

Legislation Review
Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest
No. 43/57 - 17 May 2022



New South Wales Parliamentary Library cataloguing-in-publication data:



A catalogue record for this
book is available from the
National Library of Australia

ISSN: 1448-6954

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

MEMBERSHIP _____	2
GUIDE TO THE DIGEST _____	3
SUMMARY OF CONCLUSIONS _____	4
PART ONE – BILLS	10
1. DINGO CULTURAL HERITAGE AND PROTECTION BILL 2022* _____	10
2. FIREARMS LEGISLATION AMENDMENT BILL 2022 _____	15
3. GOVERNMENT TELECOMMUNICATIONS AMENDMENT BILL 2022 _____	18
4. RSL NSW AMENDMENT BILL 2022 _____	23
5. WATER MANAGEMENT AMENDMENT (FLOODPLAIN HARVESTING LICENCES) BILL 2022* _____	25
6. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (CLIMATE CHANGE RESPONSE) BILL 2022* _____	27
APPENDIX ONE – FUNCTIONS OF THE COMMITTEE	32
APPENDIX TWO – REGULATIONS WITHOUT PAPERS.....	34

Membership

Chair Mr Dave Layzell MP, Member for the Upper Hunter

Deputy Chair Mr Lee Evans MP, Member for Heathcote

Members Mr Scott Barrett MLC
Ms Abigail Boyd MLC
Mr David Mehan MP, Member for the Entrance
The Hon. Shaoquett Moselmane MLC
Mr Shaoquett Moselmane MLC
Mr Nathaniel Smith MP, Member for Wollondilly

Contact details Legislation Review Committee
Parliament of New South Wales
6 Macquarie Street
Sydney NSW 2000

Telephone (02) 9230 2144 / (02) 9230 2390

E-mail Legislation.Review@parliament.nsw.gov.au

Website www.parliament.nsw.gov.au/lrc

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. DINGO CULTURAL HERITAGE AND PROTECTION 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 for panel members

The Bill provides that the Minister may exercise their discretion in two ways in relation to members of the Indigenous and Scientific Advisory Panel (Panel) that is constituted to advise the Minister and the Secretary in regards to dingoes.

First, under Schedule 1, clause 3(c) the Panel must include members that, in the Minister's opinion, have expertise in one or more of the following areas:

- a) dingo welfare
- b) landholder engagement about non-lethal controls to protect farmed animals from predators
- c) community involvement in conservation.

Second, the Bill provides the Minister with powers to determine the remuneration of Panel members (Schedule 1, section 7(2)), and remove Panel members from office at any time (Schedule 1, section 8(2)).

The provisions do not limit the Minister's discretion in making any of these decisions. The Bill may thereby grant the Minister a wide and ill-defined power.

The Committee acknowledges the Bill provides clear direction that members of the Panel must have specific areas of relevant expertise. Further, the Committee notes that it is not unusual for a Minister to have broad powers to fix remuneration and terms of members of advisory panels that are formed with the explicit purpose of advising the Minister.

However, the Committee notes that this unfettered power may result in members of the Panel having their employment status revoked without notice or due process as may usually be afforded to them in a conventional employment relationship. The Committee also notes that under Schedule 1, clause 6, members only hold office as part-time members which may reduce the impact of employment uncertainty on members of the Panel. In the circumstances, the Committee makes no further comment.

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

Draft plans – unfettered discretion of Secretary and Minister to carry out a dingo management plan

The Bill provides that the Minister may direct the Secretary to carry out the adopted dingo management plan. This power may give the Secretary authorisation to take action which may subvert the legislative power of the Parliament, or override other legislation that may apply to the geographical areas containing dingoes. The Committee notes that the Bill does not provide substantial limits on the scope of the plans or provide the Minister with direction as to when a plan is suitable for adoption and implementation.

The Bill may therefore result in the Minister having power to direct the Secretary to carry out plans which have significant scope and impact. The Committee acknowledges that the Bill is focussed on the protection of dingoes and intends to provide the Minister and Secretary with significant scope to address this issue; however notes that the broad scope of the Bill may result in actions being taken by the Secretary that potentially subvert the oversight role of the Parliament and impact communities. Given the circumstances, the Committee refers the matter to Parliament for consideration.

Delegation by the Secretary

Section 13 of the Bill provides that the Secretary may delegate their functions, other than the power of delegation, to any person employed in the Department or a person, or a class of persons, authorised for the purposes of this section by the regulations.

The Committee notes that there are no restrictions on the power to delegate, for example, restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the Bill provides the Secretary (and therefore their delegate) with the power to implement plans approved by the Minister which may be broad in scope and provide the Secretary with significant powers.

The Committee generally prefers provisions about the persons and class of persons to whom such functions can be delegated to be drafted with specificity. In addition, that they be included in the primary legislation and not delegated to the regulations, to ensure an appropriate level of parliamentary oversight. In the circumstances, the Committee refers the matter to Parliament for consideration.

Significant matters may be included in subordinate legislation

The Bill provides that regulations may be made in relation to the content of the draft dingo management plans, as well as the terms of office of Panel members, the filling of Panel vacancies, the general procedure of Panel meetings and the transactions of Panel business outside of meetings. Particularly in relation to what is included in draft plans (which the Minister can approve and require the implementation of), the Bill thereby may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

The Committee acknowledges that the content included in the draft plans is still subject to public and expert consultation, as well as Ministerial approval, and therefore may not be adopted and implemented without a public process being completed. The Committee further notes that it may be more convenient for administrative matters, in this case Panel membership and procedure, to be contained in the regulations. In the circumstances, the Committee makes no further comment.

2. FIREARMS LEGISLATION AMENDMENT BILL 2022

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

3. GOVERNMENT TELECOMMUNICATIONS AMENDMENT BILL 2022

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

Private property rights – entry, occupation and work on private lands

The Bill grants the Authority or a Network Operator with powers to enter and occupy public and private premises for various purposes. For example, section 34E(4) allows the Authority or a Network Operator to carry out work on a premises where after requesting an owner to remove

or modify an unsafe hazard or interference with the network, the owner fails to do so. Entry may also be granted to a residential building without the consent of an owner or occupier for specific purpose in an emergency under section 34H and where a warrant is executed under section 34Q. These powers also extend to the use of reasonable force to gain entry to residential buildings in circumstances where a warrant is executed under section 34Q.

The Committee notes the Authority and Network Operators' powers to enter and occupy private buildings may encroach on the private property rights of owners and occupiers. Specifically, the Authority and Network Operator to enter may make changes to residential structures or things where the owner or occupier has not acted in accordance with a written notice. This may interfere with an individuals' right to make choices about the use of their property under section 34E.

