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”.

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Membership

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Members	The Hon. Scott Barrett MLC Ms Abigail Boyd MLC Mr David Mehan MP, Member for the Entrance The Hon. Shaoquett Moselmane MLC Mr Peter Sidgreaves MP 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. BUILDING AND OTHER FAIR TRADING LEGISLATION AMENDMENT BILL 2022

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

Increases to maximum penalties for various offences, including strict liability offences

The Bill increases maximum penalties for various offences throughout the *Explosives Act 2003.* For example, it increases the maximum penalty applying to an individual for 4 offences, including 3 strict liability offences, regarding explosives, from 250 penalty units ($27 500) to 350 units ($38 500). For 2 of these offences, an individual can also be imprisoned for 12 months. The maximum penalty units that an offence created by the regulations can prescribe is increased from 250 to 350 penalty units. The penalty for obstructing or intimidating inspectors is also increased from 225 penalty units ($24 750) to 315 units ($34 650).

The Committee notes the number of offences subject to increased penalties, including offences created by the regulations, and the increase to the maximum penalties. It also notes that a number of these amendments increase the maximum penalty for strict liability offences under the Act.

However, it acknowledges the Minister's comments that these amendments responded to recommendations in the 2019 statutory review of the Act and that the offences aim to deter unsafe behaviour and protect workers and the community. In the circumstances, the Committee makes no further comment.

Extraterritorial application

The Bill allows inspectors under the *Explosives Act 2013* to serve a notice under section 155 of the *Work Health and Safety Act 2011* (*WHS* Act) on a person to provide information, produce documents or give evidence despite being outside of State, or the matter occurs or is located outside of the State, where the matter relates to the Act's administration. This extends the legislative jurisdiction of the Act beyond the State of NSW.

The Committee generally comments where legislation may have extraterritorial effect as it can create uncertainty about what laws individuals are subject to at any one time, especially if they live in another state or territory. However, it recognises this amendment intends to ensure safety and compliance by allowing inspectors to gather information outside of the State as part of an investigation or monitor enforcement and compliance with the *Explosives Act 2013*. Further, that the Minister noted it was recommended by the 2019 statutory review of the Act. In the circumstances, the Committee makes no further comment.

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

Significant matters referred to regulations

The Bill expands the regulation-making powers under section 36 of the *Explosives Act 2013*, including to provide that regulations can be made for or with respect to the functions and powers of inspectors, including giving directions to persons and requiring persons to provide information or documents.

The Committee notes that regulations are subject to disallowance and therefore parliamentary scrutiny. However, it generally prefers that significant matters, such as the investigatory powers

of inspectors, are contained in the principal Act to provide an appropriate level of parliamentary oversight. In particular, because such powers of investigation may (depending on their content) impact on individual rights and include penalties for non-compliance. In the circumstances, the Committee refers this issue to the Parliament for its consideration.

2. CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) AMENDMENT (FAMILY IS CULTURE) BILL 2022

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

Equal treatment of children and young persons

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to provide for additional requirements for the Secretary and Children's Courts in care proceedings involving Aboriginal and/or Torres Strait Islander children and young people. This permits the operation of the Bill's provisions to differentiate the treatment of Aboriginal and/or Torres Strait Islander and non-Aboriginal and/or Torres Strait Islander children and young people within the child protection system in New South Wales.

However, the Committee notes that the provisions seek to address recommendations of the Family is Culture Report to limit the particular harm of removal caused to Aboriginal and/or Torres Strait Islander children and young people, enhance their right to self-determination and reduce their overrepresentation in out-of-home care. In these circumstances, the Committee considers this may fit within the exceptions for special measures to meet particular needs of a specific group under state and federal laws, and does not constitute discrimination on the basis of race. The Committee therefore makes no further comment.

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

Matters deferred to the regulations

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to provide a regulation-making power in respect to processes for identifying a child or young person as an Aboriginal and/or Torres Strait Islander person for the purposes of administering the Act. The Act, as amended by the Bill, also provides for additional principles, considerations and requirements for Aboriginal and/or Torres Strait Islander children and young people in care.

The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where they impact the rights or obligations of a child or young person in care may be affected.

However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. It also acknowledges that the deferral to regulations is intended to allow for greater flexibility and consultation and co-design from Aboriginal and/or Torres Strait Islander peoples, regarding how the child protection system recognises the Aboriginal and/or Torres Strait Islander identity of a child or young person. In these 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 to the framework of child protection laws for children in care. In the circumstances, the Committee makes no further comment.

3. CONFISCATION OF PROCEEDS OF CRIME LEGISLATION AMENDMENT BILL

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

Procedural fairness/property rights – administrative forfeiture

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to establish schemes for administrative forfeiture of property which is connected to serious criminal offences. Specifically, it allows property which was the subject of a restraining order or freezing notice to be automatically forfeited after the person is convicted of the relevant serious offence, rather than having to seek a court order for forfeiture of that property. It also allows the NSW Crime Commission to administratively forfeit property seized by investigative agencies, without the need for an order from the Supreme Court. Forfeiture has the effect of vesting the property in the Crown and enabling relevant State authorities to take possession of the property.

Therefore, the Bill may impact on an individual's property rights by allowing State agencies and authorities to vest property interests in the Crown. As this forfeiture can occur administratively without the need for court orders, this may also impact an individual's right to procedural fairness because affected persons have no opportunity to make submissions or have the matter determined by a court before their property interests are forfeited.

In the case of forfeiture by the Crime Commission, property that may be administratively forfeited are those seized in the course of an investigation on reasonable suspicions, but may not otherwise be connected to an existing conviction or charge for a serious criminal offence. This may also impact a person's right to the presumption of innocence, by allowing the forfeiture of their property interests on the basis of its suspected connection to serious crime not subject to charge or conviction.

The Committee notes that these reforms are intended to streamline the existing process for forfeiture of property connected to serious crime. These amendments are intended to assist law enforcement agencies and the Crime Commission to achieve their policy objectives in respect to preventing and disrupting organised and serious crime, which is intended to protect the public from the harm of serious criminal activity. It also acknowledges that avenues for challenging property intended to be administratively forfeited in courts, including for hardship relief to dependants, is available to affected persons.

However, the Committee notes that property already forfeited is excluded from certain avenues of challenge. It also notes that, unlike an application to a court for forfeiture, the relevant State authority or the Crime Commission is not required to establish grounds for forfeiture. Rather, the schemes under the Bill would place the burden on an affected person to establish grounds for relevant property interests not to be forfeited. For these reasons, the Committee refers this matter to Parliament for its consideration.

Reverse onus of proof/presumption of innocence/property rights – drug trafficker declarations

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* to establish a scheme for a court to make a drug trafficker declaration against a person for a period of five years. This declaration must be made where the court is satisfied the person has been convicted of at least three serious drug offences or was convicted of a serious drug offence in certain circumstances. It also provides that court may make a forfeiture order against a person who is the subject of a drug trafficker declaration.

This would allow the forfeiture of property held by or in control of that person, unless they can prove that it was 'lawfully acquired'. By requiring the defendant to prove they lawfully acquired property, the Bill would reverse the onus of proof. In regards to civil actions, the reverse onus

may undermine the presumption of innocence and right to procedural fairness, by presuming property held or in the control of a person subject to a drug trafficker declaration was unlawfully acquired.

The Bill also provides for appropriate officers to apply to the Supreme Court for an *ex parte* restraining order in respect to property suspected to belong to or in the control of a person charged with a serious drug offence against whom an application for a drug trafficker declaration may be made if they were to be convicted. By allowing a restraining order be made for property of a person who has been charged with a serious drug offence but not yet convicted, it may also undermine the individual's right to the presumption of innocence.

As restraining and forfeiture orders may be made against a person's property interests in connection with a current or possible drug trafficker declaration, the Bill may also impact a person's property rights by allowing their property interests to be forfeited to the State.

The Committee notes that these reforms are intended to strengthen law enforcement powers concerning the proceeds of crime and ensure that drug traffickers cannot benefit from or reinvest proceeds of drug crimes. It also acknowledges that these provisions are intended to be consistent with similar schemes in existing laws. However, the Committee notes that these orders apply to property that belongs to or is in the control of a person subject to (or may be subject to) a drug trafficker declaration. These declarations apply for a period of five years and a person can have their property restrained or forfeited which may not be connected to their past convictions or current charges for drug offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Wide powers of enforcement/right to freedom of movement/property rights/privilege against self-incrimination – search warrants and search and seizure powers

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to allow a search warrant to be issued on additional grounds in respect to premises or a specified person. Specifically, it would allow the issuing of a search warrant for property on the grounds that it is reasonably suspected to belong to or be in the control of a person who is subject to (or may be subject to, if convicted) a drug trafficker declaration. It also would allow issue of a search warrant for property reasonably suspected of being 'unexplained wealth', and where a person is reasonably suspected of possessing a property-tracking document. These warrants empower executing officers to enter premises, stop, detain and search a person and seize property found in a search.

The Bill also empowers officers executing some of these search warrants to direct a person giving them assistance to access data held in a computer, including one secured by biometric means. Self-incrimination is excluded as a reasonable excuse. It also establishes offences for obstructing or hindering the execution of search warrants under these Acts without reasonable excuse, which carries a maximum penalty of 1 000 penalty units ($110 000) or 5 years' imprisonment, or both.

Therefore, the Bill may grant authorised officers, including police officers, wide powers of enforcement. The exercise of these enforcement powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, their right to freedom of movement in respect to the power to stop and search a person, their right to the presumption of innocence where that property is not related to a conviction for a criminal offence, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises the purpose of these amendments is to better strengthen law enforcement powers concerning property which is connected to serious crime and intended to

limit or prevent serious criminal activity. However, the Committee notes that the exercise of enforcement powers under a search warrant may expose a person to committing potential criminal conduct if they are seen to be obstructing or hindering officers without reasonable excuse. Given the possible significant custodial penalty of that offence, the Committee refers this matter to Parliament for its consideration.

Wide powers to compel evidence/right to freedom from arbitrary detention/privilege against self-incrimination – powers of Commissioner

The Bill amends the *Crime Commission Act 2012* to reform the powers and obligations of the NSW Crime Commission. These amendments would enable the Commission to use evidence given by a witness summoned to a hearing of the Commission, in proceedings for an order against the person which would restrain or confiscate property connected to serious crime. It also establishes a stronger scheme for finding a person in contempt of the Commission. This scheme expands the conduct which amounts to contempt including failure to appear when summoned and refusal to answer or provide documents as required, allows the Commission to have the Supreme Court determine whether a person is guilty of contempt without delay and issue arrest warrants in respect to a person alleged to have committed contempt.

The Bill may therefore grant the Commission wide powers to compel evidence from an individual and wide powers of enforcement in respect to compelling evidence. The exercise of these powers may impact individual rights, including a person's right to silence and privilege against self-incrimination by being compelled at pain of contempt, to give evidence that could be used against them in proceedings for orders against their property. It may also impact a person's right to liberty and freedom from arbitrary detention, as a person summoned by the Commission who is alleged to have committed contempt can be subject to arrest pending determination of that matter.

The Committee acknowledges that these reforms are intended to implement the recommendations from a statutory review of the Act, to ensure the Commission's powers and processes in respect to contempt achieve their intended objective. It also notes that there are avenues for release from custody and for reviewing decisions to keep a person alleged to have committed contempt in custody, as well as safeguard provisions to ensure compelled evidence does not prejudice current or imminent proceedings.

However, the Committee notes that the power to arrest is in addition to the power to compel evidence that may be self-incriminating. This may led to situations where a person must either give self-incriminating evidence or risk arrest for contempt of the Commission. For these reasons, the Committee refers this matter to Parliament for its consideration.

Extension of criminal liability to workers

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to establish offences in respect to notices to provide information or documents, freezing notices or monitoring orders given to financial institutions under the Acts. These offences prohibit a financial institution from giving misleading information in connection to a notice, disclosing the existence or nature of a notice which explicitly prohibits disclosure, failing to comply with the notice or knowingly contravening a monitoring order or freezing notice. The maximum penalty carried by this offence is 1 000 penalty units ($110 000).

It also inserts a definition for 'financial institution' in respect to these offences to include an officer, employee or agent of the institution acting in the course of their employment or agency. The Bill may therefore extend criminal liability of a financial institution, including for strict liability offences in respect to notices to give information or documents, to the institution's workers acting in accordance with their employment. The Committee also 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.

The Committee acknowledges that these provisions are intended to strengthen law enforcement powers concerning organised crime, by allowing authorised officers to compel compliance with relevant notices and orders to financial institutions. However, the Committee notes that these provisions may result in an individual acting under the direction of their employer being criminally liable for an offence, including a strict liability offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Presumption of innocence – unexplained wealth orders and restraining orders for unexplained wealth

The Bill amends the *Criminal Assets Recovery Act 1990* to require the Supreme Court to make an unexplained wealth order where it reasonably suspects a person's current or previous wealth exceeds the value of their lawfully acquired wealth by at least $250 000 in respect to cash, or $2 million in respect to other property. This order would require the person to pay an amount equal to the value of their assessed unexplained wealth, which is presumed to be wealth that was illegally acquired or proceeds of crime. It also enables the NSW Crime Commission to apply for an *ex parte* restraining order in respect to property suspected of being unexplained wealth that meets the aforementioned threshold.

By deeming property which exceeds a person's lawfully acquired wealth as 'unexplained wealth', it is presumed to have been illegally acquired or the proceeds of crime, without needing to prove a related criminal offence. The Bill may therefore impact an individual's right to the presumption of innocence as a person may be required to pay an amount to the court or be subject to a restraining order in respect to property deemed unexplained wealth.

The Committee acknowledges that the amendments are intended to ensure existing provisions for unexplained wealth orders can be used by investigative agencies to meet the intended policy objective. It also notes several safeguard provisions are included in the Bill in respect to the making of an unexplained wealth order.

However, the Committee notes that these orders may be granted where the court has reasonable suspicion or believes there is reasonable grounds for suspecting that the necessary circumstances under law exist. This standard of proof may be lower than the standard typical for criminal proceedings ('beyond reasonable doubt') and civil proceedings ('the balance of probabilities'). For these reasons, the Committee refers this matter to Parliament for its consideration.

Procedural fairness and open justice principles – pre-trial proceedings in closed court

The Bill amends the *Criminal Assets Recovery Act 1990* to allow the Supreme Court to hear proceedings under the Act that are not criminal proceedings in closed court, where that is necessary to prevent interference with the administration of criminal justice. This may impact an individual's rights to procedural fairness and principles of open justice, which includes the guarantee for public hearings before a court or tribunal.

However, the Committee acknowledges that these amendments are intended to implement a recommendation of the Statutory Review to ensure proceedings under the Act may be dealt with efficiently without prejudicing related criminal proceedings. It also notes that the power to order closed court hearings is limited to only where the court believes it necessary for the administration of justice. In these circumstances, the Committee makes no further comment.

Retrospectivity

The Bill makes various amendments to the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990*. It also inserts savings and transitional provisions into the Acts which extend the application of certain amendments made by the Bill to information acquired and criminal activity which occurred before the commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee notes that the Bill clarifies that amendments in respect to criminal activity does not apply to proceedings in train at the time of commencement. It also notes that the amendments in respect to secrecy offences do not expand the offence but clarify what conduct does not amount to an offence. In these circumstances, the Committee makes no further comment.

4. CONSTITUTION AMENDMENT (APPOINTMENT OF LIEUTENANT-GOVERNOR AND ADMINISTRATOR) BILL 2022

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

5. CRIMES LEGISLATION AMENDMENT (COERCIVE CONTROL) BILL 2022

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

Commencement by proclamation

Subsection 2(1) of the Bill states that the provisions will commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. This is particularly the case with Bills such as this one which establish new offences attracting significant custodial penalties.

The Committee notes that the Attorney General stated in his second reading speech that a long lead in time was necessary to ensure the relevant agencies and the community could have certainty about the offence. Accordingly, the Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation activities to be organised.

However, as the Bill establishes a new criminal offence with a maximum penalty of seven years imprisonment, the Committee refers the matter to Parliament to consider whether a set start date would provide clarity as to when the offence would apply.

Extraterritorial operation – Elements of the offence

The Bill provides that a course of conduct for the purposes of the coercive control offence includes behaviour engaged in within NSW and in another jurisdiction. This expands the range of behaviours that may constitute the offence to include those committed outside of NSW. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee notes that the offence must include behaviour that occurred in NSW and that the nature of the coercive control offence necessitates the consideration of incidents of abusive behaviour in their totality. In the circumstances the committee makes no further comment.

6. ELECTORAL LEGISLATION AMENDMENT BILL (NO 2) BILL 2022

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

Electoral offence – automated telephone calls

The Bill amends the *Electoral Act 2017* to create a new criminal offence for causing, permitting or authorising an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call be made in clear spoken English. This offence carries a maximum penalty for an individual of 20 penalty units ($2 200) or 6 months' imprisonment, or both.

It is unclear whether this offence requires a mental element to be proven and may therefore amount to a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, it may restrict an individual's freedom of political communication and, by requiring disclosure of identifying information, privacy of an individual's personal information.

However, the Committee acknowledges that the provisions intend to clarify how existing authorisation requirements for physical electoral materials apply to automated telephone calls. It also notes that the offence does not prohibit the making of automated telephone calls containing electoral matter and is intended to strengthen compliance with authorisation requirements. In the circumstances, the Committee makes no further comment.

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

Wide discretionary powers of the NSW Electoral Commissioner

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner discretionary powers under Schedule 7, Part 4 to make determinations in respect to the 2023 State general election and/or by-elections held before the general election. These determinations are required to be published on the Electoral Commission's website.

Specifically, clause 14 sets out a regulation-making power to authorise the Commissioner to permit certain COVID-19 affected electors to access telephone voting for a particular election. Telephone voting is otherwise limited to blind and vision-impaired voters. It also allows the Commissioner to determine at any time that telephone voting is not permitted for blind, vision impaired or COVID-19 affected electors for a certain election or time period. Clause 15 also allows the Commissioner to determine that postal voting in a relevant election must be conducted under the modifications set out in proposed Schedule 8. Finally, clause 16 allows the Commissioner to appoint a voting centre outside of Australia for declaration voting in the 2023 general election, and to abolish a centre so appointed.

In doing so, the Bill may therefore grant the Electoral Commissioner a wide discretionary power to regulate how electors may vote in the 2023 general election or by-elections held before the general election. This may make an individuals' right to vote and participate in public elections dependent upon the non-reviewable determinations of the Commissioner.

The Bill also defers to regulations the authorisation of the Commissioner to determine when and which COVID-19 affected electors are entitled to vote by telephone voting. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to facilitate the upcoming general election to be conducted in 2023, and that the provisions are based on the advice of the

Commission. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters that may be determined by the Commissioner and deferred to the regulations relate to the participation and voting in public elections. The Committee also notes that the determinations are only required to be published on the Commission's website, which is not required to be tabled in Parliament and therefore not subject to disallowance. These provisions may thereby make it difficult for a person to understand how they may meaningfully vote and participate in elections, in this case electors relying on telephone or postal voting and absent voters outside of Australia. For these reasons, the Committee refers this matter to Parliament for its consideration.

