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. RACING AND GAMBLING LEGISLATION AMENDMENT BILL 2022

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

*Privacy*

The Bill proposes that new sections 33JD and 33JE be inserted into the *Betting and Racing Act 1998* (BAR Act), that allow information about betting accounts, which may include personal information, to be accessed by a list of persons which may include persons prescribed by the regulations.

While the Committee acknowledges that information sharing is required to administer and ensure compliance with the scheme, it considers that these provisions may impede the relevant persons' right to privacy.

The Committee further acknowledges that the referral of matters to regulations and Minister builds flexibility into the regulatory framework. However, referring matters regarding information sharing to the regulations may impact on the right to privacy and generates uncertainty around the extent to which individuals' rights may be impacted by the scheme. The Committee generally prefers such matters be included in the primary, rather than the subordinate, legislation to facilitate an appropriate level of parliamentary oversight.

However, the Committee acknowledges that the sharing of the information in regards to online betting accounts may be of particular importance to ensure compliance with the relevant legislation. Online gambling is an area where the focus of compliance is to reduce harm to individuals, and therefore broader investigatory and information sharing powers may be required to achieve this aim. In the circumstance, the Committee makes no further comment.

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

*Delegation to regulations*

The Bill proposes a number of amendments that allow the regulations to prescribe details in regards to gambling advisory statements (section 33H) and mandatory training for employees of licenced betting agents (section 33JI). A failure to comply with these requirements as set down by the regulations may result in fine, the maximum penalty being 100 units ($11 000) for an individual and 1000 units ($110 000) for a corporation.

The Committee prefers that the creation and detail of offences be included in primary legislation so that they are subject to an appropriate level of scrutiny. The Committee notes that the Bill allows the substantive detail related to compliance to be contained in the regulation, and does not provide further clarification as to what compliance may require. The Committee does however note that the details referred to the regulations may require the flexibility of regulatory powers to be appropriately implemented, for example the approval of specific courses for employees. Further, the Committee notes that the betting industry is highly regulated and that licenced betting providers may reasonably be required to monitor ongoing compliance with regulatory change. Considering the circumstances, the Committee makes no further comment.

*Commencement by proclamation*

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments in regards to the administration of the racing industry and the Racing Appeals Tribunal in NSW. In the circumstances, the Committee makes no further comment.

## 2. ROADS AND CRIMES LEGISLATION AMENDMENT BILL 2022

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

*Freedom of assembly and association*

The Bill provides that it will be an offence to conduct certain activities that disrupt traffic and movement on roads and at major facilities. Under section 144G(1) of the *Roads Act 1993* (Roads Act), it is an offence to enter, remain on, climb, jump from or otherwise trespass on any part of a major bridge or tunnel if that conduct:

a) Causes damage to the bridge, tunnel or road,

b) Seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road, and

c) Is an offence punishable by imprisonment or is an offence arising under the *Summary Offences Act 1988*.

Under Section 214A of the *Crimes Act 1900* (Crimes Act) it is an offence to do any of the above actions, or block entry to a major facility that has the same effect as above, or causes additional types of disruption to the major facility. The maximum penalty for a breach of either section 214A of the Crimes Act or section 144G Roads Act is 200 penalty units or 2 years imprisonment, or both.

As the Bill seeks to prohibit certain conduct on bridges, tunnels and roads, this may impact on freedom of movement and assembly. These rights that are contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest. However, the ICCPR recognises that derogation from these rights may be warranted in certain circumstances, including to protect public health and safety.

The Committee notes that the offences in the Crimes Act and Roads Act do provide a number of safeguards, including that in both instances the amendments do not prohibit conduct undertaken in accordance with the consent of Transport for NSW, the NSW Police Force or another public authority. Under section 144G of the Bill, NSW Police may give authorisation for protests or similar action, which would therefore be exempted from prosecution.

It is also a defence to prosecution under section 144G of the Roads Act if the person charged proves that they had a reasonable excuse for the conduct concerned. For example, subsection (5) provides that it is a reasonable excuse if the conduct arose from a mechanical fault or breakdown of a motor vehicle. Under the Crimes Act, a person does not commit an offence if the conduct forms part of an industrial action, thereby exempting workers who may undertake protest and other industrial action at a major facility that is their workplace.

The Committee notes that potential limits on movement and assembly may be of particular interest to the public, and also notes the significance of the penalties that can be imposed in event of a breach of the Crimes Act or the Roads Act. Given these circumstances, the Committee refers the matter to Parliament for its consideration.

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

*Key definitions delegated to the subordinate legislation*

The Bill adopts the definition of major road, which is contained in clause 48A of the Roads Regulation. This definition is substantive because areas defined as major roads in the Roads Regulation will be subject to the offence provisions contained in the Bill. The Minister classifies roads under Part 5 Division 1 of the Roads Act, and then clause 48A Roads Regulation outlines which of these categories are included in the definition of major roads. The Minister may do this by way of a notice in the Gazette. Therefore, roads can be included in the definition of major roads without amending the Regulation. This may reduce parliamentary oversight as notices in the Gazette are not subject to disallowance.

The Committee generally prefers that substantive clauses be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations or individuals may be affected, such as freedom of assembly. The Committee also notes that the definitions delegated to the regulations are relevant to determining whether an individual would be subject to the penalty provisions of the Bill, which include custodial sentences. Given the circumstances, including that the Bill may curtail the rights of individuals and impose significant penalties for non-compliance, the Committee refers the matter to Parliament for consideration.

## 3. STATE INSURANCE AND CARE LEGISLATION AMENDMENT BILL 2022

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

*Strict liability offences*

The Bill amends the *Workers Compensation Act 1987* to create a new strict liability offence for conduct by a licensed insurer which contravenes an enforceable undertaking given by them under Part 7, Division 4A. It also inserts section 195 which establishes a strict liability offence for a licensed insurer who does not comply with a written direction issued by the State Insurance Regulatory Authority (SIRA) under that section. Both these strict liability offences carry a maximum penalty of $110 000.

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. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, in this case being strengthening compliance by insurers with the conditions of their operating licences. It further notes that the maximum penalty carried by these offences are monetary only, not custodial. In the circumstances, the Committee makes no further comment in respect to the establishment of these offences under Part 7, Division 4A.

The Bill inserts section 195 into Part 7, Division 4 of the Act. Within that Division, section 209 sets out a general offence for an insurer who contravenes any requirement imposed on them by Division 4 and provides that the insurer is liable to a penalty not exceeding $11 000. A contravention of a written direction under section 195 may therefore constitute an offence under both sections 195 and 209 of the Act. However, the maximum penalty for an offence under section 195 exceeds the maximum liability set out under section 209.

The Committee generally comments where provisions may be contrary to other laws. This makes the law applicable to individuals hard to ascertain and understand, and can create unfairness where penalties differ between legal provisions. The Committee acknowledges that the general offence provision under section 209 is intended to ensure compliance with the exercise of SIRA's regulatory functions. However, it notes that the overlapping operation of sections 195 and 209

to the same offending conduct may result in contradictory imposition of penalties. For these reasons, the Committee refers these provisions under Part 7, Division 4 to Parliament for its consideration.

*Access to justice – legal representation*

The Bill inserts Division 1A into Part 3 of the *Workers Compensation Act 1987*, which allows parties to settle by agreement a dispute referred to the Personal Injuries Commission about liability for compensation payable on the death of a worker. Section 32AC requires each party to a proposed agreement be separately legally represented unless otherwise directed by the Commission. This requirement may impact a person's access to justice as individuals who cannot afford separate legal representation may be precluded from settling such disputes, thereby requiring them to undergo possibly protracted litigation by reason of their lack of legal representation. This is of particular concern as the parties to death benefit disputes include the dependants of a deceased worker.

However, the Committee acknowledges that this requirement is intended to protect individuals from being pressured to enter into settlement agreements not within their best interests, particularly minor dependants of deceased workers. It also notes that the provisions enable the Commission to discretionarily permit parties to an agreement be unrepresented in proceedings. In the circumstances, the Committee makes no further comment.

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

*Commencement by proclamation*

Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may enable necessary administrative arrangements to be put in place in order to effectively implement the amendments to the function of the Personal Injury Commission and the state insurance regulators. 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 subordinate legislation*

The Bill defers to the regulations a number of substantive matters set out in the *Workers Compensation Act 1987* relating to the function of the Personal Injury Commission and the State Insurance Regulatory Authority (SIRA). In particular, the Bill permits the regulations to prescribe the broader circumstances of medical expenses compensation which may be discretionarily commuted by the Commission and allows the Commission to set out the application process for such commutations in its rules. It further enables the Workers Compensation Guidelines to provide for the management of claims for death benefits compensation subject to a proposed settlement agreement.

The Bill also provides a regulation-making power to prescribe what actions SIRA may require licensed insurers to take in accordance with a written direction issued by the authority. Under these provisions, failure to comply with such a direction is a strict liability offence which carries a maximum penalty of $110 000. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations and other subordinate legislation, to facilitate an appropriate level of parliamentary oversight.

The Committee acknowledges that these amendments are intended to build flexibility into the regulatory framework to facilitate the efficient and responsive operation of the state's

compensation scheme. The regulations intended to give effect to these matters will also be subject to stakeholder consultation. The Committee also notes that any regulations, the Workers Compensation Guidelines and the Commission rules 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 subordinate legislation relate to the lump sum compensation payable to injured workers or their dependants, including the class of claims which may be subject to commutation and the management of lump sum death benefits. It also defers to the regulations to prescribe actions which insurers may be directed to take, noting that non-compliance with such directions is a strict liability offence. For these reasons, the Committee refers the matter to Parliament for its consideration.

## 4. WATER MANAGEMENT AMENDMENT (NO COMPENSATION FOR FLOODPLAIN HARVESTING LICENCES) BILL 2022*

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

*Exclusion of compensation*

The Bill amends the *Water Management Act 2000* to exclude floodplain harvesting access licences from certain compensation. Specifically, it excludes these licence holders from compensation schemes for compulsory acquisitions of licences or reductions in water allocations permitted by those licences. These amendments may preclude individuals from receiving compensation for loss of water access.

The Committee notes that these amendments are intended to address the potential public costs burden for administering such licences. However, the provisions do not appear to offer alternative avenues for affected individuals to seek compensation for lost access. For these reasons, the Committee refers this matter to Parliament for its consideration.

## 5. WORK HEALTH AND SAFETY (MINES AND PETROLEUM SITES) AMENDMENT BILL 2022

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

*Ministerial opinion of suitability*

The Bill amends the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* to provide that the individual cannot be appointed as an industry safety and health representative unless they are, in the Minister's opinion, a person suitable to be appointed.

The provisions place no limits on the Minister's discretion although section 28(2AA) provides that he or she may make enquiries they consider appropriate in making their decision, including criminal record and other probity checks. The Bill may thereby grant the Minister a wide and ill-defined power.

The Committee acknowledges the provisions are a regular part of employment screening, and that the amendments are designed to bring the Act up to date with current NSW Government practice. Further, the provisions are designed to ensure greater integrity in the sector and do not unduly burden candidates for the position. In the circumstances, the Committee makes no further comment.

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

*Commencement by proclamation*

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.

However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments in regards to the administration the Mine Health and Safety regime in NSW. In the circumstances, the Committee makes no further comment.

## PART TWO – REGULATIONS

### 1. DESIGN AND BUILDING PRACTITIONERS AMENDMENT (MISCELLANEOUS) REGULATION 2022

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

*Penalty notice offences*

The Regulation creates a number of penalty notice offences regarding obtaining authority to install ground anchors and the mandatory provision of certain types of information to the Secretary by recognised engineering bodies. This includes bodies that have met the requirements of the *Design and Building Practitioners Regulation 2021* (2021 Regulation) and are subject to certain obligations under that regulation.

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

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

However, the Committee notes that the use of penalty notices in regards to engineering and building works may be more efficient for the administration of the scheme. Further, building and engineering works not done in accordance with the 2021 Regulation may cause damage to property and may even be dangerous, therefore penalty notice offences may serve as an important deterrent to encourage works to be completed to the required standard. The Committee also notes that the quantum of the penalty is relatively low given the context, being a maximum of $1 650 for individuals and $3 300 for a corporation. In the circumstances, the Committee makes no further comment.

*Privacy*

The Regulation requires that recognised engineering bodies provide certain types of information to the Secretary as a condition of their recognition as recognised engineering bodies. The information may include information pertaining to individuals, as recognised engineering bodies may be body corporates or sole traders, as well as information about directors of body corporates. For example, section 52B(e) allows the Secretary to consider any relevant offences of directors or officers of an applicant body corporate when considering recognition or renewal of an application.

However, the Committee notes that the provision of this information, as well as financial and technical information which must be shared under the Regulation, is aimed at ensuring the integrity, safety and transparency of the engineering industry. The information that pertains to individuals may generally be publically available, such as convictions, and that the Secretary is the only recipient of this information. Therefore the Committee considers that the privacy impacts are not significant, and in the circumstances makes no further comment.

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

*Creation of offences*

The Regulation creates several offences. For example, it is an offence to fail to ensure documentation is correctly organised and presented to the Secretary (division 3A) or a failure to exercise the function of a recognised engineering body independently, fairly and with honesty and integrity (clause 52G). The maximum penalty that applies in respect of any of these offences is a fine of 200 penalty units for body corporates ($22 000) and 100 penalty units for others ($11 000).

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that the building industry is a highly regulated industry that is often subject to changing schemes to keep pace with technological change, and the fact that it may be more administratively efficient to proceed by regulation. The Committee also notes that the penalties are more likely to be imposed on businesses as opposed to individuals, and are designed to ensure safety and protect property. In the context, the Committee makes no further comment.

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

*Discretion of the Secretary*

The Regulation grants the Secretary some powers that may be ill-defined and that could benefit from further clarification, including clause 52B and 53. These clauses propose to grant the Secretary the power to refuse, suspend or cancel the application or registration of engineers as recognised engineering bodies on the basis of their opinion of certain circumstances. For example, Clause 52B proposes that the Secretary may refuse an application on the basis that in their opinion, it is not in the public interest. The concept of public interest is not further defined.