Whilst the Committee is concerned about the encroaching nature of the entry and occupation powers granted to the Authority and Network Operators, the Committee also recognises that a number of statutory safeguards exist which may mitigate the extent to which these provisions may impact individual property rights. For example, the Authority and Network Operators may only enter and remove or modify a structure in or on a residential building, without consent, where a warrant has been executed under section 34Q. Additionally, in circumstances where a warrant is not executed, the Authority and Network Operators may only enter to perform specific functions under the Bill, and must provide notice of entry.

The Committee further understands the Bill is a response to an increasing need to facilitate communication between emergency services in an emergency. In light of this, as well as the noted statutory safeguards, the Committee makes no further comment.

Strict liability offences

The Regulation creates three strict liability offences for conduct relating to the exercise of functions by authorised officers. Section 43B(a)-(b) states a person must not prevent, hinder or obstruct an authorised officer from exercising a function under the Act. Section 43B(c) creates an offence for the impersonation of an authorised officer. The Bill does not require the mental element, *mens rea*, of these offences to be proven in order for the offences to be made out, so they are therefore considered strict liability offences. The Bill is also silent on whether any specific defences may apply to negate or diminish criminal liability.

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 enabling authorised officers to carry out their functions, particularly in emergency situations, without obstruction or interference. In the circumstances, the Committee makes no further comment.

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

Wide powers of appointment and broad non-exhaustive functions

Section 43A(1) of the Bill provides the Authority and Network Operators the administrative power to appoint authorised officers. While the power is conferred on the Authority and Network Operators, this power may be considered wide and ill-defined due as it is unclear who may be appointed as an authorised officer. For example, the Bill is silent as to whether a public health official or other civilian may be appointed as an authorised officer in an emergency. As

such, the functions of authorised officers under section 43A(2) may also be considered too broad and non-exhaustive in light of the ambiguity of who may be appointed an authorised officer.

However, the Committee understands the provisions may be intentionally wide to increase the scope of who may be appointed an authorised officer. This is particularly important as the powers of an authorised officer are likely to be enlivened in emergency situations where the Authority and Network Operators may seek to maximise the number of people who may provide assistance. In the circumstances, the Committee makes no further comment.

4. RSL NSW AMENDMENT BILL 2022

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

Incorporation of external document not tabled in Parliament

The Bill includes that the term 'sub-Branch' means a sub-Branch of RSL NSW within the meaning of the RSL NSW Constitution, being the document called "the Constitution of the Returned and Services League of Australia (New South Wales Branch)" as in force for the time being.

There does not appear to be a requirement that this document be tabled in Parliament and therefore it is not subject to disallowance. This may mean the document, including the definition of 'sub-Branch', is amended without the opportunity for Parliamentary scrutiny.

The Committee generally prefers that substantive clauses be set out in legislation where they can be subjected to a greater level of parliamentary scrutiny. However, it notes that the document incorporated by the definition of 'sub-Branch', being the RSL NSW Constitution, is defined in the *NSW RSL Act 2018*. Further, that other definitions and clauses in the Act are defined or operate by reference to this document. In the circumstances, the Committee makes no further comment.

5. WATER MANAGEMENT AMENDMENT (FLOODPLAIN HARVESTING LICENCES) BILL 2022*

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

Extinguishes existing compensation rights – retrospective application

Section 87AA(10A) of the Bill extinguishes any rights to compensation for two categories of floodplain harvesting licences: floodplain harvesting (regulated river) access licences; and floodplain harvesting (unregulated river) access licences. If enacted, the provision will disentitle those licence holders from compensation due to water allocation changes in certain circumstances despite those licences existing prior to commencement of the Bill.

As existing licence holders will lose compensatory rights for water allocations, the Bill may have retrospective application, as it affects rights that pre-date the Bill's commencement. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Noting there do not appear to be any safeguards included to mitigate the effect of this provision, the Committee refers this matter to Parliament for consideration.

6. ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (CLIMATE CHANGE RESPONSE) BILL 2022*

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

Lack of clarity of standards and thresholds

The Bill proposes a number of amendments to the Act that impose certain thresholds on developments and action that may be approved or considered under the Act. For example, Schedule 1, section 1.8(2) requires that a person, public authority or other body with functions under the Act must exercise their functions in accordance with the climate change principles. An action is not in accordance with these principles if it would likely fall under one or more of a series of criteria, which includes '(c) a material increase in greenhouse gas emissions' or '(d) an unacceptable climate risk'. An unacceptable climate risk includes a 'foreseeable threat to the lives or safety of individuals' and 'foreseeable and significant threat to biodiversity' arising from the impacts of climate change.

The thresholds that may constitute a 'material increase', a 'significant threat' or a 'foreseeable threat' are not further defined or otherwise described in the Bill or the Act, which may result in development applications and other approved actions being considered in light of standards which are not sufficiently clear. Without further clarification, the Committee considers that the Bill may reduce the possibility of persons, public authorities or other bodies with functions under the Act being able to appropriately or consistently comply with or enforce the thresholds and standards imposed by the Bill. The Committee refers this matter to Parliament for its consideration.

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

Incorporation of external guidelines not tabled in parliament

The Bill obliges the Minister to publish guidelines for the assessment of development applications and standard conditions of consent to remedy aspects of proposed development where they may contradict the climate change response principles.

The Committee understands that guidelines and standard conditions may provide regulators greater flexibility so that guidelines and standard conditions can reflect changing advice and practices surrounding climate change.

However, as the guidelines and standard conditions are not statutory instruments they will not be subject to Parliamentary scrutiny. This may mean the guidelines and standard conditions, including any directions and recommendations, may be implemented and amended without scrutiny.

The Committee generally prefers that substantive instruments, such as guidelines, and terms, such as conditions for the enforcement of development consents, be set out in legislation where they can be subjected to a greater level of parliamentary scrutiny.

Additionally, the Committee generally prefers that guidelines affecting individuals, and in this case which may have a bearing on private property and development applications, be statutorily enshrined so that persons affected by the guidelines and standard conditions are aware of the laws which may apply to them at the time of application. In the circumstances, the Committee refers the matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – delegation to regulations

The Bill enables the creation of regulations on significant matters under multiple provisions. It does so by expanding the scope of matters which may be dealt with by the regulations by increasing the list of matters in section 10.13(1) of the Act and by referring matters to the regulations under sections 2, 5 and 16 of the Bill. Specifically, section 15 of the Bill provides that the regulations may make provision for changing assessment processes, prescribing requirements for development applications consents for high impact developments and prescribing information which must be included in climate impact statements.