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.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023 and establish new offences, the Committee notes that commencement by proclamation may make it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

7. ELECTRONIC CONVEYANCING ENFORCEMENT BILL 2022

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

Wide regulation-making power

The Bill provides a general regulation-making power under section 21. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence.

The Committee recognises the provisions allow for flexibility in the new enforcement framework. However, it notes that they may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Statutory rule expressed to commence before publication on NSW legislation website

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand. It thereby asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

8. PORT OF NEWCASTLE (EXTINGUISHMENT OF LIABILITY) 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*.

9. PROPERTY TAX (FIRST HOME BUYER CHOICE) BILL 2022

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

Wide regulation-making power

The Bill provides a general regulation-making power under section 54. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence.

The Committee recognises that the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

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.

The Committee acknowledges that the Treasurer noted in his second reading speech that timing for the implementation of the scheme is outlined in the Bill. However, there is work to be done with operators to ensure the scheme can commence in 2023. Accordingly, the Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation activities to be organised. In the circumstances, the Committee makes no further comment.

Statutory rule expressed to commence before publication on NSW legislation website

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand.

The Bill asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website. This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website

(rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

10. RESIDENTIAL TENANCIES AMENDMENT (PROHIBITING NO GROUNDS EVICTIONS) BILL 2022*

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

Retrospectivity, property rights and freedom of contract – termination of residential tenancy agreements

The Bill amends the *Residential Tenancies Act 2010* to remove the ability for landlords to issue a termination notice for a fixed term or periodic residential tenancy agreement without grounds. The proposed amendments to section 84(1) and 85(1) provide that a landlord may give a notice of termination only in certain circumstances, including:

- where the landlord or a person closely associated with them intends to live at the premises for at least 12 months,
- for renovations that will make the premises uninhabitable for at least 4 weeks and all permits and consents have been obtained,
- where the premises will be used or kept in a way that means it cannot be lived in for at least 6 months, or
- on other grounds prescribed by the regulations.

In limiting landlords' rights under tenancy agreements and relevant legislation, the Bill appears to impede landlords' property rights. As the provisions would apply to existing tenancy agreements, this Bill also acts retrospectively. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Further, by limiting the ability of a landlord to exercise their rights under an existing agreement, the Bill appears to impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The Committee refers the provisions to the Parliament for its consideration, noting however that the Bill is attempting to redress a power imbalance in the tenant-landlord relationship.

Retrospectivity, property rights, freedom of contract and strict liability offence – use of property following termination order

The Bill amends the *Residential Tenancies Act 2010* to regulate the use of a premises if a termination order was made in relation to a fixed term or periodic agreement under sections 84 or 85 (as amended by this Bill). Specifically, the landlord must ensure the premises are used in accordance with the ground on which the termination order was made. Non-compliance is a strict liability offence with a maximum penalty of 100 penalty units ($11 000). If the Tribunal is satisfied the premises have not been used in accordance with the relevant ground of termination, it may, on application of the former tenant, make one or more orders. These orders include directing the landlord or person occupying or using the premises to use the premises in accordance with the ground on which the termination order was made, or pay compensation to the former tenant for wrongful termination. If the Tribunal considers it appropriate, it can also make an order deeming the premises subject to a residential tenancy agreement between the landlord and tenant for a term, and on the conditions, specified.

In limiting landlords' use of their premises after the termination of a residential tenancy agreement, the Bill appears to impact on the property rights of landlords. As provisions would apply to existing tenancy agreements, this Bill also acts retrospectively. The Committee generally

comments on such provisions, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Further, by deeming the existence of a contract on conditions specified by the Tribunal, the Bill appears to impact on freedom of contract. Finally, the Committee notes that the Bill creates a strict liability offence. It notes that strict liability offences depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

The Committee recognises that these provisions appear to be aimed at encouraging compliance by landlords with the Bill's requirements to terminate agreements only on the grounds specified in sections 84 and 85. However, noting the impact on landlords' rights and retrospective application of the provisions, it refers the provisions to the Parliament for its consideration, noting however that the Bill is attempting to redress a power imbalance in the tenant-landlord relationship.

11. STATUTE LAW (MISCELLANEOUS PROVISIONS) BILL (NO 2) 2022

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

Statutory rule expressed to commence before publication on NSW legislation website

The Bill provides that a savings and transitional provision contained in the regulations, which takes effect before its publication on the NSW legislation website, does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand. It thereby asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

12. TREASURY AND ENERGY LEGISLATION AMENDMENT BILL 2022

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

Retrospectivity

Subsection 2(2) of the Bill states that Schedule 4.2 is taken to have commenced on 8 April 1999. Schedule 4.2 removes references to "the department" in section 35 of the *Energy and Utilities Administration Act 1987*. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee acknowledges that the amendment is administrative and is intended to remove outdated references in the Act. The Committee also notes that retrospective application is required to prevent a technical breach of the Act. In the circumstances the Committee makes no further comment.

Privacy of personal information

The Bill amends the First Home Owner Act to provide that the Chief Commissioner may, for the purposes of exercising functions under Part 2A of the Act, use and disclose information obtained by the Chief Commissioner under the Act or another Act. The Committee notes that, as the Chief Commissioner's functions includes entering contracts, monitoring compliance and assessing applications, it is unclear whether this disclosure of information extends to any personal

information obtained in relation to an individual's application to the First Home Owner Grant shared equity scheme.

Subsection 24E(e) of the Act also enables the regulation to prescribe additional functions that the Chief Commissioner could exercise in the administration of the shared equity scheme. The Committee acknowledges that any function prescribed by regulation would still need to be necessary to administer and give effect to a shared equity scheme. However, the broad regulation-making power may possibly permit a use or disclosure of personal information that may interfere with an individual's privacy or confidentiality interests.

The Committee also notes that where personal information is provided, the Chief Commissioner, as part of a government agency, will still be subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

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

Strict liability offences

The Bill amends the First Home Owner Act to provide that the Chief Commissioner can impose a penalty of up to $3 300 on a participant in the shared equity scheme, where that person fails to comply with specific requirements. These requirements include notifying the Chief Commissioner of a particular change in circumstances and complying with a condition of a shared equity arrangement. These offences appear to be strict liability offences.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also notes that the penalties are monetary only and do not contemplate a custodial sentence. In the circumstances, the Committee makes no further comment

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

Commencement by Proclamation

Subsection 2(1)(a) of the Bill states that Schedule 3.1[10] commences on a day or days to be appointed 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.

Schedule 3.1[10] omits section 128A of the Superannuation Act, which sets out matters, with respect to mobility between funds, that may be set out in regulations. The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for implementation or administrative activities to be arranged. However, as section 3.10[10] would remove a substantive provision enabling the regulations to set out details around mobility between funds, the Committee refers the matter to Parliament to consider whether a set start date would provide clarity to individuals who may be impacted by the omission.

Delegation powers

The Bill amends the First Home Owner Act to allow the Minister to delegate the exercise of any function under the Act, other than the power of delegation, to the Chief Commissioner or a person employed in the public service. The Committee notes that the Bill does not contain

restrictions on this power to delegate, for example restricting delegation to people with certain qualifications or expertise.

The Committee recognises that under the Act, the Chief Commissioner is responsible to the Minister for the administration of the first home owner grant scheme. This includes assessing applications for first home owner grants and obtaining relevant information about the applicants. The Minister is also responsible for reviewing this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Delegation of the more significant tasks regarding confidential information and statutory review may warrant a higher level of specificity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

Incorporation of extrinsic materials

The Bill empowers the Treasurer to publish policy guidelines for the administration of a shared equity scheme, and mandates that the Chief Commissioner must administer a scheme in accordance with the published policy guidelines. These guidelines are not tabled in Parliament and are therefore not subject to parliamentary scrutiny. The Committee acknowledges that the guidelines may impact the way that individuals engage with the shared equity scheme. However, the Committee also appreciates that it may grant necessary flexibility to accommodate the development of the scheme. 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

Significant matters deferred to the regulations

The Bill defers a significant number of matters set out in the Electricity Supply Act and the Superannuation Act to the regulations. In respect of the Electricity Supply Act, the Bill permits regulations to prescribe key operational matters related to audits conducted as part of the administration of the renewable fuel scheme, peak demand reduction scheme, and energy savings scheme. These include offences relating to obstructing or hindering or refusing or failing to comply with requirements made by, persons who conduct audits. In respect of the Superannuation Act the Bill permits regulations to prescribe matters related to successor fund transfers and mobility between funds. The Bill also amends section 10 of the Subordinate Legislation Act to exclude certain statutory rules from the application of the staged repeal process.

Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's rights or when they seek to establish offences for individual conduct. Additionally, the proposed amendments to the Subordinate Legislation Act may circumvent future oversight of those regulations to which the staged repeal proposal do not apply.

The Committee acknowledges that regulations are still subject to parliamentary scrutiny, and that the exclusion of certain statutory rules are intended to reduce the risk of a change in law midway through a contractual term. However, given that the broad matters deferred to regulation in this instance include substantive provisions about the operation of a superannuation transfer scheme, an audit scheme, the capacity to determine offences, the Committee refers this matter to parliament for consideration.

Part One – Bills

1. Building and Other Fair Trading Legislation Amendment Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Fair Trading

Purpose and description

1.1 The object of the Bill is to make miscellaneous amendments to building legislation and other legislation administered by the Minister for Fair Trading.

Background

1.2 In his second reading speech, the Hon. Victor Dominello MP said that:

> The bill makes miscellaneous minor but important amendments to various Acts across the Fair Trading portfolio to ensure that these legislative schemes can continue to operate as Parliament intended.

1.3 In particular, the Bill amends the *Design and Building Practitioners Act 2020*, *Explosives Act 2003*, *Residential Apartment Buildings (Compliance and Enforcement) Act 2020* and *Strata Schemes Management Act 2015.*

1.4 The Bill amends the *Explosives Act 2003* to increase maximum penalties for offences, incorporate additional provisions of the *Work Health and Safety Act 2011,* and expand regulation-making powers. The automatic repeal of the *Explosives Regulation 2013* is also postponed from 1 September 2023 to 1 September 2024 by an amendment to the *Subordinate Legislation Act 1989*. In his second reading speech, the Minister said that:

> This is to allow time for implementation of further, more complex recommendations of the 2019 statutory review and further consultation on the Act and regulation as a whole.

1.5 The Bill also amends the *Design and Building Practitioners Act 2020* to require the Secretary of the Department of Customer Service to keep and publish on the Department's website a register of stop work orders. The Secretary can include on that register written undertakings made by registered practitioners.

1.6 The *Residential Apartment Buildings (Compliance and Enforcement) Act 2020* is amended, including:

(a) to increase the maximum penalties applying to developers for failing to notify the Secretary of intended completion of building work.

(b) where a written undertaking to carry out building work to eliminate, minimise or remediate a serious defect is accepted by the Secretary, to provide they are not required to obtain consent or approval under the *Environmental Planning and Assessment Act 1979* to carry out work. The Minister said in his second reading speech that this also occurs where a developer is ordered to carry out the work under a building work rectification order and 'is an appropriate concession for those developers who volunteer to rectify serious defects'. Further, that it would encourage developers 'to opt in to remediating defects expeditiously'.

(c) to provide that a building work rectification order may require a developer to take action (other than carrying out building work) to eliminate, minimise or remediate a serious defect, or potential serious defect, in a residential apartment building.

(d) to clarify information sharing provisions and allow the Secretary to share information with Australian universities and contractors or consultants to assist the Secretary in exercising its functions under the Act or assist research into, and analysis of, matters regulated by the Act.

(e) to allow the retrospective application of certain amendments made by the Bill to undertakings accepted, or orders given, before the commencement of the Bill.

1.7 In relation to the retrospective application of these provisions, the Minister said:

> As these amendments are addressing anomalies that have hindered the Act's ability to realise Parliament's intended outcome of the use of these powers, the bill includes a change in schedule 1 to give the changes in sections 28, 33, 34 and 62 retrospective effect.

1.8 The amendment to the *Strata Schemes Management Act 2015* allows a developer to obtain insurance against serious defects in the building elements of the common property for one or more buildings in the scheme for 10 years rather than giving the Secretary a building bond.

Issues considered by the Committee

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

Increases to maximum penalties for various offences, including strict liability offences

1.9 The Bill amends the *Explosives Act 2003* (the **Act**) to increase the maximum penalties applying to individuals for various offences, such as:

(a) for offences under sections 6(1), 6A, 7 and 8(1) of the Act, being offences relating to explosives, from 250 units ($27 500) to 350 units ($38 500). It is

noted that this financial penalty may apply in addition to imprisonment for 12 months for offences under sections 6, for handling an explosive or explosive precursor without a licence (if required), and 8, for negligently handling explosives and causing danger or damage.

(b) for the offence of obstructing or intimidating inspectors under section 28 of the Act, from 225 units ($24 750) to 315 units ($34 650).

1.10 Certain offences under the above sections, including sections 6, 6A, 7 and 28, are strict liability offences.

1.11 The Bill also increases the maximum penalty units that an offence created by the regulations can prescribe, from 250 units ($27 500) to 350 units ($38 500).

1.12 In the second reading speech, the Minister said that the Bill implements recommendations of the 2019 statutory review of the Act, which:

> … identified the need to increase the maximum penalties under the Act, which have not changed since its introduction in 2003. The proposed changes will see maximum penalties increased by up to 50 per cent, in accordance with the change in the consumer price index. It is important that the offences in the Act continue to strongly deter the unsafe and illegal use of explosives to protect those who work with them and the wider community.

The Bill increases maximum penalties for various offences throughout the *Explosives Act 2003.* For example, it increases the maximum penalty applying to an individual for 4 offences, including 3 strict liability offences, regarding explosives, from 250 penalty units ($27 500) to 350 units ($38 500). For 2 of these offences, an individual can also be imprisoned for 12 months. The maximum penalty units that an offence created by the regulations can prescribe is increased from 250 to 350 penalty units. The penalty for obstructing or intimidating inspectors is also increased from 225 penalty units ($24 750) to 315 units ($34 650).

The Committee notes the number of offences subject to increased penalties, including offences created by the regulations, and the increase to the maximum penalties. It also notes that a number of these amendments increase the maximum penalty for strict liability offences under the Act.

However, it acknowledges the Minister's comments that these amendments responded to recommendations in the 2019 statutory review of the Act and that the offences aim to deter unsafe behaviour and protect workers and the community. In the circumstances, the Committee makes no further comment.

Extraterritorial application

1.13 Section 27(1) of the Act provides that certain provisions of the *Work Health and Safety Act 2011* (**WHS Act**) apply to inspectors (within the meaning of the *Explosives Act 2003*) for the purposes of the administration of the Act and its regulations.

1.14 The Bill amends which provisions of the WHS Act apply. Specifically, it provides Part 8, Division 2 and Part 9, other than section 187, apply. This incorporates two additional sections of the WHS Act, being sections 155A and 155B.

1.15 Section 155A of the WHS Act allows a notice under section 155 to be served on a person even though they are outside of the State, or the matter occurs or is located out of the State, so long as the matter relates to the administration of the Act (including investigation and enforcement of offences against the Act).

1.16 Under section 155 of the WHS Act, the regulator can serve a written notice on a person requiring them to provide information in writing, produce documents, and appear in person to give evidence. A maximum penalty of 115 penalty units ($12 650) applies to an individual who refuses or fails to comply with a requirement under that section without reasonable excuse, with the evidential burden placed on the accused to show reasonable excuse.

1.17 Section 155B concerns the service of a written notice under section 155.

1.18 In his second reading speech, the Minister said that this amendment implements another recommendation of the 2019 statutory review of the Act:

> …by confirming the ability of inspectors to serve a notice under section 155 of the Work Health and Safety Act 2011, as applied by section 27 of the Explosives Act, on a person to provide information or documents, or to give evidence, despite the person being outside the State. Extending the application of section 155A to an inspector's service of notice under the explosives legislative framework is an important and necessary provision that will ensure inspectors can gather information outside New South Wales as part of an investigation or monitor or enforce compliance with the Explosives Act, critical to ensuring safety and compliance.

The Bill allows inspectors under the *Explosives Act 2013* to serve a notice under section 155 of the *Work Health and Safety Act 2011* (*WHS* Act) on a person to provide information, produce documents or give evidence despite being outside of State, or the matter occurs or is located outside of the State, where the matter relates to the Act's administration. This extends the legislative jurisdiction of the Act beyond the State of NSW.

The Committee generally comments where legislation may have extraterritorial effect as it can create uncertainty about what laws individuals are subject to at any one time, especially if they live in another state or territory. However, it recognises this amendment intends to ensure safety and compliance by allowing inspectors to gather information outside of the State as part of an investigation or monitor enforcement and compliance with the *Explosives Act 2013*. Further, that the Minister noted it was recommended by the 2019 statutory review of the Act. In the circumstances, the Committee makes no further comment.

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

Significant matters referred to regulations

1.19 The Bill expands the Act's regulation-making powers in section 36.

1.20 New subsection 36(d1) provides that regulations can be made for or with respect to the functions and powers of inspectors, including:

(a) giving directions to persons, and

(b) requiring persons to provide information or documents.

1.21 Section 25 of the Act provides that the regulatory authority may appoint as inspectors: a statutory officer, a member of staff of a Department, a person employed by a public or local authority or a person belonging to a class of persons prescribed by the regulations.

The Bill expands the regulation-making powers under section 36 of the *Explosives Act 2013*, including to provide that regulations can be made for or with respect to the functions and powers of inspectors, including giving directions to persons and requiring persons to provide information or documents.

The Committee notes that regulations are subject to disallowance and therefore parliamentary scrutiny. However, it generally prefers that significant matters, such as the investigatory powers of inspectors, are contained in the principal Act to provide an appropriate level of parliamentary oversight. In particular, because such powers of investigation may (depending on their content) impact on individual rights and include penalties for non-compliance. In the circumstances, the Committee refers this issue to the Parliament for its consideration.

2. Children and Young Persons (Care and Protection) Amendment (Family is Culture) Bill 2022

Date introduced	13 October 2022
House introduced	Legislative Council
Minister responsible	The Hon. Natasha Maclaren-Jones MLC
Portfolio	Families and Communities

Purpose and description

2.1 The object of the Bill is to amend the *Children and Young Persons (Care and Protection) Act 1998* to provide for the reforms outlined in section one of the Government's consultation findings report titled "Family is Culture—Legislative Recommendations", prepared in response to particular recommendations in the Final Report of the Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-Home Care in New South Wales.

Background

2.2 The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* (the **Act**), which sets out the legislative framework for the care and protection of, and the provision of services to, children and young persons in NSW having regard to the capacity of their parents or other persons responsible for them.