The Committee prefers provisions that affect the rights and obligations of individuals and body corporates (who both may apply for and become a recognised engineering body and incur the associated benefits), be drafted with sufficient precision so that their scope is clear. The Committee acknowledges that it is important in a regulatory context for the Secretary to retain a level of discretion. This may include a flexible power to consider approvals in relation to engineering bodies, who undertake work that has an impact on public safety.

However, it may be that the clauses in question would benefit from the inclusion of further clarification as to key terms such as 'public interest' to guide decision-making, thereby balancing the competing considerations of precise drafting and administrative discretion. However, the Committee acknowledges that these terms are in regular and frequent use, and that the broader context of the regulation provides both the Secretary and applicant with relevant context. In the circumstances, the Committee makes no further comment.

## 2. ENVIRONMENTAL PLANNING AND ASSESSMENT REGULATION 2021

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

*Property rights of land owners – consent to development applications*

Sections 181, 23 and 67 of the Regulation concern the removal of property rights of landowners in the process of development applications being made in certain circumstances. Specifically, section 181 states the consent of the owner is not required in specific applications for State significant infrastructure. Section 23 states an owner's consent is not required where the applicant is a public authority and where the application is made for public notification development. Section 67 requires that a development consent or existing use right may be modified or surrendered without the owner's consent if the original development application was made without their consent.

Removing the requirement for an owner's consent to apply for development on their property may encroach on the private property rights of that owner. Under sections 23 and 181, a public authority's power to make a State significant development application concerning privately owned land without the owner's consent may interfere with the right of a person to use or enjoy their property, their right to make decisions on how to use the property, and the right to sell or give it away. Further, the power may also interfere with the quiet enjoyment of land by a property owner or anyone who ordinarily enjoys use of the owner's land such as a tenant.

The Committee notes the existence of statutory safeguards which may mitigate the effects of these provisions by providing the owner with an avenue of review. Safeguards include requirements to notify the owner of a development application within 14 days of the application being made, pursuant to sections 181(6) and 23(3). Further, the applicant must provide notice on the NSW Planning Portal under section 181(6) and in the newspaper under section 23(3).

Additionally, the scope of section 67 is limited by only permitting a development consent or existing use right to be modified or surrendered without consent in circumstances where consent was never required for the original development application. The Committee further recognises that consent to a development application is denied only in circumstances where State significant developments are concerned. As such, the Committee makes no further comment.

*Penalty notices and right to a fair trial*

The Regulation provides that penalty notices may be issued for various offences under the Act. The Regulation also distinguishes between penalty notice values issued against individuals and those issues against corporations by separating the values in columns. The maximum penalty notice amount under the Regulations is $7 500 against an individual for offences against sections 4.2(1) and 5.14 of the Act.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $7 500 for an individual are significant monetary amounts to be imposed by way of penalty notice.

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

*Strict liability offences*

The Regulation creates numerous strict liability offences against certifiers for contravening obligations in their issuance of compliance certificates and complying development certificates. Section 141(3)-(4) of the Regulation also contains strict liability offences against a certifier for

failing to give notice of a determination and for failing to provide councils relevant documents. 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.

However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. The Committee further recognises the importance of certifier obligations being met and that the offences may have a generally deterrent effect. In the circumstances, the Committee makes no further comment.

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

*Offences created by Regulation*

The Regulation creates several offences. For example, section 136(6) creates an offence against a certifier if they issue a compliance certificate that does not comply with the certificate requirements under that section. The maximum penalty is 150 penalty units for an individual and 300 penalty units for a corporation.

The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that these penalties are monetary in nature and are not uncommon in regulatory setting to encourage compliance. Such offences may also be more administratively efficient to proceed by regulation, for example if changes are required to keep pace with developments in the industry. In these circumstances, the Committee makes no further comment.

*Henry VIII Clause*

The Regulation contains a Henry VIII Clause which allows subordinate legislation, an approved Code, to prevail over the Regulation to the extent of an inconsistency. In these circumstances, the Australian Rail Track Corporation Code may be amended and prevail over the Regulation in the extent of an inconsistency.

The Committee generally prefers amendments to a Regulation to be made by an amending Regulation rather than by subordinate legislation, such as an approved code. The Committee recognises that this may be a more administratively efficient mechanism to proceed however notes no current safeguards for the protection of parliamentary scrutiny, only Ministerial scrutiny. An amending Regulation would foster an appropriate level of parliamentary oversight compared to an approved code. As such, the Committee refers the matter to Parliament for further consideration.

## 3. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT REGULATION 2022

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

*Strict liability and penalty notice offence*

The Regulation amends the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* to establish a strict liability offence for the use of dwellings which do not comply with fire safety standards as short-term rental accommodation. The Committee generally comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. It also prefers provisions which prescribe offences to be included in primary, not delegated legislation. This is to foster an appropriate level of parliamentary oversight.

The Regulation also includes this strict liability offence as an offence for which a penalty notice can be issued under Schedule 1. 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 their right to have their matter heard by an impartial decision maker.

However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that the offence is intended to protect the safety of short-term rental tenants from renting properties that do not meet applicable fire safety standards. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice, and that individuals retain the right to elect to have their matter heard and decided by a court. In the circumstances, the Committee makes no further comment.

## 4. FAIR TRADING AMENDMENT (COMMERCIAL AGENTS) REGULATION 2022

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

*Penalty notice offences*

The Regulation amends Schedule 1 of the *Fair Trading Regulation 2019* to expand the list of prescribed offences under the *Fair Trading Act 1987* for which a penalty notice with an amount payable of $550 or $1 100 may be issued. Penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

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

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

*Matters which should be set by Parliament*

The Regulation inserts provisions into the *Fair Trading Regulation 2019* which declare further offences for which a conviction would disqualify a person from conducting commercial agent activity. It also inserts provisions which prescribe additional grounds on which the Secretary may determine a person is not 'fit and proper' to hold a commercial agent licence necessary for carrying out commercial agent activity.

The Committee notes that these provisions are made under legislative provisions introduced by the *Fair Trading Amendment (Commercial Agents) Bill 2016*, which the Committee previously reported on in its Digest No. 25/56. Consistent with those comments, the Committee prefers provisions providing for classes of people to be disqualified from carrying out commercial agent activity be included in primary legislation rather than subordinate legislation. This fosters a greater level of parliamentary oversight.

However, the Committee notes that regulations are subject to parliamentary scrutiny as they are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.

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

*Period of application*

The Regulation commences on the day on which the *Fair Trading Amendment (Commercial Agents) Act 2016* commences. As the *Fair Trading Amendment (Commercial Agents) Act 2016* is to commence by proclamation, the provisions of the Regulation will likewise commence on that undefined date. The Committee generally prefers regulatory provisions to commence on a fixed date, to provide certainty for affected persons, particularly where the provisions in question may affect the ability of classes of person to carry on commercial agent activity.

However, the Committee notes that this flexible start date is intended to allow time for industry consultation which may assist with the administrative arrangements necessary to effectively implement the new regulatory scheme for commercial agents. In the circumstances, the Committee makes no further comment.

## 5. PUBLIC HEALTH AMENDMENT (COVID-19) REGULATION 2022

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

*Penalty notice offences – right to a fair trial*

The Regulation expands the length of time that a penalty notice may be issued for offences related to compliance with public health orders. The Regulation serves to make the penalty notices permanent from 26 March 2020, where previously penalty notices could only be issued in relation to the relevant offences from 26 March 2020 to 26 March 2022.

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

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

Given this, as well as the size of the penalties that may be issued by penalty notice (up to $1 000 for an individual and $5 000 for a corporation) and that the regulation indefinitely extends the period in which these penalty notice offences can be issued, the Committee refers the matter to Parliament for its consideration.

## 6. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) 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***

*Penalty notice offences prescribed in regulations*

The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to prescribe an offence for non-compliance with a direction under an order made under section 7 of the *Public Health Act 2010* which wholly or partly remakes, replaces or consolidates the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.

The Committee generally prefers that penalties are set down in primary legislation, rather than subordinate legislation, to foster an appropriate level of parliamentary scrutiny. It further notes that penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a

person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.

The Committee also notes that the amendments would enable authorised officers to issue penalty notices for offences in relation to future public health orders which are not explicitly defined or set out in relevant primary or subordinate legislation. This may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.

The Committee further notes that, unlike regulations, there is no requirement for public health orders to be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. This may allow authorised officers to issue penalty notices for infringements of future public health orders, without that power to issue such notices for those future orders being subject to parliamentary scrutiny.

The Committee notes that these penalty notice offences are intended to deter non-compliance with self-isolation orders, in order to protect public health and safety from the risks arising from the COVID-19 pandemic. It further 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. These amendments also do not impact an individual's right to elect to have their matter heard and decided.

However, the amendments permit authorised officers to issue penalty notices for public health orders which are not set out in primary or subordinate legislation, and which are not subject to parliamentary oversight. Given the potential penalty notices of $5 000 for individuals, the Committee refers this matter to Parliament for its consideration.

## 7. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT REGULATION 2022

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

*Reduced assistance to commercial tenants*

The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and the *Conveyancing (General) Regulation 2018* to reduce the scope of the assistance provided to the tenants of retail and commercial properties under the Existing Regulation. The reductions include lowering the turnover ceiling for businesses to access the scheme from $50 million to $5 million (clause 4(b), and removing the obligation on landlords to not increase the rent of impacted lessees (clause 8).

The Regulation may therefore result in businesses being subject to significant increases in overhead expenses, including rent, as well as removing other protections for lessees such as mandatory mediation in the event of a breach of lease. The Committee notes that due to the changing nature of the COVID-19 pandemic, businesses may have expected that they could rely on the protections previously provided under the Regulations being ongoing.

However, the Committee notes that the protections provided under the Regulations were in response to the COVID-19 pandemic, and that regulation and legislation to this effect has been winding back as the economy recovers. The Committee also notes that commercial tenants will continue to be governed by the *Retail Leases Act 1994* and that this legislation prior to the COVID-19 pandemic had been considered by the Parliament as sufficient to govern commercial leasing arrangements. Given the circumstances, the Committee makes no further comment.

## 8. ROADS AMENDMENT (MAJOR BRIDGES AND TUNNELS) REGULATION 2022

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

*Freedom of assembly and association*

The Regulation provides that all bridges and tunnels in the Greater Sydney Region will deemed major bridges and tunnels for the purposes of section 144G of the Roads Act. Under subsection 144G(1), it is an offence to enter, remain on, climb, jump from or otherwise trespass on any part of a major bridge or tunnel if that conduct:

a) causes damage to the bridge or tunnel,

b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge or tunnel, or

c) is an offence punishable by imprisonment or is an offence arising under the *Summary Offences Act 1988.*

The maximum penalty for a breach of subsection 144G(1) is 200 penalty units ($22 000) or imprisonment for two years, or both.

This may impact on freedom of movement and assembly. These rights that are contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest. However, the ICCPR recognises that derogation from these rights may be warranted in certain circumstances, including to protect public health and safety.

The Committee notes that the offences in the *Crimes Act* and *Roads Act* do provide a number of safeguards, including that in both instances the amendments do not prohibit conduct undertaken in accordance with the consent of Transport for NSW, the NSW Police Force or another public authority. Under section 144G of the Bill, NSW Police may give authorisation for protests or similar action, which would therefore be exempted from prosecution.

It is also a defence to prosecution under section 144G of the Roads Act if the person charged proves that they had a reasonable excuse for the conduct concerned. For example, subsection (5) provides that it is a reasonable excuse if the conduct arose from a mechanical fault or breakdown of a motor vehicle. Under the *Crimes Act*, a person does not commit an offence if the conduct forms part of an industrial action, thereby exempting workers who may undertake protest and other industrial action at a major facility that is their workplace.

The Committee notes that potential limits on movement and assembly may be of particular interest to the public, and notes the significance of the penalties that can be imposed in event of a breach of the *Crimes Act* or the *Roads Act*, including imprisonment. In these circumstances, the Committee refers the matter to Parliament for its consideration.

# Part One – Bills

# 1. Racing and Gambling Legislation Amendment Bill 2022

| | |
|---|---|
| Date introduced | 30 March 2022 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Kevin Anderson MP |
| Portfolio | Racing |

## Purpose and description

1.1 This Bill—

(a) amends the *Harness Racing Act 2009* and *Greyhound Racing Act 2017* to implement recommendations from statutory reviews of those Acts

(b) makes consequential amendments to the *Racing Appeals Tribunal Act 1983*

(c) amends the *Betting and Racing Act 1998* to implement the National Consumer Protection Framework for Online Wagering

(d) makes other minor amendments.

## Background

1.2 The *Racing and Gambling Legislation Amendment Bill 2022* (Bill) amends four pieces of legislation that regulate racing and online wagering in NSW. In his Second Reading Speech, the Hon Kevin Anderson MP, Minister for Hospitality and Racing, stated that through this bill the Government seeks to support 'gambling harm minimisation and a competitive and sustainable racing industry in New South Wales.'

1.3 The legislation the Bill proposes to amend is:

(a) *Harness Racing Act 2009* (Harness Racing Act);

(b) *Greyhound Racing Act 2017* (Greyhound Racing Act*)*;

(c) *Racing Appeals Tribunal Act 1983* (RAT Act); and

(d) *Betting and Racing Act 1998* (BAR Act).

1.4 The Minister described the proposed amendments to the Harness Racing Act as being designed to 'strengthen the industry's governance, integrity and accountability.' These amendments are informed by the review of the Harness

Racing Act conducted in 2015, which involved a public consultation process.[1] The Bill introduces new objectives for the peak body in the industry, Harness Racing NSW, that are geared towards policy objectives such as promoting and protecting the welfare of standardbred horses. The Bill also seeks to provide an improved appeal process for decisions made by the industry panel. There are also amendments to improve accountability and governance within the industry, for example by:

(a) including members of the Harness Racing Industry Consultation Group (HRICG) within the jurisdiction of the Harness Racing Integrity Auditor;

(b) introduce stronger eligibility and conflict of interest requirements for Harness Racing NSW Board Members; and

(c) requiring Harness Racing NSW to publish its staff and board codes of conduct and make publically available its annual report.