The Committee generally prefers that the prescription of administrative requirements affecting development applications be included in primary legislation so that they are subject to an appropriate level of scrutiny. However, the Committee also notes that the Bill's provisions may benefit from the greater flexibility provided by regulations, for example in the changing of development applications for high impact developments. Further, the Committee notes that regulations may be more efficient in dealing with the changing nature of requirements for climate impact statements. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Dingo Cultural Heritage and Protection Bill 2022*

Date introduced	11 May 2022
House introduced	Legislative Council
Member responsible	The Hon. Mark Pearson MLC
	*Private Members Bill

Purpose and description

- 1.1 The objects of this Bill are—
- (a) to recognise and protect the heritage value of dingo populations to Aboriginal persons, and
 - (b) to recognise the importance of dingoes, as apex predators, in maintaining biological diversity.

Background

- 1.2 The *Dingo Cultural Heritage and Protection Bill 2022* (Bill) aims to promote the understanding that dingoes are both culturally significant for Aboriginal people as well as having an important ecological function as an apex predator, and secure further protections for dingoes.
- 1.3 In his Second Reading Speech, the Hon. Mark Pearson MLC stated that 'since the arrival of the First Fleet in 1788, the dingo has been persecuted, poisoned, trapped, hunted, fenced off and cast out'.
- 1.4 Mr Pearson also described the role that dingoes have played for Aboriginal people for thousands of years, stating that there has been a 'symbiotic partnership' and that 'dingoes are animals of exceptional significance to Aboriginal culture, and are featured in stories, rock carvings and cave paintings'.
- 1.5 He provided that fences, such as those built to keep out rabbits as well as dingoes, have significantly altered the movement patterns and survival rates of dingoes. Further, that colonising pastoralists killed dingoes to protect their flocks in significant numbers, eradicating them in many parts of NSW.
- 1.6 However, Mr Pearson noted that dingoes survive in NSW, including in 'Sturt National Park, along the Great Diving Range and in the coastal and rainforest reserves from the mid to far North Coast'.

- 1.7 The dingo is excluded from statutory protections under the *Biodiversity Conservation Act 2016*, which Mr Pearson stated is due to a misunderstanding of the dingo and 'despite the ecological role that dingoes play as a keystone species'. Mr Pearson also referenced studies and trials which demonstrated that dingoes are apex predators that regulate ecological cascades, which has benefits including reducing the number of pests such as foxes and cats.
- 1.8 Mr Pearson also raised evidence that dingoes are a separate group to domesticated dogs, and contended that:
- ...a shift in terminology from wild dog to dingo would better reflect the identity of these wild canids and allow more nuanced debate about the balance between conservation and the non-lethal management of dingoes.
- 1.9 The Bill sets out a mechanism by which dingo management plans (plans) will serve to identify the value of dingoes as well as provide practical recommendations for their protection. The plans will be informed by the Indigenous and Scientific Advisory Panel (Panel), the members of which must have relevant experience or appropriate expertise. The Panel will make recommendations to the Secretary of the Department of Planning and Environment (Secretary) who in turn will provide the draft plan to the Minister for Environment for their consideration. The Minister may choose to approve the plan, which then requires the Secretary to ensure it is carried out.

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 for panel members

- 1.10 The Bill proposes that the Minister must constitute an Indigenous and Scientific Advisory Panel (Panel) under Schedule 1 which must include Aboriginal persons, ecologists with expertise in the area of dingoes, and other persons who in the Minister's opinion have expertise in relevant areas including community involvement in conservation. A senior officer of the National Parks and Wildlife Service must also attend meetings of the Panel (Sch 1, cl 3(5)(a)).
- 1.11 The Panel is to provide advice to the Minister or the Secretary if requested, and assist with the preparation of the draft plans as required under Part 2 of the Bill.
- 1.12 The Minister appoints the members of the Panel, and remuneration is to be determined by the Minister from time to time (Sch 1, cl 7(2)). The provisions of the *Government Sector Employment Act 2013* do not apply to a member of the Panel (Sch 1, cl 11(1)). The Minister may remove a member from office at any time (Sch 1, cl 8(2)).

The Bill provides that the Minister may exercise their discretion in two ways in relation to members of the Indigenous and Scientific Advisory Panel (Panel) that is constituted to advise the Minister and the Secretary in regards to dingoes.

First, under Schedule 1, clause 3(c) the Panel must include members that, in the Minister's opinion, have expertise in one or more of the following areas:

- a) dingo welfare
- b) landholder engagement about non-lethal controls to protect farmed animals from predators
- c) community involvement in conservation.

Second, the Bill provides the Minister with powers to determine the remuneration of Panel members (Schedule 1, section 7(2)), and remove Panel members from office at any time (Schedule 1, section 8(2)).

The provisions do not limit the Minister's discretion in making any of these decisions. The Bill may thereby grant the Minister a wide and ill-defined power.

The Committee acknowledges the Bill provides clear direction that members of the Panel must have specific areas of relevant expertise. Further, the Committee notes that it is not unusual for a Minister to have broad powers to fix remuneration and terms of members of advisory panels that are formed with the explicit purpose of advising the Minister.

However, the Committee notes that this unfettered power may result in members of the Panel having their employment status revoked without notice or due process as may usually be afforded to them in a conventional employment relationship. The Committee also notes that under Schedule 1, clause 6, members only hold office as part-time members which may reduce the impact of employment uncertainty on members of the Panel. In the circumstances, the Committee makes no further comment.

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

Draft plans – unfettered discretion of Secretary and Minister to carry out a dingo management plan

- 1.13 The Bill provides that the Secretary must prepare draft dingo management plans (plans) for the Minister's consideration. These plans have a broad scope, and must, under section 5(2):
- (a) identify the heritage value of dingo populations to Aboriginal persons and set out how that value will be protected
 - (b) identify the value of the role of dingoes in regulating trophic cascades and maintaining biological diversity and set out how dingoes will be protected, and
 - (c) include matters prescribed by the regulations, if any.
- 1.14 A draft plan may not include or recommend measures that involve the lethal control of dingoes (section 5(3)), and must be made available for public consultation (section 6) and consultation with the Panel (section 7) prior to the Minister considering the plan for adoption.

- 1.15 Section 9 of the Bill provides that the Minister may adopt the draft plan proposed by the Secretary, with assistance from the Panel. If the Minister adopts the plan, under section 10 it must be carried out and given effect by the Secretary.
- 1.16 Under section 11, the Minister may, at any time, direct the Secretary to amend the plan or prepare a new draft plan that, if adopted, replaces the previous plan and must be treated in accordance with section 10.

The Bill provides that the Minister may direct the Secretary to carry out the adopted dingo management plan. This power may give the Secretary authorisation to take action which may subvert the legislative power of the Parliament, or override other legislation that may apply to the geographical areas containing dingoes. The Committee notes that the Bill does not provide substantial limits on the scope of the plans or provide the Minister with direction as to when a plan is suitable for adoption and implementation.

The Bill may therefore result in the Minister having power to direct the Secretary to carry out plans which have significant scope and impact. The Committee acknowledges that the Bill is focussed on the protection of dingoes and intends to provide the Minister and Secretary with significant scope to address this issue; however notes that the broad scope of the Bill may result in actions being taken by the Secretary that potentially subvert the oversight role of the Parliament and impact communities. Given the circumstances, the Committee refers the matter to Parliament for consideration.

