Legislation Review Committee

PARLIAMENT OF NEW SOUTH WALES

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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”.

Contents

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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. BIODIVERSITY CONSERVATION AMENDMENT (KANGAROO PROTECTION) BILL 2022*

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

Significant matters – creation of offences and prescribing prohibited conduct

The Bill inserts section 2.7A into the *Biodiversity Conservation Act 2016*, which provides a general regulation-making power to prohibit conduct as constituting harm to a kangaroo prohibited by this section. That regulation-making power also allows the establishment of offences against the regulation and the imposition of maximum penalties. This would allow regulations to impose maximum monetary penalties of up to $330 000 and/or imprisonment for 2 years for individuals who commit a relevance offence in the course of commercial operations.

The Committee acknowledges that the delegation of matters in the regulations builds flexibility into the regulatory framework. However, it prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny, particularly those which may carry a custodial sentence. Unlike primary legislation, regulations are subordinate legislation and are not required to be passed by Parliament. Given the possible custodial penalties and broader power to create offences and prescribe prohibited conduct, the Committee refers this matter to Parliament for its consideration.

2. ELECTORAL AMENDMENT (VOTING AGE) BILL 2022*

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the Legislation Review Act 1987.

3. GREATER CITIES COMMISSION BILL 2022

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

Absolute privilege - Removal of right to seek damages

The Bill amends Schedule 1, clause 34(1)(b) of the *Defamation Act 2005,* providing that certain reports and other publications of the Greater Cities Commission (Commission) are subject to absolute privilege.

These reports and publications include advice provided to the Minister on relevant issues, other documents created in relation to the functions of the Commission outlined in section 10 of the Bill, and the annual report of the Commission.

By deeming that these publications are covered by absolute privilege, the Bill removes an avenue for an effective remedy for an individual or corporation under the *Defamation Act 2005* to seek claim for damages due to a loss incurred because of defamatory statements made about them.

The Committee notes the importance of defamation law in protecting the reputations of individuals from unfair damage, and notes that the Bill applies absolute privilege to most of the documents that would be produced by the Commission. However, the Committee also acknowledges that for the Commission to be effective, it may need to publish reports and other documents that are full and frank in their assessment of the circumstances, and that claiming

absolute privilege over these documents serves to encourage this frankness. The Committee notes that similar provisions regarding absolute privilege also applies publications of other government departments. Given these circumstances, the Committee makes no further comment.

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

Procedural fairness - Removal from employment without notice

The Bill at Schedule 2, subsection 5(2) allows the Minister to remove an appointed member from any office at any time for any reason and without notice. Subsection 5(3) requires the Minister to provide a written statement of reasons for removing the member from office and make that statement publicly available.

This is a non-reviewable decision that may be implemented with immediate effect. This may result in an individual being denied the procedural fairness that would usually be afforded at the conclusion of an employment situation. Under the Bill, an individual may be removed from a position without the opportunity to advocate for themselves, negotiate a different position within the Greater Cities Commission, or organise alternative employment.

While the Minister must publish their reasons for removing the appointed member from office, this broad power may impact upon procedural fairness as the decision cannot be challenged. The Committee refers these provisions to the Parliament for its consideration.

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

Wide power of delegation

The Bill provides that the Greater Cities Commission may delegate their functions, other than the power of delegation, to any authorised person or body, which includes persons or bodies authorised through regulation. The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to be contained wholly in the primary legislation and not delegated to the regulations to ensure an appropriate level of parliamentary oversight.

The Committee notes that there are no restrictions on the power to delegate, such as restricting delegation to employees with a certain level of expertise or seniority. The Committee also notes that the Commission has broad powers in regards to seeking information from the government and local councils.

However, the Committee notes that the broad scope of the Commission's work may necessitate the delegation of powers to a range of persons and bodies, including in circumstances which have not yet arisen and therefore cannot be fully specified in the Bill. The Committee also notes that a delegate cannot sub-delegate to any person or body who is not authorised, and that the Commission must provide written authorisation before sub-delegation can occur. Given the circumstances, the Committee makes no further comment.

4. HOME BUILDING AMENDMENT (MEDICAL GAS LICENSING) BILL 2022

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.

5. MINING AND PETROLEUM LEGISLATION AMENDMENT BILL

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

Strict liability offences

The Bill amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to establish strict liability offences for carrying out prohibited prospecting operations, failing to comply with a direction concerning a person declared not fit or proper, and failure to make mandatory notifications to the Secretary. These offences carry severe monetary penalties for individuals ranging from $11 000 to $220 000 as well as a possible custodial sentence of 5 years imprisonment for the prohibited prospecting offence.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance, and that the offences are intended to deter conduct which may lead to greater environmental harm to the community. However, it notes that individuals who are convicted of the strict liability offences may be sentenced to a custodial sentence in addition to significant monetary penalties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Real property rights – enforcement powers to enter land

The Bill amends section 249(1) of the *Mining Act 1992* to expand the grounds for which the Minister may grant a permit to a person to enter land, to include enforcement of all environmental protection directions under section 240. It also inserts an identical enforcement provision into the *Petroleum (Onshore) Act 1991*, which will enable the Minister to grant a similar permit under that Act. These permits enable the holder to enter and do all things on the land which are reasonably necessary to achieve the purpose for which that permit was granted.

The Committee notes that these provisions expand existing powers of enforcement under the *Mining Act 1992* and introduce identical powers of enforcement into the *Petroleum (Onshore) Act 1991*. The exercise of these enforcement powers may impact on a person's property rights by permitting another individual to enter and do things to their land.

The Committee recognises that the overarching aim of these provisions is to enforce environmental protection provisions under the regulatory framework, and to encourage ecologically sustainable and responsible mining practices. However, the Committee notes that there is no legislative safeguards available in circumstances where individuals do not consent to the exercise of these powers on their lands. While penalties for obstruction or non-compliance with these enforcement powers are only monetary in nature, it notes that individuals may be subject to a significant maximum penalty of $220 000. For these reasons, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

The Bill provides for the retrospective application of particular amendments to the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* in relation to applications not yet finalised immediately before commencement of the Bill as an Act, as well as provisions concerning suspensions, authorisations/titles and other granted approvals in place on commencement.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time. However, the Committee notes that the relevant provisions are largely administrative and do not limit discretionary decision-making for relevant administrators. In the circumstances, the Committee makes no further comment.

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

Henry VIII clauses

The Bill amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to introduce a new scheme for the making of decisions about persons who are not fit or proper. Under each Act, the Bill permits the regulations to extend the application of other sections of the Acts to such decisions. The Committee notes that these provisions amount to Henry VIII clauses, allowing the Executive to amend the operation of Acts by way of regulation without reference to the Parliament.

In ordinary circumstances, these provisions are an inappropriate delegation of legislative powers. However, the Committee acknowledges that these provisions may build flexibility into the broader regulatory framework. It also notes that regulations must be tabled in Parliament and would be subject to disallowance under section 41 of the *Interpretation Act 1987*, and therefore affords some level of Parliamentary scrutiny. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the administrative implementation of the provisions following necessary consultation periods and regulatory reforms. In the circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill defers a significant number of matters set out in the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to the regulations. In particular, the Bill permits the regulations to prescribe regulatory requirements for applications seeking necessary approvals, authorisations, or titles to conduct mining operations for minerals and petroleum in New South Wales. Additionally, the regulations may specify matters that decision-makers may consider in reaching various determinations on those applications. The Bill also provides that a decision-maker may reject, without notification, an application for failure to comply with the requirements under the regulation. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight.

The Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances. The regulations intended to give effect to these matters will also be subject to public consultation. The Committee also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters deferred to the regulations relate to the determination of applications for mining minerals and petroleum, which is the core subject matter for which both Acts regulate, including what decision-makers may consider when making determinations. It also notes that non-compliance with the regulations is a valid ground for rejecting an application without notice to the applicant. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. RESIDENTIAL TENANCIES AMENDMENT (TENANT PROTECTIONS AND FLOOD RESPONSE) BILL 2022*

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

Freedom of contract

The Bill proposes a number of restrictions on residential tenancy agreements of impacted leases. Under the Bill, an impacted lease means a residential tenancy agreement for premises located in flood impacted areas. The Bill proposes to introduce limits on terminating residential tenancies, banning no fault terminations, and limiting the amount of rent able to be charged to impacted leases.

The Committee notes that proposed sections 230 and 231, which prevents the termination of tenancy agreements and limits on rental prices for *impacted leases*, are only operational for a fixed 12 month period. However, proposed sections 84-85A apply to all residential tenancy agreements. This may impact upon the freedom of contract between the landlord and tenant to choose the terms and condition to which they are subject.

