising material that does not comply with the Act, and for investigating, monitoring and enforcing compliance with the requirements imposed by or under this Act. This thereby expands the search powers of authorised officers connected to a motor race event. As authorised officers are not required to obtain a warrant from an independent judicial officer to conduct such searches this may increase the risk of arbitrary search, impacting on the right to privacy and personal physical integrity.

The Motor Sports Bill allows authorised officers who enter the premises of a business to search the property and question persons present in order to monitor the administration of the Motor Sports Bill. This may potentially include persons who are not in breach of the Motor Sports Bill and not involved in criminal activities. The Motor Sports Bill may thereby compound the possible increased risk of arbitrary searches taking place.

The Committee acknowledges that large public gatherings, which often occur at motor races, may give rise to security challenges that require sufficient search powers. However, the search powers contained in the Motor Sports Bill provide that the authorised officer may do what is reasonably necessary for the authorised purpose during a search which may allow a wide power of search specifically for motor race events. The Committee refers the expanded search powers to Parliament to consider whether they are reasonable and proportionate in the circumstances.

Risk of arbitrary search - persons

2.25 Under section 38 of the Motor Sports Bill, an authorised officer may ask a person who wishes to enter an event area for a motor race to undergo a search. This search may include:

(a) using a hand-held or walk-through electronic scanning device;

(b) a physical search of the person's possessions;

(c) removal of an outer layer of clothing for it to be searches;

(d) if the person enters in a vehicle or vessel, a manual search of that vehicle or vessel.

2.26 Failure to comply with the search is ground for the person to be directed to leave the area, and a failure to comply with that direction may result in a maximum penalty of 50 units ($5 500) under section 43(3).

The Motor Sports Bill allows authorised officers to search persons who wish to attend the area where a motor race is being held. This includes a physical search of their outer clothing, possessions and vehicle. This search can be undertaken without the authorised officer needing to suspect that the person is likely to be in breach of the Motor Sports Bill or pose any threat to themselves or others.

The Committee notes that while this power allows all patrons to be searched, the physical aspects of the allowable search is limited to their outer clothing and possessions, and recognises that the power to search must be balanced against the protection of public safety. In these circumstances, the Committee makes no further comment.

Liability of directors and managers for offences by corporation

2.27 Under section 66 of the Motor Sports Bill, a person who is a director or concerned in the management of the corporation, and knowingly authorised or permitted the contravention of the Motor Sports Bill by that corporation, is also taken to have

contravened a provision of the Motor Sports Bill. Under subsection 66(2), the person may be proceeded against and convicted even if the corporation has not been proceeded against or convicted, and both persons and the associated corporation can be liable for the commission of a breach.

The Motor Sports Bill contains executive liability offences under section 66. This means that a director or certain managers of a corporation may be prosecuted for an offence committed by the corporation. The Committee notes that the prosecution is required to prove actual knowledge of the offence on the part of the accused.

The Committee notes that this is a high threshold for the mental element in a regulatory context. The Committee also notes that the while the maximum penalty for an individual is a significant value of 250 penalty units ($27,500), it does not include a term of imprisonment. For these reasons, the Committee makes no further comment.

Freedom of contract and right to carry on a lawful business

2.28 Under the Motor Sports Bill, the government coordinating agency may deem areas to be 'advertising controlled sites' by an order published in the Gazette. Under section 53, no advertising material of an area of more than 1 square metre can appear on any builds or structure in the advertising controlled site area for the event period unless exempted from this section by the regulations. A failure to comply with this prohibition can lead to a maximum penalty of 250 penalty units ($27 500) for an individual or 500 penalty units ($55 000)for a corporation.

2.29 Section 54 of the Motor Sports Bill allows authorised advertisement enforcement officers to enter land an obliterate or remove any advertising material that is in breach of section 53. The officers must not enter residential premises and must cause as little damage as possible, however this may still leave scope for imposition on the business property.

The Motor Sports Bill provides under section 53 that restrictions can be placed on the display of advertising materials within the advertising controlled site during the event by way of a notification published in the Gazette. A failure to comply with these restrictions may lead to a significant fine with a maximum penalty of 250 penalty units ($27 500) for individuals, or 500 penalty units ($55 000) for corporations. Further, section 54 allows authorised advertising enforcement officers to enter commercial premises to obliterate or remove advertising material. There is no requirement for the officers to have a warrant to do so.

These sections may undermine the capacity for a businesses within the advertising controlled site to fulfil contractual obligations in regards to the display of advertising. These obligations may arise prior to the Minister providing authorisation for a motor race to take place in the area, and therefore operates in a manner that could be considered retrospective. The Committee generally comments on retrospectivity as it runs counter to the rule of law principle that people are entitled to know the law to which they are subject at any given time. This is particularly the case where a Motor Sports Bill seeks to retrospectively remove rights or impose obligations.

The Committee notes that the period where advertising may have to be removed during a race is likely to be short, and that the intent of the Motor Sports Bill is to ensure that motor races can effectively seek sponsorship agreements which commonly require other advertising to be removed. Considering these policy reasons and the small period of time in which businesses are likely to be effected, the Committee makes no further comment.

Quiet use and enjoyment of land

2.30 Division 2 of the Motor Sports Bill provides a scheme for promoters to apply to the government coordinating agency to have works approved. These works include:

(a) service roads, ramps and parking;

(b) traffic control facilities including signage;

(c) telecommunications, broadcast and lighting facilities;

(d) advertising signage; and

(e) structures to support crew, media and spectators including seating, stands, shading, catering, direction signage and toilet facilities.

2.31 Prior to providing approval for the works, the government coordinating agency must undertake consultation with the local council for the affected lands and other affected persons, and be satisfied that the promoter will ensure that harm to the environment or heritage and disruption to the lawful activities of other persons will be minimised or prevented. The government coordinating agency may also impose conditions on the works, such as in regards to environmental protection, noise requirements and insurance.

2.32 After the event, section 20 provides that the promoter must within a reasonable time remove all rubbish and reinstate the land as far as is practicable to the condition it was in before the event, including repairing all damage. If the promoter fails to do so, the government coordinating agency may provide for reinstatement and recover the cost of those works in court proceedings.

The Motor Sports Bill proposes some measures to reduce the impact on businesses and residents that live and work adjacent to a motor race event area, including the requirement to undertake consultation with the affected parties (section 13). However, neither the Minister nor the government coordinating agency is bound by the Motor Sports Bill to minimise the impact on affected persons, though the Minister and government coordinating agency does have the power to imposed conditions on the promoter that could functionally serve to protect these interests.

Section 17(2) provides that works approval must only authorise carrying out works to the extent that they are reasonably necessary for the purpose of the motor race, associated events and ancillary activities. Section 20 further provides that the promoter must remove rubbish and undertake reinstatement works within a reasonable time after the event period, and if they fail to do so the government coordinating agency may do so instead and recover the costs from

the promoter in a court of competent jurisdiction. The Committee notes that these sections seek to limit the scope of works and ensure remediation to limit the impact on the environment and affected persons.

The Committee also notes that motor race events typically run for a small number of days and therefore the disruption is inherently minimised. However, the Committee notes that infrastructure including lights, telecommunications infrastructure and large structures may create a significant disturbance. However, the Committee further notes that the Motor Sports Bill limits the avenues by which affected persons may have their concerns addressed. Section 49 specifically provides that the promoter cannot be held liable in nuisance for any works undertaken lawfully in accordance with the *Motor Sports Bill*. Taking action in nuisance allows for an individual to enforce their established common law right to the quiet use and enjoyment of their land. Removing this common law right without providing a statutory equivalent has an impact on property rights. The Committee refers these matters to Parliament for its consideration of whether the possible impacts on property rights are reasonable in the circumstances.

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

Wide power – declaration of major event area

2.33 The Major Events Amendment Bill 2022 inserts section 4B to the principal Act to provide that the Minister may declare an area to be a major event area.

2.34 Proposed subsection 4B(2) provides that the Minister must not make an order unless the Minister considers that the whole of the proposed major event area is necessary to enable the conduct of the major event.

2.35 As outlined in the Bill and the principal Act, major event areas are subject to additional laws and requirements, including the imposition of penalties for failing to comply with some of these laws. For example, the control of the sale and distribution of articles (proposed section 37) and the prohibition of certain advertising on buildings and structures (proposed section 39).

The Major Events Amendment Bill 2022 inserts section 4B to the principal Act, which provides that the Minister may declare an area to be a major event area for a major event. The Minister may not make such an order unless they consider that the whole of the proposed major event area is necessary to enable the conduct of the major event, however this is not a significant limitation on the Minister's powers.

Areas that have been declared as major event areas can be subject to a range of measures under the Major Events Amendment Bill 2022, such as road closures (under section 28). Further, certain behaviour that would regularly be lawful, may attract a penalty if undertaken within a major event area. This means that individuals and businesses who reside or operate within a major event area may be subject to both the inconveniences of a major event, as well as additional rules within that area for the duration of the major event.

The Committee notes that this power of the Minister to declare a major events area is limited to where it is necessary to enable the conduct of the major event, and therefore may allow flexibility to declare major event areas in a way that responds to the unique needs of each event and those who reside in those areas, and therefore somewhat limited. In these circumstances, the Committee makes no further comment.

Wide power – conditions for event promoters

2.36 Under section 7(1) of the Motor Sports Bill, the Minister can make a race authorisation subject to any conditions the Minister considers it is reasonable to propose, including conditions relating to;

(a) public safety,

(b) public health,

(c) environmental protection,

(d) noise management,

(e) insurance,

(f) reporting requirements,

(g) transport arrangements,

(h) reinstatement of land,

(i) consultation requirements,

(j) financial arrangements, including the provision of security,

(k) event and works planning requirements,

(l) engineering certification requirements,

(m) the exercise of powers under Division 4.

2.37 The Minister may change the conditions at any time, by providing written notice to the promoter that they intend to do so.

2.38 This power is broad, as the list of conditions provided in section 7(1) is non-exhaustive, allowing the Minister to impose a broad range of conditions on a promoter at any time, including after a promoter may have made significant financial outlays in relation to the event that may be unable to be recouped or unnecessary due to the conditions being amended. The government coordinating agency for the event must review the conditions to decide whether they remain appropriate (section 7(4)) however this does not limit the Minister's power to impose conditions they consider are reasonable.

2.39 There are three ways a promoter may be penalised if they fail to comply with the conditions of the authorisation with the order of the Minister.

2.40 Under section 10(2), the government coordinating agency may cancel the race authorisation if satisfied that:

(a) the promoter for the race has failed to comply with a condition;

(b) the failure is of a serious or continuing nature; and

(c) it is appropriate to cancel the race authorisation in the circumstances.

2.41 Further, under section 11 the Premier may also cancel or vary an order of the Minister concerning the motor race, or the motor race authorisation in two circumstances. The Premier must either:

(a) have advice of the Commissioner of any of the Police, Fire and Rescue NSW, the NSW Fire Service, the State Emergency Service or the Chief Health Officer that the Premier should take that action; or

(b) be reasonably satisfied that taking the action is necessary because of a significant risk of harm to persons rom a natural or other threat.

2.42 Lastly, a promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250,000, or for a corporation $1,000,000.

2.43 Section 10(6) does provide that it is a defence if the promoter can establish that the offence was due to causes over which it had no control, and that it took reasonable precautions and exercised due diligence to prevent the offence from occurring.

The Motor Sports Bill provides that the government coordinating agency, the Minister and the Premier have powers in regards to authorising major motor race events, providing orders in relation to major motor events and take action to ensure the administration of the Motor Sports Bill.

These powers, including the powers of a government coordinating agency to authorise a works order, have effect despite any environmental planning instrument or development consent (section 46). Additionally, section 7(1) grants the Minister with the power to impose conditions on the promoter of a major motor event. A promoter who fails to comply with a condition is guilty of an offence which carries a maximum penalty for an individual of $250 000, or for a corporation, $1 000 000. Considering the broad scope of possible conditions and the significant impact they may have on the promoter and other affected parties (including persons whose property is adjacent to the proposed race area), the Motor Sports Bill may grant the government coordinating agency a wide and ill-defined administrative power.

The Committee acknowledges that the provisions are designed to allow the Minister and the government coordinating agency to work flexibly to adapt the major motor race event to its particular location. While not an exhaustive list, section 7(1) provides the Minister with guidance on what conditions may be imposed and section 16 requires the government coordinating agency to consult with local councils and affected persons prior to authorising work orders. Further, the provisions are time limited, only applying for a maximum of 12

months after motor races typically occur over a short period of days which limits the impact on the broader community. However, given the scope of such powers, the Committee refers the matter to Parliament for further consideration of whether they are proportionate in the circumstances.

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

Matters deferred to the regulations

2.44 The Motor Sports Bill provides for regulations to be created for the effective operation of the Motor Sports Bill. This includes permitting such regulations to create offences.