Delegation by the Secretary

- 1.17 Section 13 of the Bill provides that the Secretary may delegate their functions, other than the power of delegation, to any person employment in the Department or a person, or a class of persons, authorised for the purposes of this section by the regulations.

Section 13 of the Bill provides that the Secretary may delegate their functions, other than the power of delegation, to any person employment in the Department or a person, or a class of persons, authorised for the purposes of this section by the regulations.

The Committee notes that there are no restrictions on the power to delegate, for example, restricting delegation to employees with a certain level of seniority or expertise. The Committee also notes that the Bill provides the Secretary (and therefore their delegate) with the power to implement plans approved by the Minister which may be broad in scope and provide the Secretary with significant powers.

The Committee generally prefers provisions about the persons and class of persons to whom such functions can be delegated to be drafted with specificity. In addition, that they be included in the primary legislation and not delegated to the regulations, to ensure an appropriate level of parliamentary oversight. In the circumstances, the Committee refers the matter to Parliament for consideration.

Significant matters may be included in subordinate legislation

- 1.18 Section 12 of the Bill provides that regulations may be made in respect to any matter required or permitted by the Bill, or that are necessary or convenient for the carrying out or giving effect to the Bill.
- 1.19 Under section 5(2)(f) of the Bill, the draft dingo management plans must consider matters as specified in regulations.
- 1.20 Additionally, under Schedule 1, regulations may also impose further requirements on Panel members and their operating procedures, including the filling of Panel vacancies, the general procedure of Panel meetings and the transactions of Panel business outside of meetings.

The Bill provides that regulations may be made in relation to the content of the draft dingo management plans, as well as the terms of office of Panel members, the filling of Panel vacancies, the general procedure of Panel meetings and the transactions of Panel business outside of meetings. Particularly in relation to what is included in draft plans (which the Minister can approve and require the implementation of), the Bill thereby may allow for significant matters to be dealt with in subordinate legislation. The Committee generally prefers for such matters to be dealt with in primary legislation to ensure an appropriate level of parliamentary oversight.

The Committee acknowledges that the content included in the draft plans is still subject to public and expert consultation, as well as Ministerial approval, and therefore may not be adopted and implemented without a public process being completed. The Committee further notes that it may be more convenient for administrative matters, in this case Panel membership and procedure, to be contained in the regulations. In the circumstances, the Committee makes no further comment.

2. Firearms Legislation Amendment Bill 2022

Date introduced	11 May 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

- 2.1 The object of this Bill is to—
- (a) amend the *Firearms Act 1996* to clarify certain requirements in relation to Category D firearms licences, and
 - (b) amend the *Firearms Regulation 2017* to make consequential amendments and update references to government agencies.

Background

- 2.2 The *Firearms Legislation Amendment Bill 2022* (Bill) seeks to amend the *Firearms Act 1996* (Act) and the *Firearms Regulation 2017* (Regulation) to clarify which firearms can be possessed and used by holders of a category D licence. The Bill also makes amendments in regards to the length of time for which category D licences can be issued.
- 2.3 The Bill will only affect holders of a category D licence. Under section 15 of the Act, a category D licence can only lawfully be issued to an individual who is involved in vertebrate animal pest control. This may include professional contract shooters, a shooter employed by or authorised by a government agency, a primary producer involved in an authorised eradication campaign, or someone who demonstrates special need. Collectors may also possess category D firearms, however they must be rendered permanently inoperable as required under the Act, section 20(a).
- 2.4 Under section 8 of the Act, Category D licence holders may use and possess the following firearms for authorised purposes:
- (a) any firearms to which a category C licence applies
 - (b) self-loading centre-fire rifles
 - (c) self-loading rimfire rifles with a magazine capacity of more than 10 rounds
 - (d) self-loading shotguns with a magazine capacity of more than 5 rounds
 - (e) pump action shotguns with a magazine capacity of more than 5 rounds

(f) lever action shotguns with a magazine capacity of more than 5 rounds.

2.5 Section 8 further specifies that the Act (including item 5 of Schedule 1) and regulations may also exclude firearms that would otherwise be permitted in category D from being permitted.

2.6 In 2020, in the matter of *Bankowski v Commissioner of Police* [2020] NSWCATAD 175,¹ the NSW Civil and Administrative Tribunal (NCAT) found that the Six Corp MOD KS-30 was a prohibited firearm under item 5, Schedule 1 of the Act, which prohibits any 'self-loading centre-fire rifle of a kind that is adapted or designed for military purposes' from being permitted in category D despite being a self-loading centre-fire rifle which is otherwise permitted.

2.7 At the time the NCAT decision was made, approximately 175 category D licence holders were in possession of one of these firearms and therefore were inadvertently in breach of the Act. The government amended the Regulation to temporarily authorise these licence holders to continue to possess their firearms. The Minister for Police, the Hon. Mr Paul Toole MP, stated in his Second Reading Speech that:

...the primary purpose of this bill is to deliver a permanent solution to this issue affecting category D licence holders to ensure that they can access the firearms they need for their important jobs.

2.8 The Bill proposes to amend the Act by removing the phrase 'of a kind' from the prohibition from inclusion in category D listed in item 5, Schedule 1. Therefore, self-loading centre-fire rifles such as the Six Corp MOD KS-30 will no longer be prohibited as they are only very similar to (therefore 'of a kind' of) weapons designed for military purposes, they are not actually 'adapted or designed for military purposes'.

2.9 By amending which firearms are prohibited under the Act, the Bill will functionally increase the types of weapons available under category (b), being self-loading centre-fire rifles. The Bill makes a similar amendment for self-loading shotguns that will have the same effect.

2.10 The Minister in his Second Reading Speech stated that:

...category D licence holders face stringent requirements under the Firearms Act 1996 to ensure public safety and these requirements will continue under these amendments. Category D licences will remain the most restricted firearms licences and will only be issued to fit and proposer persons after extensive probity checking by the NSW Police Force.

2.11 The Bill also provides that if a category D licence holder legally acquires a self-loading centre-fire rifle or shotgun, and then firearms of those types are subsequently adapted for military purposes, those firearms will not be a prohibited item while it remains in that licence holders possession. This will allow category D licence holders to retain these firearms, however they will not be able to transfer the ownership of these firearms to another person (including another holder of a category D licence).

¹ A copy of this decision can be accessed at [here](#), current at 11 May 2022.

2.12 The Bill also amends clause 8 of the Regulation to provide that a category D licence issued for the genuine reason of vertebrate pest control can be issued for a period of 12 months, 2 years or 5 years. The Minister stated that the current maximum licence term of 12 months is an:

...unnecessary regulatory burden on both the licence holder and the regulator, and does not provide any public safety benefits... the amendment will address this to align with other firearms licence classes, including other category D licences, that can be issued for period of two or five years.