2.3 In introducing the Bill, the Hon. Natasha Maclaren-Jones MLC, Minister for Families and Communities, acknowledged in her second reading speech that 'Aboriginal children and young people continue to be over-represented in the child protection system'. The Statement of Public Interest attached to the Bill also noted that Aboriginal and/or Torres Strait Islander children and young people are 12 times more likely to be in statutory out-of-home-care than non-Aboriginal and/or Torres Strait children and young people.

2.4 The Bill proposes a number of reforms to the Act and other legislation in the state's broader child protection legislative framework. The Minister described in her second reading speech that the intent of these amendments is to 'enshrine best practice in legislation that lifts the collective focus on improving outcomes for all children and young people'.

2.5 The Statement of Public Interest also emphasised that these amendments:

> … seeks to implement particular recommendations of the Final Report of the Family is Culture: Independent Review into Aboriginal and Torres Strait Islander Children and Young People in Out-of-Home Care in New South Wales … to respond better to the

needs of children and families to ensure they grow up safely within their families and communities, and connected to culture.

2.6 The '*Family is Culture – Independent Review of Aboriginal Children and Young People in Out of Home Care (OOHC)*' (the **Family is Culture Report**) was released in 2019 and made 125 recommendations to address the overrepresentation of and impacts to Aboriginal and/or Torres Strait Islander children and young people in the child protection system of New South Wales.[1] In her second reading speech, the Minister acknowledged 'the important work of the Family is Culture report' and stated that the report is the basis of the Bill's provisions.

2.7 As noted in the Statement of Public Interest and echoed by the Minister, 25 of the recommendations in the Family is Culture report were for changes to care and protection laws and court processes 'to reduce the number of children and young people entering and remaining in out-of-home care, improve service delivery, and increase transparency and accountability'. The Bill seeks to implement 15 of these recommendations.

2.8 The proposed reforms primarily target the care and protection system for children and young people established under the Act. Specifically, the Bill amends the Act to:

(a) Insert additional permanent placement principle to preference supported placement with a suitable person or persons rather than out-of-home care.

(b) Insert 'Aboriginal and Torres Strait Islander Children and Young Persons Principle' which sets out elements that must be applied when making care decisions in relation to an Aboriginal and/or Torres Strait Islander child or young person.

(c) Insert the 'principle of active efforts' to prevent a child or young person entering out-of-home care and a requirement for the Secretary to act in accordance with that principle when making a care application.

(d) Insert additional requirements when making care plans for an Aboriginal and/or Torres Strait Islander child or young person, including the preparation of a cultural plan in consultation with relevant persons.

(e) Change and add required matters which must be considered by the NSW Children's Court (the **Children's Court**) in determinations connected to a care and protection proceeding in its jurisdiction.

(f) Enable the Secretary to make an assessment that there is a realistic possibility of a child or young person to their parent or guardian within a period greater than 24 months, in certain exceptional circumstances.

(g) Enable representatives from a group of persons significantly impacted by a proposed care order for an Aboriginal and/or Torres Strait Islander child or

[1] Professor Megan Davis, Chairperson, Independent Review of Aboriginal Children in OOHC, *Family is Culture – Independent Review of Aboriginal Children and Young People in Out of Home Care (OOHC)*, October 2019, viewed 13 October 2022.

young person, to include a Aboriginal and/or Torres Strait Islander organisation or entity relevant to the child or young person.

(h) Amend the application of the rules of evidence to proceedings in the Children's Court, including removing a rebuttable presumption that evidence of earlier removal from care and non-restoration of a child is prima facie evidence that their other child or young person is in need of care and protection.

2.9 The Statement of Public Interest stated that these reforms 'will relieve pressure on the out-of-home care budget' and that the Bill is:

> … part of a broader program of reform that aims to increase the focus on early intervention support, build the capacity of the Aboriginal Community Controlled Organisation sector to partner with the Department to deliver services to Aboriginal children, improve casework practice to preserve or restore children with their parents and families but only where it is safe to do so.

2.10 The Bill also makes a number of miscellaneous amendments, including amendments to the other Acts. These include amending the:

(a) *Advocate for Children and Young People Act 2014* to add reviewing the Children's Guardian's exercise of functions relating to out-of-home-care as a function of the Committee on Children and Young People.

(b) *Children (Protection and Parental Responsibility) Act 1997* to allow a court hearing criminal proceedings for a child or young person to require the attendance of certain persons.

(c) *Ombudsman Act 1974* to clarify that the Ombudsman may investigate the conduct of a public authority even if that conduct is or will likely become the subject of court or other proceedings, unless the Ombudsman considers that it will likely adversely affect the proceedings.

2.11 The Minister also emphasised that the Bill was subject to consultation with stakeholders. As noted in the Statement of Public Interest, the feedback from stakeholders was summarised in a report released in September 2022.[2] It further stated that the Bill was drafted in 'close consultation' with a number of legal bodies and courts that are fundamental or regularly engage with the state's child protection system.

[2] NSW Department of Communities and Justice, *Family is Culture legislative recommendations: Consultation finds report*, September 2022, viewed 13 October 2022.

Issues considered by the Committee

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

Equal treatment of children and young persons

2.12 The Bill inserts section 83A into the Act which sets out additional requirements for permanency plans for Aboriginal and/or Torres Strait Islander children and young people. This provision requires the Secretary to include in the permanency plan:

(a) Additional evidence of active efforts made by them to determine whether the child or young person could be placed, in accordance with the principle for the general order for placement of Aboriginal and/or Torres Strait Islander children and young persons under section 13(1).

(b) Additional recommendation that the child or young person be or not be placed with a relative, member of kin or community or other suitable person in accordance with section 13(1).

2.13 Section 83A(3) also imposes additional requirements on the Children's Court before it can make a final care order for an Aboriginal and/or Torres Strait Islander child or young person. Specifically, it requires the court to find that the permanency plan:

(a) Complies with relevant principles in respect to placement and Aboriginal and Torres Strait Islander children and young people.

(b) Includes a cultural plan which:

(i) Has been developed in consultation with the child or young person, their parents, family and kind and relevant Aboriginal and/or Torres Strait Islander organisations or entities,

(ii) Sets out how the Aboriginal and/or Torres Strait Islander child or young person's connect cultural connections and identity will be maintained and developed.

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to provide for additional requirements for the Secretary and Children's Courts in care proceedings involving Aboriginal and/or Torres Strait Islander children and young people. This permits the operation of the Bill's provisions to differentiate the treatment of Aboriginal and/or Torres Strait Islander and non-Aboriginal and/or Torres Strait Islander children and young people within the child protection system in New South Wales.

However, the Committee notes that the provisions seek to address recommendations of the Family is Culture Report to limit the particular harm of removal caused to Aboriginal and/or Torres Strait Islander children and young people, enhance their right to self-determination and reduce their overrepresentation in out-of-home care. In these circumstances, the Committee considers this may fit within the exceptions for special measures to meet

particular needs of a specific group under state and federal laws,[3] and does not constitute discrimination on the basis of race. The Committee therefore makes no further comment.

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

Matters deferred to the regulations

2.14 The Bill amends section 264 of the Act to allow regulations to make provisions about processes to be used for identifying a child or young person is an Aboriginal and/or Torres Strait Islander person for the purposes of administering the Act.

2.15 Speaking to this amendment, the Minister stated that it had been developed in consultation with relevant Aboriginal community groups:

> … connected to recommendation 76 of the Family is Culture report, which recommended that regulations be developed, in partnership with relevant Aboriginal community groups and members, about identifying and de-identifying children in contact with the child protection system as Aboriginal. We recognise the complexity of this issue and acknowledge the advice received from our stakeholders that further consultation and co-design with Aboriginal individuals, communities and organisations is required in developing these regulations.

The Bill amends the *Children and Young Persons (Care and Protection) Act 1998* to provide a regulation-making power in respect to processes for identifying a child or young person as an Aboriginal and/or Torres Strait Islander person for the purposes of administering the Act. The Act, as amended by the Bill, also provides for additional principles, considerations and requirements for Aboriginal and/or Torres Strait Islander children and young people in care.

The Committee generally prefers substantive clauses to be set out in the Act where they can be subject to a greater level of parliamentary scrutiny, particularly where they impact the rights or obligations of a child or young person in care may be affected.

However, the Committee notes that regulations are still subject to parliamentary scrutiny and can be disallowed under section 41 of the *Interpretation Act 1987*. It also acknowledges that the deferral to regulations is intended to allow for greater flexibility and consultation and co-design from Aboriginal and/or Torres Strait Islander peoples, regarding how the child protection system recognises the Aboriginal and/or Torres Strait Islander identity of a child or young person. In these circumstances, the Committee makes no further comment.

Commencement by proclamation

2.16 Section 2(a) of the Bill provides that certain amendments to the Act commence on a day or days to be appointed by proclamation. These include provisions:

(a) requiring the Secretary to make active efforts,

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

(b) imposing additional requirements for permanency planning for children in care,

(c) providing for additional decisions that are reviewable by NCAT,

(d) requiring the Minister to review the Act and of a savings and transitional nature.

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 to the framework of child protection laws for children in care. In the circumstances, the Committee makes no further comment.

3. Confiscation of Proceeds of Crime Legislation Amendment Bill

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Toole MP
Portfolio	Police

Purpose and description

3.1 The object of the Bill is to amend the *Confiscation of Proceeds of Crime Act 1989*, the *Crime Commission Act 2012*, the *Criminal Assets Recovery Act 1990* and other legislation to prevent and disrupt organised and other serious crime, including the following—

(a) to provide law enforcement with certain powers to seize and forfeit property connected to persons involved in serious criminal offences including serious drug offences,

(b) to provide for additional powers of the NSW Crime Commission to conduct investigations and to provide for circumstances where a person is in contempt of the Commission,

(c) to set out circumstances in which the Supreme Court must make an unexplained wealth order,

(d) to expand the powers of law enforcement to seize property under a search warrant,

(e) to provide that the NSW Crime Commissioner and the NSW Police Commissioner may give notice requiring financial institutions to provide information about transactions or assets of certain persons,

(f) to implement the recommendations resulting from the statutory review of the *Crime Commission Act 2012* and the *Criminal Assets Recovery Act 1990*.

Background

3.2 In introducing the Bill, the Hon. Paul Toole MP, Minister for Police, stated its intent is to strike 'at the heart of serious criminal enterprise by targeting and confiscating the profits of crime and unexplained wealth that fuel organised crime'.

3.3 The Bill seeks to amend a number of statutes, primarily the *Confiscation of Proceeds of Crime Act 1989* (the **Confiscation Act**), the *Crime Commission Act 2012* (the **Commission Act)**, the *Criminal Assets Recovery Act 1990* (the **Recovery Act**). The

Minister highlighted in his second reading speech the need for these reforms, to ensure the objectives of the Confiscation Act and Recovery Act are achieved:

> Those who engage in criminal activity have no legal entitlement to the proceeds of their crimes or wealth. Accordingly, there is a rightful expectation among the community that illegitimate assets will be swiftly confiscated by law enforcement agencies. Whilst the Confiscation of Proceeds of Crime Act 1989 and the Criminal Assets Recovery Act 1990 are valuable tools for law enforcement agencies, both Acts have proven to be complex, resource intensive and inefficient in enabling law enforcement agencies to effectively seize and recover the proceeds of crime and unexplained wealth.
>
> This bill overcomes these law enforcement challenges by introducing strong, efficient and streamlined processes to effectively confiscate the profits of crime and unexplained wealth from serious criminals

3.4 The amendments proposed by the Bill are intended to strengthen the broader legislative framework regulating law enforcement of money and other property connected to serious and drug trafficking offences. Among other reforms, the Bill provides for automatic forfeiture of certain property, the confiscation of property connected to serious crime, and expanding enforcement powers in relation to property connected to crime. In his second reading speech, the Minister stated that:

> Confiscating proceeds of crime and unexplained wealth undermines and disrupts the profit motive of serious criminal enterprise and prevents reinvestment of those assets into further criminal ventures.

3.5 The Minister also confirmed that the Bill would implement the recommendations of the Statutory Review of the Commission Act, tabled in December 2020 (the **Statutory Review**).[4]

Issues considered by the Committee

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

Procedural fairness/property rights – administrative forfeiture

3.6 The Bill amends the Confiscation Act and Recovery Act to establish schemes for the administrative forfeiture of property connected to serious crime.

3.7 Part 2 of the Confiscation Act provides for the confiscation of property which has some connection to a serious offence or serious drug offence. Under section 7, this includes indictable offences and drug trafficking related offences as well as other prescribed offences. Division 2 allows an application to be made to the court for an order that this property is forfeited to the State. Per section 19, this property would then vest in the Crown and the State can take possession of it.

3.8 The Bill inserts Division 1A into Part 2 to provide for administrative forfeiture of 'relevant property'. Under section 17A, 'relevant property' is defined as property which is the subject of:

[4] Policy, Reform and Legislation, NSW Department of Communities and Justice, *Statutory Review Report: Crime Commission Act 2012*, December 2020, p 5, viewed 14 October 2022.

(a) A restraining order under Part 3, Division 2 made in relation to a serious offence for which the person has been convicted, unless the order was confirmed after conviction.

(b) A freezing notice confirmed by the relevant court under Par 3, Division 1A in relation to a serious offence for which the person has been convicted, unless the notice was confirmed after conviction.

(c) A restraining order or freezing notice made in reliance on the charging or proposed charging of a person with a serious offence under Part 3, that was revoked under section 54 because the person gave satisfactory security or undertakings in relation to the relevant property.

3.9 In accordance with section 17B, this property may be forfeited to the Crown at the end of the 'relevant period', or when applications on the restraining order/freezing notice or to exclude certain property from forfeiture are finally dismissed. This forfeiture has the same effect as a court forfeiture order noted above.

3.10 Section 4 defines 'relevant period' to mean six months after a person is taken to have been convicted of a serious offence under the Confiscation Act. Relevantly, section 5 of the Confiscation Act deems a person is convicted where:

(a) They are found guilty of the offence, but the court has made an order dismissing the relevant charges or conditionally discharging the person.

(b) They have had charges for the offence taken into account when being sentenced for a different offence.

(c) They have been charged with the offence and have absconded at any time before determination of the charge.

3.11 The relevant authority forfeiting the property must give written notice to each person they know or reasonably suspects has a beneficial interest in the property at least 28 days before the end of the relevant period.

3.12 Section 17B(3) clarifies that section 21 also applies to property forfeited under Division 1A. This means that a person whose relevant conviction is subsequently quashed or has the forfeiture discharged on appeal, becomes entitled to either payment by the State of an equivalent value or to request return of the property.

3.13 In his second reading speech, the Minister stated that these amendments:

> … enable the automatic forfeiture of property that is subject of a restraining order or a confirmed freezing notice after the person is convicted of a serious offence. This removes the need for law enforcement authorities to apply to the court for a forfeiture order for restrained or frozen property following conviction of a serious offence. It follows suit with the Commonwealth and many other Australian jurisdictions which already have similar provisions.

3.14 Division 1A also sets out a number of avenues for challenging this automatic forfeiture. Under section 17H, a dependent of the person who has an interest in forfeited property may apply for an order from the Supreme Court for relief of

hardship caused by the forfeiture. They must satisfy the court that they are entitled to be paid an amount to prevent hardship and, for a dependent aged at least 18 years, had no knowledge of the relevant serious offence.

3.15 A person with a beneficial interest may apply to the relevant court for an exclusion order, in respect to their interest in property which they can satisfy the court on the balance of probabilities is not 'tainted' by a connection to a serious offence or was not unlawfully acquired. They may also appeal a dismissal of their application for exclusion of certain property. However, section 17D(5) clarifies an exclusion order cannot be made for property that has already been forfeited.

3.16 A person may also seek leave to apply for a court order to cover their interest in forfeited property, within 6 months of its forfeiture. Where leave can be granted under section 17G, the court can only make this order if it is satisfied on the balance of probabilities that the applicant was not involved in the commission of the related serious offence, acquired that interest for sufficient consideration and was not aware that the property was unlawfully acquired or 'tainted'.

3.17 The Bill also inserts Division 1A into Part 3 of the Recovery Act to provide for administrative forfeiture of property seized, held on behalf of or otherwise in the possession of an investigative agency in connection with an investigation.

3.18 Section 21C allows the forfeiture of this property following the issue of a notice of intention to forfeit by the Commission, to each person the Commission knows or reasonably suspects has a beneficial interest in the property (an 'asset forfeiture notice'). This asset forfeiture notice must also be published in the Gazette.

3.19 However, this notice can only be issued if the Commission is reasonably satisfied the property interest is suspected of:

(a) Belonging to a person suspected of engaging in serious criminal related activity, 'whether or not a particular person is suspected'.

(b) Being derived from serious crime related activity.

(c) Being held in a false name and fraudulently acquired.

(d) Being an available interest relating to serious crime use property or capable of being the subject of a substituted serious crime use property declaration.

3.20 An asset forfeiture notice takes effect immediately after the end of the dispute period or after all dispute claims are finally dismissed, under section 21F. This would result in the interest being forfeited to the Crown and vesting in the NSW Trustee and Guardian, who can take possession of the property. The Commission must give written notice of the forfeiture to each person who received an asset forfeiture notice.

3.21 Speaking to this forfeiture scheme, the Minister stated that 'development of such a scheme was a recommendation of the statutory review'. He further highlighted issues with the current system for forfeiture by NSW Police and the Commission:

> When investigating and taking action in relation to organised crime, the NSW Police Force and the Crime Commission may seize or obtain property suspected of being derived from, or capable of facilitating, serious criminal or illegal activity… Currently, the only way this seized property can be forfeited to the State is under an order from the Supreme Court under the Criminal Assets Recovery Act. In most cases, proceedings for such orders are uncontested, as persons who identify themselves to the commission as owners of property run the risk of being investigated by the commission for involvement in criminal activity.
>
> These processes are clunky and the need to commence uncontested proceedings for forfeiture wastes the time and resources of the Crime Commission and the Supreme Court. The bill enables property to be confiscated without a court order to streamline these processes.

3.22 However, the Minister acknowledged that administrative forfeiture schemes provide for powers that are:

> … significant impositions on private property, and the bill includes a number of strict processes, thresholds and safeguards to ensure that administrative forfeiture is only available in appropriately limited circumstances.

3.23 Consequently, proposed Division 1A includes subdivisions 3 and 4 which provide avenues for challenging an asset forfeiture notice, including dispute claims in respect to alleged property interest, recovery orders and relief from hardship for dependants. These avenues mirror those under proposed Division 1A of Part 2 of the Confiscation Act, outlined above.

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to establish schemes for administrative forfeiture of property which is connected to serious criminal offences. Specifically, it allows property which was the subject of a restraining order or freezing notice to be automatically forfeited after the person is convicted of the relevant serious offence, rather than having to seek a court order for forfeiture of that property. It also allows the NSW Crime Commission to administratively forfeit property seized by investigative agencies, without the need for an order from the Supreme Court. Forfeiture has the effect of vesting the property in the Crown and enabling relevant State authorities to take possession of the property.