1.5 The proposed amendments to the Greyhound Racing Act seek to improve integrity, safety and animal welfare in the racing industry, as well as provide for the functions of regulatory bodies that oversee the industry. Amending the Greyhound Racing Act was a recommendation arising from the statutory review of that Act, which was tabled in Parliament in 2021.

1.6 The proposed amendments to the RAT Act would allow for the decisions of the harness racing panel to be appealed directly to the Racing Appeals Tribunal, as well as making specific provisions in regards to the jurisdiction of, and funding for the tribunal.

1.7 Lastly, the Bill seeks to amend the BAR Act in accordance with the National Consumer Protection Framework (NCPF), which is a national agreement between all states and territories that sets out 10 minimum standard protections for online gamblers across Australia. In 2019 the Parliament passed the *Gambling Legislation Amendment (Online and Other Betting) Bill 2019* which amended the BAR Act to incorporate the first tranche of changes arising from the NCPF.

1.8 The Bill now seeks to amend the BAR Act to include the second tranche of the NCPF requirements after significant public consultation and federally funded research. In his Second Reading Speech, the Minister described how the Bill:

> continues the Government's commitment to ensuring that gambling-related harms stemming from online wagering are dealt with proactively through appropriate controls.

1.9 The proposed amendments involve new measures to protect gamblers through measures that will be implemented consistently nationwide including:

(a) mandatory staff training requirements;

[1] NSW Office of Liquor, Racing and Gaming, Five Year Statutory Review of the *Harness Racing Act 2009*, current as at 20 April 2022.

(b) messaging about gambling; and

(c) activity statement requirements.

## Issues considered by the Committee

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

*Privacy*

1.10 The Bill proposes new sections 33JD and 33JE be inserted into the BAR Act, to provide specific detail about the privacy of betting accounts and the keeping of associated records. Section 33JD specifies that information about a betting account held by a licensed betting service provider may be given only to:

(a) the holder of a betting account;

(b) a person lawfully entitled to access the information;

(c) a racing or sports control body that requires it for integrity persons, or

(d) a person prescribed by the regulations.

1.11 Further, section 33JE(3) requires that a licensed betting service provider must not fail to make their records available to an inspector if requested to do so.

1.12 The information about a betting accounts and the records of a licensed betting service provider may include personal and financial information about individual persons who are clients of the provider.

**The Bill proposes that new sections 33JD and 33JE be inserted into the *Betting and Racing Act 1998* (BAR Act), that allow information about betting accounts, which may include personal information, to be accessed by a list of persons which may include persons prescribed by the regulations.**

**While the Committee acknowledges that information sharing is required to administer and ensure compliance with the scheme, it considers that these provisions may impede the relevant persons' right to privacy.**

**The Committee further acknowledges that the referral of matters to regulations and Minister builds flexibility into the regulatory framework. However, referring matters regarding information sharing to the regulations may impact on the right to privacy and generates uncertainty around the extent to which individuals' rights may be impacted by the scheme. The Committee generally prefers such matters be included in the primary, rather than the subordinate, legislation to facilitate an appropriate level of parliamentary oversight.**

**However, the Committee acknowledges that the sharing of the information in regards to online betting accounts may be of particular importance to ensure compliance with the relevant legislation. Online gambling is an area where the focus of compliance is to reduce harm to individuals, and therefore broader**

**investigatory and information sharing powers may be required to achieve this aim. In the circumstance, the Committee makes no further comment.**

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

*Delegation to regulations*

1.13 The Bill proposes to insert new section 33H(3) into the BAR Act, that allows for the regulations to prescribe an advisory statement that must be a part of any published gambling advertisement, as well as details about the form in which that statement must appear. Under section 33H(4), failing to include such an advisory statement in the required form may result in a maximum penalty of 100 units ($11 000) for an individual, and 1000 units ($110 000) for a corporation.

1.14 The Bill also proposes to insert a new section 33JI into the BAR Act which provides further detail in regards to the mandatory training that licensed betting providers must make available to their employees. Subsection 33JI(4) provides that a Minister may, by order published in the Gazette, take action in relation to the training, including approving specific courses and setting minimum course requirements. Subsection 33JI(5) then provides that the regulations may make provision in regards to the training. A failure to comply with a requirement under this section 33JI may result in a licensed betting service provider being fined a maximum penalty of 100 units ($11 000) for an individual and 1000 units ($110 000) for a corporation.

**The Bill proposes a number of amendments that allow the regulations to prescribe details in regards to gambling advisory statements (section 33H) and mandatory training for employees of licenced betting agents (section 33JI). A failure to comply with these requirements as set down by the regulations may result in fine, the maximum penalty being 100 units ($11 000) for an individual and 1000 units ($110 000) for a corporation.**

**The Committee prefers that the creation and detail of offences be included in primary legislation so that they are subject to an appropriate level of scrutiny. The Committee notes that the Bill allows the substantive detail related to compliance to be contained in the regulation, and does not provide further clarification as to what compliance may require. The Committee does however note that the details referred to the regulations may require the flexibility of regulatory powers to be appropriately implemented, for example the approval of specific courses for employees. Further, the Committee notes that the betting industry is highly regulated and that licenced betting providers may reasonably be required to monitor ongoing compliance with regulatory change. Considering the circumstances, the Committee makes no further comment.**

*Commencement by proclamation*

1.15 Clause 2(2) of the Bill provides that certain provisions amending the *Harness Racing Act 2009*, and the *Racing Appeals Tribunal Act 1983* commence on a day or days to be appointed by proclamation.

**Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for**

**affected persons, particularly where the legislation in question affects individual rights or obligations.**

**However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments in regards to the administration of the racing industry and the Racing Appeals Tribunal in NSW. In the circumstances, the Committee makes no further comment.**

# 2. Roads and Crimes Legislation Amendment Bill 2022

| | |
|---|---|
| Date introduced | 30 March 2022 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Mark Speakman SC MP |
| Portfolio | Attorney General |

## Purpose and description

2.1 The object of this Bill is to create offences for certain behaviour that causes damage or disruption to major roads or major facilities.

## Background

2.2 The *Roads and Crimes Legislation Amendment Bill 2022* (Bill) seeks to amend the *Roads Act 1993* (Roads Act) and the *Crimes Act 1900* (Crimes Act). The primary purposes of the Bill is to create two offences.

2.3 The first offence proposed is that it be an offence to enter, remain on, climb, jump from or otherwise trespass on a major road if that conduct:

(a) causes damage to the road, or

(b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the road.

2.4 The second offence proposed is that it be an offence to enter, remain on, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct:

(a) causes damage to the major facility,

(b) seriously disrupts or obstructs persons attempting to use the major facility,

(c) causes the major facility, or part of it, to be closed, or

(d) causes persons attempting to use the major facility to be redirected.

2.5 The Bill requires the Minister to conduct a review of these offences and relevant legislation, being the *Roads Act 1993* Part 9 Division 7, as soon as possible after a period of 2 years after the commencement date of the Bill.

2.6 The Bill was introduced to the Legislative Assembly on 30 March 2022, and standing orders were suspended to urgently consider the Bill. The Bill passed in the Legislative Assembly without amendment on 30 March 2022, and then passed in the

Legislative Council with amendments on 1 April 2022.[2] These amendments were subsequently agreed to by the Assembly later that day.

2.7 The Committee notes that the Bill was passed prior to the tabling of this Digest no 42/57. The Houses were therefore unable to take into account the comments made in this Bill report during their consideration of the Bill.

## Issues considered by the Committee

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

*Freedom of assembly and association*

2.8 The Bill seeks to extend current offences that apply to certain conduct undertaken on the Sydney Harbour bridge, major bridges and tunnels, to also apply to conduct on roads and at major facilities.

2.9 In regards to roads, the Bill amends section 144G(1) of the Roads Act to make it an offence to enter, remain on, climb, jump from or otherwise trespass on any part of the Sydney Harbour Bridge or any other major bridge or tunnel or road if that conduct causes damage or seriously disrupt or obstructs vehicles or persons. This offence carries a maximum penalty of 200 penalty units or 2 years imprisonment, or both. Under subsection 144G(4B) of the *Roads Act*, this offence does not apply to conduct in relation to Parliament house or an office of a member of parliament.

2.10 The definition of major road is prescribed by clause 48A of the *Roads Regulation 2018* (Roads Regulation), and it includes main roads, highways, freeways and tollways within the Greater Sydney Region. This is a significant number of roads that are a primary means of travel within the region.

2.11 In regards to major facilities, the Bill proposes to insert a new section 214A into the *Crimes Act 1900* (Crimes Act). This new section would make it an offence to enter, remain on, climb, jump from or otherwise trespass on or block entry to any part of a major facility if that conduct:

(a) causes damage to the major facility,

(b) seriously disrupts or obstructs persons attempting to use the major facility,

(c) causes the major facility, or part of it, to be closed, or

(d) causes persons attempting to use the major facility to be redirected.

2.12 The maximum penalty for this offence is 200 penalty units or 2 years imprisonment, or both.

2.13 A major facility is defined in proposed section 214A(5) as a railway station or public transport facility, private port or another port as, or an infrastructure facility (including water, sewerage, energy or other public service) as prescribed by regulation.

[2] Amendments debated and agreed to

2.14 It is a defence under both the *Crimes Act* and the *Roads Act* if the person charged proves that they had a reasonable excuse for their conduct. It is a reasonable excuse under the *Roads Act* section 144G(5) if the conduct arose due to a mechanical fault or breakdown of a motor vehicle.

2.15 It is not an offence under 214A of the *Crimes Act* if the activity at a major facility forms part of an industrial action. It is also not an offence under the *Crimes Act* or the *Roads Act* if the person acts in accordance with the consent or authority of the NSW Police Force, another public authority, or from the relevant owner or operator of a major facility on which the conduct is occurring.

**The Bill provides that it will be an offence to conduct certain activities that disrupt traffic and movement on roads and at major facilities. Under section 144G(1) of the *Roads Act 1993* (Roads Act), it is an offence to enter, remain on, climb, jump from or otherwise trespass on any part of a major bridge or tunnel if that conduct:**

**a) Causes damage to the bridge, tunnel or road,**

**b) Seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road, and**

**c) Is an offence punishable by imprisonment or is an offence arising under the *Summary Offences Act 1988*.**

**Under Section 214A of the *Crimes Act 1900* (Crimes Act) it is an offence to do any of the above actions, or block entry to a major facility that has the same effect as above, or causes additional types of disruption to the major facility. The maximum penalty for a breach of either section 214A of the Crimes Act or section 144G Roads Act is 200 penalty units or 2 years imprisonment, or both.**

**As the Bill seeks to prohibit certain conduct on bridges, tunnels and roads, this may impact on freedom of movement and assembly. These rights that are contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest. However, the ICCPR recognises that derogation from these rights may be warranted in certain circumstances, including to protect public health and safety.**

**The Committee notes that the offences in the Crimes Act and Roads Act do provide a number of safeguards, including that in both instances the amendments do not prohibit conduct undertaken in accordance with the consent of Transport for NSW, the NSW Police Force or another public authority. Under section 144G of the Bill, NSW Police may give authorisation for protests or similar action, which would therefore be exempted from prosecution.**

**It is also a defence to prosecution under section 144G of the Roads Act if the person charged proves that they had a reasonable excuse for the conduct concerned. For example, subsection (5) provides that it is a reasonable excuse if the conduct arose from a mechanical fault or breakdown of a motor vehicle. Under the Crimes Act, a person does not commit an offence if the conduct forms**

**part of an industrial action, thereby exempting workers who may undertake protest and other industrial action at a major facility that is their workplace.**

**The Committee notes that potential limits on movement and assembly may be of particular interest to the public, and also notes the significance of the penalties that can be imposed in event of a breach of the Crimes Act or the Roads Act. Given these circumstances, the Committee refers the matter to Parliament for its consideration.**

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

*Key definitions delegated to the subordinate legislation*

2.16 The Bill creates offences which involve actions that take place on areas defined as major roads. Major roads are defined in clause 48A of the *Roads Regulation 2018* (Roads Regulation) and includes:

(a) a main road,

(b) a highway,

(c) a freeway,

(d) a tollway,

(e) a bridge or tunnel that joins a road referred to in paragraphs (a)–(d),

(f) a bridge or tunnel in—

(i) the Greater Sydney Region, or

(ii) the City of Newcastle, or

(iii) the City of Wollongong.

2.17 The categories of roads contained in section 48A are further defined in Part 5 Division 1 of the *Roads Act*. The Minister may, by order published in the Gazette, declare roads to be main roads, highways, freeways or tollways. Under the Act, a major road must meet certain criteria, such as being a public road or any other road that passes through public open space joining other main roads.

**The Bill adopts the definition of major road, which is contained in clause 48A of the Roads Regulation. This definition is substantive because areas defined as major roads in the Roads Regulation will be subject to the offence provisions contained in the Bill. The Minister classifies roads under Part 5 Division 1 of the Roads Act, and then clause 48A Roads Regulation outlines which of these categories are included in the definition of major roads. The Minister may do this by way of a notice in the Gazette. Therefore, roads can be included in the definition of major roads without amending the Regulation. This may reduce parliamentary oversight as notices in the Gazette are not subject to disallowance.**

**The Committee generally prefers that substantive clauses be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where the rights or obligations or individuals may be affected, such as freedom of assembly. The Committee also notes that the definitions delegated to the regulations are relevant to determining whether an individual would be subject to the penalty provisions of the Bill, which include custodial sentences. Given the circumstances, including that the Bill may curtail the rights of individuals and impose significant penalties for non-compliance, the Committee refers the matter to Parliament for consideration.**

# 3. State Insurance and Care Legislation Amendment Bill 2022

| | |
|---|---|
| Date introduced | 30 March 2022 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Victor Dominello MP |
| Portfolio | Customer Service and Digital Government |

## Purpose and description

3.1 The objects of this Bill are to amend the *State Insurance and Care Governance Act 2015*, the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998* as follows—

(a) to make further provision for governance arrangements for insurance and compensation schemes,

(b) to extend the enforcement powers of the State Insurance Regulatory Authority in relation to the Workers Compensation Nominal Insurer, Insurance and Care NSW, the NSW Self Insurance Corporation and persons exercising claims administration functions on behalf of insurers,

(c) to make further provision in relation to claims for workers compensation death benefits and the commutation of workers compensation liabilities.