Additionally, as these provisions apply to existing residential tenancy agreements, the Bill may have retrospective effect. The Committee generally comments on provisions that have retrospective effect, particularly where they impact rights that were available when parties entered into a private contract, such as a residential tenancy agreement. This is because they impact on the rule of law principle that a person is entitled to know the law to which they will be subject to at any given time.

The Committee acknowledges that statutory limitations on freedom of contract are not uncommon, for example where this is deemed necessary to address the unequal bargaining power of parties. However, it also notes the amendments may have some potential for adverse financial impact on some landlords due to the limitation on terminating both fixed term and periodic residential tenancy agreements, as well as potentially limiting their private property rights. The Committee refers these amendments to Parliament to consider whether the limits they may place on freedom of contract are reasonable and proportionate in the circumstances.

7. STATE REVENUE AND FINES LEGISLATION AMENDMENT (MISCELLANEOUS) BILL 2022

Trespasses unduly on personal rights and liberties (s 8A(1)(b)(i))

Retrospective approval for actions of a local council

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, the actions of a local council may retrospectively be deemed to be validly done, where otherwise those actions may not have been valid under the *Liquor Act 2007* when they were actually done.

The Committee does however note that the proposed retrospective changes are intended to provide local councils with the power to continue to provide approvals for outdoor public spaces to be used for events in a safe way to provide support for businesses recovering from the COVID-19 pandemic, and that the changes allowed to be made under the Act are temporary. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Privacy

The Bill makes amendments to the *Fines Act 1996* and the *State Debt Recovery Act 2018* to permit the Commissioner of Fines Administration and the Chief Commissioner of State Revenue to have access to certain information for the purpose of exercising their functions under their respective Acts, rather than only to exercise specified functions. These records may include personal contact information, such as an email address and phone number, and the contact

details of their current or last known employer. This may infringe on the privacy of those individuals subject to these provisions.

However, the Committee acknowledges that the provisions are intended to assist the Commissioners in exercising their functions under the Act for the purpose of deciding whether to make garnishee orders against the fine defaulter (under the Fines Act) or for the purposes of taking debt recovery action against the debtor (under the State Debt Recovery Act). The Committee also notes that the personal information that would be provided includes details already held by police or other government agencies, which are subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

The Bill permits the creation of penalty notice offences under the *Fines Act 1996* and the corresponding *Fines Regulation 2020*. 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 (including a relevant person) 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. In these circumstances, the Committee makes no further comment.

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

Discretionary powers of the Chief Commissioner

The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make discretionary determinations relevant to a number of duties. The Bill seeks to amend the Duties Act to provide the Chief Commissioner with two additional discretionary powers:

1. allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Duties Act (section 8(2A); and

2. allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme (section 76(2A).

These discretions may have an impact on individuals, who will or will not be subject to pay duties depending on the decision of the Chief Commissioner. The new discretions also do not provide detail as to the factors the Chief Commissioner must consider in exercising their discretion, and therefore the Bill may grant an ill-defined administrative power.

The Committee however acknowledges that the Chief Commissioner has the authority under the Duties Act to make a number of discretionary decisions, and that discretion may be necessary to impose the duties outlined in the Duties Act. The Committee also notes that most decisions of the Chief Commissioner can be reviewed by the NSW Civil and Administrative Tribunal and therefore the discretion of the Chief Commissioner is not entirely unfettered. Given the circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations – creation of offences and penalties

The Bill seeks to insert a new section 119A into the *Fines Act 1996*, allowing for the regulations to prescribe both penalty notice offences, and determine the prescribed amount payable for penalties.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulation. However, the Committee notes that the Bill permits the regulations to create offences that carry a maximum penalty of the amount prescribed in the regulations, and this amount is set by Section 128(2) of the Fines Act which states that the regulations may create offences punishable by a penalty not exceeding 50 units ($5 500).

The Committee prefers that offences be legislated by Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee however does note that the maximum amount of a fine does not exceed $5 500, and that the imposition of fines under the Fines Act is subject to internal and judicial review. In the circumstances the Committee makes no further comment.

PART TWO – REGULATIONS

1. CROWN LAND MANAGEMENT AMENDMENT (RESERVE TRUSTS) REGULATION (NO 3) 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 contains a Henry VIII clause which allows subordinate legislation to amend the Act and delegates Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight.

However, the Committee notes that the primary Act, under Schedule 7, provides for regulations to amend the Act in regards to provisions of a transitional nature. Further, the amendment is limited to extending the transitional period by 26 months for transitional reserve trusts managed by corporations that are category 1 non-council managers, which must continue to comply with the transitional provisions contained in Schedule 7 of the Act. In doing so it provides clarity for those subject to the provision while the overarching scheme is yet to be implemented. In the circumstances, the Committee makes no further comment.

2. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION 2022

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

Retrospectivity, property rights and freedom of contract

Like its predecessors, the *Retail and Other Commercial Leases (COVID-10) Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

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

parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the 13 July 2021.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on 13 January 2021 until 13 March 2021. The Committee understands that this is in response to the current COVID-19 pandemic and notes the relatively small extension of time. Given the ongoing economic consequences of the COVID-19 pandemic, and the limited period the Regulation will apply for, the Committee makes no further comment.

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

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

As above, the Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against commercial lessees where lessees are unable to meet their obligation due to economic hardship resulting from the COVID-19 pandemic. In doing so, the Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 March 2022.

However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and resulting economic downturn. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that they may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

3. SNOWY HYDRO CORPORATISATION AMENDMENT (SAVINGS AND TRANSITIONAL PROVISIONS) 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 clause

The Regulation amends the *Snowy Hydro Corporatisation Act 1997* to extend, by 12 months, the exemption for operations undertaken for the Snowy 2.0 project which are not in accordance with the *Kosciuszko National Park Plan of Management 2006.* Specifically, it exempts operations from the requirement under section 81(4) of the *National Parks and Wildlife Act 1974* to comply with a plan of management adopted by the Minister.

This amendment is made by way of a Henry VIII clause set out in clause 4 of Schedule 4 to the parent Act, which allows the Executive to amend an Act by way of regulation without reference to the Parliament. The Committee notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*, and that the provision seeks to apply for a period of 12 months.

However, the Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of

parliamentary oversight over the changes. In the circumstances, the Committee refers this provision to Parliament for its consideration.

Part One – Bills

1. Biodiversity Conservation Amendment (Kangaroo Protection) Bill 2022*

Date introduced	23 March 2022
House introduced	Legislative Council
Member responsible	The Hon. Mark Pearson MLC
	*Private Members Bill

Purpose and description

1.1 The object of this Bill is to amend the *Biodiversity Conservation Act 2016* (the ***principal Act***) to—

(a) licences under the principal Act that authorise lethally harming or

(b) enable regulations to be made under the proposed Act for or with respect to the protection and care of kangaroos, including regulating the safe capture and release of a kangaroo for the purpose of relocating the kangaroo, and

(c) enable the regulations to impose penalties for an offence against a provision which provides for the protection and care of kangaroos if the offence is conducted in the course of commercial operations, and

(d) insert savings and transitional provisions.

Background

1.2 In his second reading speech, the Hon. Mark Pearson MLC explained that the purpose of the Bill is to stop 'the slaughter of kangaroos and other macropods', noting that:

> In 2021 commercial shooters lawfully killed over 40,000 kangaroos in New South Wales per month. Since 2020 more than a quarter of a million kangaroos have been killed by landholders under licences to harm issued by the National Parks and Wildlife Service.

1.3 Towards that end, the Bill amends the *Biodiversity Conservation Act 2016* (the '**Biodiversity Act**') to introduce provisions prohibiting the issuance of biodiversity conservation licences which authorise harm of a kangaroo. Mr Pearson clarified in his second reading speech that the prohibition does not affect or change existing laws in respect to the hunting practices and rights of Aboriginal and/or Torres Strait Islander peoples.

1.4 The Bill also provides for a regulation-making power in respect to the protection and care of kangaroos. Speaking to the impetus for stronger conversation protections for kangaroos, Mr Pearson described their plight having observed:

> … their habitats destroyed and their numbers dwindling. … Local extinctions are already occurring, and the red kangaroo and the wallaroo are perilously close to being lost forever in New South Wales.

Issues considered by the Committee

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

Significant matters – creation of offences and prescribing prohibited conduct

1.5 The Bill proposes to insert section 2.7A into the Biodiversity Act, which prohibits the issue of a conservation licence that authorises a person to lethally harm a kangaroo. 'Lethally harm' is defined to include killing, injuring or commercially harvesting a kangaroo, but explicitly excludes 'harm by capturing or relocating the kangaroo or changing the habitat of the kangaroo'.