Therefore, the Bill may impact on an individual's property rights by allowing State agencies and authorities to vest property interests in the Crown. As this forfeiture can occur administratively without the need for court orders, this may also impact an individual's right to procedural fairness because affected persons have no opportunity to make submissions or have the matter determined by a court before their property interests are forfeited.

In the case of forfeiture by the Crime Commission, property that may be administratively forfeited are those seized in the course of an investigation on reasonable suspicions, but may not otherwise be connected to an existing conviction or charge for a serious criminal offence. This may also impact a person's right to the presumption of innocence, by allowing the forfeiture of their property interests on the basis of its suspected connection to serious crime not subject to charge or conviction.

The Committee notes that these reforms are intended to streamline the existing process for forfeiture of property connected to serious crime. These amendments are intended to assist law enforcement agencies and the Crime Commission to achieve their policy objectives in respect to preventing and disrupting organised and serious crime, which is intended to protect the public from the harm of serious criminal activity. It also acknowledges that avenues for challenging property intended to be administratively forfeited in courts, including for hardship relief to dependants, is available to affected persons.

However, the Committee notes that property already forfeited is excluded from certain avenues of challenge. It also notes that, unlike an application to a court for forfeiture, the relevant State authority or the Crime Commission is not required to establish grounds for forfeiture. Rather, the schemes under the Bill would place the burden on an affected person to establish grounds for relevant property interests not to be forfeited. For these reasons, the Committee refers this matter to Parliament for its consideration.

Reverse onus of proof/presumption of innocence/property rights – drug trafficker declarations

3.24 The Bill inserts Division 6 into Part 2 of the Confiscation Act to make provisions in respect to 'drug trafficker declarations'.

3.25 Section 34 enables the Director of Public Prosecutions (**DPP**) or a police prosecutor to apply to an appropriate court for a declaration against a person convicted of a serious drug offence, either during sentencing or any other time. This drug trafficker declaration must be made if the court is satisfied that the person has been convicted of a serious drug offence involving a commercial quantity or while member of a criminal group, or has been convicted of at least three serious drug offences in the last ten years. This declaration expires after five years.

3.26 For a person who is subject of a drug trafficker declaration, an appropriate officer may apply for a forfeiture order in the appropriate court under section 34A, within 12 months of the declaration. This would apply to property 'belonging to, or in the effective control' of the person.

3.27 Section 34A(3) requires the court to make the order unless it is satisfied the property was 'lawfully acquired' and subsection (4) places the onus on the person to prove that it was 'lawfully acquired'. Subsection (7) defines unlawfully acquired property to mean property which is wholly or partly the proceeds of unlawful activity, or the proceeds of the disposal of or acquired using property derived from unlawful activity.

3.28 The provisions relating to forfeiture orders under the Confiscation Act also apply to forfeiture orders for declared drug traffickers, per section 34A(9). As noted earlier, this would have the effect of vesting the forfeited property in the Crown.

3.29 In his second reading speech, the Minister described this declaration scheme as 'targeting serious drug trafficking, which is harming our community'. He further stated that these amendments are:

> … designed to make sure convicted drug traffickers are not reaping the profits of their crimes or, even worse, investing those profits back into further criminal enterprises and ensnaring even more victims.

3.30 Separately, the Bill inserts section 43A into the Confiscation Act to enable an appropriate officer or police officer to apply *ex parte* for a Supreme Court restraining order in respect to property they reasonably suspects belongs to or is in the effective control of a person:

> (a) against whom a drug trafficker declaration has been made, or
>
> (b) charged with a serious drug offence and against whom an application for a drug trafficker declaration may be made if the person were to be convicted of the offence.

3.31 The Court can only make this restraining order if it is satisfied there a reasonable grounds for suspecting the property belongs to or is in effective control of such a person. This restraining order would prohibit the disposal of the whole or part of the property except in the way and circumstances specified in the order, or direct the NSW Trustee and Guardian take control of the whole or part of the specified property.

3.32 The Minister noted in his second reading speech that these provisions are:

> … consistent with other provisions in our existing legislative framework under both the Confiscation of Proceeds of Crime Act and the Criminal Assets Recovery Act, which prevents property liable to be forfeited from being disposed of ahead of forfeiture proceedings.

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* to establish a scheme for a court to make a drug trafficker declaration against a person for a period of five years. This declaration must be made where the court is satisfied the person has been convicted of at least three serious drug offences or was convicted of a serious drug offence in certain circumstances. It also provides that court may make a forfeiture order against a person who is the subject of a drug trafficker declaration.

This would allow the forfeiture of property held by or in control of that person, unless they can prove that it was 'lawfully acquired'. By requiring the defendant to prove they lawfully acquired property, the Bill would reverse the onus of proof. In regards to civil actions, the reverse onus may undermine the presumption of innocence and right to procedural fairness, by presuming property held or in the control of a person subject to a drug trafficker declaration was unlawfully acquired.

The Bill also provides for appropriate officers to apply to the Supreme Court for an *ex parte* restraining order in respect to property suspected to belong to or in the control of a person charged with a serious drug offence against whom an application for a drug trafficker declaration may be made if they were to be convicted. By allowing a restraining order be made for property of a person who has been charged with a serious drug offence but not yet convicted, it may also undermine the individual's right to the presumption of innocence.

As restraining and forfeiture orders may be made against a person's property interests in connection with a current or possible drug trafficker declaration, the Bill may also impact a person's property rights by allowing their property interests to be forfeited to the State.

The Committee notes that these reforms are intended to strengthen law enforcement powers concerning the proceeds of crime and ensure that drug traffickers cannot benefit from or reinvest proceeds of drug crimes. It also acknowledges that these provisions are intended to be consistent with similar schemes in existing laws. However, the Committee notes that these orders apply to property that belongs to or is in the control of a person subject to (or may be subject to) a drug trafficker declaration. These declarations apply for a period of five years and a person can have their property restrained or forfeited which may not be connected to their past convictions or current charges for drug offences. For these reasons, the Committee refers this matter to Parliament for its consideration.

Wide powers of enforcement/right to freedom of movement/property rights/privilege against self-incrimination – search warrants and search and seizure powers

3.33 As earlier noted, the Bill establishes a scheme in the Confiscation Act for the making of drug trafficker declarations by an appropriate court. The Bill also replaces section 36(1) to (3), which provides for a police officer to apply to 'an authorised officer' for a search warrant in respect to property connected to serious offences. Specifically, it would enable an officer to apply for a warrant if they have reasonable grounds for believing that in or on premises, there is property they reasonably suspect was unlawfully acquired and belongs to or is in the effective control of a person:

(i) against whom a drug trafficker declaration has been made, or

(ii) charged with a serious drug offence and against whom an application for a drug trafficker declaration may be made if the person were to be convicted of the offence.

3.34 The authorised officer may issue a search warrant to enter and search the premises if satisfied there are reasonable grounds for that suspicion. The Bill also replaces section 37, to clarify that the above described property may be seized in the execution of these search warrants.

3.35 The Bill also inserts sections 67A to 67C into the Confiscation Act. Section 67A enables an authorised officer to apply to the Supreme Court for a search warrant in relation to a person who they reasonably suspect is in possession of a 'property-tracking document'. Under subsection (2), the court may issue a search warrant which authorises the officer:

> … with necessary and reasonable assistance, and by the use of necessary and reasonable force to—
>
> (a) stop, search and detain the person, and
>
> (b) seize and detain all or part of a thing—
>
> (i) found as a result of the search, and

(ii) that the officer reasonably suspects is, or contains, a property-tracking document.

3.36 Section 67B gives powers to an authorised officer executing a search warrant relating to a property-tracking document. These include the power to make copies and take extracts from the document, and to seize any document or thing they reasonably believe affords evidence of a criminal offence in Australia or must be seized to prevent concealment, loss or destruction of it. It also empowers the officer to direct a person to assist them to access or copy data held in a computer, including data secured by biometric means. Subsection (4) clarifies that self-incrimination is not a reasonable excuse for refusing to comply with this direction.

3.37 Section 67C creates an offence for a person who obstructs or hinders the execution of a search warrant under Part 3, Division 1 or Part 4, Division 2. This includes search warrants in relation to property-tracking documents or property of a declared drug trafficker or somebody who is charged with a serious drug offence and would be subject to an application for a drug trafficker declaration. The maximum penalty carried by this offence is 1 000 penalty units ($110 000) and/or 5 years' imprisonment.

3.38 The Bill also amends sections 44, 45 and 47 of the Recovery Act to make provisions in respect to search warrants in relation to a property-tracking document similar to sections 67A to 67C outlined above.

3.39 Separately, the Bill amends section 4 of the Recovery Act, which sets out definitions under the Act. This includes inserting definitions for:

(a) 'Current or previous wealth', meaning the amount equal to the sum of the values of all property interests belong to, in the effective control or has been disposed of by the service and a service, advantage or benefit provided for them or another at the person's request.

(b) 'Unexplained wealth', meaning the whole or any part of the current or previous wealth of the person that is or was illegally acquired property or proceeds of an illegal activity.

3.40 It also makes a number of amendments the search powers provisions under Part 4, Division 2 of the Recovery Act. These amendments include:

(a) Expanding the grounds for the issue of a search warrant in respect to premises under section 38, to include reasonable belief that property reasonably suspected of being unexplained wealth is on the premises.

(b) Allowing an authorised officer to apply for a search warrant in respect to a person under section 38, where the authorised officer suspects on reasonable grounds that property which is unexplained property is in the possession of the person.

(c) Enabling a person executing a search warrant to seize anything reasonably suspected of being unexplained wealth under section 39.

(d) Enabling a person executing a search warrant in respect to a person to stop, search and detain them and seize and detain anything reasonably suspected of being unexplained wealth which is found as a result, under section 39.

3.41 The Bill further amends section 42 to create an offence for obstruction of a person executing a search warrant. This offence is substantively identical to the offence under proposed section 67C of the Confiscation Act outlined above.

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to allow a search warrant to be issued on additional grounds in respect to premises or a specified person. Specifically, it would allow the issuing of a search warrant for property on the grounds that it is reasonably suspected to belong to or be in the control of a person who is subject to (or may be subject to, if convicted) a drug trafficker declaration. It also would allow issue of a search warrant for property reasonably suspected of being 'unexplained wealth', and where a person is reasonably suspected of possessing a property-tracking document. These warrants empower executing officers to enter premises, stop, detain and search a person and seize property found in a search.

The Bill also empowers officers executing some of these search warrants to direct a person giving them assistance to access data held in a computer, including one secured by biometric means. Self-incrimination is excluded as a reasonable excuse. It also establishes offences for obstructing or hindering the execution of search warrants under these Acts without reasonable excuse, which carries a maximum penalty of 1 000 penalty units ($110 000) or 5 years' imprisonment, or both.

Therefore, the Bill may grant authorised officers, including police officers, wide powers of enforcement. The exercise of these enforcement powers may impact an individual's rights including, for example, their property rights in respect to the power to enter premises and seize property, their right to freedom of movement in respect to the power to stop and search a person, their right to the presumption of innocence where that property is not related to a conviction for a criminal offence, and their privilege from self-incrimination in respect to the power to give directions for assistance.

The Committee recognises the purpose of these amendments is to better strengthen law enforcement powers concerning property which is connected to serious crime and intended to limit or prevent serious criminal activity. However, the Committee notes that the exercise of enforcement powers under a search warrant may expose a person to committing potential criminal conduct if they are seen to be obstructing or hindering officers without reasonable excuse. Given the possible significant custodial penalty of that offence, the Committee refers this matter to Parliament for its consideration.

Wide powers to compel evidence/right to freedom from arbitrary detention/privilege against self-incrimination – powers of Commissioner

3.42 The New South Wales Crime Commission (the **Commission**) is a statutory corporation established under Part 2, Division 1 of the Commission Act, which also establishes the office of the Commissioner for the Commission (the **Commissioner**).

3.43 Division 2 of Part 2 sets out the functions of the Commission. The principal functions are listed in section 10, and include:

(a) investigating matters relating to criminal activity, serious crime or criminal groups referred by the Management Committee.

(b) assembling and providing the DPP with admissible evidence for criminal prosecutions arising out of investigations.

(c) providing information obtained in the course of its investigations to the Attorney General or another appropriate authority.

3.44 Section 11 allows the Commission to exercise a function conferred or imposed by the Recovery Act and conduct investigations in aid of that exercise. It also allows the Commission to 'make such use as it thinks fit of any information obtained by it in the execution of [the Recovery Act]'.

3.45 Under Part 2 of the Commission Act, the Commission is able to hold hearings for the purposes of an investigation. It may also issue summons to require that a person attend a hearing to give evidence to the Commission.

3.46 Relevantly, section 39(1) clarifies that a summoned witness cannot refuse to answer a question or produce any thing requested by the Commission on any grounds, including grounds of self-incrimination or privilege.

3.47 However, subsections (2) and (3) clarify that the evidence given by a witness at a hearing is not admissible against the person in any civil, criminal or disciplinary proceedings, with exceptions. These include proceedings for the falsity of evidence given or for an offence or contempt under the Commission Act, where the witness is a corporation or does not otherwise object to the evidence being given or produced and certain civil proceedings.

3.48 The Bill amends section 39 to expand these exceptions to include proceedings for a 'relevant order' under the Recovery, which have not commenced or are not imminent. This includes confiscation orders, interstate forfeiture or unexplained wealth orders, restraining orders and non-disclosure orders. In his second reading speech, the Minister stated that these amendments 'will improve the ability of the Crime Commission to bring forfeiture proceedings with the best available evidence in order to disrupt and financially disrupt and dismantle organised crime groups'.

3.49 The Bill also inserts section 45AA, which allows the Commission to direct the disclosure of evidence (including derivative evidence) given by a witness to be disclosed to an agency responsible for making an application for a relevant order, the court hearing that application and/or the defendant in proceedings for a relevant order. However, this direction cannot be made in relation to proceedings for a relevant order that have commenced or are imminent.

3.50 Finally, the Bill also replaces Division 9 of Part 2 which provides for the offence of obstructing or hindering the exercise of the Commission's functions or disrupting a hearing, and liability protections for certain persons exercising functions in relation to a Commission hearing. Effectively, the Bill moves these existing provisions into

Division 10 and establishes a regime for finding a person in contempt of the Commission under Division 9.

3.51 Under Division 9, section 47A, a person is guilty of contempt of the Commission if they commit any of the conduct listed under subsection (1) without reasonable excuse. Subsection (2) explicitly excludes self-incrimination as a reasonable excuse. Conduct amounting to contempt under subsection (1) includes:

(a) Failing to attend as a witness when summoned or failing to comply with the requirements of a witness,

(b) Wilfully threatening or insulting other parties in proceedings before the commission,

(c) Failing to appear or give evidence before the commission after being released on that condition,

(d) Doing 'another thing that, if the commission were a court of law having power to commit for contempt, would be contempt of the court'.

3.52 Conduct constituting the offence of obstructing, hinder or disrupting under Division 10 is also conduct which amounts to contempt of the Commission. However, section 47F clarifies that a person cannot be liable for both an offence and contempt for the same conduct which constitutes both, and allows the conduct to be dealt with as contempt rather than as an offence.

3.53 Section 47B provides that the Commissioner may give a certificate setting out the facts of alleged contempt to the Supreme Court which is 'prima facie evidence of the matters certified'. The Supreme Court must then inquire, without delay, into the alleged contempt, including hearing from witnesses and statements offered in defence. The court must also exercise its powers in the same way it would for contempt of its own court, if satisfied the person is guilty of the alleged contempt.

3.54 Section 47C provides a number of powers that the Commissioner may exercise in relation to an alleged contempt of Commission. This includes summoning the alleged person to appear before them to show cause why the process outlined above should not be followed, issue a warrant to arrest a person who fails to appear when so summoned, take a person into custody where the contempt is committed in the face or hearing of the Commissioner and issue a warrant of arrest for the alleged person in order to bring them before the Supreme Court as soon as practicable. An arrest warrant under this section authorises a police officer to arrest and deliver the person into custody.

3.55 Under section 47D, the Commissioner may order the release of a person detained above at any time before they are brought to the Supreme Court, and that release may be subject to the condition that they will appear before the court. The person has a right of review by the Supreme Court of the Commissioner's decision not to release them or to do so conditionally, under section 47E. Section 47C(10) also provides that the Supreme Court may direct that a person brought before them for alleged contempt be released, or continue in custody until determination of the matter.

3.56 The Minister noted in his second reading speech that the new contempt of Commission scheme proposed by the Bill 'implements the recommendation of the statutory review that the contempt provisions should be strengthened'. He also noted the existing contempt provisions require court determination which can take significant time to resolve, and therefore 'does not have an immediate effect on a witness who displays contempt of the commission'. The amendments proposed by the Bill were described by the Minister as a 'more comprehensive' scheme which:

> … are aligned to the contempt provisions in place for bodies such as the Law Enforcement Conduct Commission and the Independent Commission Against Corruption.

The Bill amends the *Crime Commission Act 2012* to reform the powers and obligations of the NSW Crime Commission. These amendments would enable the Commission to use evidence given by a witness summoned to a hearing of the Commission, in proceedings for an order against the person which would restrain or confiscate property connected to serious crime. It also establishes a stronger scheme for finding a person in contempt of the Commission. This scheme expands the conduct which amounts to contempt including failure to appear when summoned and refusal to answer or provide documents as required, allows the Commission to have the Supreme Court determine whether a person is guilty of contempt without delay and issue arrest warrants in respect to a person alleged to have committed contempt.

The Bill may therefore grant the Commission wide powers to compel evidence from an individual and wide powers of enforcement in respect to compelling evidence. The exercise of these powers may impact individual rights, including a person's right to silence and privilege against self-incrimination by being compelled at pain of contempt, to give evidence that could be used against them in proceedings for orders against their property. It may also impact a person's right to liberty and freedom from arbitrary detention, as a person summoned by the Commission who is alleged to have committed contempt can be subject to arrest pending determination of that matter.

The Committee acknowledges that these reforms are intended to implement the recommendations from a statutory review of the Act, to ensure the Commission's powers and processes in respect to contempt achieve their intended objective. It also notes that there are avenues for release from custody and for reviewing decisions to keep a person alleged to have committed contempt in custody, as well as safeguard provisions to ensure compelled evidence does not prejudice current or imminent proceedings.

However, the Committee notes that the power to arrest is in addition to the power to compel evidence that may be self-incriminating. This may led to situations where a person must either give self-incriminating evidence or risk arrest for contempt of the Commission. For these reasons, the Committee refers this matter to Parliament for its consideration.

Extension of criminal liability to workers

3.57 The Bill inserts sections 71A to 71C into the Confiscation Act. Specifically, section 71A empowers the Commissioner of Police to require a financial institution to

provide information or documents to an authorised officer, by written notice. This information or documents must be relevant to one or more matters listed in section 71A(1), which relate to a person specified in the notice.

3.58 Section 71B requires the notice to specify the kind of information or documents required and when this must be provided by, and state that the Commissioner believes the notice is required either to determine whether to take action under the Act or for proceedings under the Act.