2.45 The Motor Sports Bill at section 69(5) provides that regulations may be made about the following matters:

(a) the fees and charges that may be imposed for the purposes of this Act,

(b) the fees that may be charged or collected by the promoter for a motor race for admission to the event area for the motor race,

(c) the provision of services by the promoter for a motor race,

(d) access to an event area for a motor race,

(e) the conduct of persons in an event area for a motor race and the exclusion or expulsion of persons from the area,

(f) (restricting or prohibiting the bringing of liquor into, or consumption of liquor within, an event area for a motor race during the event period,

(g) specifying site or event specific requirements for particular motor races,

(h) the driving or parking of motor vehicles within an event area for a motor race, including enabling the government coordinating agency for the motor race, with the concurrence of the roads authority, to remove prescribed restrictions on parking that apply in the area,

(i) conferring on the government coordinating agency for a motor race a function that may be exercised by a local council in relation to a public place.

2.46 Subsection 69(1) also provides the Governor with the powers to make regulations and associated offences about:

(a) matters this Act expressly requires to be prescribed by regulations,

(b) matters this Act expressly permits to be prescribed by regulations,

(c) other matters, but only to the extent that making regulations about the matters is necessary or convenient to give effect to this Act.

2.47 Subsection 10(4) provides that regulations may also create an offence of failing to comply with a condition of a particular kind. Subsection 69(3) further provides that

the maximum penalty that may be imposed for an offence created by the regulations is 100 penalty units ($11,000).

The Motor Sports Bill enables regulations to be made under the proposed Act for the effective operation of the Motor Sports Bill, including regulations that can create offences and impose penalties. These regulations may be about a broad range of matters including the fees and charges that can be imposed, access to an event area or motor race, the provision of services for a motor race and the conduct of persons and their exclusion from an area or a motor race.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulations, especially when dealing with specific or technical information, that is not required to be in the primary legislation. However, the Committee notes that section 10(4) and 69(3) provide that regulations may contain offences with a maximum penalty of 110 units ($11 000). Section 10(4) provides that the regulations may create both a condition of a particular kind that a promoter must comply with, and an offence for failing to comply with that condition. Section 56 also provides that the regulations may require a promoter to pay a fee for the exercise of any function of the Minister or a government sector agency under Part 2 in relation to a motor race.

The Committee prefers that provisions containing offences and penalties be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee also notes that the regulation may impose new and onerous conditions on a promoter after they have accepted the position, including the payment of unspecified fees. The Committee considers that these regulations may have an impact on the rights or obligations of promoters that could not be anticipated when committing to promote a major motor race event. However the Committee does note the defences available to promoters under section 10(6). The Committee refers this matter to Parliament for its consideration.

Part Two – Regulations

1. Design and Building Practitioners Amendment (Miscellaneous) Regulation (No 2) 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 22 June 2022
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Fair Trading

Purpose and description

1.1 The objects of this Regulation are—

(a) to exclude certain work involving the fit-out of part of a building from being building work for the purposes of the *Design and Building Practitioners Act 2020* (**'the Act'**), and

(b) to include a requirement for building practitioners to lodge, on the NSW planning portal, a building compliance declaration, contractor document and other documents for building work that does not require an occupation certificate, and

(c) to enable the Secretary to exclude the address of a practitioner's place of business from the register of registered practitioners if the practitioner's place of business is the same as the practitioner's place of residence and the practitioner applies for the address to be excluded, and

(d) to extend the duration of certain transitional provisions, and

(e) to make other minor and consequential amendments.

Issues considered by the Committee

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

Henry VIII clause

1.2 Clause 3 of the Regulation amends Schedule 1 of the Act to extend the period over which savings and transitional provisions concerning the preparation and lodgement of designs and compliance certificates under that schedule. Specifically, the Regulation extends that transitional period by one year, to cover building works and Crown building works commenced before 1 July 2023 (previously 1 July 2022).

1.3 This amendment is made by way of a Henry VIII clause contained in the Act. A Henry VIII clause is a clause of an Act that enables the Act to be amended by subordinate legislation.

1.4 Specifically, under clause 1(4) of Schedule 1 of the Act, which enables regulations "made for the purposes of [that] clause" to amend Schedule 1 "to provide for additional or different savings and transitional provisions" rather than including those specific provisions in the regulations itself.

The Regulation amends the *Design and Building Practitioners Act 2020* to extend the period over which certain savings and transitional provisions contained in Schedule 1 of the Act applies. This amendment is made by way of a Henry VIII clause set out in Schedule 1 of the parent Act.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, it notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. It further acknowledges that it may be more administratively efficient to amend defined transitional periods within the Act by regulation. Given that the amendments only concern legislative provisions of a savings or transitional nature, the Committee makes no further comment.

2. District Court Criminal Practice Note 23 - Resumption of Jury Trials and in person appearances in Judge Alone Trials

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

2.1 This Practice Note commences on 12 January 2022 and applies to the resumption of jury trials at the following District Court venues: the Downing Centre; John Maddison Tower; Armidale; Campbelltown; Dubbo; Gosford; Goulburn; Grafton; Katoomba; Newcastle; Nowra; Parramatta; Penrith; Tamworth; Wollongong; Queanbeyan; and any other venue directed by the Chief Judge.

2.2 The commencement of new jury trials at these Court venues were temporarily suspended due to COVID-19. With the easing of restrictions under Public Health Orders and increased vaccination rates, the temporary suspension of jury trials at these venues was lifted on 25 October 2021.

2.3 In person appearances continue to only be allowed for new jury trials from 25 October 2021. All other matters in the Court will continue to be conducted by use of the virtual courtroom, subject to any leave granted by application to the trial Judge in judge alone trials. In sentencing matters, the sentencing Judge may advise the parties if in person appearance is required.

2.4 The Committee notes that the Practice Note revises its previous iteration, which commenced on 21 October 2021 and was reported on by this Committee in its Digest No. 37/57 (16 November 2021).[8] The Practice Note substantially remakes most of the provisions contained in its previous reiteration and this report draws upon the analysis of the 2021 regulation report.

[8] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Issues considered by the Committee

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

Barrier to jury participation

2.5 Paragraph 15 of the Practice Note requires the NSW Sheriff to ensure that all members of jury panels for trials in the District Court are vaccinated, and consent to and have undergone rapid antigen screening (**RAS**) as required. The Practice Note also sets out in paragraph 20 the rationale for the provision of a court participant's vaccination status, stating it will assist the management of risks arising from COVID-19 to all court participants and staff.

2.6 While a court participant (which is defined in paragraph 10 to include jurors) has a right under paragraph 18 to decline to provide their vaccination status, the Practice Note does not provide for alternative measures for the participation of jurors in trials either in-person by undergoing RAS, or using audio visual link ('**AVL**').

2.7 'Vaccinated' is defined in paragraph 10 as a person who has had the required number of doses of a COVID-19 vaccine, as defined under NSW Public Health Orders, or is taken to be "fully vaccinated" pursuant to NSW Public Health Orders.

The Practice Note requires that an individual must be vaccinated against COVID-19 and consent to undergoing rapid antigen screening (RAS) in order to participate as a juror in criminal trials heard in the District Court of New South Wales. While a potential juror has the right to decline providing their vaccination status, it appears that doing so prevents that person from becoming a member of a jury panel either in-person or by AVL as an alternative because the Practice Note does not make any exceptions to the vaccination requirement for all jurors.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[9] Consistent with the Committee's previous comments, the operation of these provisions may be discriminatory against non-vaccinated people, including individuals who are unable to be vaccinated for medical reasons or those who have received a vaccine other than those approved under NSW Public Health Orders. By limiting the eligibility of individuals to participate as jurors based on their vaccination status, these provisions may also impact the rights of accused persons to have their criminal charges determined fairly and independently by a jury of their peers.

The Committee acknowledges these provisions are intended to manage the risks of COVID-19 to and protect the health and safety of court participants. However, it notes that jury duty is a central feature of the criminal justice system and allows members of the community to participate in the administration of justice. For these reasons, the Committee refers this issue to the Parliament for its consideration.

[9] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Open justice

2.8 The Practice Note requires that all other court participants, besides jurors, in jury and judge alone trials consent to RAS as required under paragraphs 36 to 39 and 55. It also requires that these persons be vaccinated as defined by paragraph 10, or to have a valid exemption or medical clearance under the NSW Public Health Orders in accordance with paragraphs 40 and 41.

2.9 Paragraphs 56 to 58 of the Practice Note deal with matters relevant to open justice in the conduct of jury trials. Specifically, paragraphs 57 and 58 explicitly prohibits both members of the public and the media from attending court in person.

2.10 Where a member of the public or the media wishes to view a trial, attendance may be permitted by use of the virtual courtroom. That virtual attendance requires an email request to the trial Judge's associate, and paragraph 57 clarifies that the virtual attendance of a member of the public will be a discretionary matter for the trial Judge.

2.11 Paragraph 56 sets out the rationale for these prohibitions, as follows:

> The Court remains committed to the principles of open justice. However, the risk of COVID-19 requires the Court to limit the persons who may attend a trial in person.

2.12 The Committee notes that the previous iteration of the Practice Note permitted the in-person attendance of members of the media, on the condition that they can provide evidence of their vaccination status and consents to undergo mandatory RAS.

The Practice Note prohibits the attendance of members of the media or the public from attending trials in person. If person who is not a court participant wishes to view a trial, they may make an email request to the trial Judge's Associate to access the virtual courtroom.

The Committee reported on the prohibition of in-person attendance of members of the public in the previous iteration of the Practice Note, in its Digest No. 37/57.[10] Consistent with the Committee's previous comments, the prohibitions may create a barrier to the principles of open justice. That is, that the administration of justice takes place in open court subjected to public and professional scrutiny.

However, the Committee acknowledges that these measures are implemented in response to the risks arising from the COVID-19 pandemic and intended to protect the health and safety of court participants. It further notes that members of the public and the media can request to attend by alternative virtual means, which provides a degree of scrutiny by the community on criminal trials in the District Court. In the circumstances, the Committee makes no further comment.

[10] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Procedural fairness

2.13 Paragraphs 42 and 43 and 48 to 50 provides for the management of jury trials where a court participant declines to provide their vaccination status or to consent to RAS as required.

2.14 Specifically, paragraphs 48 to 50 enables the giving of evidence or appearance of witnesses for the Crown or defence, a defence expert and/or alibi witness, and the accused person by AVL.

2.15 Where an accused person, counsel and/or solicitors in the trial decline to provide their vaccination status or does not consent to RAS, the Court may vacate the trial and relist it on a later date or direct that the accused person attend by AVL where possible. The considerations which the Court will have regard to is listed in paragraphs 42 and 43.

2.16 Furthermore, paragraph 53 explicitly states that leave will not be granted to any person to attend a judge alone trial in person unless the trial judge is satisfied that they are vaccinated. Paragraph 55 requires that all court participants also undergo mandatory RAS as required.

The Practice Note provides that any court participant who declines to provide their vaccination status or does not consent to rapid antigen screening (RAS) will not be allowed to attend in-person. Where that person is participating as a witness or defence expert, it provides for that evidence to be given by audio visual link (AVL). Where that person is a solicitor, counsel or the accused, the Court may vacate and relist the trial or make a direction to enable the accused person to appear by AVL.

The Committee reported on these provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[11] Consistent with the Committee's previous comments, the appearance of the accused person or giving of evidence from witnesses by AVL may limit the ability of the Court to closely monitor the conduct of witnesses while they are giving evidence, including ensuring the witness is not referring to materials, recording their evidence or otherwise being assisted by another person in the room. It may also affect the consistency in the quality of evidence given by any particular witness appearing by AVL. This may impact the accused person's rights to a fair trial, particularly their right to procedural fairness.

However, the Committee notes that the use of AVL in criminal trials has practical benefits and may enhance the ability of witnesses to participate in criminal trials. It also acknowledges that these measures are in response to the risks arising from COVID-19 and intended to protect the health and safety of court participants and staff. In the circumstances, the Committee makes no further comment.

[11] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

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

Period of application and review date

2.17 The Practice Note commences on 12 January 2022.

2.18 Paragraph 2 states that the Practice Note will continue to be reviewed "as may be necessary".

The Practice Note does not include a specific end date or a fixed date for review. It provides that it will continue to be reviewed as may be necessary.

The Committee reported on similar provisions in the previous iteration of the Practice Note, in its Digest No. 37/57.[12] Consistent with the Committee's previous comments, the Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact of the Practice Note on an accused person's right to procedural fairness, jury participation and open justice, the Practice Note may also benefit from the inclusion of an end date. The Committee also notes that repeal or expiry dates have been included in legislation responding to COVID-19. For these reasons, the Committee refers this issue to the Parliament for its consideration.

[12] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

3. District Court Criminal Practice Note 26 - Walama List Sentencing Procedure

Date tabled	LA: 15 February 2022
	LC: 22 February 2022
Disallowance date	LA: 17 May 2022
	LC: 7 June 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

3.1 This Practice Note establishes an alternative procedure for managing cases involving eligible Aboriginal and Torres Strait Islander persons charged with criminal offences before the District Court of New South Wales, to be known as the "**Walama List**".