1.6 Section 2.7A(3) sets out a general regulation-making power to make provisions for, or with respect to, the protection and care of kangaroos. Relevantly, subsection (5) clarifies that this regulation may prohibit an action as also constituting harm to a kangaroo under section 2.7A.

1.7 Subsection (4) also provides that such a regulation may impose the following penalties for an offence against that regulation:

(a) A Tier 2 monetary penalty generally; or

(b) A Tier 1 monetary penalty and/or imprisonment for 2 years, if the offending conduct is committed in the course of commercial operations.

1.8 Under section 13.1 of the Biodiversity Act, the maximum monetary penalty for a Tier 1 offence is $1.65 million for a corporation and $330 000 for an individual. For a Tier 2 offence, the maximum monetary penalty is $660 000 for a corporation and $132 000 for an individual.

The Bill inserts section 2.7A into the *Biodiversity Conservation Act 2016*, which provides a general regulation-making power to prohibit conduct as constituting harm to a kangaroo prohibited by this section. That regulation-making power also allows the establishment of offences against the regulation and the imposition of maximum penalties. This would allow regulations to impose maximum monetary penalties of up to $330 000 and/or imprisonment for 2 years for individuals who commit a relevance offence in the course of commercial operations.

The Committee acknowledges that the delegation of matters in the regulations builds flexibility into the regulatory framework. However, it prefers that offences be legislated by the Parliament so that they are subject to an appropriate level of parliamentary scrutiny, particularly those which may carry a custodial sentence. Unlike primary legislation, regulations are subordinate legislation and are not required to be passed by Parliament. Given the possible custodial

penalties and broader power to create offences and prescribe prohibited conduct, the Committee refers this matter to Parliament for its consideration.

2. Electoral Amendment (Voting Age) Bill 2022*

Date introduced	23 March 2022
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
	*Private Members Bill

Purpose and description

2.1 The object of this Bill is to amend the *Electoral Act 2017* to—

(a) entitle persons over the age of 16 years old to vote in elections in New South Wales, and

(b) exclude persons under the age of 18 years old from the obligation to vote in elections in New South Wales, and

(c) entitle persons over the age of 14 years old to enrol to vote in New South Wales.

Background

2.2 Currently under section 31(2) the *Electoral Act 2017* (Act), the minimum age for electors in NSW is 18 years. Individuals may place themselves on the electoral roll once they are 16 years of age, however they are not entitled to vote until they are 18 years of age.

2.3 This Bill proposes that the minimum age for electors in NSW be reduced to 16 years, and the age of registration on the electoral roll be reduced to 14 years.

2.4 To support this reduction in voting age, Ms Abigail Boyd MLC in her Second Reading Speech, quoted the Human Rights Law Centre, stating that

> A minimum voting age of 16 years of age is an appropriate way to meet Australia's obligations under international law, consistent with contemporary understanding of maturity and cognitive development.

2.5 Ms Boyd also mentioned other jurisdictions including the Isle of Man, Austria and Scotland that have lowered the voting age to 16.

2.6 The Bill amends section 207(3) to exclude electors under the ages of 18 from the obligation to vote in NSW, which is currently punishable by a fine of 1 penalty unit ($110) under section 207 of the Act. Ms Boyd stated in her Second Reading speech that this is important to:

> … strike a balance between encouraging participation in democratic processes and extending the right to have a say in what happens in our State, while avoiding punishing newly enfranchised people – who, as younger people, will be less likely to have independent financial resources – for not availing themselves of that opportunity.

Issues considered by the Committee

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the Legislation Review Act 1987.

3. Greater Cities Commission Bill 2022

Date introduced	22 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Rob Stokes MP
Portfolio	Cities

Purpose and description

3.1 The object of this Bill is to repeal and re-enact the *Greater Sydney Commission Act 2015*, in substantially the same form, for the following purposes—

(a) to reconstitute the Greater Sydney Commission as the Greater Cities Commission (the Commission),

(b) to replace the Greater Sydney Region with the Six Cities Region (the Six Cities Region) and define its boundaries and the boundaries of the 6 cities within it, being the following—

(i) the Eastern Harbour City,

(ii) the Central River City,

(iii) the Central Coast City,

(iv) the Lower Hunter and Greater Newcastle City,

(v) the Western Parkland City,

(vi) the Illawarra-Shoalhaven City.

3.2 The Bill also amends the *Environmental Planning and Assessment Act 1979* to provide that each district strategic plan for a city within the Six Cities Region must, and each other district strategic plan may, include targets for net additional dwellings in local government areas within the district.

3.3 The Bill also makes savings and transitional amendments and consequential amendments to other legislation.

Background

3.4 In 2015, the *Greater Sydney Commission Act 2015* established the Greater Sydney Commission which incorporated 3 cities: the Eastern Harbour City, the Central River City and the Western Parkland City. The Greater Sydney Commission has worked with the state government, local councils and communities to improve city-wide integration in areas including as land use, infrastructure, transport and planning.

3.5 The Hon. Rob Stokes MP, Minister for Cities, in his Second Reading speech described how the Greater Sydney Commission has brought together federal, state and local government to

> … get on with setting the necessary long-term objectives and plans to manage and coordinate growth, while being able to withstand short-term political pressures and exigencies.

3.6 On 2 December 2021, the Premier announced that the Greater Sydney Commission would expand its scope and become the Greater Cities Commission, with a megaregion focus described by the Minister as a 'six cities region.' The Commission's expanded objectives and remit will include 3 additional cities: the Central Coast City, the Lower Hunter and Greater Newcastle City, and the Illawarra-Shoalhaven City.

3.7 The six cities region will include 43 local government areas and extend from Maitland and Port Stephens in the north, to the Blue Mountains in the West and Shoalhaven in the south. The Bill provides at clause 4 that adjustments to these boundaries can be made in regulations.

3.8 In regards to the membership of the new Greater Cities Commission, the Bill largely mirrors the *Greater Sydney Commission Act 2015*. Membership of the Greater Cities Commission will continue to draw on local perspectives through individual city commissioners (formerly district commissioners), as well as those with economic, social and environmental expertise.

3.9 Due to the repeal of the *Greater Sydney Commission Act 2015*, the Greater Sydney Commission will cease to operate, however the Bill provides that it's staff (including currently appointed commissioners) and existing resources will be transferred directly to the new Greater Cities Commission. Therefore functionally, the Bill provides for the continuation of the Greater Sydney Commission under the new title of the Greater Cities Commission, which will have an expanded set of objectives and remit over a larger area.

3.10 The Greater Cities Commission will, amongst other functions:

(a) provide advice to the Minister in regards to the planning, development and growth of the six cities region,

(b) providing draft strategic plans for the region under the *Planning Act ###,* Division 3.1,

(c) providing reports as to the land use, infrastructure, planning and development of the six cities region, and

(d) work with local councils and other government agencies to facilitate the development and implementation of the strategic plan for the region.

3.11 The Bill also make consequential amendments to the:

(a) *Environmental Planning and Assessment Act 1979,*

(b) *Biosecurity Act 2015*,

(c) *Defamation Act 2005,*

(d) *Government Sector Employment Act 2013,*

(e) *Government Sector Finance Legislation (Repeal and Amendment) Act 2018*,

(f) *Infrastructure NSW Act 2011*,

(g) *Interpretation Act 1987*,

(h) *Protection of the Environment Operations Act 1997,* and

(i) *Statutory and Other Offices Remuneration Act 1975*.

Issues considered by the Committee

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

Absolute privilege - Removal of right to seek damages

3.12 The *Greater Cities Commission Bill 2022* (Bill) amends Schedule 1, clause 34(1)(b) of the *Defamation Act 2005*, providing that certain reports and publications of the Greater Cities Commission are subject to absolute privilege.

The Bill amends Schedule 1, clause 34(1)(b) of the *Defamation Act 2005,* providing that certain reports and other publications of the Greater Cities Commission (Commission) are subject to absolute privilege.

These reports and publications include advice provided to the Minister on relevant issues, other documents created in relation to the functions of the Commission outlined in section 10 of the Bill, and the annual report of the Commission.

By deeming that these publications are covered by absolute privilege, the Bill removes an avenue for an effective remedy for an individual or corporation under the *Defamation Act 2005* to seek claim for damages due to a loss incurred because of defamatory statements made about them.