3.59 Importantly, section 71C creates a number of offences for a financial institution which relate to these notices, which carries a maximum penalty of 1 000 penalty units ($110 000). Subsections (1) to (4) establishes an offence for:

(a) Making an oral or written statement that is false or misleading by explicit words or omission, which is mad in connection with the notice given.

(b) Disclosing the existence or nature of a notice given which specifies that information about the notice must not be disclosed, unless that disclosure is to a law enforcement agency monitoring an account specified in the notice.

(c) Failure to comply with the notice given.

3.60 However, subsection (5) provides a defence to an offence of non-compliance under section 71C, if the financial institution:

(a) Only failed to comply with the notice because it did not provide the requested information or document within the period specified in the notice, and

(b) Took all reasonable steps to provide it within the specified period, and

(c) Provided it as soon as practicable after the end of the specified period.

3.61 A 'financial institution' is defined in section 71C(6) to include 'an officer, employee or agent of the institution acting in the course of the person’s employment or agency'.

3.62 The Bill also inserts an identical scheme to sections 71A to 71C, in respect to notices to financial institutions to provide information or documents, is also inserted into the Recovery Act by proposed sections 51A to 51C.

3.63 Separately, the Bill amends section 48 of the Recovery Act which provides for the making of monitoring orders to obtain information about transactions conducted by a particular person. Specifically, it includes as a grounds for the making of the order where there are reasonable grounds to suspect the person has unexplained wealth of a certain value. It also inserts section 48A to enable the Commissioner to give a freezing notice to a financial institution in relation to a person's account where certain circumstances are met.

3.64 Relevantly, the Bill also amends section 49 which establishes an offence for a financial institution to knowingly contravene or provide false or misleading information in purported compliance with a monitoring order. Specifically, it creates

a further offence for a financial institution to knowingly contravene a freezing notice.

3.65 Like the offence established under proposed section 71C of the Confiscation Act, the offences under section 49 carry the same maximum penalty. The Bill also inserts the same definition of 'financial institution' from section 71C(6) into section 49 of the Recovery Act.

3.66 Speaking to these amendments to both the Confiscation Act and Recovery Act, the Minister stated that:

> Unlike existing provisions which allow authorised officers to request information from financial institutions, the bill would compel compliance through the creation of a new offence punishable by a maximum penalty of 1,000 penalty units.

The Bill amends the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990* to establish offences in respect to notices to provide information or documents, freezing notices or monitoring orders given to financial institutions under the Acts. These offences prohibit a financial institution from giving misleading information in connection to a notice, disclosing the existence or nature of a notice which explicitly prohibits disclosure, failing to comply with the notice or knowingly contravening a monitoring order or freezing notice. The maximum penalty carried by this offence is 1 000 penalty units ($110 000).

It also inserts a definition for 'financial institution' in respect to these offences to include an officer, employee or agent of the institution acting in the course of their employment or agency. The Bill may therefore extend criminal liability of a financial institution, including for strict liability offences in respect to notices to give information or documents, to the institution's workers acting in accordance with their employment. The Committee also 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.

The Committee acknowledges that these provisions are intended to strengthen law enforcement powers concerning organised crime, by allowing authorised officers to compel compliance with relevant notices and orders to financial institutions. However, the Committee notes that these provisions may result in an individual acting under the direction of their employer being criminally liable for an offence, including a strict liability offence. For these reasons, the Committee refers this matter to Parliament for its consideration.

Presumption of innocence – unexplained wealth orders and restraining orders for unexplained wealth

3.67 Section 10A of the Recovery Act provides for the Commission to apply to the Supreme Court *ex parte* for a restraining order in respect to specified property interests of a person.

3.68 The Bill amends subsection (5)(a) to include unexplained wealth that is at least $250 000 for money or $2 million for other property as a grounds for the making of a restraining order against a person. As noted earlier, it also inserts definitions for

'unexplained wealth' in section 4 of the Recovery Act to mean the whole or any part of the current or previous wealth of a person that is or was illegally acquired property or proceeds of an illegal activity.

3.69 An unexplained wealth order is a confiscation order under section 4 and Part 3 of the Recovery Act, and applications for an unexplained wealth order may be made by the Commission. Section 28A also requires the Supreme Court to make an unexplained wealth order against a person where it has reasonable suspicions that certain circumstances are met.

3.70 In his second reading speech, the Minister highlighted that current section 28A sets a threshold for making an unexplained wealth order that:

> … makes it difficult to initiate forfeiture proceedings to confiscate the unexplained wealth from the heads of criminal networks, who are often removed from the actual commission of the serious criminal offence but who orchestrate the criminal activity and reap the benefits of the ill-gotten gains.

3.71 As a result, the Bill amends subsection (2) to expand these circumstances to include where:

> the person's current or previous wealth exceeds the value of the person's lawfully acquired wealth by—
>
> (i) for money—$250,000, or
>
> (ii) otherwise—$2,000,000.

3.72 The Minister confirmed in his second reading speech that:

> … in proceedings against a person for an unexplained wealth order to prove a person's current or previous wealth is not illegally acquired property or the proceeds of an illegal activity, lies on the person. The high threshold for making an unexplained wealth order under these new grounds ensures that these reforms are targeting serious organised criminals who have accumulated significant amounts of wealth which they cannot explain the origins of.

3.73 However, he highlighted several safeguards provided in the Bill and already in the Recovery Act which enables the Court to refuse to make the order or reduce the amount of unexplained wealth payable if it is in the public interest, excludes their means in determining their entitlement for legal aid in such proceedings and allowing deductions for the 'reasonable necessities of life' for them and their dependants.

The Bill amends the *Criminal Assets Recovery Act 1990* to require the Supreme Court to make an unexplained wealth order where it reasonably suspects a person's current or previous wealth exceeds the value of their lawfully acquired wealth by at least $250 000 in respect to cash, or $2 million in respect to other property. This order would require the person to pay an amount equal to the value of their assessed unexplained wealth, which is presumed to be wealth that was illegally acquired or proceeds of crime. It also enables the NSW Crime Commission to apply for an *ex parte* restraining order in respect to property

suspected of being unexplained wealth that meets the aforementioned threshold.

By deeming property which exceeds a person's lawfully acquired wealth as 'unexplained wealth', it is presumed to have been illegally acquired or the proceeds of crime, without needing to prove a related criminal offence. The Bill may therefore impact an individual's right to the presumption of innocence as a person may be required to pay an amount to the court or be subject to a restraining order in respect to property deemed unexplained wealth.

The Committee acknowledges that the amendments are intended to ensure existing provisions for unexplained wealth orders can be used by investigative agencies to meet the intended policy objective. It also notes several safeguard provisions are included in the Bill in respect to the making of an unexplained wealth order.

However, the Committee notes that these orders may be granted where the court has reasonable suspicion or believes there is reasonable grounds for suspecting that the necessary circumstances under law exist. This standard of proof may be lower than the standard typical for criminal proceedings ('beyond reasonable doubt') and civil proceedings ('the balance of probabilities'). For these reasons, the Committee refers this matter to Parliament for its consideration.

Procedural fairness and open justice principles – pre-trial proceedings in closed court

3.74 Section 5(1) of the Recovery Act provides that proceedings on an application for a restraining order or a confiscation order, which includes an unexplained wealth order, are not criminal proceedings.

3.75 The Bill also inserts section 63A into the Recovery Act to provide that the Supreme Court may order non-criminal proceedings under the Act:

> … be heard, in whole or in part, in closed court if the court considers the order is necessary to prevent interference with the administration of criminal justice.

3.76 The Committee notes that this amendment aligns with part of the Statutory Review's recommendation 9. The Statutory review concluded that:

> … giving courts options such as closed court hearing… will support the intent of s 63 to enable [proceedings under the Recovery Act] to proceed while criminal proceedings are on foot, while retaining a power for courts to stay proceedings where there is a demonstrated prejudice to the defendant and no other measures would adequately address that prejudice.[5]

The Bill amends the *Criminal Assets Recovery Act 1990* to allow the Supreme Court to hear proceedings under the Act that are not criminal proceedings in closed court, where that is necessary to prevent interference with the administration of criminal justice. This may impact an individual's rights to

[5] *Statutory Review Report: Crime Commission Act 2012*, p 37.

procedural fairness and principles of open justice, which includes the guarantee for public hearings before a court or tribunal.

However, the Committee acknowledges that these amendments are intended to implement a recommendation of the Statutory Review to ensure proceedings under the Act may be dealt with efficiently without prejudicing related criminal proceedings. It also notes that the power to order closed court hearings is limited to only where the court believes it necessary for the administration of justice. In these circumstances, the Committee makes no further comment.

Retrospectivity

3.77 The Bill amends the provisions establishing the offence relating to secrecy under the Commission Act. Specifically, it replaces section 80 with sections 80 and 80AA.

3.78 Section 80 proposed by the Bill establishes the same offence with the same maximum penalty of 50 penalty units ($5 500) and/or 12 months' imprisonment. However, it clarifies that certain actions of the Commission are not taken to be the Commission acting solely in its corporate capacity, which would otherwise fall into the exception for offending conduct. It also extends the period by which proceedings for a secrecy offence must be commenced, from six months to three years. Section 80AA carries over previous 'exceptions' to offending conduct, as 'defences'.

3.79 The Bill also inserts into Schedule 4 of the Commission Act savings and transitional provisions as Part 5, clause 14. Relevantly, subclause (1) clarify that the above amendments relating to secrecy offences extend to information acquired before the Bill commences as an Act.

3.80 The Bill also inserts Part 8 into Schedule1 of the Recovery Act, which provides for savings and transitional provisions. This provides that any amendments made by the Bill extends to serious crime related activity that occurred before its commencement as an Act, but does not apply to proceedings which are pending immediately prior to commencement. It also clarifies that proposed sections 63 and 63A of the Bill applies to proceedings or applications for a stay of proceedings pending immediately before commencement as an Act.

The Bill makes various amendments to the *Confiscation of Proceeds of Crime Act 1989* and *Criminal Assets Recovery Act 1990*. It also inserts savings and transitional provisions into the Acts which extend the application of certain amendments made by the Bill to information acquired and criminal activity which occurred before the commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee notes that the Bill clarifies that amendments in respect to criminal activity does not apply to proceedings in train at the time of commencement. It also notes that the amendments in respect to secrecy offences do not expand the offence but clarify what conduct does not amount to an offence. In these circumstances, the Committee makes no further comment.

4. Constitution Amendment (Appointment of Lieutenant-Governor and Administrator) Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Member with carriage	The Hon. Alister Henskens SC MP
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Premier

Purpose and description

4.1 The object of the Bill is to clarify that the appointment of persons to the offices of Lieutenant-Governor of the State and Administrator of the State is to be made by the Governor of the State.

Background

4.2 The *Constitution Amendment (Appointment of Lieutenant-Governor and Administrator) Bill 2022* (the **Bill**) amends the *Constitution Act 1902* (the **Constitution Act**) to provide that the Governor appoints the Lieutenant-Governor of the State and the Administrator of the State.

4.3 The Governor is the formal head of state in NSW, and serves as representative of the Crown. The Hon. Alister Henskens MP in his second reading speech stated:

> The Governor performs an important constitutional role in the administration of the State, including appointing the Premier and Ministers of the Crown, presiding at meetings of the Executive Council and assenting to bills passed by this Parliament.

4.4 In the circumstances where the Governor is unavailable, the Lieutenant-Governor or the Administrator may assume this role. The Governor may also appoint one of these individuals to be the Governor's deputy during a brief absence of illness to perform the functions of Governor.

4.5 The Minister further described how:

> Since 1891 it has been the practice in New South Wales to appoint the Chief Justice of the Supreme Court as Lieutenant-Governor. The Constitution Act includes a deeming provision providing that the Administrator shall be the Chief Justice or, if the Chief Justice is the Lieutenant-Governor or the Chief Justice is unavailable, the next most senior available judge of the Supreme Court, which is usually the president of the Court of Appeal and then if the president is unavailable, it goes down the seniority of the judges of the Supreme Court. This deeming provision applies where an

Administrator has not otherwise been appointed and ensures that in the event of a catastrophe, a surviving judge of the Supreme Court may administer the State.

4.6 The Government received advice from the Solicitor General advising that under the *Australia Act 1986*, the Lieutenant-Governor should be appointed by the Governor and not the sovereign, unless the sovereign is physically in NSW at the appropriate time. This practise has been adopted in all other states except Queensland.

4.7 The Bill adopts this advice into law by amending section 9B(2) of the Constitution Act to provide for the appointment of the Lieutenant-Governor by the Governor. The Bill also amends section 9B(4) of the Constitution Act to establish that the Administrator shall also be appointed by the Governor.

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*.

5. Crimes Legislation Amendment (Coercive Control) Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General

Purpose and description

5.1 The objects of the Bill are to amend –

(a) the *Crimes Act 1900*, to make it an offence for an adult to engage in repeated or continuous abusive behaviour against a current or former intimate partner (the **coercive control offence**), and

(b) the *Crimes (Domestic and Personal Violence) Act 2007*, to provide that the coercive control offence, and certain offences in relation to domestic abuse, falls within the definition of domestic violence offence for the purposes of that Act, and

(c) the *Crimes (Sentencing Procedure) Act 1999*, to extend provisions in that Act in relation to victim impact statements to the coercive control offence, and

(d) the *Criminal Procedure Act 1986*, to provide the coercive control offence must be dealt with summarily unless the prosecutor or person charged elects to have the offence dealt with on indictment.

Background

5.2 The *Crimes Legislation Amendment (Coercive Control) Bill 2022* amends the *Crimes Act 1900* (the **Crimes Act**) and the *Crimes (Domestic and Personal Violence) Act 2007* (the **Domestic and Personal Violence Act**). The Bill forms part of the NSW Government's ongoing response to the '*Coercive control in domestic relationships*' report (the **Report**), which was tabled by the Joint Select Committee on Coercive Control in June 2021.

5.3 The Report made 23 recommendations, including that:

> …the NSW Government should respond to the Domestic Violence Death Review Team evidence, by criminalising coercive control. However commencement of a criminal offence should not occur without a considerable prior program of education, training and consultation with police, stakeholders and the frontline sector. Following drafting

> and legislation of such an offence, and prior to commencement, implementation should be assisted through a multi-agency taskforce.[6]

5.4 The Report also recommended that:

> …the NSW Government should propose amendments to the *Crimes (Domestic and Personal Violence) Act 2007* to create a clear and accessible definition of domestic abuse, which includes coercive and controlling behaviour. This should be done as a priority, before criminalising coercive control.[7]

5.5 In the second reading speech to the Bill, the Hon. Mark Speakman SC MP, Attorney General stated that:

> This bill delivers on the Government's commitment to develop, publicly consult on and introduce a standalone offence of coercive control in the 2022 spring session. This was a clear component of our response to the findings of this Parliament's joint select committee.

5.6 Schedule 1 amends the Crimes Act to introduce a new division relating to abusive behaviours towards intimate partners. Section 54D creates the ***coercive control offence*** by making it an offence for an adult to engage in a course of conduct consisting of abusive behaviour against a current or former intimate partner.

5.7 Schedule 1 also inserts definitions to assist with assessing the elements of the coercive control offence and establishes a defence whereby the defendant can adduce evidence that the behaviour was reasonable in all circumstances. The prosecution then bears the burden of disproving the defence beyond reasonable doubt.

5.8 Pursuant to the new section 54H, the prosecution is not required to establish the particulars of any specific incident of abusive behaviour that would be necessary if the incident were charged as a separate offence. However, the prosecution is still required to provide particulars of the overall time period of the alleged course of conduct and outline the nature and description of the behaviours that compromise the course of conduct. In the second reading speech, Mr Speakman noted that these procedural requirements were modelled on the offence of persistent sexual abuse of a child in section 66EA of the Crimes Act.

5.9 The Bill also inserts section 54I which establishes a mandatory statutory review of the newly added division after three years of operation. This is intended to ensure that the coercive control offence continues to function as intended, and investigate possibilities for further expansion if there is a case for such change.

5.10 Schedule 2 amends the Domestic and Personal Violence Act to provide that a coercive control offence is a ***domestic violence offence*** for the purpose of the Act. This amendment enables targeted legislative provisions, including protections for victims such as apprehended violence orders, to be available for a coercive control

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[6] Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships*, Report 1/57, Parliament of New South Wales, June 2021, p 1.

[7] Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships*, Report 1/57, Parliament of New South Wales, June 2021, p 25.

offence. In his second reading speech Mr Speakman advised of other powers which apply only to domestic violence offences, for example:

> Police are authorised to use special search, entry and seizure powers where a police officer believes on reasonable grounds that a domestic violence offence is being or may have been recently committed or is imminent or likely to be committed. The Commissioner of Police must suspend a firearms licence or a prohibited weapons permit, respectively, when a person is charged with a domestic violence offence.

5.11 Schedule 2 also inserts a definition of ***domestic abuse*** into the Domestic and Personal Violence Act. Mr Speakman advised that Schedule 2:

> … inserts a definition of domestic abuse within the definition of "domestic violence offence". This will articulate more clearly the type of behaviours that may constitute domestic abuse, including coercive and controlling behaviour. In its findings, the joint select committee identified that New South Wales was an outlier among Australian jurisdictions because it did not have a statutory definition of domestic abuse in its civil regime. This creates uncertainty and the risk of confusion as to what constitutes domestic abuse under the law. The committee heard about the benefits of introducing such a definition, including that it would enable a common baseline for health, education, child protection, policing, corrections and legal processes.

5.12 Schedule 3 amends the *Crimes (Sentencing Procedure) Act 1999* to provide that the provisions in the Act that relate to victim impact statements, apply to the new coercive control offence.

5.13 Schedule 4 amends the *Criminal Procedure Act 1986* to provide that a coercive control offence must be dealt with summarily unless the prosecutor or person charged elect to have the offence dealt with on indictment.

Issues considered by the Committee

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

Commencement by proclamation

5.14 Subsection 2(1) of the Bill states that the provisions will commence on proclamation.

5.15 Subsection 2(2) provides that it will commence as an Act on 1 July 2024 if not commenced by proclamation earlier.

5.16 Subsection 2(3) provides that Schedule 1, 2[3] or [5], 3 or 4 must not commence before 1 February 2024.

5.17 In the second reading speech to the Bill, Mr Speakman stated that the changes would require a long lead in time prior to the offence commencing to provide clarity to the relevant agencies and the community:

> Nearly every stakeholder identified the need for a long lead time prior to the offence commencing to enable thorough and detailed training, education and other implementation activities to support the offence. This provides sufficient time to implement this offence and gives agencies, the sector and the wider community certainty as to the window within which the offence will come into force. The drafting

also provides clarity and greater certainty as to the time frame for implementation and allows sufficient time for proper implementation.

Subsection 2(1) of the Bill states that the provisions will commence by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons. This is particularly the case with Bills such as this one which establish new offences attracting significant custodial penalties.