3.2 This Practice Note commences at Sydney District Court on 31 January 2022 and applies to matters committed for sentence or where a plea of guilty has been entered upon Arraignment after 1 December 2021.

3.3 The aims of the Walama List are to:

(a) reduce the risk factors related to re-offending by Aboriginal and Torres Strait Islander offenders;

(b) reduce the rate of breaches of court orders by Aboriginal and Torres Strait Islander offenders;

(c) increase compliance with court orders by Aboriginal and Torres Strait Islander offenders;

(d) reduce the overrepresentation of Aboriginal and Torres Strait Islander persons in custody in NSW;

(e) increase Aboriginal and Torres Strait Islander community participation and confidence in the criminal justice system; and

(f) facilitate a better understanding of any underlying issues which may increase the likelihood of re-offending.

3.4 The Walama List will seek to achieve these aims by:

(a) enabling Aboriginal and Torres Strait Islander community participation in the court process and embedding Aboriginal and Torres Strait Islander narratives in the sentencing process;

(b) utilising culturally appropriate programs and supports to address needs and risk factors that may impact on an offender's continued involvement with the criminal justice system; and

(c) facilitating continuous court monitoring of appropriate therapeutic interventions to address identified needs and risk factors.

Issues considered by the Committee

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

Equal treatment of all persons before courts and tribunals

3.5 The Practice Note establishes an alternative pathway for managing the sentencing of criminal offenders who have plead guilty to an offence or offences not excluded, as per paragraph 10 of the Practice Note. That Schedule accordingly excludes the following violent offences which may be heard in the District Court of New South Wales:

(a) Prescribed sexual offences as defined by section 3 of the *Criminal Procedure Act 1986*;

(b) The offences of conspiracy or attempt to murder under sections 26-30 of the *Crimes Act 1900* (the '**Crimes Act**');

(c) The offence of wounding or grievous bodily harm with intent under section 33 of the Crimes Act; or

(d) The offence of choking, suffocation and strangulation under section 37 of the Crimes Act.

3.6 The criteria for committed individuals to be eligible to have their sentencing matter referred to the Walama List is set out in paragraph 9, as follows:

(a) have pleaded guilty to the offence either before the Local Court or upon Arraignment in the District Court;

(b) have signed an Agreed Statement of Facts;

(c) be descended from an Aboriginal person or Torres Strait Islander person, identify as an Aboriginal person or Torres Strait Islander person, and be accepted as such by the relevant community; and

(d) be willing to participate in the Walama List sentencing procedure.

3.7 Paragraphs 13 to 41 detail the steps for determining sentences in matters referred to the Walama List. In summary, the Walama List enables the presiding list judge to make sentencing decisions following a highly collaborative, multistep process which involves the participation of:

- the offender and their legal representative(s);
- a representative for the Prosecution;

- an allocated Community Corrections Officer and/or other nominated caseworker;
- a Senior Aboriginal Client and Community Support Officer ('**SACCSO**') from the Department of Community and Justice;
- at least two Aboriginal or Torres Strait Islander Elders or Respected Persons nominated by the Walama List Judge in consultation with the SACCSO, as well as any other Aboriginal or Torres Strait Islander Elders or Respected Persons who have been granted leave on application to participate as *amici curiae*;
- a support person for the offender at the judge's discretion; and
- any other person the judge considers appropriate, including any victim(s) and their support person.

3.8 Furthermore, a Walama Case Plan is prepared by the participating offender's case worker or Community Corrections Officer before sentencing determinations are given in Walama List matters. That case plan is intended to meet the particular needs and risk factors relevant to the individual offender, and final sentencing of the offender is postponed until completion of the Walama Case Plan or the participating offender ceasing participation in the Walama Case List.

The Practice Note establishes the Walama List, which provides for an alternative sentencing pathway to eligible Aboriginal or Torres Strait Islander persons who have been committed for sentencing in the District Court. By providing for distinctive sentencing procedures and practices, the provisions differentiate the treatment of Aboriginal and/or Torres Strait Islander offenders and non-Aboriginal and/or Torres Strait Islander offenders within the criminal justice system in New South Wales.

However, the Committee notes that the Walama List is intended reduce the overrepresentation of Aboriginal and Torres Strait Islander persons in custody in NSW. It further notes that the Practice Note aims to enhance Aboriginal and Torres Strait Islander community participation within the criminal justice system, and to provide more culturally appropriate programs and supports to address risk factors and underlying issues relevant to Aboriginal or Torres Strait Islander persons that may contribute to non-compliance and breaches of court orders in the circumstances, the Committee considers this may fit within the exceptions for special measures to meet the particular needs of a specific group under state and federal laws,[13] and does not constitute discrimination on the basis of race.

[13] *Anti-Discrimination Act 1977* s 21; *Racial Discrimination Act 1975* (Cth) s 8(1).

4. Electoral Amendment (COVID-19) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Dominic Perrottet MP The Hon. Mark Speakman SC MP
Portfolio	Premier Attorney General

Purpose and description

4.1 The object of the Electoral Amendment (COVID-19) Regulation 2021 (the Regulation) is to make special provision for by-elections held during the COVID-19 pandemic.

4.2 The Regulation is made under section 267 (the general regulation-making power) of the Electoral Act 2017 (the Act).

Issues considered by committee

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

Henry VIII clause

4.3 The Regulation inserts new clause 9 into the Electoral Regulations 2017. Clause 9 extends the timeframes for preliminary scrutiny of postal ballots under section 149 of the Act, for by-elections held during the period starting on 17 December and ending six months after the clause commences, on 17 June 2022.

4.4 Clause 9 provides that the Electoral Commissioner, at the scrutiny of postal ballots:

(a) may produce unopened envelopes on which a postal vote certificate is printed containing postal votes (postal vote) as have been received by the Commissioner on any day not more than 14 days before election day, rather than 5 days before the election day, and

(b) must produce unopened all remaining postal votes received by the Commissioner up to 6 pm on the thirteenth day immediately following the close of voting, rather than the fourth day immediately following the close of voting.

4.5 Section 267 includes the Act's general regulation-making power. Section 267(2) states that if the time allowed to do any act is insufficient, and that the extension of time (and any alteration of any dates consequent on that extension) is necessary, the regulations or Governor may make that alteration or declaration.

The Regulation inserts a Henry VIII clause into the *Electoral Regulations 2018*, allowing subordinate legislation to amend the principal Act. Specifically, by extending the timeframes for preliminary scrutiny of postal ballot papers for by-elections held from 17 December 2021 to 17 June 2022. This clause intends to respond to the COVID-19 pandemic.

The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation, to foster an appropriate level of parliamentary oversight. However, in this case the delegation of Parliament's legislative powers is envisaged in the principal Act. The general regulation-making power in the *Electoral Act 2017* allows the regulations to extend applicable time limits if the time allowed to do an act is insufficient and the extension of time is necessary. Additionally, the Committee notes that the clause applies for a limited duration of six months, intends to respond to the extraordinary circumstances of the pandemic, which may increase the volume of postal votes and necessitate a longer scrutiny period, and that the statutory timeframes do not appear to be excessively extended. In the circumstances, the Committee makes no further comment.

5. Electoral Amendment (COVID-19) Regulation 2022

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Executive responsible	The Hon. Dominic Perrottet MP The Hon. Mark Speakman SC MP
	Premier Attorney General

Purpose and description

5.1 The object of this Regulation is to amend the *Electoral Regulation 2018* to make further provision regarding the conduct of by-elections during the COVID-19 pandemic.

5.2 This Regulation is made under the *Electoral Act 2017* (the '**Act**'), including Part 10, Division 3 (By-elections during COVID-19 pandemic).

5.3 The Committee notes that the Regulation remakes in proposed Schedule 2, clauses 1 and 4 provisions made by the *Electoral Amendment (COVID-19) Regulation 2021*, which is reported on by this Committee in this Digest (No. 40/57). The Committee reiterates its comments raised in the report on the *Electoral Amendment (COVID-19) Regulation 2021* in respect to Schedule 2, clauses 1 and 4, and this report considered new issues identified in the *Electoral Amendment (COVID-19) Regulation 2022*.

Issues considered by the Committee

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

Henry VIII clauses and significant matters not subject to Parliamentary scrutiny

5.4 The Regulation inserts Schedule 2 into the *Electoral Regulation 2018*, clause 2 of which provides for postal voting in State government by-elections conducted during the period from 19 January to 30 June 2022.

5.5 Clause 2 is made under section 274 of the Act, which relevantly provides that:

> (1) The regulations may modify the application of this Act for a by-election held during the prescribed period, for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.
>
> (2) The Minister may recommend to the Governor that regulations be made under this section only if the proposed regulations are—
>
> (a) in accordance with advice issued by the Electoral Commissioner, and
>
> (b) reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

5.6 Specifically, subclause (1) enables the Electoral Commissioner to declare by order published on the Electoral Commission's website that the electors of a specified electoral district are 'COVID-19 affected electors' for a relevant by-election. The Commissioner may only exercise this power if satisfied that it is necessary to comply with a public health order or to reduce the risk of infection from COVID-19.

5.7 That declaration by the Commissioner must also include a notice that informs COVID-19 affected electors of their entitlement to vote by post in a relevant by-election, and also specify they may vote in person at a voting centre if they wish, per subclauses (3) and (4).

5.8 Subclause (2) clarifies that the Commissioner may also publish a copy of the declaration under subclause (1) "in other ways the Electoral Commissioner considers necessary to bring the declaration to the attention of the COVID-19 affected electors".

The Regulation inserts Schedule 2 into the *Electoral Regulation 2018* which enables the Electoral Commissioner to declare electors of a certain electoral district as COVID-19 affected electors for a by-election conducted before 30 June 2022, where the Commissioner believes it necessary to comply with a public health order or to reduce the risk of COVID-19. That declaration entitles all COVID-19 affected electors to vote by post in the by-election.

This amendment is made by way of a Henry VIII clause set out in section 274 of the parent Act. The Committee reported on the amendments to the *Electoral Act 2017*, which introduced section 274, in its Digest No. 38/57. Consistent with the Committee's previous comments, this amendment allows the Executive to legislate and amend the operation of an Act by way of regulation without reference to the Parliament.

The Committee generally prefers amendments to the operation of an Act to be made by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes as, unlike primary legislation, subordinate legislation is not required to be passed by Parliament.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the declaration-making power of the Commissioner may facilitate the safe and flexible conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It further notes that regulations must be tabled in Parliament and are subject to

disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment in respect to the exercise of the regulation-making power under section 274 of the Act.

Clauses 2(1) and (2) requires that such a declaration made by the Commissioner must be published on the Electoral Commission's website and may be published in any other ways the Commissioner considers necessary to bring it to the attention of relevantly declared COVID-19 affected electors. As the declarations dealt with by the website have bearing on the entitlements of electors legally required to cast votes in parliamentary by-elections, the Committee would prefer that they were dealt with by subordinate legislation. This would foster an appropriate level of parliamentary oversight as, under the *Interpretation Act 1987*, statutory rules must be tabled in Parliament and are subject to disallowance. There appears to be no such requirement for the website in question.

The Committee acknowledges that the provisions enable the flexible exercise of the Commissioner's declaration-making powers and provides for publications in discretionary manners intended to bring the declaration to relevantly affected persons. However, it notes that these declarations impact the entitlements of certain electors in the exercise of their democratic voting rights, and further notes that failure to effectively exercise that right may subject individuals to monetary penalties per section 245 of the *Commonwealth Electoral Act 1918* (Cth). For these reasons, the Committee refers this matter to Parliament for its consideration.

6. Electricity Supply Amendment (Renewable Fuel Scheme) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Matt Kean MP
Portfolio	Energy

Purpose and description

6.1 The objective of the *Electricity Supply Amendment (Renewable Fuel Scheme) Regulation 2021* (the **Regulation**) is to create a financial incentive to increase the production of green hydrogen and other renewable fuels by creating a renewable fuel scheme. The renewable fuel scheme is established as part of the energy security safeguard under the *Electricity Supply Act 1995* (the **Act**), Part 8B, Division 3.

6.2 The NSW Hydrogen Strategy, published by the Department of Planning, Industry and Environment in October 2021, explains:

> We will expand the Energy Security Safeguard to support hydrogen with a market-based scheme that provides financial incentives for green hydrogen production. The scheme will support industry to grow new supply chains that can improve the affordability, reliability and sustainability of green hydrogen in NSW and prepare our industries to remain competitive in decarbonised markets.
>
> The scheme target will commence in 2024 and gradually increase to 8 million GJ of hydrogen (or 67,000 tonnes) by 2030. The scheme could support an additional $6.4 billion in gross state product (GSP) and $212 million in emissions reduction benefits in present value terms and is expected to support the State's annual GSP to increase by over $600 million every year from 2030. The scheme will provide a critical financial incentive for industry to bring forward investment in transformative projects and position NSW to capture first mover advantage for the State's regional economies. [14]

6.3 The Regulation creates the renewable fuel scheme (the **scheme**) by inserting a new Part 3 into Schedule 4A of the Act. Schedule 4A includes the schemes comprising the energy security safeguard.