The Committee notes the importance of defamation law in protecting the reputations of individuals from unfair damage, and notes that the Bill applies absolute privilege to most of the documents that would be produced by the Commission. However, the Committee also acknowledges that for the Commission to be effective, it may need to publish reports and other documents that are full and frank in their assessment of the circumstances, and that claiming absolute privilege over these documents serves to encourage this frankness. The Committee notes that similar provisions regarding absolute privilege also applies publications of other government departments. Given these circumstances, the Committee makes no further comment.

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

Procedural fairness - Removal from employment without notice

3.13 The Bill at Schedule 2, subsection 5(2) allows the Minister to remove an appointed member of the Commission from office at any time for any reason and without notice.

3.14 Subsection 5(3) further provides that the Minister must provide a written statement of reasons for removing the member from office and make that statement publically available.

The Bill at Schedule 2, subsection 5(2) allows the Minister to remove an appointed member from any office at any time for any reason and without notice. Subsection 5(3) requires the Minister to provide a written statement of reasons for removing the member from office and make that statement publicly available.

This is a non-reviewable decision that may be implemented with immediate effect. This may result in an individual being denied the procedural fairness that would usually be afforded at the conclusion of an employment situation. Under the Bill, an individual may be removed from a position without the opportunity to advocate for themselves, negotiate a different position within the Greater Cities Commission, or organise alternative employment.

While the Minister must publish their reasons for removing the appointed member from office, this broad power may impact upon procedural fairness as the decision cannot be challenged. The Committee refers these provisions to the Parliament for its consideration.

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

Wide power of delegation

3.15 Under section 12, the Commission may delegate any of its functions, other than the power of delegation, to an authorised person or body. An authorised person or body is defined at subsection 12(4) and includes, among others, members of the Commission, persons employed in certain government departments and any persons authorised by the regulations. The delegate may also sub-delegate to an authorised person or body if given written authorisation to do so by the Commission (subsection 12(3)).

The Bill provides that the Greater Cities Commission may delegate their functions, other than the power of delegation, to any authorised person or body, which includes persons or bodies authorised through regulation. The Committee would prefer the provisions about the persons and class of persons to whom such functions can be delegated to be contained wholly in the primary legislation and not delegated to the regulations to ensure an appropriate level of parliamentary oversight.

The Committee notes that there are no restrictions on the power to delegate, such as restricting delegation to employees with a certain level of expertise or

seniority. The Committee also notes that the Commission has broad powers in regards to seeking information from the government and local councils.

However, the Committee notes that the broad scope of the Commission's work may necessitate the delegation of powers to a range of persons and bodies, including in circumstances which have not yet arisen and therefore cannot be fully specified in the Bill. The Committee also notes that a delegate cannot sub-delegate to any person or body who is not authorised, and that the Commission must provide written authorisation before sub-delegation can occur. Given the circumstances, the Committee makes no further comment.

4. Home Building Amendment (Medical Gas Licensing) Bill 2022

Date introduced	23 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Eleni Petinos MP
Portfolio	Fair Trading

Purpose and description

4.1 The object of this Bill is to extend the transitional period in which medical gas related work is exempt from certain licence requirements from 30 April 2022 to 30 September 2022. Carrying out medical gas related work without certain licences would otherwise be an offence outside of this period.

Background

4.2 The Bill amends the *Home Building Act 1989* to extend the transitional arrangements of the medical gas licensing from 1 May 2022 until 30 September 2022.

4.3 In particular, the exemption provides that sections 4, 5, 12, 15A-15C and 16 do not have effect during the transitional period in relation to specialist work that is medical gas-fitting work, mechanical services and medical gas work or medical technician work. The transitional period began on 1 November 2020 and is currently set to end on 30 April 2022.

4.4 In the second reading speech to the Bill, the Minister for Fair Trading stated that the amendment was intended to prevent critical shortages of eligible personnel being able to undertake certain medical gas work:

> Despite the significant number of medical facilities, as of 18 March 2022, there are only 143 people licensed to do medical gas work across the State. The bill does not stray from the robust and effective regulatory system introduced by the Gas Legislation Amendment (Medical Gas Systems) Act 2020 but is intended to give industry and government practitioners more time to secure a licence to do certain work.

4.5 The Minister also highlighted that the reason for this shortage was due to the updated licensing qualifications requiring key face to face components that have been unable to be delivered due to COVID-19 restrictions in the last year:

> Training in this space has been impacted by COVID-19, with units of competency delivered face to face, and the lockdowns that have impacted many parts of the community over the past year have also impacted the medical gas licensing scheme. Licensed practitioners will complete the mandatory additional units of competency prescribed in the Home Building Act. The New South Wales Government is and

> remains committed to continual action to ensure safe and compliant medical gases are supplied. While the bill proposes to extend the transitional arrangements for licensing, the amendments do not change the requirement that all medical gas work must comply with the relevant Australian standards and provide a safe and reliable product to the people of New South Wales. This requirement will continue to be subject to oversight by NSW Health and NSW Fair Trading.

4.6 The Minister noted that the amendments were to ensure the introduction of the new licensing requirement does not impact service delivery in the NSW Health system, such as the closure of operating theatres and particularly in rural areas.

4.7 The Committee previously commented on a similar regulation regarding the *Gas and Electricity (Consumer Safety) Amendment (Medical Gas) Regulation 2021*, in Digest 36/57 on 9 November 2021.[1] In that report, the Committee noted that the regulation permitted unqualified persons to perform medical gas and technician work, which may impact public safety.

4.8 Though this Bill proposes to make a similar amendment, it is understood that this amendment is intended to allow the service delivery of medical gas technicians while also allowing time for these professionals to update their qualifications that have been delayed by COVID-19 restrictions. It is also noted that these transitional arrangements are extended for a period of 4 months and have been done in consultation with the Ministry of Health and NSW Fair Trading. For these reasons, the Committee makes no further comment on this Bill.

Issues considered by the Committee

The Committee makes no comment on the Bill in respect of the issues set out in section 8A of the *Legislation Review Act 1987*.

[1] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 36/57*, 9 November 2021.

5. Mining and Petroleum Legislation Amendment Bill

Date introduced	22 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Regional New South Wales

Purpose and description

5.1 The object of this Bill is to amend the *Mining Act 1992* (the **Mining Act**) and the *Petroleum (Onshore) Act 1991* (the **Petroleum Act**) to make further provision in relation to the regulation of the prospecting for, and mining of, minerals and petroleum.

Background

5.2 The Bill has been drafted following a consultation process on the exposure draft by the NSW Government, which was open from November 2021 to January 2022.[2] In introducing the Bill, the Hon. Paul Toole MP, Deputy Premier and Minister for Regional New South Wales, noted in his second reading speech that the amendments 'are the result of extensive consultation'. The Deputy Premier stated that the Government:

> … listened to the feedback from a range of stakeholders on the need to remove unnecessary barriers to doing business and to update and modernise the legislation and government processes.

5.3 The Bill makes numerous amendments to the Mining Act. and the Petroleum Act to update the State's broader regulatory framework for the mining of minerals and petroleum. The Deputy Premier described the amendments to both Acts as:

> …a suite of changes… that harmonise, modernise and update the legislation to ensure that it remains fit for purpose for the ongoing responsible development of resources in our State. These changes will ensure more effective decision-making over the lifecycle of a mine, from exploration through to rehabilitation.

5.4 Amongst these amendments, the Bill inserts sections 292W-292Y into the Mining Act to establish the 'Royalties for Rejuvenation Fund', which will invest coalmining royalties paid into the fund back into coalmining communities. The stated object of the Fund under those provisions is to:

[2] NSW Government, *Mining and Petroleum legislation*, viewed 23 March 2022.

> … alleviate economic impacts in affected coal mining regions caused by a move away from coal mining by supporting other economic diversification in those regions, including by the funding of infrastructure, services, programs and other activities.

5.5 In speaking to the need for the fund, the Deputy Premier remarked on the future transition from coal:

> Under some scenarios, global demand for thermal coal could be sustained for the next two decades or more. But the Government also recognises that Australia's domestic reliance on coal is gradually declining. Many of the mines supplying coal-fired power stations have the capacity to pivot to export, and that is why now is the time to introduce this fund—while demand for New South Wales thermal coal is strong.

Issues considered by the Committee

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

Strict liability offences

5.6 The Bill establishes a number of strict liability offences under the Mining Act and the Petroleum Act.

5.7 In respect to both Acts, the Bill introduces penalties for the conduct of prospecting operations not in accordance with an applicable access arrangement under section 140(1) of the Mining Act or section 69C of the Petroleum Act. Specifically, this strict liability offence would carry a maximum penalty of—

(a) for a corporation: $550 000, and an additional $55 000 for each day of a continuing offence; and

(b) for an individual: $110 000 and/or 5 years imprisonment, and an additional $11 000 for each day of a continuing offence.