The Committee notes that the Attorney General stated in his second reading speech that a long lead in time was necessary to ensure the relevant agencies and the community could have certainty about the offence. Accordingly, the Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation activities to be organised.

However, as the Bill establishes a new criminal offence with a maximum penalty of seven years imprisonment, the Committee refers the matter to Parliament to consider whether a set start date would provide clarity as to when the offence would apply.

Extraterritorial operation – Elements of the offence

5.18 Section 54G sets out the meaning of "course of conduct", which means engaging in behaviour repeatedly and/or continuously, which does not have to be engaged in as an unbroken series of incidents or in immediate succession.

5.19 Subsection 54G(3) provides that a course of conduct includes behaviour engaged in within NSW, and in NSW and another jurisdiction.

The Bill provides that a course of conduct for the purposes of the coercive control offence includes behaviour engaged in within NSW and in another jurisdiction. This expands the range of behaviours that may constitute the offence to include those committed outside of NSW. The Committee generally comments where legislation may have extraterritorial effect as it could create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee notes that the offence must include behaviour that occurred in NSW and that the nature of the coercive control offence necessitates the consideration of incidents of abusive behaviour in their totality. In the circumstances the committee makes no further comment.

6. Electoral Legislation Amendment Bill (No 2) Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Member with carriage[8]	The Hon. Alister Henskens SC MP
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Premier

Purpose and description

6.1 The object of the Bill is to make further miscellaneous amendments to the *Electoral Act 2017*.

6.2 The Bill also amends the *Government Sector Finance Act 2018* in relation to the New South Wales Electoral Commission.

Background

6.3 The Bill seeks to make further amendments to the *Electoral Act 2017* (the **Act**), in addition to the amendments set out in the *Electoral Legislation Amendment Bill 2022* (the **earlier Bill**). The Committee notes that the earlier Bill was introduced in the Legislative Assembly on 22 June 2022 and passed with amendments on 10 August 2022, and is currently under consideration in the Legislative Council at the time of writing. The earlier Bill was reported on by this Committee in its Digest No. 46/57 (9 August 2022).[9]

6.4 In introducing the Bill, the Hon. Alister Henskens SC MP, Leader of the House, stated that these amendments are intended to 'facilitate the upcoming 2023 State general election and improvements to the administration of the NSW Electoral Commission'. He further stated that:

> Amendments included in the bill have been recommended by the NSW Electoral Commission largely to support the delivery and integrity of the State general election in March of next year.

6.5 The Bill proposes a range of reforms to the Act, including establishing a new electoral offence in respect to automated telephone calls containing 'electoral matter'. It also inserts additional provisions under Schedule 2 to enable the Electoral Commissioner (the **Commissioner**) appoint a staff member of the NSW Electoral

[8] The Bill was introduced by the Hon. Alister Henskens SC MP, Minister and Leader of the House, having carriage of the Bill. However, the primary Act that it amends, the *Electoral Act 2017*, is under the joint administration of the Premier and Attorney General in accordance with the *Allocation of the Administration of Acts*.

[9] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 46/57*, 9 August 2022.

Commission (the **Commission**) to act as the Commissioner, while their office is vacant during an election period, or while they are ill or absent.

6.6 It also replaces Part 4 of Schedule 7 to the Act and inserts Schedule 8, which set out special provisions applicable for the upcoming 2023 State general election and by-elections held before that general election.

6.7 Finally, the Bill also amends section 2.7 of the *Government Sector Finance Act 2018* to clarify that the Commissioner is that accountable authority for the Commission under that Act.

Issues considered by the Committee

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

Electoral offence – automated telephone calls

6.8 The Bill inserts section 187A into the Act which establishes a new electoral offence, during the period from the issue of the writ for election until 6 pm on election day.

6.9 Specifically, a person must not 'cause, permit or authorise' an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call to be made in clear spoken English. This offence carries a maximum penalty of 20 penalty units ($2 200) and/or 6 months' imprisonment for an individual.

6.10 Speaking to these amendments, the Leader of the House explained in his second reading speech that they are intended to clarify existing authorisation requirements for automated telephone calls, otherwise known as 'robocalls'. He noted that under existing section 186, a person is already required to 'legibly show' the name and address of an individual instructing the creation or printing of electoral material on the material. He further stated that:

> … it is not clear how authorisation details can be "legibly shown" on robocalls. The bill therefore makes amendments to clarify that for automated telephone calls containing electoral matter, the call must contain, in a clear voice, spoken in English, the name and address of an individual on whose instructions the call was made.

The Bill amends the *Electoral Act 2017* to create a new criminal offence for causing, permitting or authorising an automated telephone call to be made which contains electoral matter, unless it includes the name and address of an individual who instructed the call be made in clear spoken English. This offence carries a maximum penalty for an individual of 20 penalty units ($2 200) or 6 months' imprisonment, or both.

It is unclear whether this offence requires a mental element to be proven and may therefore amount to a strict liability offence. The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. Additionally, it may restrict an individual's freedom of political communication and, by requiring disclosure of identifying information, privacy of an individual's personal information.

However, the Committee acknowledges that the provisions intend to clarify how existing authorisation requirements for physical electoral materials apply to automated telephone calls. It also notes that the offence does not prohibit the making of automated telephone calls containing electoral matter and is intended to strengthen compliance with authorisation requirements. In the circumstances, the Committee makes no further comment.

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

Wide discretionary powers of the NSW Electoral Commissioner

6.11 As the Committee previously reported in its Digest No. 46/57,[10] the earlier Bill inserts Part 4 into Schedule 7 of the Act. It sets out special provisions to limit technology-assisted voting available in the 2023 general election and by-elections held before then, to telephone voting for vision impaired or blind voters.

6.12 The Bill replaces Schedule 7, Part 4 of the Act, to set out further special provisions for the 2023 general election and any by-elections held before that election.

6.13 Clause 14 sets out additional circumstances where telephone voting is permitted in these elections. Specifically, subclause (3) allows regulations to authorise the Electoral Commissioner to determine that telephone voting is permitted for COVID-19 affected electors. Subclause (4) allows the Commissioner to determine at any time that telephone voting is not permitted for a specified election or period during an election. A determination by the Commissioner under clause 14 is required to be published on the Electoral Commission's website.

6.14 In his second reading speech, the Leader of the House explained that these provisions provide 'flexibility should it be required closer to the 2023 election'. He also acknowledged that the earlier Bill:

> … which is currently before the Parliament, contains a prohibition on technology assisted voting—except for telephone voting for vision impaired or blind electors—for the 2023 general election and any by-elections held before that date. Other than including some flexibility for telephone voting to be made available for electors isolating due to COVID-19, the bill otherwise retains this prohibition.

6.15 Under Part 4, clause 15 allows the Commissioner to determine that 'modified postal voting' must be conducted for the 2023 general election and/or a by-election held before the general election. Subclause (2) sets out the deadline for the making of this determination, and requires the determination be published on the Electoral Commission's website.

6.16 Relevantly, the Bill also inserts Schedule 8 into the Act which sets out amendments to the postal voting provisions under Part 7, Division 10. These amendments only operate for an election over which a determination by the Commissioner under clause 15 applies and is in force, in accordance with clause 15(3).

[10] Parliament of New South Wales, Legislation Review Committee, *Legislation Review Digest No. 46/57*, 9 August 2022.

6.17 The Leader of the House explained the rationale for this modified method of postal voting in his second reading speech, noting that high numbers of postal votes are expected for the 2023 general election and stating that:

> The NSW Electoral Commission has advised that no supplier in New South Wales is able to print and dispatch sufficient quantities of postal vote material in the form currently required by the Electoral Act to meet the anticipated demand and the time frames required in response to these issues. The NSW Electoral Commission has proposed an alternate form of postal vote materials consistent with the postal vote pack used in the Federal election.

6.18 Finally, Part 4 substituted by the Bill includes clause 16, which sets out provisions which apply to the 2023 general election only.

6.19 Specifically, clause 16(2) allows the Commissioner to appoint a voting centre outside of Australia for all electoral districts, and designate and determine the operation of that centre as an early voting centre. The Commissioner may do this only if they are satisfied it would 'enhance the convenience of a large number of electors'. Subclause (3) also allows the Commissioner to abolish a voting centre so appointed.

6.20 However, clause 16(5) clarifies that only absent voters and absent silent electors under sections 135 and 136 of the Act may vote at a voting centre outside of Australia that has been appointed by the Commissioner. Subclause (4) also requires the Commissioner to publish a notice on the Electoral Commission's website of a determination regarding a voting centre outside of Australia under clause 16. This notice should be published at the time of making the determination.

6.21 In his second reading speech, the Leader of the House explained that clause 16 is intended to 'better facilitate declaration voting at overseas early voting centres for the 2023 general election' and stated that the Commission 'has advised that postal votes sent from overseas are not always able to be returned in time to be included in the vote count'.

The Bill amends the *Electoral Act 2017* to give the Electoral Commissioner discretionary powers under Schedule 7, Part 4 to make determinations in respect to the 2023 State general election and/or by-elections held before the general election. These determinations are required to be published on the Electoral Commission's website.

Specifically, clause 14 sets out a regulation-making power to authorise the Commissioner to permit certain COVID-19 affected electors to access telephone voting for a particular election. Telephone voting is otherwise limited to blind and vision-impaired voters. It also allows the Commissioner to determine at any time that telephone voting is not permitted for blind, vision impaired or COVID-19 affected electors for a certain election or time period. Clause 15 also allows the Commissioner to determine that postal voting in a relevant election must be conducted under the modifications set out in proposed Schedule 8. Finally, clause 16 allows the Commissioner to appoint a voting centre outside of Australia for declaration voting in the 2023 general election, and to abolish a centre so appointed.

In doing so, the Bill may therefore grant the Electoral Commissioner a wide discretionary power to regulate how electors may vote in the 2023 general election or by-elections held before the general election. This may make an individuals' right to vote and participate in public elections dependent upon the non-reviewable determinations of the Commissioner.

The Bill also defers to regulations the authorisation of the Commissioner to determine when and which COVID-19 affected electors are entitled to vote by telephone voting. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when it commences. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's right to participate and vote in public elections.

The Committee acknowledges that these amendments are intended to facilitate the upcoming general election to be conducted in 2023, and that the provisions are based on the advice of the Commission. It also notes that any regulations are required to be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*.

However, the matters that may be determined by the Commissioner and deferred to the regulations relate to the participation and voting in public elections. The Committee also notes that the determinations are only required to be published on the Commission's website, which is not required to be tabled in Parliament and therefore not subject to disallowance. These provisions may thereby make it difficult for a person to understand how they may meaningfully vote and participate in elections, in this case electors relying on telephone or postal voting and absent voters outside of Australia. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Commencement by proclamation

6.22 Clause 2 of the Bill provides that the Bill commences (as an Act) 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.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for the necessary administrative arrangements to be implemented in order to give effect to the amendments. However, given that some of these provisions are intended to facilitate the upcoming State general election in March 2023 and establish new offences, the Committee notes that commencement by proclamation may make it difficult for individuals to ascertain their electoral rights and obligations for the election. For these reasons, the Committee refers the matter to Parliament for its consideration.

7. Electronic Conveyancing Enforcement Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital Government

Purpose and description

7.1 The object of the Bill is to establish mechanisms for the enforcement of the Electronic Conveyancing National Law (**ECNL**) set out in the Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012*. The ECNL provides the basis for a national scheme for the electronic lodgment and processing of conveyancing transactions. In particular, the Bill authorises the Registrar-General to take the following action in relation to an Electronic Lodgment Network Operator (**ELNO**) approved to operate an Electronic Lodgment Network under the ECNL—

(a) to accept an enforceable undertaking given by an ELNO in relation to a contravention of the ECNL, an operating requirement made under the ECNL or a condition of an approval,

(b) to give a remedial direction or an interim remedial direction to an ELNO in relation to a contravention of a requirement imposed by or under the ECNL,

(c) to apply to the Supreme Court for an order requiring payment of a monetary amount for a contravention of certain requirements of the ECNL or a remedial direction or interim remedial direction.

Background

7.2 The Bill provides the Registrar-General (**Registrar**) with enforcement powers to regulate compliance of ENLOs under the national eConveyancing framework.

7.3 In his second reading speech, the Hon. Victor Dominello MP said that a 'fit-for-purpose' enforcement regime is currently missing from the national framework and that, while such regime is currently being developed, implementing a national regime is difficult and takes time. The Minister said that:

> For these reasons, New South Wales proposes to introduce a standalone enforcement regime for the protection of New South Wales conveyancing transactions until an agreed national enforcement regime is in place. The passage of the bill will not lessen the Government's commitment to national consistency or slow the progress of further amendments to the Electronic Conveyancing National Law. In fact, the New South Wales eConveyancing enforcement regime will run parallel to the developing national regime and has been designed to minimise impact on national consistency, in the following ways. First, the New South Wales regime is intended to operate on an

> interim basis until a suitable national regime comes into effect. This will minimise any inconsistency or overlap between the New South Wales and national regimes. Secondly, the New South Wales regime is a targeted, pared-back version of the national enforcement proposal, designed to ensure regulatory consistency and minimal disruption when New South Wales transitions to the national regime.

7.4 The Minister also emphasised that an 'existing effective compliance process' is being used by the Registrar for subscribers such as law firms, conveyancing practices and financial institutions, which is why they are covered by the enforcement regime set out in the Bill. This process will be used 'until it can be enhanced by the enforcement reforms at a national level'.

7.5 Part 2 of the Bill introduces three enforcement measures to regulate the conduct of ENLOs 2, being:

(a) enforceable undertakings that can be offered by ENLOs and accepted by the Registrar (Division 1),

(b) remedial directions which can be given by the Registrar to ENLOs (Division 2),

(c) civil penalties for non-compliance with an enforcement provision (Division 3).

7.6 Under Division 1, the Registrar can accept a written, enforceable undertaking by an ENLO which specifies the measures the ENLO will implement to remedy or prevent a contravention of the ECNL, an operating requirement determined under the ECNL or a condition of approval of the ENLO under the ECNL. If the Registrar reasonably believes the ENLO has contravened the undertaking, it can apply to the Supreme Court for an order directing compliance with, or discharging or varying, the undertaking. Other enforcement action under Divisions 2 and 3 cannot be taken if an enforceable undertaking is in effect in relation to the contravention.

7.7 The Minister provided in his second reading speech that:

> Enforceable undertakings are intended to provide a flexible, adaptive remedy that focuses on practical steps to resolve the root cause of any noncompliance, while also allowing the ELNO in breach to continue to operate.

7.8 Under Division 2, the Registrar can give a written remedial direction to an ENLO it reasonably believes to have contravened, or is contravening, a requirement imposed by or under the ECNL, setting out the measures the ENLO must implement to remedy the contravention or prevent it occurring again. Directions are typically given with 14 days' notice unless an interim remedial direction needs to be given earlier because an emergency situation exists. A decision of the Registrar to give a remedial direction can be appealed to the Supreme Court.

7.9 Under Division 3, the Registrar can apply to the Supreme Court for an enforcement order requiring and ENLO to pay the State a monetary amount if it contravenes certain sections of the ECNL, or a requirement of a remedial direction or interim remedial direction. The Register cannot commence proceedings if more than 2 years have passed after it has become aware of the contravention.

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

Wide regulation-making power

7.10 Section 21 of the Bill provides a general regulation-making power that the Governor 'may make regulations, not inconsistent with this Act, about any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

The Bill provides a general regulation-making power under section 21. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence.

The Committee recognises the provisions allow for flexibility in the new enforcement framework. However, it notes that they may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Statutory rule expressed to commence before publication on NSW legislation website

7.11 Schedule 1 provides that regulations may contain provisions of a savings or transitional nature consequent on the commencement of a provision of this Act or a provision amending the Act.

7.12 Subsection (5) states that a savings or transitional provision taking effect before its publication on the NSW legislation website does not:

(a) affect the rights of a person existing before that publication in a way prejudicial to the person, or

(b) impose liabilities on a person for anything done or omitted to be done before publication.

7.13 In this section, 'person' does not include the State or an authority of the State.

7.14 Section 39(2A) of the *Interpretation Act 1987* provides:

> Neither the whole nor any part of a statutory rule is invalid merely because (without statutory authority) the statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence. In that case, that or those provisions commence on the day the statutory rule is published on the NSW legislation website, instead of on the earlier day.

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand. It thereby asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

8. Port of Newcastle (Extinguishment of Liability) Bill 2022*

Date introduced	13 October 2022
House introduced	Legislative Assembly
Member responsible	Mr Greg Piper MP
	*Private Members Bill

Purpose and description

8.1 The object of the Bill is to extinguish certain liabilities of the operator of the Port of Newcastle relating to an agreement between the State and the operator of Port Botany and Port Kembla.

Background

8.2 The *Port of Newcastle (Extinguishment of Liability) Bill 2022* (the *Bill*) extinguishes liability of an operating entity associated with the Port of Newcastle that arises from reimbursement provisions under the Port of Newcastle Port Commitment Deed (the **Port Commitment Deed**).

8.3 The Bill defines the Port Commitment Deed as that entered into by the State on or about 30 May 2014 for the purposes of privatising the Port of Newcastle, as in force from time to time.

8.4 The Bill extinguishes liability that arises from a reimbursement provision under the Port Commitment Deed.

8.5 A reimbursement provision requires an operating entity associated with the Port of Newcastle to pay the State where the State is required to pay an amount to an operating entity associated with another port.

8.6 In the second reading speech to the Bill, Mr Greg Piper MP indicated that the reimbursement provision in the Port Commitment Deed:

> ...constitutes a considerable restriction on free trade, is anti-competitive and creates a monopoly for NSW Ports to the detriment of the Hunter and other regional areas north of Sydney.

8.7 The Committee notes that the provisions of the Bill may affect the freedom of contract of the relevant parties, which may include corporations or industry stakeholders. However, the Committee is satisfied that the Bill does not engage with the personal rights and liberties at an individual level. The Committee therefore makes no further comment on the Bill.

Issues considered by the Committee

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

9. Property Tax (First Home Buyer Choice) Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasury

Purpose and description

9.1 The object of the Bill is to give first home buyers a choice when buying a first home as to whether to pay duty on the transfer of the land or to instead make the land subject to property tax.

Background

9.2 The *Property Tax (First Home Buyer Choice) Bill 2022* (the **Bill**) establishes a legislative scheme by which first homes buyers can chose whether to pay stamp duty upfront or opt into an annual property tax.

9.3 The scheme is only available to people who can currently access the First Home Buyers Assistance Scheme, deemed first home buyers (section 5). To access the scheme, individuals must be Australian Citizens or permanent residents living in NSW that have not, nor can their spouse have, previously owned residential land in Australia.

9.4 Persons who opt-in to the scheme must comply with a residence requirement (section 15) that requires them to reside in the property for a continuous period of at least six months that commences within 12 months of the property being purchased. The Chief Commissioner has discretionary powers under section 15(3) to waive this requirement where there are extenuating circumstances.