3.2 The Bill also repeals the *Workers Compensation Legislation Amendment Act 2012* consequent on the amendments referred to in paragraph (c).

## Background

3.3 In his second reading speech, the Hon. Victor Dominello MP, Minister for Customer Service and Digital Government, highlighted that the Bill enacts:

> …part of the Government's response to the recommendations made by the independent review of Insurance and Care NSW [icare] and the State Insurance and Care Governance Act 2015, [SICG] Act, as well as certain overlapping recommendations made in the Legislative Council Standing Committee on Law and Justice*2020 Review of the Workers Compensation Scheme*.

3.4 Towards that end, the Bill amends the *State Insurance and Care Governance Act 2015* (the **SICG Act**), the *Workers Compensation Act 1987* (the **1987 Act**) and the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 Act**) which together set out the regulatory framework for workers compensation in New South Wales.

3.5 In respect to the SICG Act and the 1998 Act, the Bill makes a number of amendments to the operation of NSW's state insurance regulatory bodies, the State Insurance

Regulatory Authority (**SIRA**) and Insurance and Care NSW (**ICNSW**). These amendments include

(a) inserting provisions into the Act that set out the objects of the Act, the role of these authorities under the Act and the principal objectives of both SIRA and ICNSW;

(b) providing for Ministerial directions to the board of ICNSW be in the public interest;

(c) increasing the maximum appointment period for directors of the ICNSW Board by one year; and

(d) extending the exercise of certain regulatory, investigative and enforcement powers of SIRA to self-insurers, ICNSW, the NSW Self Insurance Corporations and other entities engaging in claims management.

3.6 Speaking to these amendments to the State regulatory bodies, the Minister highlighted the important role held by these bodies:

> The effective operation of the State insurance and care schemes in New South Wales is owed in large part to the effectiveness of the regulator in that space, and I have no doubt that SIRA will continue to secure the integrity and transparency of the system.

3.7 The Bill also makes a number of substantive amendments to the legislative scheme for workers compensation set out in the 1987 Act. In his second reading speech, the Minister explained that the Bill amends two benefit-related areas of the scheme, concerning lump sum death benefits and commutations. He further summarised these amendments, noting that the Bill:

> … allows the parties to a liability dispute to reach a compromise settlement for the lump sum death benefit in the Personal Injury Commission. … The amendments provide for the approval of a commutation agreement in the Personal Injury Commission, removing the need for multiple touchpoints in the process of approving commutation agreements. The bill also provides a regulation-making power to expand access to commutations for certain classes of claims with appropriate controls to protect workers and ensure the long-term viability of the scheme.

## Issues considered by the Committee

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

*Strict liability offences*

3.8 The Bill inserts Division 4A into Part 7 of the 1987 Act, to provide for the use of enforceable undertakings by a licensed insurer in respect to alleged contraventions of their licence. Proposed section 209E establishes a strict liability offence for an insurer contravening an undertaking that is in effect and given under this Division. That offence carries a maximum penalty of $110 000 (1 000 penalty units).

3.9 Additionally, the Bill inserts section 195 into Part 7, Division 4 of the 1987 Act to enable SIRA to issue written directions to licensed insurers to refrain from conduct or take required action in respect to contraventions of their licence. Subsection (2) establishes a strict liability offence for an insurer who does not comply with such a

written direction issued to them, which also carries a maximum penalty of $110 000 (1 000 penalty units).

3.10 Relevantly, section 209 establishes a general offence provision for Part 7, Division 4 of the 1987 Act. Section 209 states that:

> An insurer who contravenes, whether by act or omission, any requirement imposed on the insurer by or under this Division is guilty of an offence and liable to a penalty not exceeding 100 penalty units

3.11 The Minister explained in his second reading speech that these amendments are intended to directly respond to concerns raised in the independent review:

> … about the limits of the regulator's authority to properly regulate insurers within the workers compensation scheme. … They are in keeping with the recommendations and will create a stronger, more transparent system of State insurance and care in New South Wales.

**The Bill amends the *Workers Compensation Act 1987* to create a new strict liability offence for conduct by a licensed insurer which contravenes an enforceable undertaking given by them under Part 7, Division 4A. It also inserts section 195 which establishes a strict liability offence for a licensed insurer who does not comply with a written direction issued by the State Insurance Regulatory Authority (SIRA) under that section. Both these strict liability offences carry a maximum penalty of $110 000.**

**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. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, in this case being strengthening compliance by insurers with the conditions of their operating licences. It further notes that the maximum penalty carried by these offences are monetary only, not custodial. In the circumstances, the Committee makes no further comment in respect to the establishment of these offences under Part 7, Division 4A.**

**The Bill inserts section 195 into Part 7, Division 4 of the Act. Within that Division, section 209 sets out a general offence for an insurer who contravenes any requirement imposed on them by Division 4 and provides that the insurer is liable to a penalty not exceeding $11 000. A contravention of a written direction under section 195 may therefore constitute an offence under both sections 195 and 209 of the Act. However, the maximum penalty for an offence under section 195 exceeds the maximum liability set out under section 209.**

**The Committee generally comments where provisions may be contrary to other laws. This makes the law applicable to individuals hard to ascertain and understand, and can create unfairness where penalties differ between legal provisions. The Committee acknowledges that the general offence provision under section 209 is intended to ensure compliance with the exercise of SIRA's regulatory functions. However, it notes that the overlapping operation of sections 195 and 209 to the same offending conduct may result in contradictory**

**imposition of penalties. For these reasons, the Committee refers these provisions under Part 7, Division 4 to Parliament for its consideration.**

*Access to justice – legal representation*

3.12 Division 1 under Part 3 of the 1987 Act provides for compensation payable on the death of a worker resulting from an injury defined under section 4 ('**death benefit compensation**'). Under this Division, death benefit compensation is payable by an employer to the dependents of the deceased worker if applicable, or otherwise to their legal personal representative and/or other persons to whom payments such as funeral and transporting body expenses are owed.

3.13 Specifically, for deceased workers who leave dependants, section 25 provides that the following death benefit compensation is payable to their dependents:

(a) a lump sum amount of $750 000 to be apportioned among any dependents who are 'wholly or partly' dependent on the deceased worker for support (the '**lump sum amount**'); and

(b) additional weekly amounts of $66.60 for each dependant under 16 years old and each dependant student between 16-21 years old.

3.14 The Bill inserts Division 1A into Part 3, which applies to a claim for death benefit compensation that is the subject of a dispute which has been referred to the Personal Injury Commission (the **Commission**) about liability for the compensation (a '**death benefit dispute**'). Section 32AC enables the parties to settle the part of a death benefit dispute claim concerning the lump sum amount payable under section 25, by lodging a proposed settlement agreement with the Commission which must determine whether to give effect to that agreement.

3.15 In speaking to these provisions, the Minister stated that they respond to the specific recommendation from the independent review into New South Wale's insurance regulators for the expansion of powers to settle death benefit disputes. The Minister further noted the compassionate grounds behind this recommendation in his second reading speech:

> … in a small number of claims, liability for the worker's death is the subject of a genuine liability dispute in the commission. Under the current legislation, this is an all-or-nothing proposition for families and insurer. Depending on the outcome of the dispute, either the lump sum amount is payable or nothing is payable… the current framework, which can result in prolonged litigation following a death and where there is no ability for the parties to reach a reasonable compromise, could be improved. Litigation can add to families' grief, and the uncertainty of the outcome can be unbelievably distressing.

3.16 Section 32AC(3) specifically requires that such a settlement agreement must include the insurer and each dependant of the deceased worker or, if there are no dependants, the deceased worker's legal personal representative. Subsection (6) further requires that:

> In proceedings for the death benefit dispute, each party to the agreement must be represented by an Australian legal practitioner unless otherwise directed by the Commission.

3.17 The Minister emphasised that this requirement for separate legal representation applies to all parties unless otherwise directed by the Commission. In his second reading speech, he highlighted that this requirement is intended to ensure 'nobody… can be forced into a settlement' and is 'especially important to protect the interests of minor children'.

**The Bill inserts Division 1A into Part 3 of the *Workers Compensation Act 1987*, which allows parties to settle by agreement a dispute referred to the Personal Injuries Commission about liability for compensation payable on the death of a worker. Section 32AC requires each party to a proposed agreement be separately legally represented unless otherwise directed by the Commission. This requirement may impact a person's access to justice as individuals who cannot afford separate legal representation may be precluded from settling such disputes, thereby requiring them to undergo possibly protracted litigation by reason of their lack of legal representation. This is of particular concern as the parties to death benefit disputes include the dependants of a deceased worker.**

**However, the Committee acknowledges that this requirement is intended to protect individuals from being pressured to enter into settlement agreements not within their best interests, particularly minor dependants of deceased workers. It also notes that the provisions enable the Commission to discretionarily permit parties to an agreement be unrepresented in proceedings. In the circumstances, the Committee makes no further comment.**

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

*Commencement by proclamation*

3.18 Clause 2(a) of the Bill provides that the repeal of the *Workers Compensation Legislation Amendment Act 2012* and the amendments to the 1987 Act under clauses 2 to 17 of Schedule 2 to the Bill commences (as an Act) on a day or days to be appointed by proclamation.

**Parts of the Bill commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations. However, the Committee notes that a flexible start date may enable necessary administrative arrangements to be put in place in order to effectively implement the amendments to the function of the Personal Injury Commission and the state insurance regulators. 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 subordinate legislation*

3.19 The Bill updates the provisions of the 1987 Act which regulate the commutation of workers compensation liability. Under section 87EA(1) of the 1987 Act, an employer's liability in respect of an injury may not be commuted to a lump sum payment under that Division unless the criteria listed under subsection (1) is satisfied. Section 87F of the 1987 Act enables the commutation of certain workers compensation liability to a lump sum by agreement. Subsection (2) sets out

requirements for independent legal advice which the worker must receive and confirm in writing before entering into such an agreement.

3.20 In his second reading speech, the Minister emphasised the findings in the independent review regarding the 'significant psychosocial benefits associated with allowing workers and their families to settle claims and get on with their lives'. He noted that the Bill seeks to promote these benefits by:

> establishing the legislative framework to give workers and insurers greater choice and flexibility… and proposes a way forward to appropriately regulate the Nominal Insurer and set it up for long-term success as the State insurer under the workers compensation scheme.

3.21 Towards that end, the Bill amends section 87EA to expand the ability of the Commission's President to commute liability to a lump sum for cases which do not meet the strict preconditions under subsection (1). The amendments provide that the President may commute a liability which does not meet those preconditions where they are satisfied that:

> (a) the case is of a class prescribed by the regulations as a class to which this subsection applies, and
>
> (b) the circumstances of the case satisfy the requirements prescribed by the regulations as requirements that must be satisfied for this subsection, and
>
> (c) unless the regulations otherwise provide, the lump sum to which the liability will be commuted is not inadequate and not excessive.

3.22 The Bill also amends section 87F to include subsections (2A) and (2B). subsection (2A) provides for an exemption from the requirement for independent legal advice, where the agreement relates to 'a claim belonging to a class of claims prescribed by the regulations'. Subsection (2B) further provides that the regulations may:

> … may require the provision of independent financial advice to a worker, at the expense of the insurer, before the worker enters into a commutation agreement and the requirement applies despite any other provision of this section.

3.23 In respect to applications to the Commission for such a determination, the Bill inserts section 87EB into the 1987 Act which provides that the Commission rules may set out the procedure and requisite documentation for such an application.

3.24 Speaking to the rationale for these regulation-making provisions, the Minister highlighted the need 'to strike that balance of giving greater access to commutations for workers who want to exit the scheme, while at the same time not driving behaviours that lead to poor outcomes for workers and for the scheme as a whole'. He also noted that the use of regulations will assist 'to ensure the long-term viability of the scheme' and assured that:

> SIRA will undertake a program of work, including consultation with stakeholders, to identify the classes of claims that are appropriate for commutation.

3.25 As noted earlier, the Bill also inserts Division 1A into Part 3 of the 1987 Act which provides for the settlement of death benefit disputes in respect to the lump sum

amount claim. Relevantly, section 32AC(8) allows the Workers Compensation Guidelines (the **Guidelines**) to 'make provisions in relation to the management of a claim to which an agreement [for settlement] under this Division relates'.

3.26 Additionally, as noted earlier, the Bill inserts section 195 into the 1987 Act which provides SIRA with the enforcement power to issue a written direction to licensed insurers regarding contraventions of their licence. Relevantly, subsection (1) provides that this written direction may require the insurer to 'take other action prescribed by the regulations'. Notable, an insurer who does not comply with an issued direction under this provision is guilty of an offence carrying a maximum penalty of $110 000 (1 000 penalty units).

3.27 In summarising the rationale for these amendments, the Minister noted that the Bill is intended to strengthen the 'system of accountability and enhanced oversight of the management of workers compensation claims' by empowering SIRA to effectively preserve the integrity of the schemes it regulates.