5.8 The Bill also updates both Acts in respect to determinations that a relevant person is not a fit and proper person, by enabling the relevant decision-maker to make such a declaration by written order. These mirror provisions in both Acts to allow the decision-maker to do a number of things in respect to such a declaration, including directing the person to do or refrain from doing a specified thing. Relevantly, the Bill includes provisions in both Acts which establish an offence for a person to contravene such a direction, carrying a maximum monetary penalty of $1.1 million for a corporation and $220 000 for an individual.

5.9 Finally, the Bill inserts provisions into both Acts requiring mandatory notifications to the Secretary in respect to the external administration, winding up or deregistration of corporate authority holders, applicants or proposed transferees. Under these provisions, a corporation which fails to notify the Secretary of the existence of circumstances specified commits an offence which carries a maximum monetary penalty of $11 000.

5.10 In his second reading speech, the Deputy Premier noted that these amendments are intended to operate as 'improved compliance tools which will discourage illegal and fraudulent activities'.

The Bill amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to establish strict liability offences for carrying out prohibited prospecting operations, failing to comply with a direction concerning a person declared not fit or proper, and failure to make mandatory notifications to the Secretary. These offences carry severe monetary penalties for individuals ranging from $11 000 to $220 000 as well as a possible custodial sentence of 5 years imprisonment for the prohibited prospecting offence.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance, and that the offences are intended to deter conduct which may lead to greater environmental harm to the community. However, it notes that individuals who are convicted of the strict liability offences may be sentenced to a custodial sentence in addition to significant monetary penalties. For these reasons, the Committee refers the matter to Parliament for its consideration.

Real property rights – enforcement powers to enter land

5.11 Both section 240 of the Mining Act and section 75 of the Petroleum Act empowers the Secretary or an inspector to direct a responsible person of an authorisation under the Act to do one or more of the following:

(a) give effect to a condition of a mining authorisation/petroleum title;

(b) address any adverse environmental impact which activities carried out under the authorisation/title had or may have;

(c) conserve the environment or protect the environment from, prevent, control or mitigate any harm resulting from activities under the authorisation/title; and

(d) rehabilitate land or water which may be affected by activities under the authorisation/title.

5.12 The Bill amends section 249(1) of the Mining Act, which allows the Minister to grant 'any person to enter any land so as to enable' them to enforce an direction under section 240. Specifically, the amendment expands the enforcement power by allowing such a permit be granted to enable compliance with any direction issued under section 240, not just for the carrying out of any rehabilitation work.

5.13 Likewise, the Bill inserts section 104KA into the Petroleum Act which empowers the Minister to grant a similar permit to a person to enter land for enforcement purposes. Section 104KA effectively mirrors section 249 of the Mining Act, as amended by the Bill, to enable the granting of such a permit in order to enable:

(a) compliance with an environmental direction under section 75; or

(b) removal of a petroleum plant in accordance with a direction under section 82 or 83.

5.14 Subsection (2) of these enforcement provisions under both Acts empowers the permit holder (or their employee or agent) to both enter the land relevant to the permit and do on the land things 'reasonably necessary' to achieve the purpose of the permit.

5.15 Relevantly, obstruction of a person exercising this power (either wilfully or without reasonable excuse) constitutes an offence under section 257 of the Mining Act and section 125B of the Petroleum Act. Those offences carries a maximum penalty of $1.1 million for corporations and $220 000 for individuals.

5.16 The Deputy Premier noted in his second reading speech that these 'improved compliance tools' are intended to 'encourage ecologically sustainable and responsible development of mineral resources and an appropriate return to the State'.

The Bill amends section 249(1) of the *Mining Act 1992* to expand the grounds for which the Minister may grant a permit to a person to enter land, to include enforcement of all environmental protection directions under section 240. It also inserts an identical enforcement provision into the *Petroleum (Onshore) Act 1991*, which will enable the Minister to grant a similar permit under that Act. These permits enable the holder to enter and do all things on the land which are reasonably necessary to achieve the purpose for which that permit was granted.

The Committee notes that these provisions expand existing powers of enforcement under the *Mining Act 1992* and introduce identical powers of enforcement into the *Petroleum (Onshore) Act 1991*. The exercise of these enforcement powers may impact on a person's property rights by permitting another individual to enter and do things to their land.

The Committee recognises that the overarching aim of these provisions is to enforce environmental protection provisions under the regulatory framework, and to encourage ecologically sustainable and responsible mining practices. However, the Committee notes that there is no legislative safeguards available in circumstances where individuals do not consent to the exercise of these powers on their lands. While penalties for obstruction or non-compliance with these enforcement powers are only monetary in nature, it notes that individuals may be subject to a significant maximum penalty of $220 000. For these reasons, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

5.17 The Bill inserts Part 27 into Schedule 6 of the Mining Act and Part 15 into Schedule 1 of the Petroleum Act, to make a number of provisions consequent on the enactment of the Bill as an Act.

5.18 A number of these clauses provide for the retrospective application of various sections of both Acts, as amended or substituted by the Bill, applies to:

(a) applications made under the Act but not finally determined immediately before commencement;

(b) suspensions of mining operations at the time of commencement; and

(c) authorisations, leases or approvals granted or in force before commencement and the activities carried out under them before commencement.

The Bill provides for the retrospective application of particular amendments to the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* in relation to applications not yet finalised immediately before commencement of the Bill as an Act, as well as provisions concerning suspensions, authorisations/titles and other granted approvals in place on commencement.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time. However, the Committee notes that the relevant provisions are largely administrative and do not limit discretionary decision-making for relevant administrators. In the circumstances, the Committee makes no further comment.

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

Henry VIII clauses

5.19 As earlier noted, the Bill inserts Division 2 into Part 18 of the Mining Act and Division 2 into Part 14 of the Petroleum Act to introduce a new scheme for the making of declarations about persons who are not fit and proper.

5.20 The Bill also provides for a regulation-making power under this Division, which enables regulations to make provisions:

(a) That extend the application of a provision of the relevant Act to a decision under this Division, with or without modification; and

(b) For the application of this Division to authorisations or applications jointly held/made by more than one person under the relevant Act.

The Bill amends the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to introduce a new scheme for the making of decisions about persons who are not fit or proper. Under each Act, the Bill permits the regulations to extend the application of other sections of the Acts to such decisions. The Committee notes that these provisions amount to Henry VIII clauses, allowing the Executive to amend the operation of Acts by way of regulation without reference to the Parliament.

In ordinary circumstances, these provisions are an inappropriate delegation of legislative powers. However, the Committee acknowledges that these provisions may build flexibility into the broader regulatory framework. It also notes that regulations must be tabled in Parliament and would be subject to disallowance under section 41 of the *Interpretation Act 1987*, and therefore affords some level

of Parliamentary scrutiny. In the circumstances, the Committee makes no further comment.

Commencement by proclamation

5.21 Clause 2 of the Bill provides that provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.

The Bill is to commence by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons, particularly where the legislation affects individual rights or obligations. However, the Committee notes that a flexible start date may assist with the administrative implementation of the provisions following necessary consultation periods and regulatory reforms. In the circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

5.22 The Bill updates the broader regulatory framework established by the Mining Act and Petroleum Act for the prospecting and mining of minerals and onshore petroleum in New South Wales.

5.23 In summary, the Bill omits numerous matters set out within existing provisions of both Acts and provides for the prescription of those matters by the regulations. These matters include:

(a) the form, time limits and manner of lodgement for and the information to be included in applications and tenders for the granting, renewal or transfer of relevant titles, licences, authorisations, approvals or leases to enable the mining of minerals or petroleum;

(b) the manner by which the Secretary is to give notice of relevant applications and competitive selection or tender processes to the public;

(c) keeping and public inspection of various registers, including registers of arbitration panels and arbitrated access arrangements and subleases or subtitles;

(d) matters to which the Secretary or relevant decision-maker may have regard when making decisions in respect to:

(i) granting renewal applications and requests that an application continue to be dealt with,

(ii) determining land 'genuinely required' to support a proposed work program;

(iii) calculating or reviewing the amount for an assessed/security deposit,

(iv) the assessment and due date of various fees, charges and levies, and

(v) making a declaration that a person or corporate person is not fit and proper; and

(e) the manner of service of documents required under the Act.

5.24 Relevantly, the Bill seeks to insert section 382 into the Mining Act and section 133 into the Petroleum Act, which provide that:

> An application, tender or prescribed document, thing or information, required or authorised under this Act to be given to a person, must be given in the way, and within the periods, prescribed by the regulations, if any.