[14] NSW Department of Planning, Industry and Environment, *NSW Hydrogen Strategy*, October 2021, p 54.

6.4 The scheme requires participants to surrender certificates for each yearly compliance period, from the 2024 compliance period to the 2044 compliance period.[15] The number of certificates a participant must surrender is calculated by dividing the participant's liable use of gas for the previous year by the liable use of all scheme participants for the same period, multiplied by the scheme target (in gigajoules).[16] The Regulation amends the *Electricity Supply (General) Regulation 2014* to include the scheme targets for green hydrogen. Where the participant has less certificates than it must surrender, it must pay a penalty or carry the shortfall (or part thereof, which is not subject to the penalty) forward to the next compliance period only.[17]

6.5 Certificates are created by an accredited certificate provider in accordance with scheme rules and registered with the Scheme Administrator.[18] They last for three years from the date of registration unless sooner cancelled.[19] Certificates are transferable and may otherwise be dealt with in accordance with the regulations.[20]

Issues considered by committee

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

Right to a fair trial and double punishment – penalty notice offences

6.6 Clause 216 of the scheme allows a compliance officer to issue a penalty notice to a person if it appears to the officer than the person has committed a penalty notice offence.

6.7 A "penalty notice offence" is an offence under the Part, or a regulation under the Part, that is prescribed by the regulations as a penalty notice offence. The regulations also prescribe the amount payable for the alleged offence, which must not exceed the maximum amount that could be imposed for the offence by the court.

6.8 A "compliance officer" means a compliance officer appointed by the Scheme Administrator under clause 214 of the scheme, in accordance with any guidelines issued by the Minister under that clause.

6.9 Clause 216 also states that the clause does not limit the operation of another provision of, or made under, the Act or another Act relating to proceedings that may be taken for offences.

The scheme included in the Regulation allows a compliance officer to issue a penalty notice if it appears to the officer that a person has committed a penalty notice offence. There is no requirement that the compliance officer's view be

[15] See *Electricity Supply Amendment (Renewable Fuel Scheme) Regulation 2021* (**Regulation**) cl 150, 161 and 228.

[16] See Regulation cl 153, 154 and 156.

[17] See Regulation cl 165.

[18] See Regulation cl 170 and 181.

[19] See *Electricity Supply Amendment (Renewable Fuel Scheme) Regulation 2021*, cl 183.

[20] See Regulation cl 184 and 185.

"reasonable", noting that such threshold would limit the circumstances in which a penalty notice can be issued under the clause.

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 an individual retains the right to elect to have their matter heard and decided by a court. It 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.

The relevant penalty notice provision also provides that the clause does not limit the operation of another provision of, or made under, this or another Act relating to proceedings that may be taken for offences. It appears that this could result in a person receiving a penalty notice in addition to being subject to proceedings for an offence. The Committee refers this matter to the Parliament for its consideration.

Real property rights – power of compliance officers to enter premises

6.10 Clause 215 of the scheme provides that a compliance officer may at a reasonable time enter:

(a) premises used in connection with an activity for which a certificate has been created, and

(b) the principal place of business of an accredited certificate provider,

for the purpose of investigating that provider's compliance with the Part, regulations, scheme rules or condition of the provider's accreditation. The officer must not enter a part of the premises used only for residential purposes without the occupier's permission.

6.11 While at the premises, the officer may do anything that, in the opinion of the compliance officer, is necessary for the purposes of the investigation, including:

(a) examining and testing plant or equipment,

(b) taking photographs, films, audio, video and other recordings,

(c) taking copies of records or documents, and

(d) seizing anything that he compliance officer believes on reasonable grounds is connected with an offence under the Part.

6.12 An individual who hinders or obstructs a compliance officer in the exercise of a power is liable for a maximum penalty of 50 penalty units ($5 500). A corporation may also be found liable for a penalty of 200 penalty units ($22 000).

6.13 As stated above, a "compliance officer" means a compliance officer appointed by the Scheme Administrator under clause 214 of the scheme, in accordance with any guidelines issued by the Minister under that clause.

The scheme included in the Regulation permits a compliance officer to enter premises of an accredited service provider for the purpose of investigating the provider's compliance with the scheme. While at the premises, the compliance officer may do anything that, in the opinion of the officer, is necessary for the purposes of the investigation.

There is no requirement that the compliance officer's opinion be "reasonable", noting that this threshold would limit the actions an officer may take at the premises under the clause. A penalty also applies where an individual hinders or obstructs the compliance officer in the exercise of their power, effectively limiting the actions an individual may take under pain of penalty.

The Committee considers that this power of a compliance officer to enter and do a broad range of things on land, along with the penalty, may interfere with the real property rights of accredited service providers. However, it also understands the importance of adequate investigation powers in regulatory settings to ensure compliance. The Committee refers this matter to the Parliament for its consideration.

Extraterritorial operation of scheme

6.14 Clause 171 of the scheme states: "the scheme rules may make provision for the creation of certificates in relation to an activity, or class of activity, that produces renewable fuel in another jurisdiction, if an approved corresponding scheme is in operation in that jurisdiction".

6.15 An "approved corresponding scheme" is defined as a scheme approved by the Minister, for the purposes of clause 171, by order published in the Gazette. Clause 171 provides that the Minister may only approve the scheme if certain criteria are satisfied.

6.16 As outlined above, clause 215 of the scheme provides that a compliance officer may enter premises that are used in connection with an activity for which a certificate has been created for the purpose of investigating an accredited certificate provider's compliance with the scheme.

The scheme included in the Regulation provides that the scheme rules may provide for the creation of certificates in relation to an activity that produces renewable fuel in another jurisdiction, if an approved corresponding scheme is in operation in that jurisdiction. An "approved corresponding scheme" is a scheme approved by the Minister by order published in the Gazette.

This extends the legislative jurisdiction of activities forming part of scheme beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory. It also appears that the creation of certificates for an activity in another jurisdiction may allow compliance officers to enter a premises used in connection with an activity for which the certificate has been created in that other jurisdiction, for the purpose of an investigating an accredited certificate provider's compliance with the scheme. The Committee refers this issue to the Parliament for its consideration.

Right to privacy

6.17 The scheme includes provisions which permit and govern information sharing.

6.18 Clause 213 of the scheme allows the Scheme Administrator to enter into an information sharing arrangement with a relevant agency to share or exchange information about offences, alleged offences and investigations, the administration of the scheme and other matters prescribed by the regulations. A "relevant agency" means a government agency within the meaning of the *Government Sector Employment Act 2013* (a **government sector agency**) and another person or body prescribed by the regulations.

6.19 Clause 213(2) states that under an information sharing arrangement the Scheme Administrator and relevant agency are, despite any other Act or law, authorised to request and receive information held by, and disclose information to, the other party.

6.20 Clause 227 of the scheme permits the Scheme Administrator to keep information about offences or alleged offences, and collected in the administration of the Act. It may give this information to a person or body undertaking functions similar to those undertaken by the Scheme Administrator in another State or Territory or for the Commonwealth, and a government sector agency.

6.21 The Minister must also provide:

(a) under clause 189(3), information in the Minister's possession regarding compliance by scheme participants with the scheme, if requested by the Scheme Regulator, to enable the Scheme Regulator to exercise its functions, and

(b) under clause 191(3), information in the Minister's possession regarding compliance by accredited certificate providers with the scheme, if requested by the Scheme Administrator, to enable the Scheme Administrator to exercise its functions.

The scheme included in the Regulation permits information sharing in certain circumstances. While the Committee acknowledges that information sharing is required to administer and ensure compliance with the scheme, it considers that certain provisions may impede relevant persons' right to privacy.

Clause 213 authorises the Scheme Administrator and a relevant agency are to request, share and disclose information to the other party "despite any other Act or law". Information which may be shared concerns offences, alleged offences and investigations, the administration of the scheme and other matters prescribed by the regulations. This may limit protections upholding persons' right to privacy or otherwise cut across provisions regarding information sharing included in any other Act or law.

Clause 227 permits the Scheme Administrator to keep information about offences or alleged offences, and collected in the administration of the Act, with a person or body undertaking functions similar to its own in another State or Territory or for the Commonwealth, and a government sector agency. The clause

does not limit the time for which the Scheme Administrator may keep this information.

Finally, clauses 189 and 191 require the Minister to provide information on request to the Scheme Regulator and Scheme Administrator regarding compliance by scheme participants and accredited certificate providers with the scheme, respectively. There is no requirement that the request be "reasonable".

The scope of the information which may be requested, shared, kept or disclosed, as the case may be, appears to be quite broad, and includes information relation to offences and alleged offences. Taking this factor and the considerations outlined above into account, the Committee refers this issue to Parliament for its consideration.

Vicarious liability

6.22 Clause 200 allows the Scheme Regulator or Scheme Administrator to issue a written order (**civil penalty order**) to a person who has contravened a civil penalty provision, requiring them to pay a monetary penalty of no more than the penalty notice amount for the provision.

6.23 A "civil penalty provision" means a provision prescribed by the regulations as a civil penalty provision.

6.24 The regulations prescribe the amount payable for a penalty notice offence, which must not exceed the maximum amount that could be imposed for the offence by the court.

6.25 Clause 200 also provides that a director of a corporation or a person concerned with the management of a corporation may be ordered to pay a monetary penalty if the person knowingly authorised or permitted that corporation's contravention of a civil penalty provision.

The scheme provides that a director or person concerned with the management of a corporation may be ordered to pay a monetary penalty if the person knowingly authorised or permitted the corporation to contravene a civil penalty provision; such provision prescribed by the regulations. The amount payable is no more than the penalty notice amount for the provision.

The Committee generally comments on vicarious liability offences as they depart from the common law principle that the *mens rea*, or the mental element of an offence, is a relevant factor in establishing liability for an offence. The Committee notes that vicarious liability offences are not uncommon in regulatory settings to encourage compliance. 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

Strict liability offences with significant penalties

6.26 The scheme includes various strict liability offences which apply to individuals and corporations in the renewable fuel industry.

6.27 The highest maximum penalties apply to the following strict liability offences:

(a) improper creation of a certificate, resulting in a maximum penalty of 2000 penalty units ($220 000),

(b) contravention by a person of a condition of their accreditation as a certificate provider, resulting in a maximum penalty of 2000 penalty units ($22 000), and

(c) failure to comply with an order by the Scheme Administrator to surrender certificates where the Scheme Administration is satisfied, on the balance of probabilities, that the person is guilty of either offence outlined above. This results in a maximum penalty of 1000 penalty units ($110 000) plus 1 penalty unit ($110) for each certificate a person fails to surrender in accordance with the order.

6.28 Some other strict liability offences incur a penalty of 100 penalty units ($11 000) for an individual and include (without limitation):

(a) failure by a scheme participant to notify the Scheme Regulator of their liable use for a compliance period by the relevant date and in the required form,

(b) contravention of a scheme rule by a scheme participant or accredited certificate provider, and

(c) without reasonable excuse, refusal or failure by a relevant person to comply with a notice from the Scheme Regulator or Scheme Administrator requiring information, documents or evidence, or answering a question at a meeting of the Tribunal. A reasonable excuse includes where compliance might tend to incriminate the individual or make them liable to a forfeiture or penalty. A "relevant person" means:

(i) an officer of a scheme participant or former scheme participant,

(ii) an officer of an accredited service provider or former accredited service provider, or

(iii) another person that the Scheme Regulator or Scheme Administrator reasonably believes is able to provide information relevant to its functions.

6.29 In each case, a corporation is subject to maximum penalty of 250 penalty units ($27 500).

The scheme included in the Regulation includes various strict liability offences. Some of these offences, including for improper creation of a certificate, incur significant penalties of 2 000 penalty units ($220 000). Some other offences, including failure to notify the Scheme Regulator of certain information necessary to administer the scheme or contravention of a scheme rule, incur a penalty of 100 penalty units ($11 000) for an individual and 250 penalty units ($27 500) for a corporation. This may adversely impact on the business community.

The Committee generally comments on strict liability offences as they depart from the common law principle that the *mens rea,* or the mental element of an offence, is relevant to the imposition of liability. It also generally prefers that provisions which create offences be included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. However, it notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. In the 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 clause

6.30 The Regulation amends Schedule 4A of the Act to include a new scheme which, along with the other schemes included in Schedule 4A, comprises the energy security safeguard.

6.31 As noted in Digest No 25/57,[21] this amendment is made possible by Henry VIII clause, which is a clause of an Act enabling that Act to be amended by subordinate legislation. Specifically, section 98D of the Act enables a regulation to amend Schedule 4A to give effect to the object of the safeguard by establishing a scheme whose object is to courage a specified energy activity.

6.32 Specifically, Schedule 1 of the Regulation inserts a new Part 3 into Schedule 4A, which sets out the renewable fuel scheme.

The Regulation amends the *Electricity Supply Act 1995,* made possible by a Henry VIII clause in the Act, to include the scheme in Schedule 4A of the Act. This is an inappropriate delegation of legislative power. The Committee considers that primary legislation should not be changed by subordinate legislation because it reduces parliamentary scrutiny of those changes.