**The Bill defers to the regulations a number of substantive matters set out in the *Workers Compensation Act 1987* relating to the function of the Personal Injury Commission and the State Insurance Regulatory Authority (SIRA). In particular, the Bill permits the regulations to prescribe the broader circumstances of medical expenses compensation which may be discretionarily commuted by the Commission and allows the Commission to set out the application process for such commutations in its rules. It further enables the Workers Compensation Guidelines to provide for the management of claims for death benefits compensation subject to a proposed settlement agreement.**

**The Bill also provides a regulation-making power to prescribe what actions SIRA may require licensed insurers to take in accordance with a written direction issued by the authority. Under these provisions, failure to comply with such a direction is a strict liability offence which carries a maximum penalty of $110 000. The Committee generally prefers substantive matters to be dealt with in the principal legislation, rather than the regulations and other subordinate legislation, to facilitate an appropriate level of parliamentary oversight.**

**The Committee acknowledges that these amendments are intended to build flexibility into the regulatory framework to facilitate the efficient and responsive operation of the state's compensation scheme. The regulations intended to give effect to these matters will also be subject to stakeholder consultation. The Committee also notes that any regulations, the Workers Compensation Guidelines and the Commission rules 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 subordinate legislation relate to the lump sum compensation payable to injured workers or their dependants, including the class of claims which may be subject to commutation and the management of lump sum death benefits. It also defers to the regulations to prescribe actions which insurers may be directed to take, noting that non-compliance with such directions is a strict liability offence. For these reasons, the Committee refers the matter to Parliament for its consideration.**

# 4. Water Management Amendment (No Compensation for Floodplain Harvesting Licences) Bill 2022*

| | |
|---|---|
| Date introduced | 31 March 2022 |
| House introduced | Legislative Council |
| Member responsible | Ms Cate Faehrmann MLC |
| | *Private Members Bill |

## Purpose and description

4.1 The object of this Bill is to amend the *Water Management Act 2000* to remove the entitlements of holders of floodplain harvesting access licences to compensation for—

(a) the compulsory acquisition of the licence, and

(b) certain reductions in water allocations.

## Background

4.2 The *Water Management Act 2000* (the **Act**) sets out the overarching regulatory framework for accessing water from specified sources within New South Wales, by providing for volumetric allocations of water access under a comprehensive licensing scheme subject to water managements plans. Water management plans oversee the sharing and use of water from a water management area and set caps on the total volume of water that may be accessed from that area. This overarching limit applies to the cumulative volume of water available for access by all relevant license holders. Therefore, when water managements plans are varied, the allocated volumes permitted under an access licence may be consequently reduced.

4.3 The Act also regulates floodplain harvesting, which is the capture and use of water flowing across a prescribed floodplain,[3] under section 57A. That section grants a general regulation-making power for the issue of replacement floodplain harvesting access licences and defers the substance of those access licences to regulatory provisions. The Act also provides broad administrative powers to the Minister for achieving the objects of the Act, including the power to compulsorily acquire access licences where required for the public interest.

4.4 The Bill amends the Act to exclude access licences for floodplain harvesting from entitlement to compensation where such licences are subject to compulsory

[3] NSW Government, *Floodplain harvesting licensing*, viewed 8 April 2022.

acquisition or a reduced water determination by reason of variations to water management plans.

4.5 In her second reading speech to the Bill, Ms Cate Faehrmann MLC stated that these amendments are intended to enable administrators to limit floodplain water harvesting without 'facing any financial liability'. She further highlighted that the entitlement to compensation under the Act presented a possible financial burden for the government, noting that:

> We must be certain on the question of compensability for these licences. If the current or any future government came to the conclusion that the volumes of floodplain harvesting being handed out today were unsustainable and had to be permanently reduced, then that government could be on the line for up to $1 billion in payments of taxpayers' money to put that water back into the rivers.

4.6 The Committee notes that the *Water Management (General) Amendment Regulation 2021* published on 17 December 2021 amended the *Water Management (General) Regulation 2018* to include provisions for the issue of replacement floodplain harvesting access licences, in accordance with section 57A of the Act. As reported by the Committee in Appendix Two of its Digest No. 40/57 (22 March 2022),[4] that regulation was disallowed by motion of the Legislative Council on 24 February 2022 and therefore was not reported on by the Committee.

4.7 The Committee further notes that, as a result of that disallowance, the issue and regulation of floodplain harvesting access licences in New South Wales has not yet been implemented.[5]

## Issues considered by the Committee

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

*Exclusion of compensation*

4.8 Section 79 of the Act enables the Minister to compulsorily acquire issued access licences if they are of the opinion that the public interest so requires in the special circumstances of the case. Relevantly, subsection (2) provides that a person from whom that compulsory acquisition occurs is entitled to compensation from the State for the market value of the licence compulsorily acquired. The Bill inserts subsection (2A) which would exclude compulsorily acquired floodplain harvesting access licences from that requirement for State compensation.

4.9 The Bill also amends Part 2, Division 9 of the Act which provides for compensation payable in relation to access licences. Specifically, the Bill amends sections 87 and 87AA to exclude floodplain harvesting access licences from eligibility for compensation for reductions in water allocations arising from a variation to the bulk access regime under a water management plan.

> **The Bill amends the *Water Management Act 2000* to exclude floodplain harvesting access licences from certain compensation. Specifically, it excludes these licence holders from compensation schemes for compulsory acquisitions**

[4] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 40/57*, 22 March 2022.

[5] NSW Government, *NSW Floodplain Harvesting Policy*, viewed 8 April 2022.

**of licences or reductions in water allocations permitted by those licences. These amendments may preclude individuals from receiving compensation for loss of water access.**

**The Committee notes that these amendments are intended to address the potential public costs burden for administering such licences. However, the provisions do not appear to offer alternative avenues for affected individuals to seek compensation for lost access. For these reasons, the Committee refers this matter to Parliament for its consideration.**

# 5. Work Health and Safety (Mines and Petroleum Sites) Amendment Bill 2022

| | |
|---|---|
| Date introduced | 30 March 2022 |
| House introduced | Legislative Assembly |
| Minister responsible | The Hon. Paul Toole |
| Portfolio | Regional New South Wales |

## Purpose and description

5.1 The object of this Bill is to amend the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* to—

(a) update a reference to the Department of Regional NSW consequent on a recent administrative change, and

(b) provide that the regulator is to be known as the NSW Resources Regulator, and

(c) express penalties for offences as penalty units, rather than monetary values, for consistency with the Work Health and Safety Act 2011, and

(d) provide that, when determining whether a person is suitable to be appointed as an industry safety and health representative, the Minister may make enquiries about the person's suitability, including a nationwide criminal record check and other relevant probity checks, and

(e) provide that the person appointed Chair of the Mining and Petroleum Competence Board must be independent of the entities that may nominate prospective board members, and

(f) enable the service of documents on a person or a body corporate by email to an email address specified by the person or body corporate.

## Background

5.2 The Bill seeks to amend the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (Act) following a statutory review of the Act undertaken by Mr Kym Bills in 2020.[6] This review made 40 recommendations aimed at improving the existing scheme. Many of these reforms will be actioned through regulation and incorporating additional guidance material as agreed thought the National Mine Safety Framework process.

[6] Kym Bills, Statutory Review of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* and Regulation, current as at 20 April 2022.

5.3 The Bill provides clarification and modernises the Act, as well as enhancing oversight for statutory roles. Clarifications include updating language to reflect the current machinery of government, enabling the electronic service of documents, and harmonising the penalty units regime by harmonising it with the *Work Health and Safety Act 2011* to ensure those amounts will be appropriately indexed over time.

5.4 The Act currently permits the appointment of industry safety and health representatives to review safety management systems, participate in investigations of events and assist in safety training at coal mines, and the Bill will ensure that probity checks are conducted on candidates to ensure suitability. In his Second Reading Speech on behalf of Mr Paul Toole MP, Minister for Regional NSW, Mr Gurmesh Singh MP, Member for Coffs Harbour, commented that this will:

> … formalise the current practise for any ministerial appointment and ensures compliance with the Government policy regarding appointments for integrity screening.

5.5 The Bill also seeks to improve integrity in the sector by requiring the chairperson of the Mining and Petroleum Competence Board to be independent from the industry nominating bodies, which Mr Singh stated will 'codify current practice.'

## Issues considered by the Committee

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

*Ministerial opinion of suitability*

5.6 The Bill proposes a new section 28(2)(c) be added. This section provides that an individual cannot be appointed as an industry safety and health representative unless they are, in the Minister's opinion, a person suitable to be appointed.

5.7 The Bill further clarifies at proposed section 28(2)(2AA) that the Minister in making their determination about suitability may make enquiries they consider appropriate, including, but not limited to:

(a) a nationwide criminal record check, and

(b) other relevant probity check relating to the person's previous employment or other activities.

**The Bill amends the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* to provide that the individual cannot be appointed as an industry safety and health representative unless they are, in the Minister's opinion, a person suitable to be appointed.**

**The provisions place no limits on the Minister's discretion although section 28(2AA) provides that he or she may make enquiries they consider appropriate in making their decision, including criminal record and other probity checks. The Bill may thereby grant the Minister a wide and ill-defined power.**

**The Committee acknowledges the provisions are a regular part of employment screening, and that the amendments are designed to bring the Act up to date**

**with current NSW Government practice. Further, the provisions are designed to ensure greater integrity in the sector and do not unduly burden candidates for the position. In the circumstances, the Committee makes no further comment.**

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

*Commencement by proclamation*

5.8 The Bill commences on a day or days to be appointed by proclamation.

**The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the legislation in question affects individual rights or obligations.**

**However, the Committee notes that a flexible start date may assist with the implementation of administrative arrangements necessary for the effective operation of the proposed amendments in regards to the administration the Mine Health and Safety regime in NSW. In the circumstances, the Committee makes no further comment.**

# Part Two – Regulations

## 1. Design and Building Practitioners Amendment (Miscellaneous) Regulation 2022

| | |
|---|---|
| Date tabled | LA: 4 March 2022<br>LC: 4 March 2022 |
| Disallowance date | LA: 21 June 2022<br>LC: 21 June 2022 |
| Minister responsible | The Hon. Eleni Petinos MP |
| Portfolio | Fair Trading |

### Purpose and description

1.1 This Regulation has the following objects—

(a) to require a building practitioner who intends to install ground anchors on neighbouring land to provide evidence of the legal authority to install the anchors to the Secretary before the work commences,

(b) to require evidence in certain circumstances of the following—

(i) destressing of temporary ground anchors,

(ii) removal of reinforcement tendons from removable ground anchors,

(c) to prescribe professional bodies of engineers and recognised engineering bodies as relevant agencies for the purpose of exchanging certain information with the Secretary,

(d) matters relating to the recognition scheme for professional bodies of engineers including the following—

(i) applications for recognition,

(ii) applicable fees,

(iii) conditions on recognition, including the variation of conditions,

(iv) renewal of recognition,

(v) suspension or cancellation of recognition,

(e) to exempt building practitioners from certain insurance requirements until 30 June 2023,

(f) to set out the relevant practical experience required for registration in the design practitioner— architectural class,

(g) to set out the qualifications, experience, knowledge and skills required for registration in the design practitioner—architectural with a condition for medium rise work class and the type of work authorised to be carried out by a person registered in that class,

(h) to set out the qualifications, experience, knowledge and skills required for the following building practitioners with conditions on registration and the type of work authorised to be carried out—

(i) building practitioner—body corporate nominee with a condition for low rise work,

(ii) building practitioner—body corporate nominee with a condition for medium rise work,

(iii) building practitioner—general with a condition for low rise work,

(iv) building practitioner—general with a condition for medium rise work,

(i) to prescribe certain offences as penalty notice offences,

(j) to make minor amendments to update terminology and cross-references.

## Issues considered by the Committee

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

*Penalty notice offences*

1.2 The Regulation creates a number of penalty notice offences in relation to:

(a) obtaining authority to install ground anchors (clauses 28B – 28D);

(b) the mandatory provision of certain types of information (such as audit information) to the Secretary by recognised engineering bodies (clauses 52D – 52G).

1.3 The maximum penalty under the regulation is $1 650 for individuals and $3 300 for a corporation.

**The Regulation creates a number of penalty notice offences regarding obtaining authority to install ground anchors and the mandatory provision of certain types of information to the Secretary by recognised engineering bodies. This includes bodies that have met the requirements of the *Design and Building Practitioners Regulation 2021* (2021 Regulation) and are subject to certain obligations under that regulation.**

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

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

**However, the Committee notes that the use of penalty notices in regards to engineering and building works may be more efficient for the administration of the scheme. Further, building and engineering works not done in accordance with the 2021 Regulation may cause damage to property and may even be dangerous, therefore penalty notice offences may serve as an important deterrent to encourage works to be completed to the required standard. The Committee also notes that the quantum of the penalty is relatively low given the context, being a maximum of $1 650 for individuals and $3 300 for a corporation. In the circumstances, the Committee makes no further comment.**

*Privacy*

1.4 The Regulation requires that recognised engineering bodies provide certain types of information to the Secretary as a condition of their recognition as recognised engineering bodies.

1.5 For example, in subclause 52B(3) when considering an application for recognition, the Secretary can seek information in relation to and consider whether the applicant, including a director or officer of the applicant, has been convicted of a relevant offence within the previous 10 years. Under subclause 52B(d) the Secretary can also request additional information from the applicant as is required to assist with their decision making.

1.6 This information may be about a body corporate, however it may also involve the personal information of individuals making an application as a sole trader, or the directors or officers of a body corporate.

**The Regulation requires that recognised engineering bodies provide certain types of information to the Secretary as a condition of their recognition as recognised engineering bodies. The information may include information pertaining to individuals, as recognised engineering bodies may be body corporates or sole traders, as well as information about directors of body corporates. For example, section 52B(e) allows the Secretary to consider any relevant offences of directors or officers of an applicant body corporate when considering recognition or renewal of an application.**

**However, the Committee notes that the provision of this information, as well as financial and technical information which must be shared under the Regulation,**

**is aimed at ensuring the integrity, safety and transparency of the engineering industry. The information that pertains to individuals may generally be publically available, such as convictions, and that the Secretary is the only recipient of this information. Therefore the Committee considers that the privacy impacts are not significant, and in the circumstances makes no further comment.**

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

*Creation of offences*

1.7 The Regulation contains a number of requirements that recognised engineering bodies must comply with. A failure to comply with these requirements may result in penalties being imposed. The maximum penalty that applies in respect of any of these offences is a fine of 200 penalty units for body corporates ($22 000) and 100 penalty units for others ($11 000). The requirements that recognised engineering bodies must comply with include:

(a) making the applications for recognition and renewal process for recognition under the body's recognition or registration scheme publicly available (clause 52F(5));

(b) providing annual scheme declarations including information and evidence requested by the Secretary (clause 52F(7));

(c) exercising their recognition function independently, fairly and with honesty and integrity (clause 52G(3)(a)); and

(d) having in place a conflict of interest policy that complies with the requirements outlined in the Regulation (clause 52G(4)(2)).