5.25 The Bill also inserts section 381A into the Mining Act and section 132 into the Petroleum Act, which allows a decision-maker to reject an application because the applicant has failed to pay a fee or levy prescribed by the regulations; or has not lodged information required by the regulations within a specified period. Those provisions clarify that the decision-maker does not have to notify the applicant before that rejection.

5.26 Speaking to these amendments, the Deputy Premier noted that the regulations are more appropriate for dealing with the 'more prescriptive and procedural requirements from the Acts'. He further stated in his second reading speech that these amendments will:

> … provide more flexibility for the Government to modernise and adapt to changing circumstances. Many of the changes are housekeeping and best practice updates to clarify and simplify requirements for industry and improve government processes associated with applications and authorisations.

5.27 The Deputy Premier also remarked that the Government intends to 'release a consultation draft of the regulations for public consideration' prior to their commencement.

The Bill defers a significant number of matters set out in the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991* to the regulations. In particular, the Bill permits the regulations to prescribe regulatory requirements for applications seeking necessary approvals, authorisations, or titles to conduct mining operations for minerals and petroleum in New South Wales. Additionally, the regulations may specify matters that decision-makers may consider in reaching various determinations on those applications. The Bill also provides that a decision-maker may reject, without notification, an application for failure to comply with the requirements under the regulation. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations, to facilitate an appropriate level of parliamentary oversight.

The Committee acknowledges that these amendments are intended to build more flexibility into the regulatory framework and allow regulators to better respond to changing industry circumstances. The regulations intended to give effect to these matters will also be subject to public consultation. The Committee also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters deferred to the regulations relate to the determination of applications for mining minerals and petroleum, which is the core subject matter for which both Acts regulate, including what decision-makers may consider when making determinations. It also notes that non-compliance with the regulations is a valid ground for rejecting an application without notice to the applicant. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Residential Tenancies Amendment (Tenant Protections and Flood Response) Bill 2022*

Date introduced	24 March 2022
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong
	*Private Members Bill

Purpose and description

6.1 This Bill amends the *Residential Tenancies Act 2010* to provide protections for tenants, including tenants in areas impacted by the 2022 NSW floods.

Background

6.2 This Bill proposes a number of amendments to the *Residential Tenancies Act 2010* (the Act) to increase protection against termination and rent increases for tenants.

6.3 Firstly, the Bill provides protection for tenants in flood affected areas from rent increases and termination for the 12 months after the commencement of the Bill. These temporary measures are designed to provide tenants in these areas with greater housing security during the initial flood recovery stage.

6.4 The Bill introduces amendments requiring landlords to ensure properties are waterproofed and free from mould if being used for a residential tenancy.

6.5 Secondly, the Bill amends the Act to change the circumstances in which a residential tenancy agreement may be terminated, including the removal of the ability to terminate a residential tenancy agreement on no grounds.

6.6 Instead, the Bill allows termination of a residential tenancy agreement in specific circumstances including:

(a) where the landlord requires the premises for their own use or their families use

(b) for the purpose of renovations or repairs that will render the property uninhabitable for a period of at least 4 weeks, or

(c) where the property will be used in a way that means it cannot be used as a residence for at least 6 months.

6.7 The Bill also provides that a landlord may be fined a maximum of 50 units ($5 500) for making a false statement in regards to the reason for termination, and further provides clarity in regards to whom is considered family of a landlord.

Issues considered by the Committee

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

Freedom of contract

6.8 The Bill amends the Act to limit certain actions regarding residential tenancy agreements of impacted leases. Under the Bill, an impacted lease means a residential tenancy agreement for a premises located in the flood impacted area which includes specific local government areas impacted by the recent 2022 NSW floods.

6.9 For example, under proposed section 41(1C), the rent payable under a residential tenancy agreement may not be increased by more than the lesser of:

(a) the public sector wage increase, being the amount prescribed in the Industrial Relations (Public Sector Conditions of Employment) Regulation 2014, clause 6(1)(a), and

(b) the Consumer Price Index (All Groups Index) for Sydney issued by the Australian Statistician.

6.10 Proposed sections 84-85A amend provisions regarding the end of fixed term tenancy, termination of a periodic agreement and wrongful termination of fixed term and periodic agreements. Specifically, it amends the Act to provide that:

(a) A residential tenancy agreement or periodic agreement may not be terminated on no grounds (sections 84-85A). Instead, a notice of termination may only be provided if:

(i) The premises is required for the landlord or their families use;

(ii) Renovations or repairs are to be carried out which would leave the property uninhabitable for no less than 4 weeks; or

(iii) The residential premises will be used in a way that renders it unable to be used as a residence for no less than 6 months.

6.11 If an agreement is terminated and does not use the premises for one of the valid reasons for termination, a maximum penalty of 100 units ($11 000) may apply and the NSW Civil and Administrative Tribunal (Tribunal) may award compensation to the tenant (section 85A(2)). Additionally:

(a) A notice of termination may not be given in the 12 months after receiving an order from the Tribunal that a previous termination was invalid, and doing so may incur a penalty of a maximum 20 units ($2 200) (section 115A);

(b) An impacted lease (residential tenancy in a flood impacted area as specified at section 229) must not be terminated during the moratorium period (12

months after the commencement of the Bill) unless the Tribunal considers that the property has otherwise than as a result of a breach of an agreement, has been destroyed or is wholly or partly uninhabitable, or has ceased to be lawfully useable as a residence, or the behaviour of the tenant is unreasonable in the circumstances (section 230);

(c) During the moratorium period, the rent payable under an impacted lease must not be increased (section 231(1));

(d) During the moratorium period, a residential tenancy agreement for a premises in a flood impacted area must not be entered if the rent payable is higher than either the rent payable for that property on 25 February 2022 (if the property was under a residential tenancy agreement) or otherwise, the median rent for the same type of premises (section 231(2).

The Bill proposes a number of restrictions on residential tenancy agreements of impacted leases. Under the Bill, an impacted lease means a residential tenancy agreement for premises located in flood impacted areas. The Bill proposes to introduce limits on terminating residential tenancies, banning no fault terminations, and limiting the amount of rent able to be charged to impacted leases.

The Committee notes that proposed sections 230 and 231, which prevents the termination of tenancy agreements and limits on rental prices for *impacted leases*, are only operational for a fixed 12 month period. However, proposed sections 84-85A apply to all residential tenancy agreements. This may impact upon the freedom of contract between the landlord and tenant to choose the terms and condition to which they are subject.

Additionally, as these provisions apply to existing residential tenancy agreements, the Bill may have retrospective effect. The Committee generally comments on provisions that have retrospective effect, particularly where they impact rights that were available when parties entered into a private contract, such as a residential tenancy agreement. This is because they impact on the rule of law principle that a person is entitled to know the law to which they will be subject to at any given time.

The Committee acknowledges that statutory limitations on freedom of contract are not uncommon, for example where this is deemed necessary to address the unequal bargaining power of parties. However, it also notes the amendments may have some potential for adverse financial impact on some landlords due to the limitation on terminating both fixed term and periodic residential tenancy agreements, as well as potentially limiting their private property rights. The Committee refers these amendments to Parliament to consider whether the limits they may place on freedom of contract are reasonable and proportionate in the circumstances.

7. State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022

Date introduced	22 March 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

Purpose and description

7.1 The objects of this Bill are—

(a) to make miscellaneous amendments to legislation relating to State revenue and fines, and

(b) to amend the *Liquor Act 2007* to extend the provision that allows local councils to encourage the use of outdoor space for dining and performance.

Background

7.2 The *State Revenue and Fines Legislation Amendment (Miscellaneous) Bill 2022* (Bill) seeks to amend the following legislation and statutory instruments:

(a) Crimes (Administration of Sentences) Act 1999,

(b) Crimes (Administration of Sentences) Regulation 2014,

(c) Crimes (Sentencing Procedure) Act 1999,

(d) *Duties Act 1997,*

(e) *Fines Act 1996,*

(f) *Fines Regulation 2020,*

(g) *First Home Owner Grant (New Homes) Act 2000,*

(h) *Land Tax Act 1956,*

(i) *Liquor Act 2007,*

(j) *State Debt Recovery Act 2018,* and

(k) *Taxation Administration Act 1996*.

7.3 The reforms contained in the Bill fall into three categories:

(a) amendments to taxation and grant legislation with the aim of improving the integrity of the revenue system in NSW, address anomalies, respond to decisions of the court and close loopholes that allow for tax avoidance, and ensure that exemptions and concessions are equitable;

(b) amendments to state debt legislation to give Revenue NSW additional powers to deliver end-to-end payment collection and debt recovery for state agencies; and

(c) amendments to fines legislation to strengthen enforcement provisions and remove the capacity for imprisonment to be imposed for unpaid fines.