9.5 The land values that will be used to calculate the annual tax are established in Part 5, and are the official land values issued by the Valuer General. The taxation will be indexed (section 24). An additional tax will be charged on the property if it is rented out (Schedule 2). The Hon. Matt Kean MP, Treasurer, stated in his second reading speech that:

> The higher rates for investors apply because of the scheme's focus on lifting rates of home ownership and because investors' property tax payments would be deductible expenses for income tax purposes. These tax rates will remain unchanged during the first two financial years of the scheme.

9.6 Schedule 4, Part 2 provides for a period of retrospective application. Property tax applications will be available for dwelling purchases that are contracted in the period between the date of assent of this legislation and 15 January 2023. An eligible

first home buyer who buys a property between assent and 15 January will be required to pay stamp duty. However, after 16 January they will be able to apply to opt in to property tax and if this is approved, they will receive a refund for the stamp duty paid.

9.7 Schedule 4, Part 7 provides for a deferral scheme, which allows property owners who have opted in to the tax to defer payment until the property is sold, at which time the Government would claim the unpaid taxes in the property settlement. This deferral will be available to property owners who are assessed by the Chief Commissioner as being otherwise unable to meet their basic living expenses, or other considerations including mental health and intellectual disability. In his second reading speech, the Treasurer stated that:

> This scheme is intended to support vulnerable home owners who have fallen on financially difficult times and cannot meet their property tax liabilities… No person will be required to sell their principal place of residence in order to meet their property tax obligations.

9.8 Schedule 5 provides for minor amendments to relevant existing legislation, including the *Duties Act 1997*, *Land Tax Act 1956* and *Taxation Administration Act 1956*.

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

Wide regulation-making power

9.9 Section 54 of the Bill provides a general regulation-making power that the Governor 'may make regulations, not inconsistent with this Act, about matters that by this Act are required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

The Bill provides a general regulation-making power under section 54. Specifically, it allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or effecting the Bill.

There appears to be no provisions which define or narrow the scope of the ordinary meaning of 'convenient'. The Bill may therefore include a wide regulation-making power. Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence.

The Committee recognises that the overarching aim of the provisions is to strengthen law enforcement in their investigation and prevention of organised criminal activity using encrypted devices. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters with little limit. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Commencement by proclamation

9.10 Section 2 of the Bill states that the provisions will commence a day or days to be appointed by proclamation.

9.11 In the second reading speech to the Bill, Treasurer stated that:

> The Government is working closely with the relevant public and private sector systems operators to ensure the scheme is ready to go live in 2023.

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.

The Committee acknowledges that the Treasurer noted in his second reading speech that timing for the implementation of the scheme is outlined in the Bill. However, there is work to be done with operators to ensure the scheme can commence in 2023. Accordingly, the Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation activities to be organised. In the circumstances, the Committee makes no further comment.

Statutory rule expressed to commence before publication on NSW legislation website

9.12 Part 1 of Schedule 4 provides that the regulations may contain provisions of a savings or transitional nature consequent on the commencement of a provision of this Act or a provision amending the Act.

9.13 Subsection (5) states that a savings or transitional provision taking effect before its publication on the NSW legislation website does not:

(a) affect the rights of a person existing before that publication in a way prejudicial to the person, or

(b) impose liabilities on a person for anything done or omitted to be done before publication.

9.14 In this section, 'person' does not include the State or an authority of the State.

9.15 Section 39(2A) of the *Interpretation Act 1987* provides:

> Neither the whole nor any part of a statutory rule is invalid merely because (without statutory authority) the statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence. In that case, that or those provisions commence on the day the statutory rule is published on the NSW legislation website, instead of on the earlier day.

The Bill provides that a savings and transitional provision, which may be contained in the regulations, taking effect before publication on the NSW legislation website does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand.

The Bill asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website. This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

10. Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2022*

Date introduced	13 October 2022
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong MP
	*Private Members Bill

Purpose and description

10.1 The object of the Bill is to amend the *Residential Tenancies Act 2010* (the **Act**)—

(a) to remove the right of a landlord to terminate residential tenancy agreements without grounds, and

(b) to specify the grounds on which residential tenancy agreements may be terminated, and

(c) to make it an offence for a landlord to fail to ensure residential premises are used in accordance with the ground on which the termination order was made, and

(d) to enable the Civil and Administrative Tribunal to make certain orders, on the application of a tenant, if the Tribunal is satisfied that the residential premises have not been used in accordance with the ground on which the residential tenancy agreement was terminated.

Background

10.2 The Bill amends the *Residential Tenancies Act 2010*, which sets out the legislative framework for residential tenancy agreements and the rights and obligations of landlords and tenants.

10.3 The Bill removes the right of a landlord to terminate a fixed term agreement or a periodic agreement without grounds. The grounds on which a landlord can terminate are set out in the Bill, and additional grounds can be prescribed by the regulations. In her second reading speech, Ms Jenny Leong MP provided that this allows for additional grounds for termination to be included in the framework.

10.4 Where a termination order was made by the NSW Civil and Administrative Tribunal (the **Tribunal**), the Bill also requires a landlord to ensure the premises are used in accordance with the ground on which the order was made. A penalty applies for non-compliance. If the Tribunal is satisfied that the landlord has not complied with

this requirement it may, on application by the former tenant, make one or more orders.

10.5 In her second reading speech, Ms Leong emphasised the instability currently faced by renters in NSW. She criticised 'the current no grounds eviction provisions, which allow landlords to evict tenants at the end of a lease or during a lease with no reason whatsoever' and said that the Bill 'would prevent unfair no grounds evictions taking place'.

Issues considered by the Committee

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

Retrospectivity, property rights and freedom of contract – termination of residential tenancy agreements

10.6 The Bill amends sections 84(1) and 85(1) of the Act to remove the right of a landlord to terminate a fixed term agreement or periodic agreement without grounds. Rather, a termination notice can only be given:

(a) for a landlord who is an individual, if the landlord or a person associated with the landlord intends to occupy the residential premises for at least 12 months. A person is 'associated' with the landlord if they are in a close family relationship with the landlord, or normally live with the landlord and are wholly or substantially dependant on them,

(b) if the landlord intends to carry out renovations and repairs to the premises which will render it uninhabitable for at least 4 weeks, and they have obtained all necessary permits and consents to carry out the work,

(c) if the residential premises will be used in a way, or kept in a state, that means it cannot be used as a residence for at least 6 months, or

(d) for another ground prescribed by the regulations.

10.7 For a fixed term agreement, the termination notice must specify a termination date that is on or after the fixed term and give at least 90 days' notice. The Act current requires that at least 30 days' notice is given. The notice period for a periodic agreement remains the same, being at least 90 days' notice.

10.8 The Tribunal must make a termination order if the landlord makes an application and the Tribunal is satisfied that:

(a) a termination notice was given in accordance with the relevant section,

(b) the landlord has established the ground on which the notice was given, or

(c) the termination is appropriate in the circumstances and the tenant has not vacated the premises as required by the notice.

10.9 The Bill amends Schedule 2 to provide that the amendments made by the Bill extend to a residential tenancy agreement entered into before its commencement.

The Bill amends the *Residential Tenancies Act 2010* to remove the ability for landlords to issue a termination notice for a fixed term or periodic residential tenancy agreement without grounds. The proposed amendments to section 84(1) and 85(1) provide that a landlord may give a notice of termination only in certain circumstances, including:

- **where the landlord or a person closely associated with them intends to live at the premises for at least 12 months,**
- **for renovations that will make the premises uninhabitable for at least 4 weeks and all permits and consents have been obtained,**
- **where the premises will be used or kept in a way that means it cannot be lived in for at least 6 months, or**
- **on other grounds prescribed by the regulations.**

In limiting landlords' rights under tenancy agreements and relevant legislation, the Bill appears to impede landlords' property rights. As the provisions would apply to existing tenancy agreements, this Bill also acts retrospectively. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Further, by limiting the ability of a landlord to exercise their rights under an existing agreement, the Bill appears to impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The Committee refers the provisions to the Parliament for its consideration, noting however that the Bill is attempting to redress a power imbalance in the tenant-landlord relationship.

Retrospectivity, property rights, freedom of contract and strict liability offence – use of property following termination order

10.10 The Bill includes certain provisions relating to the use of residential premises where a termination order is made by the Tribunal in relation to an agreement terminated under sections 84 or 85 (as amended).

10.11 New section 85A requires that the landlord must ensure the premises are used in accordance with the ground on which the termination order was made. A maximum penalty of 100 penalty units ($11 000) applies for non-compliance.

10.12 New section 85B provides that, where the Tribunal is satisfied that the premises have not been used in accordance with the ground on which the termination order was made, it can make certain orders on application by the tenant of the terminated agreement. Specifically, the Tribunal can make one or more of the following orders:

(a) an order directing the landlord, or person permitted by the landlord to occupy or use the premises, to occupy or use the premises in accordance with the ground on which the termination order was made,

(b) if the Tribunal considers it appropriate, an order deeming the premises is subject to a residential tenancy agreement between the landlord and tenant for a term, and on the conditions, specified by the Tribunal,

(c) an order that the landlord pay compensation to the tenant for wrongful termination.

10.13 The period in which a tenant can make an application to the Tribunal under section 85B is prescribed by the regulations.

10.14 As noted above, the Bill amends Schedule 2 to provide that the amendments made by the Bill extend to a residential tenancy agreement entered into before its commencement.

The Bill amends the *Residential Tenancies Act 2010* to regulate the use of a premises if a termination order was made in relation to a fixed term or periodic agreement under sections 84 or 85 (as amended by this Bill). Specifically, the landlord must ensure the premises are used in accordance with the ground on which the termination order was made. Non-compliance is a strict liability offence with a maximum penalty of 100 penalty units ($11 000). If the Tribunal is satisfied the premises have not been used in accordance with the relevant ground of termination, it may, on application of the former tenant, make one or more orders. These orders include directing the landlord or person occupying or using the premises to use the premises in accordance with the ground on which the termination order was made, or pay compensation to the former tenant for wrongful termination. If the Tribunal considers it appropriate, it can also make an order deeming the premises subject to a residential tenancy agreement between the landlord and tenant for a term, and on the conditions, specified.

In limiting landlords' use of their premises after the termination of a residential tenancy agreement, the Bill appears to impact on the property rights of landlords. As provisions would apply to existing tenancy agreements, this Bill also acts retrospectively. The Committee generally comments on such provisions, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Further, by deeming the existence of a contract on conditions specified by the Tribunal, the Bill appears to impact on freedom of contract. Finally, the Committee notes that the Bill creates a strict liability offence. It notes that strict liability offences depart from the common law principle that the mental element of an offence is relevant to the imposition of liability.

The Committee recognises that these provisions appear to be aimed at encouraging compliance by landlords with the Bill's requirements to terminate agreements only on the grounds specified in sections 84 and 85. However, noting the impact on landlords' rights and retrospective application of the provisions, it refers the provisions to the Parliament for its consideration, noting however that the Bill is attempting to redress a power imbalance in the tenant-landlord relationship.

11. Statute Law (Miscellaneous Provisions) Bill (No 2) 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Alister Henskens SC MP
Portfolio	Enterprise, Investment and Trade; Sport; Skills and Training; Science, Innovation and Technology

Purpose and description

11.1 The objects of this Bill are to—

(a) make minor amendments to various Acts and instruments (Schedule 1), and

(b) amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2), and

(c) amend certain other Acts and instruments for the purpose of effecting statute law revision in relation to machinery of government changes arising from administrative changes orders (Schedule 3), and

(d) repeal an Act and an instrument (Schedule 4), and

(e) make other provisions of a consequential or ancillary nature (Schedule 5).

Background

11.2 In his second reading speech, the Hon. Alister Henskens MP noted that the Bill 'continues the statute law revision program', and explained that it is:

> …an effective method for making minor policy changes and maintaining the quality of the New South Wales statute book by removing typographical errors, updating cross-references and repealing redundant provisions.

11.3 The Bill makes various amendments to a number of unrelated Acts and instruments grouped into Schedules within the Bill in accordance with the operational nature of those provisions. Those Schedules were discussed by Mr Henskens MP in his second reading speech as follows:

(a) Schedule 1 'contains policy changes of a minor and non-controversial nature that are too inconsequential to warrant the introduction of separate amending bills', to 34 Acts and 4 instruments. For example, amendments to various Acts which allow the service of documents by electronic transmission to 'reflect contemporary practices in the service of documents'.

(b) Schedule 2 consists 'of minor technical changes to legislation that the Parliamentary Counsel considers are appropriate for inclusion in the bill'. For example, corrections of grammatical errors and updating references to outdated legislation.

(c) Schedule 3 sets out 'machinery-of-government changes, arising from administrative change orders', including updates to department names.

(d) Schedule 4 'continues the program of repealing Acts and instruments that are redundant or of no practical utility'. Specifically, it repeals *Stock Medicines Amendment Act 2004*, which 'contains one remaining amendment that is not intended to commence', and the *City of Sydney Regulation 2016*, as the Bill relocates its only provision to the primary legislation.

(e) Schedule 5 contains general savings, transitional and other provisions.

Issues considered by the Committee

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

Statutory rule expressed to commence before publication on NSW legislation website

11.4 Clause 5 of Schedule 5 provides that the Governor may make regulations containing provisions of a savings or transitional nature consequent on enactment of the Bill (as an Act).

11.5 Subsection (3) provides that, to the extent to which a savings or transitional provision takes effect before its publication on the NSW legislation website, it does not operate to:

(a) affect the rights of a person (other than the State or an authority of the State) existing before that publication in a way prejudicial to the person, or

(b) impose liabilities on a person (other than the State or an authority of the State) for anything done or omitted to be done before publication.

11.6 Section 39(2A) of the *Interpretation Act 1987* states:

> Neither the whole nor any part of a statutory rule is invalid merely because (without statutory authority) the statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to commence. In that case, that or those provisions commence on the day the statutory rule is published on the NSW legislation website, instead of on the earlier day.

The Bill provides that a savings and transitional provision contained in the regulations, which takes effect before its publication on the NSW legislation website, does not affect a person's existing rights prejudicially or impose liability on them for anything done or omitted to be done beforehand. It thereby asserts that a provision contained in a regulation may apply before its publication on the NSW legislation website.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. The section provides that where a statutory rule is published on the NSW legislation website after the day on which one or more of its provisions is or are expressed to

commence, that those provisions commence on the day the statutory rule is published on the NSW legislation website (rather than the earlier day). The Committee refers this matter to the Parliament for its consideration.

12. Treasury and Energy Legislation Amendment Bill 2022

Date introduced	12 October 2022
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasury and Energy

Purpose and description

12.1 The Bill—

(a) amends the *Government Sector Finance Act 2018* to—

(i) provide that particular payments between Government Sector Finance (GSF) agencies of money, out of the Consolidated Fund, appropriated under the Authority of an Act (deemed appropriation money) are taken to be appropriations to the lead Minister for the GSF agency that receives or recovers the deemed appropriation money, and

(ii) clarify the reporting requirements for deemed appropriations, and

(iii) clarify that an appropriation relating to a service, function or program may be applied by a Minister, in accordance with a determination by the Treasurer, if the service, function or program is transferred between Ministers or between GSF agencies, and

(iv) enable the Treasurer to make determinations about the application of deemed appropriations if a service, function or program is transferred between Ministers or between GSF agencies, and

(b) amends the *First Home Owner Grant (New Homes) Act 2000* to enable the establishment of shared equity schemes, and

(c) amends the *Superannuation Act 1916* to provide for the transfer of benefits from public sector schemes and trust deed schemes to successor funds, and

(d) amends the *Electricity Supply Act 1995* to—

(i) regulate the conduct and cost of audits, and

(ii) provide for regulations to be made to extend the period in which energy savings scheme certificates may be surrendered, and

(iii) clarify when peak demand reduction scheme certificates and renewable fuel scheme certificates may be surrendered, and

(iv) enable the Scheme Administrator to waive payment of, or reduce, an application fee in relation to the energy savings scheme, the peak demand reduction scheme or the renewable fuel scheme, and

(e) amends the *Energy Utilities and Administration Act 1987* to remove the requirement for payments to be made into and out of the Energy Administration Account by the Department, and

(f) amends the *Subordinate Legislation Act 1989* to exclude regulations made under the *Electricity Infrastructure Investment Act 2020* from staged repeal, and

(g) makes consequential amendments to other Acts.

Background

12.2 The *Treasury and Energy Legislation Amendment Bill 2022* amends various pieces of legislation administered by the Treasurer and Minister for Energy with the intention of delivering a series of reforms that will strengthen accountability, transparency, performance and innovation in the New South Wales Government.

12.3 Schedule 1 amends the *Government Sector Finance Act 2018* (**GSF Act**) to clarify the authority for GSF agencies that spend and receive payments with other agencies within the sector. In his second reading speech to the Bill, the Hon. Matt Kean MP, Treasurer and Minister for Energy, stated that:

> While there are strong mechanisms in place to manage agencies' administrative expenditure limits detailed in the budget papers, there is no mechanism to ensure expenditure by agencies from the Consolidated Fund does not cause a technical breach of a Minister's appropriation authority. This is because the legal framework is out of step with modern cash and accrual accounting concepts. The proposed amendments simplify and clarify the authorisation framework. This will enable Ministers to have clearer visibility over their appropriation limits, and an improved ability to manage those appropriations they are accountable for.

12.4 Schedule 2 amends the *First Home Owner Grant (New Homes) Act 2000* (**First Home Owner Act**) to provide a statutory framework to enable the operation of a shared equity scheme in New South Wales. These amendments will provide the Chief Commissioner with the authority to administer the shared equity scheme and the corresponding powers to protect the state's interests.

12.5 Schedule 3 amends the *Superannuation Administration Act 1996* (the **Superannuation Act**) to allow for a transfer of former government superannuation schemes to successor funds via a new regulation-making power. In his second reading speech the Treasurer noted that the need for this bill arose from:

> …the proposed merger between the Energy Industries Superannuation Scheme [EISS] set up by the New South Wales Government and the Construction and Building Union Superannuation Fund [Cbus].

12.6 The amendment is intended to precede the *Superannuation Administration (Cbus Transitional Provisions) Regulation 2022* which will set out the details of the

proposed transfer to the successor fund. In regards to this amendment, the Treasurer noted that:

> The proposed regulation will transfer the members of EISS to the Cbus fund; make Cbus liable for the payment of their benefits; and provide that employers under EISS are now employers contributing to the Cbus fund. Without this bill and the proposed regulation, EISS and Cbus would have to merge through other mechanisms, which creates additional ongoing administrative costs to the detriment of members. Also without the bill, EISS may not be able to merge with Cbus, which could breach the conditions set by APRA requiring EISS to merge with a larger, better-performing fund.

12.7 Schedule 4 amends the *Electricity Supply Act 1995* (**Electricity Supply Act**) to improve the operation of the Energy Security Safeguard. The Treasurer asserted that these amendments would:

> …complete the reforms to align with the policy and design features that the Government committed to in the Energy Security Safeguard position paper. Given the similarities and need for consistency between the safeguard schemes to minimise red tape, the amendments also apply to the Renewable Fuel Scheme, which was legislated after the position paper was published.