**The Regulation creates several offences. For example, it is an offence to fail to ensure documentation is correctly organised and presented to the Secretary (division 3A) or a failure to exercise the function of a recognised engineering body independently, fairly and with honesty and integrity (clause 52G). The maximum penalty that applies in respect of any of these offences is a fine of 200 penalty units for body corporates ($22 000) and 100 penalty units for others ($11 000).**

**The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that the building industry is a highly regulated industry that is often subject to changing schemes to keep pace with technological change, and the fact that it may be more administratively efficient to proceed by regulation. The Committee also notes that the penalties are more likely to be imposed on businesses as opposed to individuals, and are designed to ensure safety and protect property. In the context, the Committee makes no further comment.**

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

*Discretion of the Secretary*

1.8 The Regulation affords the Secretary a number of discretions when making determinations in regards to recognised engineering bodies, including whether to

accept their initial or renewal applications to be formally recognised. These discretions include under clause 52B, the Secretary may refuse an application for recognition or a renewal application if, in the Secretary's opinion;

(i) it is not in the public interest;

(ii) the applicant does not exercise the functions of a professional body of engineers; or

(iii) the applicant is not suitable.

1.9 The Regulation also proposes to amend clause 53 to include grounds based on the Secretary's forming an opinion that recognition of an engineering body should be suspended or cancelled.

1.10 There are also other grounds on which an application may be refused or body recognition cancelled that do not involve the Secretary forming an opinion of the circumstances.

**The Regulation grants the Secretary some powers that may be ill-defined and that could benefit from further clarification, including clause 52B and 53. These clauses propose to grant the Secretary the power to refuse, suspend or cancel the application or registration of engineers as recognised engineering bodies on the basis of their opinion of certain circumstances. For example, Clause 52B proposes that the Secretary may refuse an application on the basis that in their opinion, it is not in the public interest. The concept of public interest is not further defined.**

**The Committee prefers provisions that affect the rights and obligations of individuals and body corporates (who both may apply for and become a recognised engineering body and incur the associated benefits), be drafted with sufficient precision so that their scope is clear. The Committee acknowledges that it is important in a regulatory context for the Secretary to retain a level of discretion. This may include a flexible power to consider approvals in relation to engineering bodies, who undertake work that has an impact on public safety.**

**However, it may be that the clauses in question would benefit from the inclusion of further clarification as to key terms such as 'public interest' to guide decision-making, thereby balancing the competing considerations of precise drafting and administrative discretion. However, the Committee acknowledges that these terms are in regular and frequent use, and that the broader context of the regulation provides both the Secretary and applicant with relevant context. In the circumstances, the Committee makes no further comment.**

# 2. Environmental Planning and Assessment Regulation 2021

| | |
|---|---|
| Date tabled | LA: 15 February 2022<br>LC: 22 February 2022 |
| Disallowance date | LA: 17 May 2022<br>LC: 19 May 2022 |
| Minister responsible | The Hon. Anthony Roberts MP |
| Portfolio | Planning |

## Purpose and description

2.1 The object of the *Environmental Planning and Assessment Regulation 2021* (the Regulation) is to remake, with amendments, certain provisions of the *Environmental Planning and Assessment Regulation 2000*, which is repealed on 1 March 2022 by the *Subordinate Legislation Act 1989*, section 10.

2.2 This Regulation deals with the following matters—

- planning instruments, including local environmental plans and development control plans,
- development applications, including for State significant development,
- modification of development applications,
- complying development,
- existing uses,
- State significant infrastructure,
- environmental impact assessment,
- infrastructure contributions and finance,
- paper subdivisions,
- registers of development consents and other certificates kept by councils,
- reviews and appeals,
- fees payable by applicants and other persons.

2.3 The Regulation also makes minor amends the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* and the

*Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017.*

2.4 The Regulation is made under section 10.13 of the *Environmental Planning and Assessment Act 1979*.

2.5 The Regulation makes a number of key changes in its remake of the 2000 Regulation, specifically to administrative processes associated with making development applications, planning certificates and fees. The Regulation also digitises the application process by requiring applications to be made in the approved form and updates and reviews to be made available on the NSW Planning Portal.

2.6 In addition to a number of administrative changes, the Regulation simplifies stop the clock provisions and removes concessional delays from the approval period where a request by the approval body for additional information remains unanswered for two days.

2.7 Requirements for information contained in a Complying Development Certificate (CDC) are also amended to include details such as engineering plans for telecommunications or electricity works, in addition to a number of other requirements.

2.8 Factors to be taken into account concerning the impact of activity on the environment are revised and re-titled under section 171 *to reviews of environmental factors*. The factors which must be considered in those reviews are amended under the Regulation to create an obligation to consider such factors, irrespective of the extent to which they are present.

2.9 The list of designated developments under the Regulation is expanded and clarified to align with newer technologies. Further, a number of definitions are changed to alter location-based triggers for designated developments.

2.10 The Regulation was drafted in consultation with relevant stakeholders such as local councils, peak bodes, industry, planning and other professionals, state and federal governments and individual citizens.[7]

## Issues considered by the Committee

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

*Property rights of land owners – consent to development applications*

2.11 Section 181 of the Regulation states that consent of the owner is not required in an application for State significant infrastructure in certain circumstances. Section 181(5) specifies the State significant infrastructure in which consent is not required in an application, specifically:

- State significant infrastructure that will be carried out by a proponent that is a public authority,

[7] NSW Government, *Submissions Report*, viewed 11 April 2022.

- critical State significant infrastructure,
- State significant infrastructure comprising 1 or more of linear transport infrastructure, utility infrastructure and/or infrastructure on land with multiple owners designated by the Planning Secretary,
- State significant infrastructure that involves development for a purpose specified in *State Environmental Planning Policy (Planning Systems) 2021,* Schedule 1, section 5(1)–(4). Infrastructure under section 5(1)-(4) of this Policy includes mining for coal and mineral sands, and other mining specifications.

2.12 Section 181(6) requires the Minister to publish notice of the State significant development on the NSW Planning Portal and to give written notice to the owner of the land within 14 days of making the application.

2.13 Similarly, section 23(2) of the Regulation states the owner's consent is not required in two circumstances; firstly, where the applicant is a public authority and; secondly, where the application is made for public notification development and complies with sections 23(3) and (4). This is in direct contrast with section 23(1)(b) which states that another person may make a development application but only with the consent of the owner of the land.

2.14 Schedule 7 of the Regulation defines a public notification development as:

- State significant development set out in *State Environmental Planning Policy (Planning Systems) 2021*, Schedule 1, section 5 or 6, excluding development carried out on land in a state conservation area reserved under the *National Parks and Wildlife Act 1974*, or
- State significant development on land with multiple owners designated by the Planning Secretary for the purposes of section 23 by written notice to the applicant for the State significant development.

2.15 State significant development established in sections 5 and 6 of Schedule 1 of the *State Environmental Planning Policy (Planning Systems) 2021* include various mining sites and petroleum production sites.

2.16 Section 23(3) of the Regulation requires the public authority or public notification development applicant to give notice to the owner of the land. Alternatively, they must publish written notice in a newspaper no later than 14 days after the application is made.

2.17 Finally, section 67(2) of the Regulation requires that a development consent or existing use right may be modified or surrendered by written notice to the consent authority. Where the notice is provided by the person who is not the owner of the land, the owner of the land must prepare a signed statement stating they consent to a modification or surrender of consent. This is not required if the owner's consent for the development application was not required under section 23.

**Sections 181, 23 and 67 of the Regulation concern the removal of property rights of landowners in the process of development applications being made in certain circumstances. Specifically, section 181 states the consent of the owner is not**

**required in specific applications for State significant infrastructure. Section 23 states an owner's consent is not required where the applicant is a public authority and where the application is made for public notification development. Section 67 requires that a development consent or existing use right may be modified or surrendered without the owner's consent if the original development application was made without their consent.**

**Removing the requirement for an owner's consent to apply for development on their property may encroach on the private property rights of that owner. Under sections 23 and 181, a public authority's power to make a State significant development application concerning privately owned land without the owner's consent may interfere with the right of a person to use or enjoy their property, their right to make decisions on how to use the property, and the right to sell or give it away. Further, the power may also interfere with the quiet enjoyment of land by a property owner or anyone who ordinarily enjoys use of the owner's land such as a tenant.**

**The Committee notes the existence of statutory safeguards which may mitigate the effects of these provisions by providing the owner with an avenue of review. Safeguards include requirements to notify the owner of a development application within 14 days of the application being made, pursuant to sections 181(6) and 23(3). Further, the applicant must provide notice on the NSW Planning Portal under section 181(6) and in the newspaper under section 23(3).**

**Additionally, the scope of section 67 is limited by only permitting a development consent or existing use right to be modified or surrendered without consent in circumstances where consent was never required for the original development application. The Committee further recognises that consent to a development application is denied only in circumstances where State significant developments are concerned. As such, the Committee makes no further comment.**

*Penalty notices and right to a fair trial*

2.18 Schedule 5 of the Regulation establishes penalty notice values for offences under both the Regulation and the Act. Unlike the 2000 Regulation, the 2021 Regulation distinguishes between penalty notice values for individuals and corporations by separating the values in columns.

2.19 Offences with the highest penalty notice values are offences against sections 4.2(1) and 5.14 of the Act. section 4.2(1) creates an offence for carrying out development on land without consent of the owner in circumstances where the owner's consent is legally required. Section 5.14 of the Act creates an offence for carrying out the development of State significant infrastructure without the Minster's approval. Each of these offences carry a maximum penalty notice value of $7 500 for individuals and $15 000 for corporations.

2.20 Pursuant to section 9.58 of the Act, a person served with a penalty notice who does not wish to have the matter determined by a court, may pay the penalty amount within the appropriate time.

**The Regulation provides that penalty notices may be issued for various offences under the Act. The Regulation also distinguishes between penalty notice values**

**issued against individuals and those issues against corporations by separating the values in columns. The maximum penalty notice amount under the Regulations is $7 500 against an individual for offences against sections 4.2(1) and 5.14 of the Act.**

**As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $7 500 for an individual are significant monetary amounts to be imposed by way of penalty notice.**

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

*Strict liability offences*

2.21 The Regulation creates various strict liability offences under sections 136(6), 137(4) and 141(3)-(4) and prescribes respective maximum penalties for those offences.

2.22 Section 136(6) creates an offence against a certifier if they issue a compliance certificate that does not comply with the certificate requirements under that section. The provision also creates an offence for not including a fire safety schedule with a complying development certificate for the erection of a building, where it is required under the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021. The maximum penalty for an individual is 300 penalty units for an individual and 600 penalty units for a corporation.

2.23 Section 137(4) creates an offence against a certifier if they issue a complying development certificate without the correct evidence.

2.24 Section 141(3)-(4) creates an offence against a certifier for failing to give notice of the determination of an application for a complying development certificate through the NSW planning portal. It also creates an offence against a certifier if they do not provide specific documents to a council using the NSW planning portal.

**The Regulation creates numerous strict liability offences against certifiers for contravening obligations in their issuance of compliance certificates and complying development certificates. Section 141(3)-(4) of the Regulation also contains strict liability offences against a certifier for failing to give notice of a determination and for failing to provide councils relevant documents. 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.**

**However, the Committee notes that strict liability offences are not uncommon in regulatory contexts to encourage compliance. The Committee further recognises**

**the importance of certifier obligations being met and that the offences may have a generally deterrent effect. In the circumstances, the Committee makes no further comment.**

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

*Offences created by Regulation*

2.25 The Regulation creates various offences under sections 136(6), 137(4) and 141(3)-(4) and prescribes respective maximum penalties for those offences.

*2.26* Section 136(6) creates an offence against a certifier if they issue a compliance certificate for a development that does not comply with the certificate requirements under that section. The maximum penalty is 150 penalty units for an individual and 300 penalty units for a corporation. The provision also creates an offence for not including a fire safety schedule with a complying development certificate for the erection of a building, where it is required under the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021.* The maximum penalty for an individual is 300 penalty units for an individual and 600 penalty units for a corporation.

2.27 Section 137(4) creates an offence against a certifier if they issue a complying development certificate without the correct evidence. The maximum penalties are 150 penalty units for an individual and 300 penalty units for a corporation.

2.28 Section 141(3)-(4) creates an offence against a certifier for failing to give notice of the determination of an application for a complying development certificate through the NSW planning portal. It also creates an offence against a certifier if they do not provide specific documents to a council using the NSW planning portal. The maximum penalties for each offence are 150 penalty units for an individual and 300 penalty units for a corporation.

**The Regulation creates several offences. For example, section 136(6) creates an offence against a certifier if they issue a compliance certificate that does not comply with the certificate requirements under that section. The maximum penalty is 150 penalty units for an individual and 300 penalty units for a corporation.**

**The Committee generally prefers that penalties are set down in primary legislation to afford a greater level of parliamentary scrutiny. However, the Committee notes that these penalties are monetary in nature and are not uncommon in regulatory setting to encourage compliance. Such offences may also be more administratively efficient to proceed by regulation, for example if changes are required to keep pace with developments in the industry. In these circumstances, the Committee makes no further comment.**

*Henry VIII Clause*

2.29 Section 171 states that a determining authority must take into account matters specified in the environmental factors guidelines when deciding a development application. Those factors are listed in section 171(2) of the Regulation and include matters such as pollution of the environment. Section 171(3) creates an obligation

on the determining authority to prepare a review of the environmental factors to demonstrate how those factors were taken into account in deciding the application.

2.30 In circumstances where the activity has a capital investment value of more than $5 million or requires an approval under various statutes, the review must be published on the NSW Planning Portal before commencement of activity or as soon as practicable, pursuant to section 171(6). However, a review does not need to be published if the activity belongs to a class of activity specified by the Planning Secretary on the Department's website or if the activity belongs to an approved Code under Division 6.

2.31 An approved Code means a Code approved by the Minister that make provisions about various matters under section 198 of the Regulation. An example of an approved code is the Australian Rail Track Corporation which is noted in section 197 of the Regulation.