2.13 Lastly, the Bill includes the Department of Planning and Environment and the Department of Regional NSW in clause 35 of the Regulation which provides a list of government agencies prescribed for the genuine reason of vertebrate pest control.

Issues considered by the Committee

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

3. Government Telecommunications Amendment Bill 2022

Date introduced	11 May 2022
House introduced	Legislative Council
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Development

Purpose and description

- 3.1 The object of the *Government Telecommunications Amendment Bill 2022* (Bill) is to amend the *Government Telecommunications Act 2018* (Act) to provide for the functions of the New South Wales Government Telecommunications Authority and emergency telecommunications network operators in relation to telecommunications infrastructure.

Background

- 3.2 The Bill was introduced to facilitate the rollout of the Critical Communications Enhancement Program (CCEP), which is a program facilitated by the NSW Telecommunications Authority (the Authority). The CCEP aims to streamline communication services through a single network for emergency services to communicate with each other in their coordination of responses to critical incidents and disasters.²
- 3.3 The Bill supports the rollout of the CCEP by making a number of amendments to the powers of authorised officers and emergency telecommunications network operators (Network Operators) under the Act. Specifically, the Bill increases the powers of entry and occupation of land by authorised officers and Network Operators and prescribes the circumstances in which those powers may be exercised. The powers include a power, when approved by the Authority, to use reasonable force for the purposes of gaining entry to a building to carry out the Authority's or a Network Operator's functions.
- 3.4 Section 43A expands the definition of an 'authorised officer' under the Act to include those persons authorised by the NSW Telecommunications Authority as well as Network Operators appointed by emergency services organisations.
- 3.5 In His Second Reading Speech, the Hon. Victor Dominello MP, Minister for Customer Services and Digital Government, stated:

These authorised officers will be permitted to exercise a range of specific powers prescribed in this Act, including new powers to respond to interference issues and new powers of entry... include provisions to manage interference by trees and

² NSW Government, [Critical Communications Enhancement Program](#), viewed 11 May 2022.

vegetation, structures and excavation work to Public Safety Network infrastructure or transmissions. These powers are derivative of similar provisions in the *Electricity Supply Act 1995* and are necessary to apply to the infrastructure of the Public Safety Network to ensure that it continues to function at optimal capacity without interference.

- 3.6 Deemed access provisions are introduced under the Bill to provide the Authority and Network Operators entry and access rights under certain circumstances, to land:
- on which infrastructure owned or operated by a government sector agency or State owned corporation is located (or adjoined land), and
 - that is not subject to an agreement with the Authority or Network Operator for access to the infrastructure.
- 3.7 The Minister stated that the deemed access provisions supported one of the core objectives of infrastructure rationalisation under the CCEP.
- 3.8 Section 34E of the Bill allows authorised officers and Network Operators to serve written notices on persons who are owners of structures for the removal of those structures where they may reasonably interfere with the Authority's infrastructure needs. Provisions are made to limit the exercise of these powers in certain protected areas and indigenous protected areas, as defined under section 34D of the Bill.
- 3.9 The Bill also provides that in certain circumstances, the person whose building or structures are entered, occupied or removed by the Authority or a Network Operator, may bear the cost of the Authority's or Network Operator's removal of that interference.
- 3.10 The expansion of the Authority's and Network Operator's powers has resulted in the introduction of penalty provisions which may be used against persons who prevent an Authority or operator's exercise of those powers. In his Second Reading Speech, the Minister stated that penalty provisions ensure that the access powers established under the Bill are effective in overcoming barriers to the rollout of the network.
- 3.11 Lastly, the Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) by including the Bill in the list of statutes to which Division 4 of LEPRA applies. LEPRA is relevant to section 34Q of the Bill, which allows the Authority or a Network Operator to apply for a warrant if they reasonably believe that it is necessary to enter and inspect a premises.

Issues considered by the Committee

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

Private property rights – entry, occupation and work on private lands

- 3.12 Section 34A(1)(b) of the Bill provides the Authority or a Network Operator has deemed entry and occupation rights to infrastructure owned or operated by a government sector agency or adjoining land. The scope of these powers is limited by them only being exercisable in daylight hours or in an emergency, for the limited

purpose of installing telecommunications equipment and in accordance with the site assessment process under the Property and Infrastructure Management Strategy.

- 3.13 In order for deemed access to be granted, the Authority or a Network Operator must provide the occupier of the land with reasonable written notice unless that notice would reasonably cause undue delay. Entry is prohibited on a building used for residential purposes without the consent of the occupier under section 34A(5) of the Bill, unless a warrant is executed under section 34Q of the Bill.
- 3.14 Section 34E(1) requires the Authority or a Network Operator to provide written notice to an owner to modify or remove a structure or thing, where they reasonably believe the structure or thing could be unsafe or interfere with the network. If an owner fails to carry to the work then the Authority or a Network Operator may carry out the work. Costs may also be sought from the owner by the Authority or a Network Operator for that work. Identical provisions apply under section 34G to excavation work. Section 34E(4) of the Bill allows the Authority or a Network Operator, in an emergency, to remove that structure or thing if it is unsafe or interferes with the telecommunications network.
- 3.15 The Bill grants the Authority or an emergency telecommunications network operator the power to enter premises for specific investigative and repair functions without the consent of the owner or occupier in an emergency under section 34H.
- 3.16 Section 34I requires the Authority or a Network Operator to provide notice of entry to a premises but that requirement may be waived where the owner or occupier consents to the entry or the entry is required in an emergency. Entry to a residential premises may only be gained without consent, and not in an emergency, where a warrant is executed under section 34Q of the Bill.
- 3.17 Reasonable force may also be used to gain entry to a residential premises under section 34K, in circumstances where entry is approved by the Authority or Network Operator and where a warrant is executed.
- 3.18 Care must be taken in the exercise of the Authority's and Network Operator's powers upon entry and execution of warrants and carrying out statutory activities under section 34M of the Bill.

The Bill grants the Authority or a Network Operator with powers to enter and occupy public and private premises for various purposes. For example, section 34E(4) allows the Authority or a Network Operator to carry out work on a premises where after requesting an owner to remove or modify an unsafe hazard or interference with the network, the owner fails to do so. Entry may also be granted to a residential building without the consent of an owner or occupier for specific purpose in an emergency under section 34H and where a warrant is executed under section 34Q. These powers also extend to the use of reasonable force to gain entry to residential buildings in circumstances where a warrant is executed under section 34Q.

The Committee notes the Authority and Network Operators' powers to enter and occupy private buildings may encroach on the private property rights of owners

and occupiers. Specifically, the Authority and Network Operator to enter may make changes to residential structures or things where the owner or occupier has not acted in accordance with a written notice. This may interfere with an individuals' right to make choices about the use of their property under section 34E.