Unlike primary legislation, subordinate legislation is not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs. The Committee refers this matter to Parliament for further consideration.

Matters to be included in primary legislation

6.33 The scheme delegates various matters to the Minister including, for example:

(a) appointment of the Scheme Regulator and Scheme Administrator.

(b) the granting and revocation of exemptions from the scheme and, in relation to the granting of exemptions, in accordance with conditions including any

[21] New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest No 25/57*, 16 February 2021.

criteria specified by the Minister in a notice published in the Gazette (157, 159, 160).

(c) approval of the scheme rules under clause 218, notice of which must be published by the Gazette and made available to each scheme participant and the public. The scheme rules provide for a number of important issues relating to the administration of the scheme, including regarding the creation of certificates (including in relation to activities outside of NSW) and eligibility of a certificate provider for accreditation (cl 170, 171, 174). Penalties and consequences apply for non-compliance with the scheme rules, including for the improper creation of certificates under clause 172 and investigation by a compliance officer for non-compliance with the scheme rules under clause 215.

6.34 The Scheme Regulator and Scheme Administrator can each delegate the exercise of their functions (other than the power of delegation) to another person or body approved by the Minister, or a person who is a member of a class of persons approved by the Minister (cl 189, 191).

6.35 The scheme also refers a number of matters to the regulations including, for example:

(a) grounds for refusing an accreditation as a certificate provider, and suspending or cancelling an accreditation of a certificate provider (175-176).

(b) grounds for refusing an application to register the creation of certificate (181).

(c) which provisions are civil penalty provisions for the purposes of Division 11. As set out above, contravention of a civil penalty provision may result in a person, including an individual or corporation (including directors and persons concerned with the management of the corporation) being liable for monetary penalties.

(d) other decisions of the Scheme Regulator and Scheme Administrator subject to administrative review (220).

(e) other types of information that may be shared under an information sharing arrangement between the Scheme Administrator and a relevant agency, being government sector agency or another person or body prescribed by the regulations (213).

The scheme refers various matters to the Minister and to the regulations. For example, the scheme refers the approval of the scheme rules to the Minister, and penalties and investigations by compliance officers may arise for non-compliance. It also permits the Scheme Regulator and Scheme Administrator to delegate the exercise of their functions, with the Minister's approval. The scheme refers other decisions of the Scheme Regulator and Scheme Administrator, as well as other types of information that may be shared under an information sharing arrangement, to the regulations.

The Committee acknowledges that the referral of matters to regulations and Minister builds flexibility into the regulatory framework. However, it considers that certain matters referred are significant to the administration of the scheme, offences under it and the proper delegation of legislative power. Additionally, referring matters to the regulations which may impact on the right to privacy and administrative review matters generates uncertainty around the extent to which individuals' rights may be impacted by the scheme.

The Committee generally prefers such matters be included in the primary rather than the subordinate legislation in order to facilitate an appropriate level of parliamentary oversight. The Committee refers this issue to the Parliament for its consideration.

7. Environmental Planning and Assessment Amendment (Housing) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Anthony Roberts MP
Portfolio	Planning

Purpose and description

7.1 The object of the Environmental Planning and Assessment Amendment (Housing) Regulation 2021 (the **Regulation**) is to amend the Environmental Planning and Assessment Regulation 2000 as follows—

(a) to prescribe conditions of a development consent involving boarding houses, co-living housing, in-fill affordable housing, certain residential flat buildings and seniors housing,

(b) to require the name of the registered community housing provider who will be managing a boarding house to be included in development applications for boarding houses,

(c) to require a copy of the plan of management for a boarding house or co-living housing to be included in the development application concerned,

(d) to enable a monetary contribution for affordable housing to be paid by electronic transfer into an account nominated by the relevant consent authority,

(e) to make other amendments consequent on the commencement of *State Environmental Planning Policy (Housing) 2021*.

7.2 The Regulation is made under the *Environmental Planning and Assessment Act 1979* (the **Act**), including section 10.13 (general regulation-making power).

Issues considered by committee

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

Incorporation of policies and guidelines not subject to disallowance

7.3 The Regulation includes definitions and requirements contained in external documents regarding affordable housing developments.

7.4 The Regulation incorporates definitions relevant to permitted development by reference to the *State Environmental Planning Policy (Housing) 2021* (the **SEPP**).

7.5 The SEPP is an environmental planning instrument made under section 3.29 of the Act. Section 3.13 of the Act provides that environmental planning instruments are made for the purpose of achieving any of the objects of the Act. The SEPP is not a statutory rule and therefore is not subject to parliamentary scrutiny or disallowance under section 41 of the *Interpretation Act 1987*.[22]

7.6 The Regulation also inserts clauses 98G, 98H and 98I, and provides that the 'Affordable Housing Guidelines' must be applied by a registered community housing provider who manages a prescribed affordable housing component, boarding house or affordable housing dwelling during the prescribed period.

7.7 The term 'Affordable Housing Guidelines' is defined as the 'NSW Affordable Housing Ministerial Guidelines' published by the Department of Communities and Justice in August 2020, as approved by the Minister for Families, Communities and Disability Services from time to time.[23] Like the SEPP, these Guidelines are not a statutory rule and are similarly not subject to parliamentary scrutiny or disallowance.

7.8 These Guidelines set out the policy framework for delivering affordable housing that is developed with financial assistance from the NSW Government and is owned or managed by registered community housing providers.[24] Specifically, they set out the framework for:

(a) tenancy management, including eligibility criteria, setting rent, rent review, termination and appeals, and

(b) portfolio management, including financial management, developing or acquiring affordable housing and trading affordable housing.

(c) Regarding their application, the Guidelines provide that:

> The *NSW Affordable Housing Ministerial Guidelines* apply to all designated affordable housing properties in a registered community housing provider's portfolio which received capital funding from the NSW Government and/or were acquired using finance secured against government-funded assets.
>
> These Guidelines may also be applied when managing affordable housing properties developed under NSW Government planning instruments (such as the *State Environmental Planning Policy (Affordable Rental Housing) 2009, State Environmental Planning Policy No. 70 Affordable Housing (Revised Schemes) and Voluntary Planning Agreements*) and properties funded under NRAS B.

7.9 The Guidelines also state that NSW Government contracts will confirm the application of the Guidelines.[25] Where a NSW Government contract stipulates a

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[22] NSW legislation, *Environmental planning instruments*, updated 30 August 2020.

[23] NSW Government, Department of Communities and Justice, *NSW Affordable Housing Ministerial Guidelines 2021/2022*, 11 July 2021 (**Affordable Housing Guidelines**).

[24] Affordable Housing Guidelines, p5.

[25] Affordable Housing Guidelines, p5.

specific requirement, whether more or less stringent than the Guidelines, the contractual requirement prevails.[26]

7.10 Section 10.13(e) of the Act allows the Governor to make regulations including regarding the purposes, objectives, provision and maintenance of affordable housing, including:

(a) means for determining whether a household is a very low income, low income or moderate income household,

(b) means for determining affordable housing costs payable in respect of affordable housing, and

(c) enabling the Minister by order to determine matters relating to affordable housing.

The Regulation incorporates certain policies and guidelines regarding conditions for affordable housing developments.

Specifically, it incorporates requirements set out in and related to the *State Environmental Planning Policy (Housing) 2021* (the SEPP) and the *NSW Affordable Housing Ministerial Guidelines* (the Guidelines). Under the Regulation, a registered community housing provider who manages an affordable housing component, boarding house or affordable housing dwellings during the prescribed period must apply the Guidelines.

There is no requirement that the SEPP or the Guidelines (or its updates) be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. They are therefore not subject to parliamentary scrutiny.

However, the Committee acknowledges that the regulation-making power under the *Environmental Planning and Assessment Act 1979* contemplates the means for determining matters relating to affordable housing, including costs payable for affordable housing, being included in the regulations. The SEPP and Guidelines appear to be incorporated for this purpose and its inclusion in the Regulation may therefore maintain the intent of the primary legislation. In the circumstances, the Committee makes no further comment.

The regulation duplicates, overlaps or conflicts with any other regulation or Act: s 9(1)(b)(vi) of the LRA

Consistency of terms – meaning of 'relevant period'

7.11 The Regulation incorporates certain requirements set out in the *State Environmental Planning Policy (Housing) 2021* (the **SEPP**), and includes provisions related to these incorporated terms which do not align with the SEPP.

7.12 As stated above, the SEPP is an environmental planning instrument made under section 3.29 of the Act. Section 3.13 of the Act provides that environmental planning instruments are made for the purpose of achieving any of the objects of the Act. The

[26] Affordable Housing Guidelines, p5.

SEPP is not a tabled statutory rule and therefore is not subject to parliamentary scrutiny or disallowance under section 41 of the *Interpretation Act 1987*. It is instead treated as being a distinct category of legislation separate from other subordinate legislation.[27]

7.13 Clauses 98G, 98H and 98I, inserted by the Regulation into the *Environmental Planning and Assessment Regulation 2000*, incorporate requirements set out in the *State Environmental Planning Policy (Housing) 2021*. Specifically:

(a) clause 98G(3)(a)-(b) incorporates requirements set out in section 21(1)(a)-(b) of the SEPP regarding affordable housing components during the relevant period,

(b) clause 98I(3)(a)-(b) incorporates requirements set out in section 40(1)(a)-(b) of the SEPP regarding affordable housing dwellings during the relevant period, and

(c) clause 98H(3)(a)-(b) incorporates requirements in clause 26(1)(a)-(b) of the SEPP regarding boarding houses.

7.14 The 'relevant period' included in clause 98I(3) of the Regulation does not appear to align with the corresponding time period set out in the SEPP. Clause 98I(3) provides that the 'relevant period' means a period of 10 years commencing on the day an occupation certificate is issued for all parts of the building or buildings to which the development relates. However, section 40(1) of the SEPP provides that the requirements apply for a period of at least 15 years from the date of the issue of an occupation certificate.

The Regulation incorporates provisions set out in the *State Environmental Planning Policy (Housing) 2021* (SEPP), and includes related provisions which do not align with the SEPP.

The SEPP includes requirements for affordable housing components, affordable housing dwellings and boarding houses in sections. The Regulation functionally incorporates certain requirements regarding these developments within clauses 98G, 98I and 98H respectively, inserted by the Regulation into the *Environmental Planning and Assessment Regulation 2000*. This facilities parliamentary scrutiny of the incorporated SEPP requirements, which would otherwise not be subject to this scrutiny.

The 'relevant period' for the requirements under clauses 98I and 98G (including those SEPP requirements incorporated into the *Environmental Planning and Assessment Regulation 2000* by the Regulation) do not appear to align with the applicable periods set out in the SEPP. That is, because clause 98I provides that the 'relevant period' runs for 10 years, while section 40 of the SEPP indicates it runs for a period of 15 years.

[27] NSW legislation, *Environmental planning instruments*, updated 30 August 2020.

Noting that the SEPP is not a statutory rule and it appears the *Environmental Planning and Assessment Regulation 2000* (as amended) prevails over the SEPP, the Committee refers the non-alignment of SEPP and Regulation provisions to the Parliament for its consideration.

8. Pesticides Amendment Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. James Griffin MP
Portfolio	Environment and Heritage

Purpose and description

8.1 The objects of the *Pesticides Amendment Regulation 2021* (the **Regulation**) are to:

(a) to create exemptions to certain provisions of the *Pesticides Act 1999* and the *Pesticides Regulation 2017*,

(b) to provide that a licence to carry out prescribed pesticide work may have a term of duration of 1 year or 5 years and to prescribe fees to apply for or renew the licence,

(c) to prescribe—

(i) timber pest management technician work as a kind of prescribed pesticide work, and

(ii) timber pest management technician licences as a kind of licence, and

(iii) qualifications to hold a timber pest management technician licence,

(d) to provide for savings and formal matters.

8.2 The Regulation is made under the *Pesticides Act 1999* (the **Act**), including sections 5A, 46, 47(2)(b), 49(2)(b), 50(1)(a), 51(1) and (6), 117 and 119 (the general regulation-making power).

Issues considered by committee

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

Review of shorter licence term

8.3 The Regulation replaces clause 28 of the *Pesticides Regulation 2017* (**regulations**) regarding the duration of licence for prescribed pesticide work.

8.4 Clause 28(2)(b) provides that the Environment Protection Authority (**EPA**) may grant or renew a licence for the nominated term or, if satisfied that it is in the public interest, a shorter term than the nominated term.

8.5 Section 50 of the Act provides that a licence is subject to any condition prescribed by the regulations or any condition imposed on the licence by the EPA under the Act at the time the licence is granted or subsequently.

8.6 The Regulation does not create an avenue for review for applicants granted a shorter term than the term nominated in their application.

8.7 A process for review is included in section 52 of the Act when a licence is suspended or revoked. In that case, the EPA must provide advance notice of the proposed decision, have regard to representations made by the licence holder in relation to the proposed decision and, if it decides to proceed with the proposed suspension or cancellation, provide reasons for the suspension or cancellation.