12.8 Schedule 4 also amends the *Subordinate Legislation Act 1989* (**Subordinate Legislation Act**) to exclude regulations made under the *Electricity Infrastructure Investment Act 2020* from the application of the staged repeal provisions. In the second reading speech, the Treasurer advised that this amendment would:

> …provide greater confidence to long-term energy service agreement operators and network operators that are engaged under the Electricity Infrastructure Roadmap. These amendments will reduce the risk of a change in law mid-contractual term, affecting long-term energy service agreements and network infrastructure project revenue determinations made under the Electricity Infrastructure Investment Act 2020 and the Electricity Infrastructure Investment Regulation 2021.

12.9 The Act also amends the *Energy and Utilities Administration Act 1987* (**Energy and Utilities Administration Act**) to remove outdated reference, and to remedy a current technical breach of the Act by Treasury.

Issues considered by the Committee

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

Retrospectivity

12.10 Subsection 2(2) of the Bill states that Schedule 4.2 is taken to have commenced on 8 April 1999.

12.11 Schedule 4.2 removes references to "the department" in section 35 of the Energy and Utilities Administration Act.

12.12 Section 35 of the Energy and Utilities Administration Act currently reflects the energy administration framework that was present on the enactment of the Act in 1987. This provision established the department of energy, which was abolished on 8 April 1999 by the *Public Sector Management (General) Order 1999.*

12.13 In the second reading speech, the Treasurer stated that the amendment to section 35 of the Act 'removes outdated references to "the department" and remedies the current technical breach of the Energy and Utilities Administration Act by Treasury'.

Subsection 2(2) of the Bill states that Schedule 4.2 is taken to have commenced on 8 April 1999. Schedule 4.2 removes references to "the department" in section 35 of the *Energy and Utilities Administration Act 1987*. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

However, the Committee acknowledges that the amendment is administrative and is intended to remove outdated references in the Act. The Committee also notes that retrospective application is required to prevent a technical breach of the Act. In the circumstances the Committee makes no further comment.

Privacy of personal information

12.14 The Bill amends the First Home Owner Act to provide that the Chief Commissioner may, for the purposes of exercising functions under Part 2A Shared Equity Scheme of the Act, use and disclose information obtained by the Chief Commissioner under this Act or another Act.

12.15 Subsection 24E(e) of the First Home Owner Act states that the Chief Commissioner has the functions necessary to administer and give effect to a shared equity scheme including the following functions:

(a) to establish application processes relating to participation in the scheme,

(b) to receive and assess applications,

(c) to enter contracts or other arrangements for the purposes of administering the scheme,

(d) to monitor compliance with requirements of the scheme,

(e) other functions prescribed by the regulations.

The Bill amends the First Home Owner Act to provide that the Chief Commissioner may, for the purposes of exercising functions under Part 2A of the Act, use and disclose information obtained by the Chief Commissioner under the Act or another Act. The Committee notes that, as the Chief Commissioner's functions includes entering contracts, monitoring compliance and assessing applications, it is unclear whether this disclosure of information extends to any personal information obtained in relation to an individual's application to the First Home Owner Grant shared equity scheme.

Subsection 24E(e) of the Act also enables the regulation to prescribe additional functions that the Chief Commissioner could exercise in the administration of the shared equity scheme. The Committee acknowledges that any function prescribed by regulation would still need to be necessary to administer and give effect to a shared equity scheme. However, the broad regulation-making power

may possibly permit a use or disclosure of personal information that may interfere with an individual's privacy or confidentiality interests.

The Committee also notes that where personal information is provided, the Chief Commissioner, as part of a government agency, will still be subject to certain privacy safeguards regarding the storage, use and disclosure of such information. In these circumstances, the Committee makes no further comment.

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

Strict liability offences

12.16 The Bill amends the First Home Owner Act by inserting section 45(4) which provides that the Chief Commissioner may, by written notice to a participant in the shared equity scheme, impose a penalty of up to $3 300 on the person if the person fails to do any of the following:

(a) give the Chief Commissioner information the Chief Commissioner reasonably requests from the person for the administration of the scheme,

(b) notify the Chief Commissioner of a change in circumstances required to be notified to the Chief Commissioner under the conditions of the person's participation in the scheme,

(c) comply with a condition of a shared equity arrangement under a shared equity scheme and the condition is prescribed by the regulations,

The Bill amends the First Home Owner Act to provide that the Chief Commissioner can impose a penalty of up to $3 300 on a participant in the shared equity scheme, where that person fails to comply with specific requirements. These requirements include notifying the Chief Commissioner of a particular change in circumstances and complying with a condition of a shared equity arrangement. These offences appear to be strict liability offences.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is a relevant factor in establishing liability for an offence. However, the Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also notes that the penalties are monetary only and do not contemplate a custodial sentence. In the circumstances, the Committee makes no further comment

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

Commencement by Proclamation

12.17 Subsection 2(1)(a) of the Bill states that Schedule 3.1[10] commences on a day or days to be appointed by proclamation.

12.18 Schedule 3.1[10] omits section 128A of the Superannuation Act which sets out matters that may be set out in regulations relating to mobility between funds.

Subsection 2(1)(a) of the Bill states that Schedule 3.1[10] commences on a day or days to be appointed 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.

Schedule 3.1[10] omits section 128A of the Superannuation Act, which sets out matters, with respect to mobility between funds, that may be set out in regulations. The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for implementation or administrative activities to be arranged. However, as section 3.10[10] would remove a substantive provision enabling the regulations to set out details around mobility between funds, the Committee refers the matter to Parliament to consider whether a set start date would provide clarity to individuals who may be impacted by the omission.

Delegation powers

12.19 The Bill inserts section 31A into the First Home Owner Act , which states that the Minister may delegate the exercise of any function of the Minister under the Act, other than the power of delegation, to the Chief Commissioner or a person employed in the public service.

The Bill amends the First Home Owner Act to allow the Minister to delegate the exercise of any function under the Act, other than the power of delegation, to the Chief Commissioner or a person employed in the public service. The Committee notes that the Bill does not contain restrictions on this power to delegate, for example restricting delegation to people with certain qualifications or expertise.

The Committee recognises that under the Act, the Chief Commissioner is responsible to the Minister for the administration of the first home owner grant scheme. This includes assessing applications for first home owner grants and obtaining relevant information about the applicants. The Minister is also responsible for reviewing this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. Delegation of the more significant tasks regarding confidential information and statutory review may warrant a higher level of specificity about who can perform these tasks. In the circumstances, the Committee refers this matter to Parliament for its consideration.

Incorporation of extrinsic materials

12.20 The Bill amends the GSF Act to enable the Treasurer to publish policy guidelines for the purposes of the administration of a shared equity scheme.

12.21 The Bill also requires the Chief Commissioner to administer a shared equity scheme in accordance with the published policy guidelines for the scheme.

The Bill empowers the Treasurer to publish policy guidelines for the administration of a shared equity scheme, and mandates that the Chief Commissioner must administer a scheme in accordance with the published policy

guidelines. These guidelines are not tabled in Parliament and are therefore not subject to parliamentary scrutiny. The Committee acknowledges that the guidelines may impact the way that individuals engage with the shared equity scheme. However, the Committee also appreciates that it may grant necessary flexibility to accommodate the development of the scheme. 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

Significant matters deferred to the regulations

12.22 The Bill amends the Electricity Supply Act to provide that the regulations may prescribe matters regarding the administration of the renewable fuel scheme, peak demand reduction scheme, and energy savings scheme. Specifically:

(a) matters that may be the subject of audits,

(b) persons who may conduct audits,

(c) functions that may be exercised by persons conducting audits,

(d) offences relating to obstructing or hindering or refusing or failing to comply with requirements made by, persons who conduct audits.

12.23 The Bill amends the Subordinate Legislation Act to specify that the staged repeal of statutory rule provisions do not apply to a regulation made under the *Electricity Infrastructure Investment Act 2020* or a regulation under the *Marine Estate Management Act 2014* that sets out management rules for the making of marine parks or aquatic reserves.

12.24 In his second reading speech to the Bill, the Treasurer stated that the amendments to the Subordinate Legislation Act will provide:

> … greater confidence to long-term energy service agreement operators and network operators that are engaged under the Electricity Infrastructure Roadmap. These amendments will reduce the risk of a change in law mid-contractual term, affecting long-term energy service agreements and network infrastructure project revenue determinations made under the Electricity Infrastructure Investment Act 2020 and the Electricity Infrastructure Investment Regulation 2021.

12.25 The Bill inserts section 127B into the Superannuation Act to allow the regulations to provide for successor fund transfers from the electricity industry superannuation scheme and the local government superannuation scheme.

12.26 Section 127B also enables regulations to be made about matters relating to successor fund transfers including:

(a) transferring benefits of members,

(b) the entitlements, rights and obligations of a member whose benefit is transferred,

(c) employee deeming provisions.

12.27 The Bill inserts a new section 128A which sets out matters, relating to mobility between funds, which can be determined by regulations. These matters include:

(a) the eligibility requirements for an employee to exercise a right of transfer,

(b) how a transfer option may be exercised, including the way, form and time for exercising the option,

(c) the terms and conditions to which the employee's membership of the fund is subject once the employee exercises a transfer option.

The Bill defers a significant number of matters set out in the Electricity Supply Act and the Superannuation Act to the regulations. In respect of the Electricity Supply Act, the Bill permits regulations to prescribe key operational matters related to audits conducted as part of the administration of the renewable fuel scheme, peak demand reduction scheme, and energy savings scheme. These include offences relating to obstructing or hindering or refusing or failing to comply with requirements made by, persons who conduct audits. In respect of the Superannuation Act the Bill permits regulations to prescribe matters related to successor fund transfers and mobility between funds. The Bill also amends section 10 of the Subordinate Legislation Act to exclude certain statutory rules from the application of the staged repeal process.

Unlike primary legislation, regulations are subordinate legislation which are not required to be passed by Parliament and the Parliament does not control when they commence. The Committee generally prefers substantive matters to be dealt with in the principal legislation to facilitate an appropriate level of parliamentary oversight, particularly where those matters may impact an individual's rights or when they seek to establish offences for individual conduct. Additionally, the proposed amendments to the Subordinate Legislation Act may circumvent future oversight of those regulations to which the staged repeal proposal do not apply.

The Committee acknowledges that regulations are still subject to parliamentary scrutiny, and that the exclusion of certain statutory rules are intended to reduce the risk of a change in law midway through a contractual term. However, given that the broad matters deferred to regulation in this instance include substantive provisions about the operation of a superannuation transfer scheme, an audit scheme, the capacity to determine offences, the Committee refers this matter to parliament for 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.

Functions Regarding Bills

The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the *Legislation Review Act 1987*. Section 8A requires the Committee to scrutinise all Bills introduced into Parliament while section 9 requires the scrutiny of all regulations. The Committee can only comment on the specific issues set out under these two sections.

The Committee's purpose is to assist all members of Parliament to be aware of, and make considered decisions on, the rights implications of legislation. The Committee does not make specific recommendations on Bills and does not generally comment on government policy.

The Committee's functions with respect to Bills as established under section 8A of the Act are as follows:

(i) To consider any Bill introduced into Parliament, and

(ii) To report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:

(1) trespass unduly on personal rights and liberties, or

(2) makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers, or

(3) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or

(4) inappropriately delegates legislative powers, or

(5) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

The terms of section 8A are not defined. However, the types of issues the Committee typically addresses in its Digests include, but are not limited to:

Trespass unduly on personal rights and liberties:

- retrospectivity
- self-incrimination and the right to silence
- reversal of the onus of proof
- strict liability
- search and seizure without warrant
- confidential communications and privilege
- oppressive official powers
- right to vote
- equal application of laws
- non-discrimination

- freedom of speech
- freedom of religion
- privacy and protection of personal information
- rights to personal physical integrity
- excessive and disproportionate punishment
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- ill-defined and wide powers
- vagueness or uncertainty

Non-reviewable decisions:

- excludes merits review
- excludes judicial review
- no requirement to provide reasons for an a decisions
- decisions made in private

Inappropriate delegation of legislative powers:

- provides the executive with unilateral authority to commence an Act;
- Henry VIII clauses (clauses that allow amendment of Acts by regulation)
- provide that a levy, tax or penalty be set by regulation
- allow for offences to be set by regulation
- extraterritoriality
- matters which should be set by Parliament (for example definitions)

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament and not subject to disallowance
- insufficient disallowance period
- providing that regulations may incorporate rules or standards of other bodies in force not subject to disallowance

Past practice of the Committee has been to highlight issues of concern it identifies in a Bill and its provisions. The Committee also evaluates the potential reasons and safeguards regarding issues of concern and determines if the provisions may be reasonable in the circumstances or should be referred to Parliament for further consideration.

Under section 8A(2) of the Act, Parliament may pass a Bill whether or not the Committee has reported on the Bill. However, this does not prevent the Committee from reporting on any passed or enacted Bill.

Functions Regarding Regulations – Review of All Regulations

Functions with respect to regulations are established under section 9 of the Act as follows:

(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, or

  (vii) that the form or intention of the regulation calls for elucidation.

(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.

Unlike Bill reports, the Committee only reports on those regulations with identified issues under section 9, rather than reporting on every regulation made.

The Committee may write to the relevant Minister for further information or, as with Bills, refer particular matters to the Parliament for further consideration. As above, the Committee may also recommend that Parliament disallow a regulation that has been made.

A summary of the regulations that the Committee considers do not warrant comment are published as an appendix to the Digest.

Appendix Two – Regulations without papers

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

1. Biosecurity Order (Permitted Activities) Amendment Order 2022 (No 2)

This order is made under the *Biosecurity Act 2015*, section 404A, and amends the *Biosecurity Order (Permitted Activities) 2019*. The amendments provide for circumstances and conditions for the import of Panama disease tropical race 4 and banana freckle carriers into New South Wales, which is otherwise prohibited under clause 22 of the *Biosecurity Regulation 2017*.

2. Civil and Administrative Tribunal Regulation 2022

The object of this Regulation is to repeal and remake, without substantive changes, the *Civil and Administrative Tribunal Regulation 2013*, which would otherwise be repealed by the *Subordinate Legislation Act 1989* on 1 September 2022.

This Regulation makes provision for the following—

(a) the practice and procedure for resolution processes, including alternative dispute resolution,
(b) the fees payable for services provided by the Civil and Administrative Tribunal (the **Tribunal**),
(c) the allowances and expenses payable to witnesses in proceedings at the Tribunal,
(d) other miscellaneous matters.

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.

The Regulation does not make any substantive changes from the previous iteration, except for introducing a new method for calculating the amount of fees payable in respect to proceedings and processes of the Tribunal.

3. Contaminated Land Management Regulation 2022

The object of this Regulation is to repeal and remake, with minor amendments, the *Contaminated Land Management Regulation 2013*, which would otherwise be repealed on 1 September 2022 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following—

(a) the observance of certain guidelines about financial assurances,
(b) the waiver or refund of the accreditation fee payable by a site auditor under certain circumstances,
(c) requiring the following particulars of each site audit to be included in the annual return—
    (i) whether the audit is a statutory site audit,
    (ii) the termination date of a terminated audit and the reason for the termination,

(iii) the date of issue of a revised or amended statutory site audit statement and the reason for the revision or amendment,

(d) increasing the amounts payable for certain penalty notice offences under the *Contaminated Land Management Act 1997*.

This Regulation is made under the *Contaminated Land Management Act 1997*, including section 112, the general regulation-making power.

The Regulation substantively replicates its previous iteration, with the exception that it significantly increases the amounts payable prescribed for a number of penalty notice offences under the *Contaminated Land Management Act 1997*.

4. Contract Cleaning Industry (Portable Long Service Leave Scheme) (Cleaning Work) Order 2022

The object of this Order is to declare certain work and activities as cleaning work under the *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*.

The Order declares various activities relating to bedding, kitchen and surfaces cleaning and rubbish.

5. Duties Regulation 2022

The object of this Regulation is to prescribe certain types of transactions as excluded transactions under the *Duties Act 1997*, section 8(3).

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

The Regulation prescribes various transactions which deal with proprietary interests in real property as being excluded from duty charges under the *Duties Act 1997*.

6. Environmental Planning and Assessment Amendment (Wilton Town Centre Precinct) Regulation (No 2) 2022

The object of this Regulation is to defer, from 30 September 2022 to 30 June 2023, the commencement of certain amendments to the *Environmental Planning and Assessment Regulation 2021*. The amendments relate to documents required 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*.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including section 10.13(1).

The Regulation amends the commencement date of an earlier amending regulation, the *Environmental Planning and Assessment Amendment (Wilton Town Centre Precinct) Regulation 2022*. This new commencement date does not predate the publication date of either regulations, and if effectively a postponement.

7. Referable Debt Order

Pursuant to section 7(2) of the *State Debt Recovery Act 2018*, building work levies payable under Part 2 of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020*, payable to the Department of Customer Service, are declared to be referable debts.

The Order enables the Department of Customer Service to refer the building work levies specified to the Chief Commissioner of State Revenue for the making of a debt recovery order. The levies specified are payable only by developers in relation to the completion of residential apartment building work.

8. Road Transport Legislation Amendment (National Heavy Vehicle Regulator) Regulation 2022

The objects of this Regulation are to amend rules and regulations consequential to the proposed commencement, on 1 August 2022, of the remaining provisions of the *Heavy Vehicle Legislation Amendment (National Regulator) Act 2021*, and the transfer of certain functions from Transport for NSW (**TfNSW**) to the National Heavy Vehicle Regulator (the **NHVR**).

This Regulation amends the following instruments—

(a) the *Road Rules 2014*—
  (i) to allow officers of the NHVR undertaking law enforcement activities to use flashing lights and sirens on vehicles, and
  (ii) to exempt officers of the NHVR from certain rules concerning pedestrian traffic,

(b) the *Road Transport (General) Regulation 2021*—
  (i) to prescribe officers of the NHVR as authorised officers who may issue penalty notices for offences under the Road Transport Act 2013 and regulations, and
  (ii) to prescribe the offences for which officers of the NHVR may issue penalty notices,

(c) the *Road Transport (Vehicle Registration) Regulation 2017*—
  (i) to prescribe officers of the NHVR as officers who may direct that a vehicle be inspected and who may carry out inspections, and
  (ii) to amend the Light Vehicle Standards Rules to prescribe vehicles being used by NHVR officers as transport enforcement vehicles and to allow those vehicles to be fitted with flashing lights and sirens,

(d) the *Transport Administration (General) Regulation 2018* to allow TfNSW to delegate functions to the NHVR.

This Regulation also amends the *Road Transport (Driver Licensing) Regulation 2017* to remove a redundant clause.

The Regulation extends existing powers and exemptions applicable to officers of TfNSW in the conduct of their regulatory duties to officers of the newly established NHVR.