2.32 Section 171(7) of the Regulation states that if a provision of an approved Code under applies to a determining authority's functions under section 5.5 of the Act, then the provision of the approved code prevails to the extent of an inconsistency.

**The Regulation contains a Henry VIII Clause which allows subordinate legislation, an approved Code, to prevail over the Regulation to the extent of an inconsistency. In these circumstances, the Australian Rail Track Corporation Code may be amended and prevail over the Regulation in the extent of an inconsistency.**

**The Committee generally prefers amendments to a Regulation to be made by an amending Regulation rather than by subordinate legislation, such as an approved code. The Committee recognises that this may be a more administratively efficient mechanism to proceed however notes no current safeguards for the protection of parliamentary scrutiny, only Ministerial scrutiny. An amending Regulation would foster an appropriate level of parliamentary oversight compared to an approved code. As such, the Committee refers the matter to Parliament for further consideration.**

# 3. Environmental Planning and Assessment Amendment Regulation 2022

| | |
|---|---|
| Date tabled | LA: 22 February 2022<br>LC: 22 February 2022 |
| Disallowance date | LA: 7 June 2022<br>LC: 19 May 2022 |
| Minister responsible | The Hon. Anthony Roberts MP |
| Portfolio | Planning |

## Purpose and description

3.1 The objects of this Regulation are as follows—

(a) to incorporate various amendments made to the *Environmental Planning and Assessment Regulation 2000* since the *Environmental Planning and Assessment Regulation 2021* was made on 17 December 2021,

(b) to make other minor amendments, including law revision amendments and amendments that are consequent on the consolidated State environmental planning policies that commence on 1 March 2022.

## Issues considered by the Committee

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

*Strict liability and penalty notice offence*

3.2 The Regulation amends section 102B of the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* (the **Fire Safety Regulation**), which prohibits the use of dwellings as short-term rental accommodation unless it complies with the requirements of the fire safety standard. Specifically, the Regulation amends subsection (1) to create a strict liability offence for the prohibited conduct. The maximum penalty carried by this offence is $33 000 for a corporation or $16 500 for an individual.

3.3 Schedule 1 of the Fire Safety Regulation sets out the offences for which a penalty notice may be issued and the amount payable for the penalty notice offence. The Regulation also includes the strict liability offence established under section 102B(1) as a penalty notice offence. The penalty set for that penalty notice offence is $1 500 for individuals and $3 000 for corporations.

**The Regulation amends the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021* to establish a strict liability offence for the use of dwellings which do not comply with fire safety standards as short-term rental accommodation. The Committee generally**

**comments on strict liability offences as they depart from the common law principle that mens rea, or the mental element, is a relevant factor in establishing liability for an offence. It also prefers provisions which prescribe offences to be included in primary, not delegated legislation. This is to foster an appropriate level of parliamentary oversight.**

**The Regulation also includes this strict liability offence as an offence for which a penalty notice can be issued under Schedule 1. 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 their right to have their matter heard by an impartial decision maker.**

**However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that the offence is intended to protect the safety of short-term rental tenants from renting properties that do not meet applicable fire safety standards. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice, and that individuals retain the right to elect to have their matter heard and decided by a court. In the circumstances, the Committee makes no further comment.**

# 4. Fair Trading Amendment (Commercial Agents) Regulation 2022

| | |
|---|---|
| Date tabled | LA: 22 March 2022<br>LC: 22 March 2022 |
| Disallowance date | LA: 21 June 2022<br>LC: 9 June 2022 |
| Minister responsible | The Hon. Anthony Roberts MP |
| Portfolio | Planning |

## Purpose and description

4.1 The object of this Regulation is to amend the *Fair Trading Regulation 2019* (the **Fair Trading Regulation**) to—

(a) insert Part 2B to regulate commercial agents, including in relation to the following—

(i) persons taken to be disqualified persons for the purposes of the *Fair Trading Act 1987*,

(ii) grounds on which the Secretary may determine that a person is not a fit and proper person to hold a commercial agent licence,

(iii) information to be kept on the Register maintained by the Secretary for the purposes of the *Fair Trading Act 1987*, Part 5, and

(b) prescribe—

(i) further penalty notice offences, and

(ii) fees for licence applications, renewals, restorations and replacements, and

(iii) rules of conduct for the carrying out of commercial agent activities.

## Issues considered by the Committee

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

*Penalty notice offences*

4.2 The *Fair Trading Amendment (Commercial Agents) Act 2016* (the **amending Act**) amends the *Fair Trading Act 1987* (the **Fair Trading Act**) to include provisions which regulate people who carry out debt collection, repossessions and process serving ('commercial agents'). As a consequence, the amending Act also repeals the *Commercial Agents and Private Inquiry Agents Act 2004*.

4.3 The Regulation amends Schedule 1 of the Fair Trading Regulation to prescribe the following offences under the Fair Trading Act as penalty notice offences, with the following amounts payable:

(a) Refusing or failing to comply with a notice to provide information, documents or evidence to an investigator or secretary under section 20(3)(a): $550 for individuals and $1 100 for corporations;

(b) Obstructing, hindering or assaulting an employee in the performance of their duties under section 23(1): $550 for individuals and $1 100 for corporations;

(c) Offences established by the amending Act relating to the conduct of commercial agent activity by disqualified persons or without the appropriate licence under sections 60B and 60C: $1 100 for individuals and $5 500 for corporations;

(d) A person carrying out commercial agent activity not producing the licence for inspection as requested or required under section 60C: $550 for individuals and $1 100 for corporations;

(e) Contravention of commercial agent restriction orders under section 60G(4): $1 100 for individuals and $5 500 for corporations; and

(f) Carrying out commercial agent activity which is not in compliance with the commercial agent rules under section 60K: $550 for individuals and $1 100 for corporations.

**The Regulation amends Schedule 1 of the *Fair Trading Regulation 2019* to expand the list of prescribed offences under the *Fair Trading Act 1987* for which a penalty notice with an amount payable of $550 or $1 100 may be issued. Penalty notices allow an individual to pay a specified monetary amount and in some circumstances may elect to have the matter heard by a court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.**

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

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

*Matters which should be set by Parliament*

4.4 As noted, the amending Act inserts provisions into the *Fair Trading Act* as Part 5 which regulate the activity of commercial agents. Under Part 5, section 60B prohibits a 'disqualified person' from carrying out commercial agent activity and section 60C requires a person hold a commercial agent licence in order to carry out commercial agent activity.

4.5 Section 60A sets out the criteria for disqualification under Part 5, including subsection (1)(d) which states 'the person has been convicted, within the last 5 years, of a relevant offence and a sentence of imprisonment or a fine of $500 or more has been imposed on the person following that conviction'. What constitutes a 'relevant offence' for the purpose of Part 5 is set out in section 60A(2). Relevantly, subsection (2)(d) provides a regulation-making power to declare offences to be a relevant offence as well as declare certain offences to be excluded from constituting a relevant offence.

4.6 The Regulation amends the Fair Trading Regulation to insert clause 11G, which declares further offences to be a 'relevant offence' for the purposes of section 60A. This list of declared offences include a broad range of summary and indictable offences under the *Crimes Act 1900*, *Crimes (Domestic and Personal Violence) Act 2007*, *Privacy Act 1988*, *Security Industry Act 1997* and *Surveillance Devices Act 2007*.

4.7 Regarding commercial agent licences, section 60D requires all licence holders to be a 'fit and proper person'. Relevantly, section 60D(2)(b) enables the Secretary to make a finding that a person is not 'fit and proper' to hold a licence and subsection (3) sets out a non-exhaustive list of grounds that the Secretary may make such a determination. Specifically, section 60D(3)(d) provides that regulations may prescribe further grounds for making a determination that a person is not 'fit and proper' to hold a commercial agent licence.

4.8 The Regulation also inserts clause 11H into the Fair Trading Regulation, which prescribes further grounds for the Secretary to determine a person is not 'fit and proper' to hold a commercial activity licence. These grounds include previous licence cancellations or suspensions in the last 5 years of a relevant commercial agent licence (or its equivalent issued under the *Commercial Agents and Private Inquiry Agents Act 2004*), or disqualification from holding any other licence, permit or authority under legislation administered by the Minister for Fair Trading.

**The Regulation inserts provisions into the *Fair Trading Regulation 2019* which declare further offences for which a conviction would disqualify a person from conducting commercial agent activity. It also inserts provisions which prescribe additional grounds on which the Secretary may determine a person is not 'fit and proper' to hold a commercial agent licence necessary for carrying out commercial agent activity.**

**The Committee notes that these provisions are made under legislative provisions introduced by the *Fair Trading Amendment (Commercial Agents) Bill 2016*, which the Committee previously reported on in its Digest No. 25/56.[8] Consistent with those comments, the Committee prefers provisions providing for classes of people to be disqualified from carrying out commercial agent activity be included in primary legislation rather than subordinate legislation. This fosters a greater level of parliamentary oversight.**

**However, the Committee notes that regulations are subject to parliamentary scrutiny as they are required to be tabled in Parliament and are subject to**

[8] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 25/56*, 20 September 2016.

**disallowance under section 41 of the *Interpretation Act 1987*. In the circumstances, the Committee makes no further comment.**

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

*Period of application*

4.9 Clause 2 of the Regulation provides that its provisions commence on the day on which the amending Act commences. Section 2 of the amending Act provides that the Act commences on a day or days to be appoints by proclamation, which has yet to be so proclaimed.

**The Regulation commences on the day on which the *Fair Trading Amendment (Commercial Agents) Act 2016* commences. As the *Fair Trading Amendment (Commercial Agents) Act 2016* is to commence by proclamation, the provisions of the Regulation will likewise commence on that undefined date. The Committee generally prefers regulatory provisions to commence on a fixed date, to provide certainty for affected persons, particularly where the provisions in question may affect the ability of classes of person to carry on commercial agent activity.**

**However, the Committee notes that this flexible start date is intended to allow time for industry consultation which may assist with the administrative arrangements necessary to effectively implement the new regulatory scheme for commercial agents. In the circumstances, the Committee makes no further comment.**

# 5. Public Health Amendment (COVID-19) Regulation 2022

| | |
|---|---|
| Date tabled | LA: 4 March 2022<br>LC: 4 March 2022 |
| Disallowance date | LA: 21 June 2022<br>LC: 21 June 2022 |
| Minister responsible | The Hon. Brad Hazzard MP |
| Portfolio | Health |

## Purpose and description

5.1 This Regulation—

(a) prescribes the Department of Enterprise, Investment and Trade as a body whose members, or members of staff, may be appointed as authorised officers under the *Public Health Act 2010* (the Act), and

(b) extends the operation of certain provisions, relating to authorised officers and the issuing of penalty notices, beyond 26 March 2022, and

(c) replaces a reference to a repealed order under the Act.

5.2 This Regulation is made under the *Public Health Act 2010*, including sections 118, 126 and 134, the general regulation-making power.

## Issues considered by the Committee

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

*Penalty notice offences – right to a fair trial*

5.3 The Regulation proposes to amend schedule 4 of the *Public Health Regulation 2012* in regards to the following offences under the *Public Health Act 2012* (Act):

(a) a failure to comply with any direction of the Minister in an order made under the Act;

(b) a failure to comply with section 11 of the Act, which concerns the power to close public premises on public health grounds; and

(c) a failure to comply with section 70(1) of the Act, which concerns the making of public health orders.

5.4 Penalty notices could previously be imposed regarding offences occurring between 26 March 2020 and 26 March 2022. The Regulation extends this period indefinitely from 26 March 2020.

**The Regulation expands the length of time that a penalty notice may be issued for offences related to compliance with public health orders. The Regulation serves to make the penalty notices permanent from 26 March 2020, where previously penalty notices could only be issued in relation to the relevant offences from 26 March 2020 to 26 March 2022.**

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

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

**Given this, as well as the size of the penalties that may be issued by penalty notice (up to $1 000 for an individual and $5 000 for a corporation) and that the regulation indefinitely extends the period in which these penalty notice offences can be issued, the Committee refers the matter to Parliament for its consideration.**

# 6. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2022

| | |
|---|---|
| Date tabled | LA: 22 February 2022<br>LC: 22 February 2022 |
| Disallowance date | LA: 7 June 2022<br>LC: 19 May 2022 |
| Minister responsible | The Hon. Brad Hazzard MP |
| Portfolio | Health |

## Purpose and description

6.1 This Regulation provides that the penalty notice offence for a failure to comply with certain directions under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* continues to apply under an order that remakes, replaces or consolidates that order.

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

## 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**

*Penalty notice offences prescribed in regulations*

6.3 Schedule 4 of the *Public Health Regulation 2012* prescribes offences for which a penalty notice may be issued, and the amount payable for that penalty notice for individuals and corporations.

6.4 Relevantly, Part 1 of Schedule 4 prescribes the offence of failing to comply with a direction to self-isolate under the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021* (the **2021 Self-Isolation Order**) as a penalty notice offence. It also prescribes the penalty payable on that penalty notice is $5 000 for individuals and $10 000 for corporations.

6.5 The Regulation amends Schedule 4 to expand that prescription to include a penalty notice offence of non-compliance with a direction under 'an order under the Act, section 7 that remakes, replaces or consolidates, whether in whole or in part' the 2021 Self-Isolation Order.