8.8 Section 62 provides that a person may apply to the Civil and Administrative Tribunal for administrative review of the refusal or failure by the EPA to grant a licence, and a condition imposed by the EPA in relation to a licence.

The Regulation includes a new provision into the *Pesticides Regulation 2017* allowing the EPA to grant or renew a licence for a shorter term than the nominated term if satisfied that it is in the public interest to do so. This may impact, or otherwise create uncertainty regarding, the obligations of those individuals subject to a shorter licence term.

Additionally, the Regulation does not create a specific avenue of review regarding the EPA's decision to grant a shorter licence term. The Committee notes that a specific review process is provided in relation to the cancellation or suspension of a licence under section 52 of the *Pesticides Act 1999*, which requires the EPA to provide prior notice to the licence holder, consider representations made by the licence holder and provide reasons for suspension or cancellation.

However, the Committee acknowledges that a traditional avenue of review through the NSW Civil and Administrative Tribunal appears to be available to applicants, and that the shorter term may only be applied for a public interest purpose. In the circumstances, the Committee makes no further comment.

Property rights – limitation of notice requirements

8.9 The Regulation makes amendments to clarify that notice is not required in certain circumstances for the use of pesticide in a residential complex.

8.10 Under the existing regulatory provisions, clause 46 provides residents must be notified at least 5 working days' *before* proposed pest management technician work at a residential complex. Under clause 47, notice signs must be displayed in prescribed locations *during* the use of pesticide in a residential complex and for any period that the affected area should not be entered.

8.11 A "residential complex" means any multiple occupancy medium-density or high-density residential premises, and includes:

(a) any block of home units, or

(b) any caravan park used for, amongst other purposes, residencies of over 8 weeks' duration, or

(c) multiple occupancy land under a strata scheme (whether or not the dwellings are separate from each other), or

(d) a community scheme within the meaning of the *Community Land Development Act 2021*,

but does not include residential premises that comprise only 2 dwellings.

8.12 Despite the existing notice requirements, the Regulation amends clauses 46 and 47 to provide that notice is not required to be given under this clause if:

(a) the work being carried out is pest management technician work, and

(b) the work will be carried out by a person specified in clause 12A(1), being a person who is:

(i) the holder of a contractor licence, endorsed contractor licence, owner-builder permit or supervisor certificate under the *Home Building Act 1989* that authorises the holder to carry out waterproofing, or

(ii) under the supervision, and subject to the direction, of the holder of an endorsed contractor licence or supervisor certificate under the *Home Building Act 1989* that authorises the holder to supervise waterproofing, and

(c) the work will be carried out for a purpose specified in clause 12A(2)(a) or (b), specifically:

(i) to install, replace, repair, alter or maintain a waterproofing barrier than contains pesticides,

(ii) to use a waterproofing adhesive, foam or sealant that contains pesticides.

8.13 The Regulation also amends clause 48, which sets out provisions for prior notice for use of pesticides near a sensitive place. Under this existing clause, at least 5 working days' notice must be given *before* using pesticide for pest management technical work near a sensitive place. A "sensitive place" means a school, pre-school, kindergarten or childcare centre, hospital, community health centre or nursing home, and any place declared to be a sensitive place by the EPA by order published in the Gazette.

8.14 The Regulation inserts clause 48(5A) and limits the circumstances in which notice must be given prior to certain pest management technician work within 20 metres of a sensitive place (other than a hospital). As above, notice is not required if the work to be carried out is pest management technician work or timber pest management technician work, and it is to be carried out by a person specified in clause 12A(1)for a purpose specified in clause 12A(2)(a) or (b).

The Regulation limits the circumstances in which notice must be given prior to and during certain pest management technician work in the common area of a residential complex or a sensitive place. Specifically it provides that notice is not required if the work is pest management technician work or timber pest management technician work, and the work is to be carried out by a licenced contractor for the purpose of installing, replacing, repairing, altering or maintaining a waterproofing barrier than contains pesticides. A sensitive place is defined as a school, pre-school, kindergarten or childcare centre, hospital, community health centre or nursing home, and any place declared to be a sensitive place by the EPA by order published in the Gazette.

This limits the right of residents of residential complexes to receive notice before and while certain pesticides are used in the common areas of their complexes. It also limits the circumstances in which sensitive places including schools, childcare centres and nursing homes are notified before certain pesticides are used near those places.

The Committee acknowledges that the circumstances where notice is not required to be given appear to be specific. The work must be pest management technician work, must be carried out by certain persons and must be for specified purposes related to waterproofing products containing pesticides. However given the proximity to residential areas and sensitive places that would ordinarily require notice, the Committee refers this issue to the Parliament for consideration of whether appropriate safeguards are in place to limit any potential damage to property or vulnerable individuals.

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

Meaning of 'reasonable time'

8.15 The Regulation inserts clauses 56A and 56B into the regulations, which provide exemptions to the requirements under the Act not to possess or use an "unregistered pesticide". An unregistered pesticide includes a pesticide that has had its registration end, suspended or cancelled. Section 117 of the Act provides that the regulations may include exemptions from any provision or provisions of the Act or regulations.

8.16 The Act defines that to "use" a pesticide includes:

(a) apply, spray, spread or disperse the pesticide by any means (for example by hand or by the use of a machine or any type of equipment including aerial spraying equipment), or

(b) store the pesticide, or

(c) prepare the pesticide for use.

8.17 Clauses 56A provides that a person possessing a pesticide the registration of which has ended or been suspended or cancelled is exempt from the requirement under section 12(1) of the Act not to possess an unregistered pesticide if the person:

(a) does not use the pesticide,

(b) stores the pesticide in a way that does not endanger human health or the environment, and

(c) within a reasonable time after the registration of the pesticide ended or is suspended or cancelled, makes or has made arrangements to lawfully dispose of the pesticide.

8.18 This exemption ceases to apply if the unregistered pesticide is not lawfully disposed of within a reasonable time after the registration of the pesticide has ended or was suspended or cancelled.

8.19 The same conditions apply for application and cessation of the exemption under clause 56B, under which a person who is storing a pesticide is exempt from the requirement under section 13(1) of the Act not to use an unregistered pesticide.

8.20 The term "reasonable time" is not defined in the legislation despite the exemptions applying and ceasing to apply on the basis of compliance a condition within this timeframe. It is unclear who determines the expiry of this period.

8.21 A maximum penalty for breach of each sections 12(1) and 13(1) is $60 000 for an individual and $120 000 for a corporation. An offence committed against either section is an executive liability offence attracting executive liability for a director or other person involved in the management of the corporation under section 112.

The Regulation inserts clauses 56A and 56B into the *Pesticides Regulation 2017*, which provide exemptions under section 117 of the *Pesticides Act 1999* to the operation of Act's requirements not to possess unauthorised pesticides and use unauthorised pesticides, respectively. The exemptions cease to apply if the unregistered pesticide is not lawfully disposed of within a reasonable time after its registration ended or was suspended or cancelled. The maximum penalty for breach of each of these requirements is $60 000 for an individual and $120 000 for a corporation, with executive liability applying for a director or other person involved in the management of the corporation.

The period of a "reasonable time" is not defined in the legislation. This may create ambiguity as to an individual's obligations, how long they have to dispose of the unregistered pesticide, and whether they may be subject to any penalties. The Committee acknowledges that this timeframe may provide flexibility to allow for safe and lawful disposal of the pesticide. However, given the significant penalties for non-compliance, it refers to the Parliament the question of whether the term "reasonable time" should be defined or replaced with a definitive time period.

9. Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

9.1 The Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021 is made under the Public Health Act 2010 and takes effect from the date on which the Regulation was published, 1 December 2021.

9.2 The object of this Regulation is to prescribe a penalty notice offence amount of $5 000 for an individual and $10 000 for a corporation for the offence of failing to comply with a direction under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*.

9.3 There are a significant number of directions that can be lawfully given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Minister, police officers and the Chief Health Officer have powers under the Order to make directions in relation to the questioning, testing and quarantine for those arriving by air transportation into NSW.

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

9.4 The Regulation provides that a person or corporation that does not comply with a direction lawfully given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021* may be issued with a penalty notice. The maximum penalty that may be given is $5 000 for an individual or $10 000 for a corporation.

9.5 There are a significant number of directions under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*, including directions to:

(a) isolate at a particular location or residence;

(b) be tested for COVID-19;

(c) provide contact information to a class of persons;

(d) wear a mask in certain circumstances; and

(e) not be present at certain location if unvaccinated.

9.6 The Order also provides that the Minister, Chief Health Officer, and Commissioner of Police can give further directions under the Order.

The *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

The Committee has previously commented on other regulations related to managing the COVID-19 pandemic that allow for the issue of penalty notices.[28] Consistent with its previous comments, the Committee notes that penalty notices allow an individual or corporation to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person or corporation'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 in regards to the penalty for an individual, that $5 000 is a significant monetary amount to be imposed by way of penalty notice.

However, the Committee notes that individuals retain the right to elect to have their matter heard and decided by a Court. There are also 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

9.7 As noted above, the Regulation allows for a penalty notice of $5 000 for individuals and $10 000 for corporations to be issued for a contravention of the wide range of directions given in the Order.

As noted above, the *Public Health Amendment (COVID-19 Penalty Notice Offences—Air Transportation Quarantine) Regulation 2021* allows a penalty

[28] Digest No. 39/57; Digest No. 33/57

notice of $5 000 for an individual, or $10 000 for a corporation to be issued to an individual or corporation that contravenes a direction given under the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 4) 2021*. The Order provides directions in relation to the arrival, transportation, quarantining and testing of inbound arrivals to NSW, including flight crew. The Order also grants the Minister, the Chief Health Officer and the Commissioner of Police powers to make further directions in regards to inbound arrivals.

Consistent with previous comments in regards to penalty notice offences being included in regulations, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation.[29] 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.

Given the severe circumstances surrounding the COVID-19 pandemic, 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 circumstances, the Committee makes no further comment.

[29] Digest No. 39/57; Digest No. 33/57

10. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 7) 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

10.1 The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 7) 2021* (the **Regulation**) is to prescribe a penalty notice offence amount of $5 000 for an individual and $10 000 for a corporation for the offence of failing to comply with a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* (the **Order**).

10.2 The Regulation is made under delegation of the *Public Health Act 2010*. Specifically, section 7 enables the Minister to take such action and by order give directions if the Minister believes on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health. Section 4 of the Order provides the basis for concluding that such a situation has arisen on the basis of COVID-19.

10.3 The Regulation commenced at 10pm on 4 December 2021, at the same time as the Order.

10.4 The Committee commented on the creation of the penalty notice offence for contravention of a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* in Digest No. 37/57,[30] in relation to a person's right to a fair trial.

Issues considered by committee

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

Penalty notice offence – right to a fair trial

10.5 The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to make it a penalty notice offence to fail to comply with a direction of the Minister under the Order. It achieves this by replacing the reference to the *Public Health (COVID-19*

[30] New South Wales Parliament, Legislation Review Committee, *Legislation Review Digest No. 37/57*, 16 November 2021.

Self-Isolation) Order (No 3) 2021, in force until 4 December 2021 at 10pm, with a reference to the updated version of the public health order.

10.6 The Order includes directions of the Minister about, among other things:

(a) self-isolation of persons diagnosed with COVID-19 and close contacts (being a person identified by an authorised contact tracer as likely to have come into contact with a person with COVID-19, and at risk of developing COVID-19), including a requirement:

(i) for a person who diagnosed with COVID-19 to self-isolate until medically cleared,

(ii) for a person diagnosed with COVID-19 to provide information of their residence or place and also on their movements for the previous 28 days and take reasonable steps to notify employers, close contacts and education providers, and

(iii) for close contacts to self-isolate for up to 14 days if directed,

(b) providing information to a police officer and, where the person is conducting a business or undertaking, SafeWork NSW, and

(c) being medically cleared of COVID-19 and medical clearance notices.

10.7 The penalty imposed for a penalty notice offence is $5 000 for an individual and $10 000 for a corporation.

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. Specifically, the Regulation replaces reference of the predecessor public health order in the *Public Health Regulation 2012* with a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

Directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* include, but are not limited to, the requirement to self-isolate after being diagnosed with COVID-19, for close contacts of a person diagnosed with COVID-19 to self-isolate where directed and provide information to specified persons including workplaces, employers and police.

Penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may therefore impact on a person's right to a fair trial, specifically any automatic right to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, the Committee acknowledges that the Regulation does not remove an individual's right 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.

In the circumstances and considering the extraordinary context of COVID-19, including the need to maintain public health by restricting the movement of persons diagnosed with COVID-19 or in contact with those persons, the Committee makes no further comment.

Penalty notice offence – freedom of movement

10.8 The Regulation makes it a penalty notice offence to fail to comply with a direction of the Minister under the Order, including the Minister's orders for persons diagnosed with COVID-19 and close contacts to self-isolate. Specifically, the Minister directs:

(a) persons diagnosed with to self-isolate at their residence or a specified place until medically cleared, and

(b) close contacts to self-isolate at their residence or a specified place, if directed by an authorised contact tracer, for 7 days if they are fully vaccinated (meaning they have had 2 does of a COVID-19 vaccinate at least 14 days prior) or 14 days if they are not.