Whilst the Committee is concerned about the encroaching nature of the entry and occupation powers granted to the Authority and Network Operators, the Committee also recognises that a number of statutory safeguards exist which may mitigate the extent to which these provisions may impact individual property rights. For example, the Authority and Network Operators may only enter and remove or modify a structure in or on a residential building, without consent, where a warrant has been executed under section 34Q. Additionally, in circumstances where a warrant is not executed, the Authority and Network Operators may only enter to perform specific functions under the Bill, and must provide notice of entry.

The Committee further understands the Bill is a response to an increasing need to facilitate communication between emergency services in an emergency. In light of this, as well as the noted statutory safeguards, the Committee makes no further comment.

Strict liability offences

3.19 The Bill creates two offences under section 43B for the obstruction and impersonation of an authorised officer. Section 43B(a)-(b) state a person must not prevent, hinder or obstruct an authorised officer from exercising a function under the Act. Section 43B(c) creates an offence for the impersonation of an authorised officer. The maximum penalties for offences under this section are 200 penalty units (\$22 000) for a corporation and 50 penalty units(\$5 500) for an individual.

The Regulation creates three strict liability offences for conduct relating to the exercise of functions by authorised officers. Section 43B(a)-(b) states a person must not prevent, hinder or obstruct an authorised officer from exercising a function under the Act. Section 43B(c) creates an offence for the impersonation of an authorised officer. The Bill does not require the mental element, mens rea, of these offences to be proven in order for the offences to be made out, so they are therefore considered strict liability offences. The Bill is also silent on whether any specific defences may apply to negate or diminish criminal liability.

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 enabling authorised officers to carry out their functions, particularly in emergency situations, without obstruction or interference. In the circumstances, the Committee makes no further comment.

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

Wide powers of appointment and broad non-exhaustive functions

- 3.20 Section 43A(1) of the Bill prescribes that authorised officers may be appointed by the Authority and Network Operators.
- 3.21 Schedule 1 states that a Network Operator means an emergency services organisation within the meaning of the *State Emergency and Rescue Management Act 1989* such as the Ambulance Service of NSW and the State Emergency Service. an authorised officer means an authorised officer appointed under section 43A. A Network Operator is distinguishable by its establishment or use of an alternative telecommunications network for operational communications.
- 3.22 Additionally, section 43A(2) of the Bill contains a list of functions which may be carried out by an authorised officer. Those functions under section 43A(2) include:
- (a) carrying out inspections in connection with the proposed installation or extension of telecommunications equipment and infrastructure
 - (b) installation, extension, inspection, maintenance, repair and disconnection of telecommunications equipment and infrastructure
 - (c) investigation of compliance with the requirements imposed by or under the Act.

Section 43A(1) of the Bill provides the Authority and Network Operators the administrative power to appoint authorised officers. While the power is conferred on the Authority and Network Operators, this power may be considered wide and ill-defined due as it is unclear who may be appointed as an authorised officer. For example, the Bill is silent as to whether a public health official or other civilian may be appointed as an authorised officer in an emergency. As such, the functions of authorised officers under section 43A(2) may also be considered too broad and non-exhaustive in light of the ambiguity of who may be appointed an authorised officer.

However, the Committee understands the provisions may be intentionally wide to increase the scope of who may be appointed an authorised officer. This is particularly important as the powers of an authorised officer are likely to be enlivened in emergency situations where the Authority and Network Operators may seek to maximise the number of people who may provide assistance. In the circumstances, the Committee makes no further comment.

4. RSL NSW Amendment Bill 2022

Date introduced	10 May 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. David Elliot MP
Portfolio	Veterans

Purpose and description

- 4.1 The object of the Bill is to amend the *RSL NSW Act 2018* to provide that duty is not payable under the *Duties Act 1997* in relation to an act, matter or thing to give effect to the incorporation, under the *Corporations Act 2001* of the Commonwealth, of a sub-Branch of RSL NSW as a company limited by guarantee.

Background

- 4.2 The *RSL NSW Amendment Bill 2022* (Bill) inserts a new section 15A into the *RSL NSW Act 2018* which applies if, with the approval of RSL NSW, a sub-Branch incorporates under the *Corporations Act 2001* as a company limited by guarantee. If this occurs, duty is not chargeable under the *Duties Act 1997* in relation to an act, matter or thing to give effect to the incorporation, including in relation to the transfer of assets, rights or liabilities from the unincorporated sub-Branch to the incorporated sub-Branch.
- 4.3 In his Second Reading Speech, the Hon. David Elliot MP, Minister for Veterans explained that following reforms to improve its governance and accountability, NSW RSL is seeking to encourage its approximately 340 sub-Branches to incorporate.
- 4.4 The Minister provided that trustees of each sub-Branch currently hold their sub-Branch's assets, including real property, on trust. He stated:

Absent any concession, exemption or amendment to the *Duties Act 1997*, real estate owned by the sub-branch will constitute dutiable property under that Act. The conveyance of that real property by or on behalf of each sub-branch to the incorporated replacement sub-branch will constitute a dutiable transaction and attract duty, which will be payable by the incorporated sub-branch. For all intents and purposes, the practical effect of each conveyance will not alter the ultimate beneficial ownership of the real property, as all property of a sub-branch must be applied to further the RSL's charitable purpose as defined in the constitution of RSL NSW and none of the assets may be distributed or transferred, directly or indirectly, to any of its members.

However, any duty payable as part of that restructuring exercise will significantly deplete the cash reserves of RSL NSW, which in turn will affect its charitable operations and other related activities and operations... As sub-branches are seeking to become companies limited by guarantee, their land is not being sold. In some cases, they may not have the funding available to pay the duty. There is no change in ownership upon transfer.

- 4.5 The Minister said that the Bill will help sub-Branches to incorporate, modernise their governance structure and ensure property is held by the incorporated entity rather than being tied to individual members.

Issues considered by the Committee

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

Incorporation of external document not tabled in Parliament

- 4.6 Section 15A(3) at Schedule 1 of the Bill includes the definition of 'sub-Branch', meaning 'a sub-Branch of RSL NSW within the meaning of the RSL NSW Constitution'.
- 4.7 The *NSW RSL Act 2018* defines the 'RSL NSW Constitution' as 'the document called "the Constitution of the Returned and Services League of Australia (New South Wales Branch)" as in force for the time being'.

The Bill includes that the term 'sub-Branch' means a sub-Branch of RSL NSW within the meaning of the RSL NSW Constitution, being the document called "the Constitution of the Returned and Services League of Australia (New South Wales Branch)" as in force for the time being.

There does not appear to be a requirement that this document be tabled in Parliament and therefore it is not subject to disallowance. This may mean the document, including the definition of 'sub-Branch', is amended without the opportunity for Parliamentary scrutiny.