**The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to prescribe an offence for non-compliance with a direction under an order made**

**under section 7 of the *Public Health Act 2010* which wholly or partly remakes, replaces or consolidates the *Public Health (COVID-19 Self-Isolation) Order (No 4) 2021*.**

**The Committee generally prefers that penalties are set down in primary legislation, rather than subordinate legislation, to foster an appropriate level of parliamentary scrutiny. It further notes that penalty notices allow a person to pay the amount specified for an offence within a certain time should he or she not wish to have the matter determined by a court. This may impact on a person's right to a fair trial, notably the automatic right to have a matter heard by an impartial decision maker in public with the opportunity to put forward his or her side of the case.**

**The Committee also notes that the amendments would enable authorised officers to issue penalty notices for offences in relation to future public health orders which are not explicitly defined or set out in relevant primary or subordinate legislation. This may run counter to the rule of law principle that a person is entitled to know the law that applies to them at any given time.**

**The Committee further notes that, unlike regulations, there is no requirement for public health orders to be tabled in Parliament and subject to disallowance under section 41 of the *Interpretation Act 1987*. This may allow authorised officers to issue penalty notices for infringements of future public health orders, without that power to issue such notices for those future orders being subject to parliamentary scrutiny.**

**The Committee notes that these penalty notice offences are intended to deter non-compliance with self-isolation orders, in order to protect public health and safety from the risks arising from the COVID-19 pandemic. It further 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. These amendments also do not impact an individual's right to elect to have their matter heard and decided.**

**However, the amendments permit authorised officers to issue penalty notices for public health orders which are not set out in primary or subordinate legislation, and which are not subject to parliamentary oversight. Given the potential penalty notices of $5 000 for individuals, the Committee refers this matter to Parliament for its consideration.**

# 7. Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2022

| | |
|---|---|
| Date tabled | LA: 4 March 2022<br>LC: 4 March 2022 |
| Disallowance date | LA: 21 June 2022<br>LC: 21 June 2022 |
| Minister responsible | The Hon. Eleni Petinos MP |
| Portfolio | Small Business |

## Purpose and description

7.1 The object of this Regulation is to remove requirements in relation to impacted leases that—

(a) required parties to an impacted lease to renegotiate the rent payable under, and other terms of, the lease, and

(b) prevented rent payable under an impacted lease from being increased.

7.2 Provisions requiring compulsory mediation are to remain in place. This Regulation is made under—

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

(b) the *Conveyancing Act 1919*, including clause 202, the general regulation-making power.

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

*Reduced assistance to commercial tenants*

7.4 The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* (Existing Regulation) to reduce the scope of the assistance provided under the Existing Regulation to the tenants of retail and commercial properties.

7.5 The amendments include:

(a) limiting eligibility by reducing the turnover limit for businesses to qualify for the scheme from $50 million to $5 million (clause 4(b));

(b) removing the obligation on landlords to not increase the quantum of rent payable (clause 8);

(c) removing the obligation to attend compulsory mediation to resolve breaches if the breach occurs after 13 March 2022; and

(d) removing the requirement of a Tribunal or court to consider the National Code of Conduct leasing principles if the prescribed action is for a breach occurring after 13 March 2022.

7.6 The Regulation also amends the *Conveyancing (General) Regulation 2018* to the same effect.

**The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* and the *Conveyancing (General) Regulation 2018* to reduce the scope of the assistance provided to the tenants of retail and commercial properties under the Existing Regulation. The reductions include lowering the turnover ceiling for businesses to access the scheme from $50 million to $5 million (clause 4(b), and removing the obligation on landlords to not increase the rent of impacted lessees (clause 8).**

**The Regulation may therefore result in businesses being subject to significant increases in overhead expenses, including rent, as well as removing other protections for lessees such as mandatory mediation in the event of a breach of lease. The Committee notes that due to the changing nature of the COVID-19 pandemic, businesses may have expected that they could rely on the protections previously provided under the Regulations being ongoing.**

**However, the Committee notes that the protections provided under the Regulations were in response to the COVID-19 pandemic, and that regulation and legislation to this effect has been winding back as the economy recovers. The Committee also notes that commercial tenants will continue to be governed by the *Retail Leases Act 1994* and that this legislation prior to the COVID-19 pandemic had been considered by the Parliament as sufficient to govern commercial leasing arrangements. Given the circumstances, the Committee makes no further comment.**

# 8. Roads Amendment (Major Bridges and Tunnels) Regulation 2022

| | |
|---|---|
| Date tabled | LA: 22 March 2022<br>LC: 22 March 2022 |
| Disallowance date | LA: 21 June 2022<br>LC: 21 June 2022 |
| Minister responsible | The Hon. Natalie Ward, MLC |
| Portfolio | Metropolitan Roads |

## Purpose and description

8.1 The object of this Regulation is to amend the *Roads Regulation 2018* to provide that any bridge or tunnel within the Greater Sydney Region is a major bridge or tunnel for the purposes of the *Roads Act 1993*, section 144G.

8.2 Section 144G creates an offence for a person who trespasses on a major bridge or tunnel, including by seriously disrupting or obstructing vehicles or pedestrians attempting to use the bridge or tunnel if the person's conduct causes the bridge or tunnel to be closed or vehicles or pedestrians redirected.

8.3 This Regulation is made under the *Roads Act 1993*, including sections 144G and 264.

## Issues considered by the Committee

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

*Freedom of assembly and association*

8.4 The Regulation provides that all bridges and tunnels in the Greater Sydney Region (as defined in Schedule 1 of the *Greater Sydney Commission Act 2015*) will be deemed major bridges and tunnels for the purposes of section 144G of the *Roads Act 1993* (Roads Act).

8.5 Under section 144G of the Roads Act it is an offence to enter, remain on, climb, jump from or otherwise trespass on any part of the Sydney Harbour Bridge or any other major bridge or tunnel or road if that conduct causes damage or seriously disrupt or obstructs vehicles or persons. This offence carries a maximum penalty of 200 penalty units or 2 years imprisonment, or both.

**The Regulation provides that all bridges and tunnels in the Greater Sydney Region will deemed major bridges and tunnels for the purposes of section 144G of the Roads Act. Under subsection 144G(1), it is an offence to enter, remain on, climb, jump from or otherwise trespass on any part of a major bridge or tunnel if that conduct:**

**a) causes damage to the bridge or tunnel,**

**b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge or tunnel, or**

**c) is an offence punishable by imprisonment or is an offence arising under the *Summary Offences Act 1988.***

**The maximum penalty for a breach of subsection 144G(1) is 200 penalty units ($22 000) or imprisonment for two years, or both.**

**This may impact on freedom of movement and assembly. These rights that are contained in Articles 21 and 22 of the ICCPR. The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest. However, the ICCPR recognises that derogation from these rights may be warranted in certain circumstances, including to protect public health and safety.**

**The Committee notes that the offences in the *Crimes Act* and *Roads Act* do provide a number of safeguards, including that in both instances the amendments do not prohibit conduct undertaken in accordance with the consent of Transport for NSW, the NSW Police Force or another public authority. Under section 144G of the Bill, NSW Police may give authorisation for protests or similar action, which would therefore be exempted from prosecution.**

**It is also a defence to prosecution under section 144G of the Roads Act if the person charged proves that they had a reasonable excuse for the conduct concerned. For example, subsection (5) provides that it is a reasonable excuse if the conduct arose from a mechanical fault or breakdown of a motor vehicle. Under the *Crimes Act*, a person does not commit an offence if the conduct forms part of an industrial action, thereby exempting workers who may undertake protest and other industrial action at a major facility that is their workplace.**

**The Committee notes that potential limits on movement and assembly may be of particular interest to the public, and notes the significance of the penalties that can be imposed in event of a breach of the *Crimes Act* or the *Roads Act*, including imprisonment. In these circumstances, the Committee refers the matter 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. Civil Procedure Amendment (Fees) Regulation 2022 (2022-123)

   The object of this Regulation is to increase certain fees payable to a court in relation to the conduct of civil proceedings in the court. This Regulation is made under the Civil Procedure Act 2005, section 18(1)(a)(i)–(iii).

2. Crimes Amendment (Major Facilities) Regulation 2022 (2022-128)

   The object of this Regulation is to prescribe certain train stations, other public transport facilities, ports and infrastructure facilities to be major facilities for the purposes of the *Crimes Act 1900*, section 214A. Under the Act, section 214A, certain conduct is prohibited at major facilities, including conduct that causes damage to major facilities or seriously disrupts or obstructs persons attempting to use the facilities, or conduct that causes the facilities to be closed or persons attempting to use the facilities to be redirected.

   The Regulation is divided into four Parts which; define and prescribe major facilities; prescribe other public transport facilities; prescribe ports, and prescribe infrastructure facilities for the purposes of facilities subject of contraventions of the *Crimes Act 1900*, section 214A(7).

   Section 214A of the *Crimes Act 1900* was recently created by the *Roads and Crimes Legislation Amendment Act 2022*. The Regulation is created under section 582 of the *Crimes Act 1900.*

3. Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot Scheme) Regulation 2022 (2022-144)

   The object of this Regulation is to amend the Criminal Procedure Regulation 2017 to extend the duration of the child sexual offence evidence pilot scheme established by the Criminal Procedure Act 1986, Schedule 2, Part 29.

4. District Court Criminal Practice Note 19—Criminal Trials at Circuit Settings (n2022-0248)

This Practice Note commences on 18 February 2022 and revises District Court Criminal Practice Note 19, which commenced on 2 August 2021.

The purpose of this Practice Note is to:

(a) ensure that matters are dealt with efficiently and in a manner consistent with the obligations of the prosecution and an accused person under Chapter 3, Part 3 of the *Criminal Procedure Act 1986*;

(b) establish case management procedures from the time an accused person's matter is first mentioned in the District Court;

(c) refine the disclosure obligations of the prosecution and an accused person;

(d) reduce avoidable delays; and

(e) promote procedural fairness.

The Practice Note substantially remakes its previous iteration, which the Committee reported on in its Digest No. 37/57 (16 November 2021). The Committee notes that the Practice Note omits the provisions which were the subject of its comments in its previous report.

5. Electricity Infrastructure Investment Amendment Regulation 2022 (2022-145)

The objects of this Regulation are as follows—

a) to provide for risk management arrangements associated with the electricity infrastructure investment safeguard,
b) to provide for reporting of the financial administration of the electricity infrastructure fund,
c) to make arrangements for contribution determinations and contribution orders for the payment of money into the electricity infrastructure fund.

6. Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Amendment (Modifications) Regulation 2022 (2022-88)

The object of this Regulation is to provide that a request to modify a project or concept plan that was originally dealt with under repealed *Part 3A of the Environmental Planning and Assessment Act 1979*, and that may continue to be dealt with as a transitional Part 3A project, may itself be amended prior to being approved, or refused, by the Minister.

The Regulation inserts subclauses 3BA(5A) and (5B) into Schedule 2 of the *Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017* to allow applicants to amend their requests under clause 3BA to modify such a plan.

7. Environmental Planning and Assessment Amendment (Wilton Town Centre Precinct) Regulation 2022 (2022-118)

   The object of this Regulation is to require certain documents to accompany a development application for development on land in the Wilton Town Centre Precinct in the Wilton Growth Area under *State Environmental Planning Policy (Precincts—Western Parkland City) 2021* from 30 September 2022.

   This Regulation also repeals various Regulations that contained uncommenced amendments to the *Environmental Planning and Assessment Regulation 2000*, which was repealed on 1 March 2022. The uncommenced amendments are instead being made to the *Environmental Planning and Assessment Regulation 2021* and the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*, which replaced the *Environmental Planning and Assessment Regulation 2000*.

8. Gambling (Two-up) Regulation 2022 (2022-147)

   The object of this Regulation is to prescribe certain days as commemorative days on which two-up may be played under the Gambling (Two-up) Act 1998.

   This Regulation comprises or relates to matters set out in the Subordinate Legislation Act 1989, Schedule 3, namely matters of a machinery nature and matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

9. Jury Amendment (Additional Jurors) Regulation 2022 (2022-89)

   The object of this Regulation is to amend the Jury Regulation 2015 to prescribe a trial of criminal proceedings the duration of which is likely to be 2 or more weeks as a trial of proceedings in which the Supreme Court or the District Court may order that up to 3 additional jurors be selected for the jury. This Regulation is made under the Jury Act 1977, including sections 19(2) and 76(1), the general regulation-making power.

10. Legal Profession Uniform Law Australian Solicitors' Conduct Amendment (No 2) Rules 2022 (2022-159)

    The object of these Rules is to make provision in relation to returning judicial officers.

    The Amendment changes Rule 38 to prohibit a solicitor who is a former judicial officer from appearing in a court for a period of two years after their cessation of office under particular circumstances. Firstly, they are prohibited from appearing in a court in which they used to preside therein and secondly, they are prohibited from appearing in any inferior court in which an appealable decision would be heard by the court in which they used to preside. The solicitor may appear if permission is granted by the relevant court.

    The Amended Rule is made by the Legal Services Council under the *Legal Profession Uniform Law*, section 430

11. Local Government (General) Amendment (Minimum Amounts of Rate) Regulation 2022 (2022-90)

    The object of this Regulation is to increase the limit on the minimum amount of ordinary council rates under the *Local Government Act 1993*, section 548(3)(a) from $565 to $569.

    The Regulation amends the minimum amount payable for ordinary council rates under section 126 of the *Local Government (General) Regulation 2021*.

12. Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Amendment Regulation 2022 (2022-148)

    The object of this Regulation is to provide that the installation of a moveable dwelling or associated structure on land used for the purposes of a caravan park or camping ground that is permitted without development consent under State Environmental Planning Policy (Housing) 2021, Chapter 3, Part 10, and the operation of the caravan park or camping ground, are activities that may be carried out without council approval.

13. Referable Debt Order (2022-91)

    Pursuant to section 7 (2) of the State Debt Recovery Act 2018, the fees, charges and other amounts specified in the order are declared to be referable debts.

14. Roads Amendment (Major Roads) Regulation 2022 (2022-136)

    The object of this Regulation is to amend the *Roads Regulation 2018*, consequent on the enactment of the *Roads and Crimes Legislation Amendment Act 2022*, to prescribe major bridges, tunnels and roads for the purposes of the *Roads Act 1993*, section 144G. Section 144G creates an offence for a person who trespasses on a major bridge, tunnel or road if the conduct—
    (a) causes damage to the bridge, tunnel or road, or
    (b) seriously disrupts or obstructs vehicles or pedestrians attempting to use the bridge, tunnel or road.

    The Regulation is made under section 264 of the *Roads Act 1993*.

15. Workers Compensation Amendment (Certificates of Capacity) Regulation 2022 (2022-128)

    The object of this Regulation is to amend the Workers Compensation Regulation 2016, clause 175, which sets out the requirements for a second or subsequent certificate of capacity to be provided by a worker to an insurer under the Workers Compensation Act 1987, to provide that the clause will no longer be repealed on 17 April 2022.