10.9 While self-isolating, persons diagnosed with COVID-19 or close contacts may only leave their residence or the specified place to obtain medical care or supplies and in emergencies. They may only allow other people to enter in certain circumstances, including where (without limitation) those other people usually live there and are complying with the Order, or the entry is for medical or emergency care, or to provide essential support services.

The Regulation enables penalty notices to be issued for a contravention of a direction of the Minister under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*, which includes directions for persons diagnosed with COVID-19 or close contacts to self-isolate.

The requirement to self-isolate or otherwise be issued with a penalty notice may effectively limit the freedom of movement of persons diagnosed with COVID-19 and close contacts for the duration they are required to isolate. Article 12 of the International Covenant on Civil and Political Rights provides that freedom of movement may be restricted where, provided by law, it is necessary to protect public health and consistent with other rights recognised by the Covenant.

The Committee notes that the right is only limited for persons diagnosed with COVID-19 and close contacts only until the person is medically cleared or otherwise for a specified duration (of 7 days if fully vaccinated or 14 days if not), respectively. The Order also specifies circumstances in which they can leave or allow people to enter their residence or place where they are isolating, including for medical or emergency purposes. In the circumstances and considering the extraordinary context of COVID-19, the Committee makes no further comment.

11. Public Health Amendment (Rapid Antigen Tests) Regulation 2022

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC 7 June 2022
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health

Purpose and description

11.1 The *Public Health Amendment (Rapid Antigen Tests) Regulation 2022* (the Regulation) was introduced in response to the COVID-19 pandemic and prescribes that a person may be issued with a penalty notice of $1 000 if they fail to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test.

11.2 The Regulation is made under sections 118 and 134 of the Act and the general regulation making power.

Issues considered by the Committee

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

Penalty notice offence – right to a fair trial

11.3 The Regulation amends schedule 4 of the *Public Health Regulation 2012* to create a penalty notice offence against a person who does not give notification (failure to give notification offence) that the person has tested positive to COVID-19 following a rapid antigen test.

11.4 The Regulation amends schedule 4(d) of the *Public Health Regulation 2012* by creating an exception to the penalty for offences prescribed under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*. The Regulation amends schedule 4(d) to state that the penalties for those offences is $5 000 and $10 000 for individuals and corporations respectively, but for the offence of failing to give notification where the penalty notice amount is $1 000. Under the Regulation, failure to give notification offences are dealt with as failures to comply with a Ministerial direction under section 4(e) of the schedule.

11.5 A person may provide notification of a positive COVID-19 rapid antigen test by registering their positive result on their Service NSW account.[31] It is not a requirement that negative test results are registered.

The Regulation provides that penalty notices of up to $1 000 can be issued for an offence of failing to comply with a direction of the Minister for Health requiring them to report a positive COVID-19 result detected by a rapid antigen test (failure to give notification offence). The Regulation creates an exception to schedule 4(d) of the Public Health Regulation 2012 to distinguish between penalties under the Public Health (COVID-19 Self-Isolation) Order (No 4) 2021 and that of failing to give notification offences.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $1 000 for an individual are significant monetary amounts to be imposed by way of penalty notice, particularly in the extraordinary circumstances of the COVID-19 pandemic.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19 court backlogs, the Committee makes no further comment.

[31] Service NSW, COVID-19 Services - Register a positive rapid test result, viewed 14 March 2022.

12. Retail and Other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance

Purpose and description

12.1 The object of this Regulation is to provide that a lessee may still request to renegotiate for reduced rent for a temporary period even though the lessee is no longer an impacted lessee if the lessee—

(a) would have qualified for certain grants or payments, and

(b) had a turnover of less than $5 million during the 2020–2021 financial year.

12.2 This Regulation is made under—

(a) the Retail Leases Act 1994, including sections 85, the general regulation-making power, and 87, and

(b) the Conveyancing Act 1919, section 202, the general regulation-making power.

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

12.4 This regulation extends the term in which lessees, who would previously have been characterised as impacted lessees, are able to request to renegotiate for a reduced rent for a temporary period. Accordingly, the amendment continues to give effect to clause 6D of the previous version of the *Retail and Other Commercial Leaves Covid-19) Regulation 2021*, which in turn gave effect to the *National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19* which were adopted by the National Cabinet on 7 April 2020.

12.5 As with previous versions of the Regulation, this amendment requires lessors to commence renegotiation of a lease within 14 days of a request by a lessee, unless another timeframe is agreed, and allowing lessees to make multiple requests for rent renegotiation during the prescribed period.

Issues considered by committee

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

Property rights and freedom of contract

12.6 Under the Regulation, a lessee who is no longer an impacted lessee under the definition at section 4 of the *Retail and Other Leases (COVID-19) Regulation 2021*, but who would have met the criteria for an impacted lessee, can request a rent renegotiation. Those criteria are that the lessee:

(a) would have qualified for certain grants or payments; and

(b) had a turnover of less than $5 million during the 2020-2021 financial year.

12.7 Under the Regulation, if a lessee requests a rent renegotiation, the lessor must commence the renegotiation within 14 days of receiving that request. This renegotiation must acknowledge the economic impacts of the COVID-19 pandemic, and the leasing principles set out in the National Code of Conduct.

The *Retail and other Commercial Leases (COVID-19) Amendment (Impacted Lessees) Regulation 2021* imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The Regulation requires lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation extends the rights of lessees that were previously deemed impacted lessees to make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. As the Committee noted in digest 27/57, the requirement for lessors to engage in renegotiation of rent in this Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee recognises that the Regulation, like the previous version, only applies to cases involving lessees that were previously deemed to be 'impacted lessees' (i.e. lessees that qualified for certain grants or payments and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking other prescribed actions. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

13. Strata Schemes Management Amendment (Information) Regulation 2021

Date tabled	LA: 15 February 2022 LC: 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Fair Trading

Purpose and description

13.1 The objects of the *Strata Schemes Management Amendment (Information) Regulation 2021* are—

(a) to require the owners corporation for a strata scheme—

(i) to give information to the Secretary, and

(ii) to notify the Secretary if the information changes or is incorrect in a material particular, and

(b) to prescribe the following—

(i) the types of information that must be given,

(ii) how and when the information, and notice of changes to the information, must be given,

(iii) the fee payable to the Secretary for administration relating to the information,

(iv) restrictions on the Secretary disclosing the information,

(v) offences for failing to comply with certain requirements to give information.

13.2 The Regulation will commence on 30 June 2022, and requires owners corporations to submit the prescribed information in the authorised form to the Secretary by 30 September 2022 if their first annual general meeting ('AGM') occurred prior to 30 June 2022, or within 3 months of their first AGM for all owners corporations forming post 30 June 2022. Owners corporations must then continue to submit the prescribed information each subsequent calendar year within 3 months of their AGM. Failure to submit the prescribed information within the 3 months carries a maximum penalty of 50 penalty units ($5,500).

13.3 Information that must be provided to the Secretary includes:

(a) the strata plan number and date of registration;

(b) the address and number of lots in the strata scheme;

(c) the uses of the lots in the strata scheme;

(d) the status of relevant occupancy certificates and fire safety statements;

(e) insurance in relation to buildings;

(f) the balance of any capital works fund; and

(g) the contact details of the secretary of the owners corporation, an agent if used and other relevant office holders.

13.4 The owners corporation must notify the Secretary if any material given was incorrect, and must also notify the Secretary if certain prescribed information changes prior to the next AGM of the owners corporation. Failure to provide this notification within 28 days of the change in the approved form carries a maximum penalty of 20 penalty units ($2,200).

13.5 The Regulation includes two new penalty notice offences that can be issued for:

(a) for a failure to provide the specified information (clause 43(1)); or

(b) failing to provide notification of changed information within the prescribed period (clause 43B(2)).

13.6 These offences each carry a maximum penalty of 2 penalty units ($220).

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 fair trial

13.7 The Regulation includes two new penalty notice offences that can be issued for:

(a) for a failure to provide the specified information (clause 43(1)); or

(b) failing to provide notification of changed information within the prescribed period (clause 43B(2)).

13.8 These offences each carry a maximum penalty of 2 penalty units ($220).

The *Strata Schemes Management Amendment (Information) Regulation 2021* expands the list of offences for which a penalty notice may be issued. Penalty notices allow a person or owners corporation to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee however recognises the practical benefits of penalty notices such as their cost effectiveness and ease of administration. Further, the Committee notes that the issuing of a penalty notice does not prevent a person or owners corporation from electing to have the matter proceed to court. However, there is a risk that some may waive this right and pay the on-the-spot fine to avoid the need to attend court, with its associated inconvenience, stress, and/or the risk of having a larger penalty imposed. However, considering the size of the penalties that may be issued by penalty notice (a maximum of $220), 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

13.9 The Regulation provides for two new offences. Clause 43(1) provides that an owners corporation must provide prescribed information about the strata scheme it manages to the Secretary on an annual, ongoing basis. The maximum penalty that applies in respect of this offence is 50 penalty units ($5 500). Clause 43B(2) provides that the owners corporation must also inform the Secretary if any of the information provided was incorrect, or if certain prescribed information changes during the period between the annual reports. The maximum penalty that applies in respect of this offence is 20 penalty units ($2 200).

The *Strata Schemes Management Amendment (Information) Regulation 2021* creates several offences. For example, subclause 43(1) provides that an owners corporation must provide prescribed information about the strata scheme it manages to the Secretary on an annual, ongoing basis. The maximum penalty that applies in respect of any of these offences is a $5 500 fine.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, given the regulatory context, it may be more administratively efficient to proceed by regulation (e.g. if changes are required to keep pace with developments in the industry) and the penalties are relatively modest. On this basis the Committee makes no further comment.

14. Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2021

Date tabled	LA: 15 February 2022 LC 22 February 2022
Disallowance date	LA: 17 May 2022 LC: 7 June 2022
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

14.1 The object of the *Surveillance Devices Amendment (Body-Worn Recording Devices) Regulation 2021* (the **Regulation**) is to amend the *Surveillance Devices Regulation 2014* to extend, by 2 years, the trial period during which ambulance officers may use body-worn recording devices.

14.2 The trial is otherwise due to expire on 30 November 2021.

14.3 In effect, the Regulation amends the *Surveillance Devices Regulation 2014* to exempt ambulance officers from the operation of sections 7 and 8 of the *Surveillance Devices Act 2007* (the **Act**) for a further 2 years.

14.4 Section 7 of the Act creates an offence for the installation, use and maintenance of listening devices. Section 8 of the Act creates an offence for the installation, use and maintenance of optical surveillance devices without consent unless the conduct falls within a statutory exemption under section 8(2A).

14.5 The program uses 60 cameras across the Sydney Ambulance Centre, Liverpool Superstation and Hamilton station. The pilot was introduced following recommendations made across the NSW Ambulance Occupational Violence Prevention Strategic Advisory Group report, the Round-table meeting report, and the Legislative Assembly Committee on Law and Safety inquiry report into Violence against Emergency Services Personnel.[32] Those recommendations included:

(a) A review to explore current and potential communication devices used by Paramedics to potentially further strengthen personal security for all employees.

[32] Legislative Assembly Committee on Law and Safety, Inquiry into Violence against Emergency Services Personnel – Final report, August 2017.

(b) A Review to identify contributing factors and behaviours that place Paramedic staff at risk to enable the improvement of support and management processes for employees. [33]

14.6 The Regulation is made under section 59 of the *Surveillance Devices Act 2007.*

14.7 The Committee previously commented on the original regulation in February 2021.[34]

Issues considered by the Committee

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

Right to privacy

14.8 Clause 5 of the *Surveillance Devices Regulation 2014* provides that an ambulance officer is exempt from sections 7 and 8 of the Act in certain circumstances. Under the Regulation, this will extend the timeframe in which Ambulance officers may exercise their powers to record audio and video, as permitted in certain circumstances sections 7 and 8.

14.9 Exemptions under sections 7 and 8 of the Regulation will only be lawful where the audio or video recording is conducted in accordance with clause 5 of the Regulation, where:

(a) The ambulance officer uses the device in execution of their duty, and

(b) The device is attached to the uniform of, or is otherwise worn by, an ambulance officer, and

(c) Either:

(i) Before making a recording, the ambulance officer made a reasonable attempt to ensure that the persons likely to be recorded by the device are aware that the device is capable of recording images or sound, or both, or

(ii) In the opinion of the ambulance officer, there is a significant risk of harm to the ambulance officer or another person, or

(iii) The recording of images or sound, or both, by the device is inadvertent or unexpected.

14.10 While the *Surveillance Devices Regulation 2014* was originally due to expire on 30 November 2021, the amending Regulation extends the trial period until 30 November 2023.

The Regulation extends the trial period during which ambulance officers will be exempt from certain requirements under the *Surveillance Devices Act 2007*, for

[33] NSW Ambulance, Body worm camera pilot, viewed 14 March 2021.