The Committee generally prefers that substantive clauses be set out in legislation where they can be subjected to a greater level of parliamentary scrutiny. However, it notes that the document incorporated by the definition of 'sub-Branch', being the RSL NSW Constitution, is defined in the *NSW RSL Act 2018*. Further, that other definitions and clauses in the Act are defined or operate by reference to this document. In the circumstances, the Committee makes no further comment.

5. Water Management Amendment (Floodplain Harvesting Licences) Bill 2022*

Date introduced	11 May 2022
House introduced	Legislative Council
Member responsible	Mr Justin Field MLC
	*Private Members Bill

Purpose and description

- 5.1 The object of the *Water Management Amendment (Floodplain Harvesting Licences) Bill 2022* (the Bill) is to amend the *Water Management Act 2000*, section 87AA—
- (a) to remove the entitlement of floodplain harvesting access licence holders to compensation for certain water allocation reductions, and
 - (b) to limit circumstances in which the regulations may prescribe floodplain harvesting access licences as licences to which an entitlement applies, and
 - (c) to extinguish any existing entitlements.

Background

- 5.2 The *Water Management Act 2000* (Act) regulates floodplain harvesting, which is the capture and use of water flowing across a prescribed floodplain,³ under section 57A. 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.
- 5.3 The Bill amends the Act to exclude access licence holders for floodplain harvesting from entitlement to compensation for reductions in water allocations by removing sections 87AA(1)(f1) and (f2) from the Act. Those provisions entitle floodplain harvesting (regulated river) access licences and floodplain harvesting (unregulated river) access licences to compensation in certain circumstances under the current Act.
- 5.4 The Bill further amends the Act by prescribing administrative obligations on the Minister in their exercise of Regulation making powers under the Act. This amendment is made by inserting section 87AA(1)(1A) which states the Minister may not make a regulation under section 87AA to allow compensation to be payable in

³ NSW Government, [Floodplain harvesting licencing](#), viewed 11 May 2022.

certain circumstances for reductions in water allocations unless specific criteria are satisfied. That criteria includes where the Minister:

- (a) is satisfied that the floodplain harvesting carried out under the prescribed categories of access licence is consistent with the water management principles
- (b) has published in the Gazette, in relation to each area in which floodplain harvesting is carried out under the prescribed categories of access licence, an explanation of how the floodplain harvesting is consistent with the water management principles
- (c) has obtained the concurrence of the Minister administering the *Biodiversity Conservation Act 2016* to the proposed regulation.

5.5 Proposed section 87AA(1A) of the Bill also creates an obligation on the Minister administering the *Biodiversity Conservation Act 2016* to not grant concurrence unless they have received and published advice in relation to the matters which must be satisfied by the relevant Minister in their regulation-making power.

5.6 Finally, the Bill extinguishes any rights to compensation for licences existing before the Bill comes into effect by inserting section 87AA(10A). The Bill commences on the date of assent.

Issues considered by the Committee

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

Extinguishes existing compensation rights – retrospective application

5.7 Section 87AA(10A) of the Bill extinguishes any rights to compensation for specific licences that exist before the Bill commences. The Bill states that any entitlement to compensation for changes to water levels in relation to floodplain harvesting (regulated river) access licences and floodplain harvesting (unregulated river) access licences that previously arose under section 87AA will be extinguished.

Section 87AA(10A) of the Bill extinguishes any rights to compensation for two categories of floodplain harvesting licences: floodplain harvesting (regulated river) access licences; and floodplain harvesting (unregulated river) access licences. If enacted, the provision will disentitle those licence holders from compensation due to water allocation changes in certain circumstances despite those licences existing prior to commencement of the Bill.

As existing licence holders will lose compensatory rights for water allocations, the Bill may have retrospective application, as it affects rights that pre-date the Bill's commencement. The Committee generally comments on provisions drafted to have retrospective effect, particularly where they retrospectively remove rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Noting there do not appear to be any safeguards included to mitigate the effect of this provision, the Committee refers this matter to Parliament for consideration.

6. Environmental Planning and Assessment Amendment (Climate Change Response) Bill 2022*

Date introduced	12 May 2022
House introduced	Legislative Assembly
Member responsible	Mr Jamie Parker MP
	*Private Members Bill

Purpose and description

- 6.1 The object of the *Environmental Planning and Assessment Amendment (Climate Change Response) Bill 2022* (Bill) is to amend the *Environmental Planning and Assessment Act 1979* (Act) to require the exercise of functions under the Act to be consistent with the object of mitigating and adapting to climate change; and for related purposes.

Background

- 6.2 The Bill addresses climate change through a number of amendments to the Act. The Bill makes clear that one of the purposes of the Act will be to address climate change by recognising;

- that climate change is caused by humans
- that it poses serious risks to life and the economy, and
- failure to take action on climate change will contribute to similar risks nationally and globally.

- 6.3 The Bill establishes climate change response principles with reference to relevant recommendations made by the United Nations, including by defining various climate change concepts. The climate change response principles are that climate change can and should be mitigated, through a number of strategies such as reducing greenhouse gas emissions associated with development, and other means.

- 6.4 Further, the Bill stipulates that any exercise of functions under the Act must be consistent with the climate change response principles. Under section 5 of the Bill, the Minister will be required to publish planning proposal assessment guidelines and standard conditions of consent, which are defined under the Bill.

- 6.5 In his second reading speech, Mr Parker stated:

The bill better integrates climate change considerations into planning decisions; strengthens strategic land-use planning, rather than developers' rent-seeking planning; requires climate impact statements for major projects; and provides

guidance for decision-makers on how to assess whether a project will have unacceptable climate impacts.

- 6.6 A statutory Independent Planning and Climate Change Advisory Group (Group) is created under section 5 of the Bill, with the purpose of publishing relevant guidelines to guide the Minister in the exercise of statutory functions. The Group is also established to provide the Minister with advice on Ministerial directions and climate change guidelines and other functions prescribed by the Regulations.
- 6.7 Section 7 of the Bill allows a consent authority to modify a consent in order to enforce standard climate change conditions, whether or not the applicant or other person is entitled to act on the consent. Standard climate change conditions are defined under section 1.9 the Bill, which also provides these conditions must be published and reviewed by the Minister.
- 6.8 Section 10 of the Bill confers a climate advocate with appeal rights. A climate advocate is a person who may appeal to the Court against the determination of a consent authority when the basis of their original submission was that the development was inconsistent with the Bill's climate change response principles.
- 6.9 Section 16 of the Bill creates additional obligations for the Minister. Specifically, the Minister is required to review the *Environmental Planning and Assessment Regulation 2021* and *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004* for consistency with the climate change response principles.
- 6.10 In his Second Reading Speech, Mr Parker said the Bill enacts recommendations of the experts at the Environmental Defenders Office.