7.4 The Bill also contains amendments to the *Liquor Act 2007* that provide local councils with powers to extend the power of local councils to rapidly approve the use of roads and certain other public spaces for outdoor dining, foyer and performance spaces.

Issues considered by the Committee

Trespasses unduly on personal rights and liberties (s 8A(1)(b)(i))

Retrospective approval for actions of a local council

7.5 The Bill proposes inserting a new part to Schedule 1 of the *Liquor Act 2007* that provides that anything done by a local council during the relevant period that would had been validly done had the Bill commenced before it was done, is taken to have been validly done under the Liquor Act. The Bill grants local councils powers to temporarily allow the use of public infrastructure, including roads and footpaths, for outdoor dining, recreation and performances to stimulate outdoor events in accordance with public health advice.

The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to him or her at any given time. In this case, the actions of a local council may retrospectively be deemed to be validly done, where otherwise those actions may not have been valid under the *Liquor Act 2007* when they were actually done.

The Committee does however note that the proposed retrospective changes are intended to provide local councils with the power to continue to provide approvals for outdoor public spaces to be used for events in a safe way to provide support for businesses recovering from the COVID-19 pandemic, and that the changes allowed to be made under the Act are temporary. The Committee refers the matter to Parliament to consider whether the retrospectivity is reasonable in the circumstances.

Privacy

7.6 The Bill amends sections 117, 117AA and 117AB of the *Fines Act 1996* to provide that the Commissioner of Fines Administration may access certain information for the purpose of enabling the Commissioner to exercise any of the Commissioner's functions under the *Fines Act 1996*, rather than only to exercise specified functions.

7.7 Amended section 117 also requires police and other government agencies to provide the Commissioner of Fines Administration, on request, available information about a fine defaulter's email address and phone number. Schedule 2[22] authorises a credit reporting body to disclose to the Commissioner of Fines Administration the contact details of the current or last known employer of a fine defaulter.

7.8 The Bill also inserts section 117AC, which enables the Commissioner of Fines Administration to obtain from an authorised deposit-taking institution the balance of a fine defaulter's bank account for the purpose of deciding whether to make a garnishee order against the fine defaulter.

7.9 The Bill makes similar amendments section 105-107 of the *State Debt Recovery Act 2018,* which provide that the Chief Commissioner of State Revenue may access certain information for the purpose of enabling the Chief Commissioner to exercise any of the Chief Commissioner's functions under the State Debt Recovery Act 2018, rather than only to exercise specified functions. The Also amends subsection 107(2) to clarify that 'relevant information' that a credit reporting body is authorised to disclose to the Chief Commissioner of State Revenue includes the contact details of the current or last known employer of a debtor.

The Bill makes amendments to the *Fines Act 1996* and the *State Debt Recovery Act 2018* to permit the Commissioner of Fines Administration and the Chief Commissioner of State Revenue to have access to certain information for the purpose of exercising their functions under their respective Acts, rather than only to exercise specified functions. These records may include personal contact information, such as an email address and phone number, and the contact details of their current or last known employer. This may infringe on the privacy of those individuals subject to these provisions.

However, the Committee acknowledges that the provisions are intended to assist the Commissioners in exercising their functions under the Act for the purpose of deciding whether to make garnishee orders against the fine defaulter (under the Fines Act) or for the purposes of taking debt recovery action against the debtor (under the State Debt Recovery Act). The Committee also notes that the personal information that would be provided includes details already held by police or other government agencies, which are subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

7.10 The Bill inserts section 119A to the *Fines Act 1996* , which enables employees of, and other persons engaged or authorised by, Revenue NSW to issue penalty notices for alleged offences under the *Fines Act 1996*.

7.11 Schedule 3 of the Bill amends the corresponding *Fines Regulation 2020* and inserts clause 7A, which enables a penalty notice to be issued to a person who does not, within the period specified in a verification notice, supply a statutory declaration verifying the person responsible for a vehicle or vessel offence. The amount payable under the penalty notice is equivalent to the amount prescribed in relation to an equivalent offence under the *Road Transport Act 2013*, section 189(4).

The Bill permits the creation of penalty notice offences under the *Fines Act 1996* and the corresponding *Fines Regulation 2020*. 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 (including a relevant person) 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. In these circumstances, the Committee makes no further comment.

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

Discretionary powers of the Chief Commissioner

7.12 The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make determinations relevant to a number of duties. The Bill proposes to extend the Chief Commissioner's powers to give approvals or exemptions in certain circumstances. These amendments seek to:

(a) insert section 8(2A) to allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Act, and

(b) insert section 76(2A) to allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme.

7.13 These discretions of the Chief Commissioner may impact the liability of individuals who will or will not be subject of a duty depending on the outcome of that decision.

The Chief Commissioner has broad powers under the *Duties Act 1997* to seek payment for and make discretionary determinations relevant to a number of duties. The Bill seeks to amend the Duties Act to provide the Chief Commissioner with two additional discretionary powers:

1. **allow the Chief Commissioner to decide on the basis of their opinion, if an excluded transition that results in a change of beneficial ownership of dutiable property, was made with the collateral purpose of reducing the duty otherwise chargeable under the Duties Act (section 8(2A); and**

2. **allow the Chief Commissioner to give an approval or exemption to the residence requirement for the First Home Buyers Assistance Scheme (section 76(2A).**

These discretions may have an impact on individuals, who will or will not be subject to pay duties depending on the decision of the Chief Commissioner. The new discretions also do not provide detail as to the factors the Chief

Commissioner must consider in exercising their discretion, and therefore the Bill may grant an ill-defined administrative power.

The Committee however acknowledges that the Chief Commissioner has the authority under the Duties Act to make a number of discretionary decisions, and that discretion may be necessary to impose the duties outlined in the Duties Act. The Committee also notes that most decisions of the Chief Commissioner can be reviewed by the NSW Civil and Administrative Tribunal and therefore the discretion of the Chief Commissioner is not entirely unfettered. Given the circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations – creation of offences and penalties

7.14 The Bill proposes inserting a new section 119A into the *Fines Act 1996*, which would allow penalty notice offences to be prescribed by the regulations, and also allow for regulations to determine the prescribed amount for penalties.

The Bill seeks to insert a new section 119A into the *Fines Act 1996*, allowing for the regulations to prescribe both penalty notice offences, and determine the prescribed amount payable for penalties.

The Committee acknowledges that it may be useful to delegate matters of an administrative nature to the regulation. However, the Committee notes that the Bill permits the regulations to create offences that carry a maximum penalty of the amount prescribed in the regulations, and this amount is set by Section 128(2) of the Fines Act which states that the regulations may create offences punishable by a penalty not exceeding 50 units ($5 500).

The Committee prefers that offences be legislated by Parliament so that they are subject to an appropriate level of parliamentary scrutiny. The Committee however does note that the maximum amount of a fine does not exceed $5 500, and that the imposition of fines under the Fines Act is subject to internal and judicial review. In the circumstances the Committee makes no further comment.

Part Two – Regulations

1. Crown Land Management Amendment (Reserve Trusts) Regulation (No 3) 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. Kevin Anderson MP
Portfolio	Lands and Water

Purpose and description

1.1 The object of this Regulation is to further amend the savings and transitional provisions in the *Crown Land Management Act 2016*, Schedule 7 to extend until 29 February 2024 the transitional period for reserve trusts managed by corporations that are category 1 non-council managers under the repealed *Crown Lands Act 1989*.

1.2 This Regulation is made under the *Crown Land Management Act 2016*, including section 13.5 (the general regulation-making power) and Schedule 7, clause 1.

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

1.3 The *Crown Land Management Amendment (Reserve Trusts) Regulation (No 3) 2021* (the Regulation) amends Schedule 7 of the *Crown Land Management Act 2016* (the Act) to extend the transition period for the implementation of the scheme for reserve trusts managed by corporations that are category 1 non-council managers under the repealed *Crown Lands Act 1989*.

1.4 This amendment extends the end of the transition period from 30 December 2021 until 29 February 2024, providing an additional 26 months for the transition.

The Regulation contains a Henry VIII clause which allows subordinate legislation to amend the Act and delegates Parliament's legislative power to the Executive. The Committee generally prefers amendments to an Act to be made by an amending Bill rather than subordinate legislation to foster an appropriate level of parliamentary oversight.