[34] Legislation Review Committee, Digest 20/57, 16 February 2021.

a further 2 years. The Committee previously comments on the first version of this regulation in its Digest 20/57 (16 February 2021).

This exemption, and its extension by the Regulation, has the potential to impact individuals' right to privacy, as it permits ambulance officers to record people using video or audio equipment without their consent in certain circumstances; for example, if the ambulance officer believes there is a significant risk of harm to themselves or another person. The Committee notes that different ambulance officers may have different interpretations of what constitutes a significant risk. Both the original and amending regulations appear to be silent on what constitutes a significant risk in the circumstances. Relevantly, ambulance officers are likely to interact with vulnerable members of the public – for example, those who are sick or injured. Further, it is unclear from the regulation how recordings captured by body worn surveillance devices will be stored, or for how long, or how they can be used.

However, the Committee acknowledges that the exemption is associated with a trial in three locations and as such only some ambulance officers in NSW will have access to the surveillance devices. There are also safeguards accompanying the exemption, including that the exemption does not apply unless the ambulance officer informs a person that they might be recorded or the recording is accidental. It is further anticipated that officers with access to these devices will have training and regulatory guidance on circumstances which may constitute a significant risk. In addition, the Committee recognises the public interest in deterring violence and anti-social behaviour towards ambulance officers. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

(i) trespasses unduly on personal rights and liberties, or

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

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

(iv) inappropriately delegates legislative powers, or

(v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

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

9 Functions with respect to regulations

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

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

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

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

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

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

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

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

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

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

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

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

(1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.

(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.

(3) The functions of the Committee with respect to regulations 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.

Appendix Two – Regulations without papers

Note: at the time of writing, the Committee makes no further comment about the following regulations.

1. Biosecurity Order (Permitted Activities) Amendment Order 2022 (2022-37)

   The Order is made pursuant to section 404A of the *Biosecurity Act 2015* and commenced on 16 February 2022.

   The Order amends the *Biosecurity Order (Permitted Activities) 2019* to correct a typographical error in clause 65 and amend the conditions for permitted importation of potted plants from a tramp ant infested area.

2. Fisheries Management (Thompsons Creek Dam Special Approval and Possession Limit) Order 2021 (n2021-2817)

   This Order is made under sections 37 and 17C of the *Fisheries Management Act 1994* and remains in force for 5 years commencing on the date of publication.

   The Order regulates and sets limits for the fishing of specified species in Thompsons Creek Dam.

3. Legal Profession Uniform Conduct (Barristers) Amendment Rule 2022

   The object of this Regulation is to provide further clarification as to the circumstances in which a barrister must not engage in conduct which constitutes discrimination, sexual harassment, or bullying.

4. Liquor Amendment (Outdoor Dining) Regulation 2022

   The object of this Regulation is to extend by 2 months the period within which proposed temporary boundary changes to certain licensed premises may apply.

   The Regulation continues to exempt temporary boundary changes to adjacent land for food and drink premises for use as an outdoor dining area up to 30 June 2022.

5. Local Government (General) Amendment (By-Elections during COVID-19 Pandemic) Regulation 2022

   The object of this Regulation is to provide that technology assisted voting, other than telephone voting for vision impaired or blind electors, is not to be used at by-elections held before the end of 30 June 2022.

   The Regulation inserts clause 333M into the *Local Government (General) Regulation 2021* prescribes that telephone voting for vision impaired or blind electors as the only technology assisted voting to be used for local government by-elections held in the period from 4 February to 30 June 2022. It time-limits this clause for repeal at the end of 30 June 2022.

6. Mining Amendment (Competitive Selection Process) Regulation 2022

   The object of this Regulation is to provide for the consequences of the withdrawal of an invitation for competitive selection applications.

7. Notice of Reservation of a National Park (n2021-2684, 2686)

   This notice reserves additional land to be incorporated as part of the below listed National Parks, under the provisions of section 30A(1)(a) of the *National Parks and Wildlife Act 1974.* The National Parks affected are the:

   - Blue Mountains National Park; and
   - Koonaburra National Park.

8. Notice of Reservation of a National Park (n2021-2787, 2792)

   This notice reserves additional land to be incorporated as part of the below listed National Parks, under the provisions of section 30A(1)(a) of the *National Parks and Wildlife Act 1974.* The National Parks affected are the:

   - Everlasting Swamp National Park; and
   - Tapin Tops National Park.

9. Notice of Reservation of State Conservation Area (n2021-2685)

   This notice reserves additional land to be incorporated as part of the Langidoon-Metford State Conservation Area under the provisions of section 30A(1)(c) of the *National Parks and Wildlife Act 1974.*

10. Notice of Reservation of State Conservation Area (n2021-2788, 2790)

    This notice reserves additional land to be incorporated as part of the below listed State Conservation Areas under the provisions of section 30A(1)(c) of the *National Parks and Wildlife Act 1974.*

    The State Conservation Areas affected are the:

    - Parr State Conservation Area; and
    - Gurranang State Conservation Area.

11. Notification of a Reservation of an Aboriginal Area (n2021-2625)

    This notice reserves land as an Aboriginal Area under the provisions of section 30A(1)(g) of the *National Parks and Wildlife Act 1974.* This land is assigned the name Ngiyungbayi Aboriginal Area under Section 30A(2) of the *National Parks and Wildlife Act 1974*.

12. Notification of Notice of a Reservation of State Conservation Area (n2021-2610, 2623, 2628)

    This notice reserves additional land to be incorporated as part of the below listed State Conservation Areas under the provisions of section 30A(1)(c) of the *National Parks and Wildlife Act 1974.*

    The State Conservation Areas affected are the:

    - Glenrock State Conservation Area;
    - Goulburn River State Conservation Area; and
    - Woomargama State Conservation Area.

13. Notification of Notice of Reservation of a National Park (n2021-2609, 2611, 2612, 2614-2617, 2619, 2624, 2626, 2627, 2629-2632)

    This notice reserves additional land to be incorporated as part of the below listed National Parks, under the provisions of section 30A(1)(a) of the *National Parks and Wildlife Act 1974.* The National Parks affected are the:

    - Barrington Tops National Park;
    - Bongil Bongil National Park;
    - Budawang National Park;
    - Capertree National Park;
    - Culgoa National Park;
    - Garigal National Park;
    - Goulburn River National Park;
    - Jervis Bay National Park;
    - Middle Brother National Park;
    - Narriearra Caryapundy Swamp National Park;
    - Oxley Wild Rivers National Park;
    - Paroo-Darling National Park;
    - Sturt National Park;
    - Wollemi National Park; and
    - Yuraygir National Park;

14. Notification of Notice of Reservation of a Nature Reserve (n2021-2613, 2618)

    This notice reserves additional land to be incorporated as part of the below listed Nature Reserves under the provisions of section 30A(1)(f) of the *National Parks and Wildlife Act 1974.*

    The Nature Reserves affected are the:

    - Billinudgel Nature Reserve; and
    - Koukandowie Nature Reserve.

15. Notification of Notice of Reservation of a Nature Reserve (n2021-2789, 2791)

    This notice reserves additional land to be incorporated as part of the below listed Nature Reserves under the provisions of section 30A(1)(f) of the *National Parks and Wildlife Act 1974.*

    The Nature Reserves affected are the:

    - Eusdale Nature Reserve; and
    - Yarri Barri Nature Reserve.

16. NSW Trustee and Guardian Amendment (Fees) Regulation 2021

The object of this Regulation is to amend the *NSW Trustee and Guardian Regulation 2017* to update the fees payable to the NSW Trustee for the following—

(a) managing the affairs of persons incapable of managing their own affairs,
(b) managing estates,
(c) professional services in connection with preparing the following—
    (i) wills,
    (ii) enduring guardianship appointments,
    (iii) powers of attorney.

The Regulation significantly increases certain fees which may be charged by the NSW Trustee in respect to professional services rendered by the Trustee. However, the parent Act gives the Trustee discretion to waive, remit or reduce fees.

17. Practice Note SC CL 10

The purpose of this Practice Note is to provide arrangements for seeking orders to vary or discharge orders relating to the proceeds of crime or criminal assets.

18. Professional Standards Act 1994—Notification pursuant to section 13

Pursuant to section 13 of the *Professional Standards Act 1994*, the Law Society of South Australia Professional Standards Scheme is published in New South Wales. The Scheme will commence on 1 July 2022.

The Scheme is prepared for the purposes of limiting occupational liability of its participants to the extent to which such liability may be limited under the Act.

The Scheme substantially remakes the previous version which commenced on 1 July 2017.

19. Radiation Control Amendment Regulation 2021

The objects of the Regulation are to amend the *Radiation Control Regulation 2013* to—

a) Define the terms employment, medically exposed person and member of the public for the purposes of the Regulation,
b) Prescribe dose limits for exposure to ionising radiation for occupationally exposed persons who are 16 years of age or over but less than 18 years of age,
c) Require an employer to comply with the dose limits,
d) Prescribe an employer's failure to comply with the dose limits as a penalty notice offence and the amount payable under the penalty notice,
e) Make other minor amendments.

The Regulation is made under sections 25A and 40 of the *Radiation Control Act 1990* and the general regulation-making power.

Under the amendment employers will be bound by a duty to only expose occupationally exposed persons to ionising radiation in compliance with the exposure limits stipulated in schedule 5 of the Regulation. Breaches of those exposure limits may result in penalty notices being issued under the Regulation.

20. Road Transport (Vehicle Registration) Amendment (Primary Producer's Vehicle) Regulation 2022

The object of this Regulation is to amend the Road Transport (Vehicle Registration) Regulation 2017, definition of primary producer's vehicle so that a heavy vehicle can only be a primary producer's vehicle if it is used solely for specified primary production purposes.

21. Supreme Court Act 1970 — Notification of Practice Note SC CL 10 (n2022-0064)

Notification of Practice Note SC CL 10, Supreme Court Common Law Division – Proceeds of Crimes and Criminal Assets, which sets out arrangements for seeking orders to vary or discharge orders relating to the proceeds of crime or criminal assets. This Practice Note applies to any application, by consent or otherwise, for variation or discharge of orders concerning the proceeds of crime or criminal assets. This Practice Note was issued on 17 December 2021 and commenced 17 December 2021.

22. Water Management (General) Amendment Regulation 2021

The object of this Regulation is to amend the *Water Management (General) Regulation 2018* to—

(a) provide for replacement floodplain harvesting access licences, including by—
  (i) setting out the circumstances in which a landholder may be eligible for a replacement floodplain harvesting access licence, and
  (ii) providing for the determination by the Minister for Water, Property and Housing of the share components of replacement floodplain harvesting access licences, and
(b) impose mandatory conditions on a work approval in relation to a water supply work nominated for the purpose of capturing or storing water taken under the following arrangements—
  (i) a floodplain harvesting (regulated river) access licence,
  (ii) a floodplain harvesting (unregulated river) access licence,
  (iii) a basic landholder right and an access licence referred to in subparagraph (i) or (ii), and
(c) provide for exemptions from requirements under the *Water Management Act 2000* for a landholder—
  (i) to hold a water supply work approval to use a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field that is part of the land, and
  (ii) to hold a water access licence to take water from a tailwater drain for the purpose of collecting rainfall run-off from an irrigated field that is part of the land, except during a period in which a work on the land, other than a tailwater drain, takes overland flow water.

This Regulation was subject to a disallowance motion in the Legislative Council on 24 February 2022. As the Committee may only report on regulations while they are disallowable (see s 9(1) of the *Legislation Review Act 1987)* this regulation has not been reported on. However, the Committee has noted that the regulation raised the following issues that it may have otherwise reported on:

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

Strict liability offence

The amending Regulation creates strict liability offence of non-compliance with Division 3C of the *Water Management (General) Regulation 2018* (the Regulation) under cl 238Q(4), by way of a Henry VIII clause under s 400(3) of the *Water Management Act 2000* (the Act).

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

Significant matters not subject to parliamentary scrutiny – models published on departmental website

Cl 23G(2) provides that models (for the purposes of determining the share component of water which a holder of a replacement floodplain harvesting access licence under clause 23C is entitled to) are to be published on the Department's website.

Henry VIII clauses

The amending Regulation contains the following Henry VIII clauses:

- Cl 39B exempts specified activity (collecting rainfall run-off from irrigated field part of the land using a tailwater drain) that would be an offence under s 91B(1) of Act—by way of general defence under s 91M(2) of the Act
- Adds cl 17C to Sch 4, Pt 1 which under cl 21 of the Regulation exempts collection of rainfall run-off from being an offence under s 60A of the Act—by way of general defence under s 60F of the Act
- Cl 236 amendments prescribing matters for duly qualified persons—by way of s 101A of the Act
- Clauses 238B, 238D, 238E, 238H, 238I, 238S and 238T imposes mandatory conditions for licence holders—by way of s 91IA and 115 of Act
- Cl 238C allows discretionary exemptions from application of mandatory conditions established under the regulations—by way of s 400(2) of the Act
  Cl 238R provides conditions where s 91I doesn't apply