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

Lack of clarity of standards and thresholds

- 6.11 The Bill proposes a number of amendments to the Act that require a consent authority to consider whether certain thresholds are met in regards to a proposed development. These thresholds being met may have an impact on whether consent is granted for a development, or alter what conditions are imposed on a development. The Bill or Act do not appear to provide clear standards that can be used by the consent authority to determine whether these thresholds have been met.
- 6.12 For example, Schedule 1, section 1.8(2) provides that each person, public authority or other body with functions under the Act must exercise their functions in accordance with the climate change principles. An action is not in accordance with these principles if it would likely be one or more of a series of criteria, which includes '(c) a material increase in greenhouse gas emissions' or '(d) an unacceptable climate risk'.
- 6.13 An unacceptable climate risk is defined in Schedule 1, section 1.8(4) as the following risks arising from the impacts of climate change:

- (a) a foreseeable threat to the lives or safety of individuals
- (b) a foreseeable and significant threat to biodiversity
- (c) a threat that cannot be adequately managed by emergency management, the building of infrastructure, or other adaptation measures.

6.14 The thresholds of a 'material increase' in greenhouse gas emissions (in Schedule 1, section 1.8(2)), a 'significant threat' (in Schedule 1, section 1.8(4)) or a 'foreseeable threat' to the threat to lives or safety of individuals or to biodiversity (in Schedule 1, section 1.8(4)) are not defined or described in the Bill.

The Bill proposes a number of amendments to the Act that impose certain thresholds on developments and action that may be approved or considered under the Act. For example, Schedule 1, section 1.8(2) requires that a person, public authority or other body with functions under the Act must exercise their functions in accordance with the climate change principles. An action is not in accordance with these principles if it would likely fall under one or more of a series of criteria, which includes '(c) a material increase in greenhouse gas emissions' or '(d) an unacceptable climate risk'. An unacceptable climate risk includes a 'foreseeable threat to the lives or safety of individuals' and 'foreseeable and significant threat to biodiversity' arising from the impacts of climate change.

The thresholds that may constitute a 'material increase', a 'significant threat' or a 'foreseeable threat' are not further defined or otherwise described in the Bill or the Act, which may result in development applications and other approved actions being considered in light of standards which are not sufficiently clear. Without further clarification, the Committee considers that the Bill may reduce the possibility of persons, public authorities or other bodies with functions under the Act being able to appropriately or consistently comply with or enforce the thresholds and standards imposed by the Bill. The Committee refers this matter to Parliament for its consideration.

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

Incorporation of external guidelines not tabled in parliament

- 6.15 Section 5 of the Bill obliges the Minister to publish guidelines for the assessment of development applications. The Minister must also publish standard conditions of consent to remedy aspects of proposed development that would be inconsistent with the Bill's climate change response principles (standard conditions).
- 6.16 As noted, the Bill prescribes the climate change response principles in section 3. These principles includes that climate change can and should be mitigated through a number of strategies such as reducing greenhouse gas emissions associated with development, as well as meeting relevant State and Commonwealth emissions reduction targets, and rapidly phasing out fossil fuel production and use in accordance with relevant recommendations of the United Nations.

The Bill obliges the Minister to publish guidelines for the assessment of development applications and standard conditions of consent to remedy aspects of proposed development where they may contradict the climate change response principles.

The Committee understands that guidelines and standard conditions may provide regulators greater flexibility so that guidelines and standard conditions can reflect changing advice and practices surrounding climate change.

However, as the guidelines and standard conditions are not statutory instruments they will not be subject to Parliamentary scrutiny. This may mean the guidelines and standard conditions, including any directions and recommendations, may be implemented and amended without scrutiny.

The Committee generally prefers that substantive instruments, such as guidelines, and terms, such as conditions for the enforcement of development consents, be set out in legislation where they can be subjected to a greater level of parliamentary scrutiny.

Additionally, the Committee generally prefers that guidelines affecting individuals, and in this case which may have a bearing on private property and development applications, be statutorily enshrined so that persons affected by the guidelines and standard conditions are aware of the laws which may apply to them at the time of application. In the circumstances, the Committee refers the matter to Parliament for consideration.

Significant matters not subject to parliamentary scrutiny – delegation to regulations

- 6.17 The Bill enables the creation of further regulations on significant matters under numerous provisions. It does so by expanding the scope of matters which may be dealt with by the regulations by increasing the list of matters in section 10.13(1) of the Act and by referring matters to the regulations.
- 6.18 For example, under section 15 of the Bill the regulations may make provision for changing assessment processes, prescribing requirements for development applications consents for high impact developments and prescribing information which must be included in climate impact statements.
- 6.19 Sections 2, 5, 16 of the Bill also provides that the regulations may be used for purposes such as the making of recommendations of the Independent Planning and Climate Change Advisory, the definition of greenhouse gas emissions and determining the climate change response principles.

The Bill enables the creation of regulations on significant matters under multiple provisions. It does so by expanding the scope of matters which may be dealt with by the regulations by increasing the list of matters in section 10.13(1) of the Act and by referring matters to the regulations under sections 2, 5 and 16 of the Bill. Specifically, section 15 of the Bill provides that the regulations may make provision for changing assessment processes, prescribing requirements for development applications consents for high impact developments and prescribing information which must be included in climate impact statements.

The Committee generally prefers that the prescription of administrative requirements affecting development applications be included in primary legislation so that they are subject to an appropriate level of scrutiny. However, the Committee also notes that the Bill's provisions may benefit from the greater flexibility provided by regulations, for example in the changing of development applications for high impact developments. Further, the Committee notes that regulations may be more efficient in dealing with the changing nature of requirements for climate impact statements. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (i) trespasses unduly on personal rights and liberties, or
 - (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
 - (iv) inappropriately delegates legislative powers, or
 - (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to regulations

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the [Subordinate Legislation Act 1989](#), or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.
- (2) Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – Regulations without papers

Note: at the time of writing, the Committee makes no further comment about the following regulations.

1. [Water Management \(General\) Amendment \(Lake Albert Filling\) Regulation 2022](#)

The object of this Regulation is to provide for the issuing of a specific purpose access licence to Wagga Wagga City Council allowing access to water for the purpose of filling Lake Albert.

2. [Water Management \(General\) Amendment \(Specific Purpose Access Licences\) Regulation 2022](#)

The object of this Regulation is to amend the *Water Management (General) Regulation 2018* to create 3 subcategories of certain access licences, namely—

- (a) McPhillamys Belubula River gold mine and Newcastle Racecourse, as subcategories of the unregulated river access licence, and
- (b) Temporary dewatering for construction, as a subcategory of the aquifer access licence.

The Regulation prescribes very specific categories of licences for accessing water in respect to defined commercial operations, as regulated under the *Water Management Act 2000*.