However, the Committee notes that the primary Act, under Schedule 7, provides for regulations to amend the Act in regards to provisions of a transitional nature. Further, the amendment is limited to extending the transitional period by 26 months for transitional reserve trusts managed by corporations that are category 1 non-council managers, which must continue to comply with the transitional provisions contained in Schedule 7 of the Act. In doing so it provides clarity for those subject to the provision while the overarching scheme is yet to be implemented. In the circumstances, the Committee makes no further comment.

2. Retail and Other Commercial Leases (COVID-19) 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. Eleni Petinos MP
Portfolio	Small Business

Purpose and description

2.1 The object of this Regulation is to limit the exercise of certain rights by a lessor under retail and certain other commercial leases for a breach of the lease if—

(a) the lessee is a business that, due to the impact of the COVID-19 pandemic, qualified for certain grants, and

(b) the breach is a prescribed breach that occurs between 13 July 2021 and 13 March 2022.

2.2 Before exercising the right, the lessor must try to resolve the breach using mediation.

2.3 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.

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

Issues considered by the Committee

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

Retrospectivity, property rights and freedom of contract

2.5 The *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (the Regulation) repeals and remakes with minor amendments the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*. The Regulation provides that during the prescribed period a lessor is prohibited from taking a 'prescribed action' against an impacted lessee because of:

(a) a failure to pay rent,

(b) a failure to pay outgoings, or

(c) the business operating under the lease not being open for business during the hours specified in the lease.

2.6 An impacted lessee is a lessee with a turnover in the 2020-21 financial year of less than $50 million that would qualify but for a COVID-19 Disaster payment made to the lessee by the Commonwealth:

(a) 2021 COVID-19 Micro-business Grant,

(b) 2021 COVID-19 Business Grant, or

(c) 2021 JobSaver Payment.

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

2.8 Further, the Regulation continues to place certain obligations on lessors, including an obligation not to increase rent payable for an impacted lessee (clause 8), compulsory mediation (clause 9), and the obligation to renegotiate the rent payable under the impacted lease (clause 10). It also specifies that an act or omission of an impacted lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic does not amount to a breach of the impacted lease and does not constitute grounds for termination or the taking of any prescribed action by the lessor against the impacted lessee (clause 11).

2.9 The Regulation also extends the prescribed period from 13 January 2022 to 13 March 2022.

Like its predecessors, the *Retail and Other Commercial Leases (COVID-10) Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the 13 July 2021.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they

are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on 13 January 2021 until 13 March 2021. The Committee understands that this is in response to the current COVID-19 pandemic and notes the relatively small extension of time. Given the ongoing economic consequences of the COVID-19 pandemic, and the limited period the Regulation will apply for, the Committee makes no further comment.

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

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

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

2.11 The amending Regulation extends the prescribed period for which these limitations are imposed from 13 January 2022 to 13 March 2022.

2.12 The Committee notes that financial mortgage assistance is available for eligible lessors to defer business loan repayments for a period of 3 months.[3] Following any loan repayment deferral, lessors experiencing ongoing financial difficulty may be able to negotiate with their bank to restructure or vary their loan, or be eligible for a deferral extension.[4]

As above, the Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against commercial lessees where lessees are unable to meet their obligation due to economic hardship resulting from the COVID-19 pandemic. In doing so, the Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 March 2022.

However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and resulting economic downturn. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that they may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[3] Australian Banking Association, COVID-19 Assistance, current as at 15 March 2022.

[4] Australian Banking Association, COVID-19 support: phase 2, current as at 15 March 2022.

3. Snowy Hydro Corporatisation Amendment (Savings and Transitional Provisions) 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. Paul Toole MP
Portfolio	Regional New South Wales

Purpose and description

3.1 The object of this Regulation is to extend by 12 months the period during which the *National Parks and Wildlife Act 1974*, section 81(4) does not operate to prohibit operations being undertaken in relation to the Snowy 2.0 project that are not in accordance with *Kosciuszko National Park Plan of Management 2006*.

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

3.2 The Regulation amends clause 7(1) of Schedule 4 to the *Snowy Hydro Corporatisation Act 1997* (the **Act**).

3.3 Clause 7 of the Schedule provides that section 81(4) of the *National Parks and Wildlife Act 1974* does not apply for the specified period to operations undertaken for the Snowy 2.0 project which are not in accordance with the *Kosciuszko National Park Plan of Management 2006*. Section 81(4) of the *National Parks and Wildlife Act 1974* provides that:

> …despite anything in this or another Act or in an instrument made under this or another Act, if the Minister has adopted a plan of management under this Part, no operations may be undertaken in relation to the lands to which the plan relates unless the operations are in accordance with the plan.

3.4 The Regulation amends the specified period under clause 7(1), from a period of 3 years from first approval to a period of 4 years from first approval.

3.5 Schedule 4 to the Act sets out savings, transitional and other provisions on the commencement of the Act. Relevantly, clause 1 of the Schedule provides a general regulations-making power to make provisions of a savings or transitional nature.

Specifically, subclause 1(4) provides that regulations made for that purpose may amend Schedule 4 'to provide for additional or different savings and transitional provisions instead of including the provisions in the regulations'.

The Regulation amends the *Snowy Hydro Corporatisation Act 1997* to extend, by 12 months, the exemption for operations undertaken for the Snowy 2.0 project which are not in accordance with the *Kosciuszko National Park Plan of Management 2006.* Specifically, it exempts operations from the requirement under section 81(4) of the *National Parks and Wildlife Act 1974* to comply with a plan of management adopted by the Minister.

This amendment is made by way of a Henry VIII clause set out in clause 4 of Schedule 4 to the parent Act, which allows the Executive to amend an Act by way of regulation without reference to the Parliament. The Committee notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*, and that the provision seeks to apply for a period of 12 months.

However, the Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes. In the circumstances, the Committee refers this provision to Parliament for its consideration.

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. Environmental Planning and Assessment Amendment (Moree Activation Precinct) Regulation 2022

   The object of this Regulation is to require a consent authority, when determining a development application for development on land to which Moree Plains Local Environmental Plan 2011 applies, to consider whether or not the development is consistent with the Moree Plains Special Activation Precinct Master Plan, published by the Department of Planning, Industry and Environment in January 2022. This applies until 31 March 2022 when the Moree Activation Precinct is declared under State Environmental Planning Policy (Precincts—Regional) 2021.

2. Liquor Amendment (COVID Support) Regulation 2022

   The objects of this Regulation are as follows—

   (a) to provide for RSA and RCG endorsements that expire from 1 February 2020 until 30 June 2022 to be renewable before 1 July 2022 on the completion of an RSA refresher course or an approved RCG training course, respectively,

   (b) to extend trading periods for the Parkes Elvis Festival and Tamworth Country Music Festival.

3. Notice of Reservation of a National Park (n2021-2684, 2686)

   This notice reserves additional land to be incorporated as part of the Blue Mountains National Park, under the provisions of section 30A(1)(a) of the *National Parks and Wildlife Act 1974.*

   This notice also reserves land as a National Park under the provisions of section 30A(1)(a) of the *National Parks and Wildlife Act 1974.* This land is assigned the name Koonaburra National Park under Section 30A(2) of the *National Parks and Wildlife Act 1974*.

4. Notice of Reservation of a State Conversation Area (n2021-2685)

This notice also reserves land as a State Conservation Area under the provisions of section 30A(1)(c) of the *National Parks and Wildlife Act 1974.* This land is assigned the name Langidoon-Metford State Conservation Area under Section 30A(2) of the *National Parks and Wildlife Act 1974*.

5. Public Health Amendment (COVID-19) Regulation (No 2) 2022

This Regulation replaces a reference to a repealed order under the Act.

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

The Regulation substitutes references to the *Public Health (COVID-19 Air Transportation Quarantine) Order (No 1) 2022*, to now refer to the *Public Health (COVID-19 Air and Maritime Arrivals) Order (No 1) 2022*.

6. Water Management (General) Amendment (Advertising Requirements and Compliance Audits) Regulation 2021

The object of this Regulation is to amend the *Water Management (General) Regulation 2018* as follows—

(a) to provide that the Minister must advertise an application for an approval under the *Water Management Act 2000* (the Act) by a notice published on—

(i) the Department's website, or

(ii) a publicly available website maintained by WaterNSW or the Natural Resources Access Regulator,

(b) to make provision for compliance audits to be undertaken by the holder of an access licence or an approval at the direction of the Minister under the Act, section 326A, including providing for the following—

(i) the payment of the costs of compliance audits by holders,

(ii) requirements for the form and content of compliance audits,

(iii) certification of compliance audits,

(iv) persons who are qualified to undertake compliance audits.