

Legislation Review Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

Contents

Membership.....	5
Guide to the Digest.....	6
Digest Snapshot.....	13
Summary of Conclusions.....	16

PART ONE – BILLS 32

1. Anti-Discrimination Amendment (Religious Vilification) Bill 2023	33
2. Constitution Amendment (Sydney Water and Hunter Water) Bill 2023	36
3. Crimes Amendment (Breaking and Entering) Bill 2023*	37
4. Crimes Legislation Amendment (Assaults on Retail Workers) Bill 2023	40
5. Criminal Legislation Amendment (Knife Crimes) Bill 2023	43
6. Drug Misuse and Trafficking Amendment (Appointed Persons) Bill 2023.....	46
7. Electoral Funding Amendment (Registered Clubs) Bill 2023.....	48
8. Electoral Funding Amendment Bill 2023.....	52
9. Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023	54
10. First Home Buyer Legislation Amendment Bill 2023.....	59
11. Fiscal Responsibility Amendment (Wellbeing Budget) Bill 2023*	61
12. Forestry Amendment (Koala Habitats) Bill 2023*	63
13. Forestry Amendment (Timber Harvesting Safety Zones) Bill 2023*	64
14. Government Sector Finance Amendment (Grants) Bill (No 2) 2023	68
15. Government Sector Finance Amendment (Grants) Bill 2023	70
16. ICAC and LECC Legislation Amendment Bill 2023	74
17. Independent Commission Against Corruption Amendment (Validation) Bill 2023*	76
18. Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2023.....	79
19. Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023*	82
20. Parliamentary Remuneration Amendment Bill 2023	84
21. Prevention of Cruelty to Animals Amendment (Battery Cage Prohibition) Bill 2023*	86
22. Prevention of Cruelty to Animals Amendment (Gassing Devices Prohibition) Bill 2023*	88
23. Property Services Council Bill 2023*	90

24. Residential Tenancies Amendment (Rent Freeze) Bill 2023*	94
25. Residential Tenancies Amendment (Rental Fairness) Bill 2023	97
26. Revenue Legislation Amendment Bill 2023	102
27. Revenue, Fines and Other Legislation Amendment Bill 2023	104
28. Road Transport Amendment (Demerit Point Reduction Trial) Bill 2023	107
29. Road Transport Amendment (Medicinal Cannabis) Bill 2023*	110
30. State Insurance and Care Governance Amendment (ICNSW Board) Bill 2023	112
31. Statute Law (Miscellaneous Provisions) Bill 2023	114
32. Statutory and Other Offices Remuneration Amendment Bill 2023	118
33. Water Management Amendment (Transfer of Water) Bill 2023*	120
APPENDICES	122
Appendix One – Functions of the Committee	123
Appendix Two – Regulations without comment	125

Membership

Chair	Ms Lynda Voltz MP, Member for Auburn
Deputy Chair	Ms Maryanne Stuart MP, Member for Heathcote
Members	Ms Donna Davis MP, Member for Parramatta Mr Nathan Hagarty MP, Member for Leppington Ms Sue Higginson MLC Mr Dave Layzell MP, Member for Upper Hunter The Hon. Jacqui Munro MLC The Hon. Cameron Murphy MLC
Contact details	Legislation Review Committee Parliament of New South Wales 6 Macquarie Street Sydney NSW 2000
Telephone	(02) 9230 2144 / (02) 9230 2151
E-mail	Legislation.Review@parliament.nsw.gov.au
Website	www.parliament.nsw.gov.au/lrc

Guide to the Digest

The Legislation Review Committee has two broad functions set out in sections 8A and 9 of the *Legislation Review Act 1987* (**the Act**). Section 8A requires the Committee to scrutinise all Bills introduced into Parliament while section 9 requires the scrutiny of all regulations.

Part One: Functions Regarding Bills

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:

- (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) trespass unduly on personal rights and liberties
 - (ii) makes rights, liberties and obligations unduly dependent upon insufficiently defined administrative powers
 - (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions
 - (iv) inappropriately delegates legislative powers, or
 - (v) 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
- procedural fairness
- rule of law and separation of powers
- extraterritoriality
- strict liability and penalty notice offences
- search and seizure without warrant
- confidential communications and privilege
- wide regulatory powers
- access to vote
- ability to engage in public life and public elections
- equal application of laws
- freedom of expression and free speech
- freedom of religion and belief
- freedom of contract
- right to personal and real property
- privacy and protection of personal information
- right to personal physical integrity
- legislative interference in standing judicial matters

Insufficiently defined administrative powers:

- insufficiently defined or wide powers

Non-reviewable decisions:

- excludes access to review
- limits type of evidence available to a decision-maker
- provides decision-maker is not required to provide reasons for a decision
- decisions made in private

Inappropriate delegation of legislative powers:

- provides the executive with unilateral authority to commence an Act (i.e. commencement by proclamation)
- wide power of delegation
- wide regulation-making powers (e.g. creation of offences or setting penalties)
- Henry VIII clauses (clauses that allow amendment of Acts by regulation)
- imposition of tax or levy by regulation

Insufficiently subjects the exercise of legislative power to parliamentary scrutiny

- subordinate legislation not tabled in Parliament and not subject to disallowance
- insufficient disallowance period
- significant matters which should be set by Parliament (e.g. definitions)
- incorporating rules or standards of other bodies in force not subject to disallowance



In practice, the Committee highlights issues of concern and takes into consideration the potential reasons for introducing such a provision and any safeguards in place. The Committee 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 it. However, this does not prevent the Committee from reporting on any passed or enacted Bill.

Part Two: Functions Regarding Regulations

The Committee's functions regarding regulations are established under section 9 of the Act:

- (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament, and
- (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.

The Committee reviews all disallowable regulations which have been tabled in Parliament. However, unlike Bills, 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.

Conclusions on Bills and Regulations

Part One of the Digest contains the Committee's reports on Bills which were introduced into Parliament. Under the section titled 'Issues considered by the Committee', the report includes commentary about whether the Bill engages with one or more of the five criteria for scrutiny set out in section 8A(1)(b) of the Act. This will include either:

- Where no issues set out in section 8A(1)(b) are identified, that 'The Committee makes no comment in respect of the issues set out in section 8A of the LRA.'
- Where issues set out in section 8A(1)(b) are identified, a distinct comment on each issue identified.

Part Two of the Digest contains the Committee's reports on regulations and other statutory instruments which are tabled in Parliament and are still subject to disallowance. As noted, the Committee only reports on regulations and other statutory instruments with identified issues under section 9 of the Act, and those instruments which don't have identified issues are listed in Appendix Two of the Digest. Like Bill reports, the Committee's regulation reports includes a distinct comment on each issue identified under the section titled 'Issues considered by the Committee'.

For every issue identified in a report, the Committee's comment will conclude either that the Committee 'refers/notes the matter to Parliament' or 'makes no further comment'.

Where the Committee concludes to **refer/notes the matter to Parliament**, the Committee considers that it requires a response or further comment by the Member with carriage of the Bill (for Bill reports) or the responsible Minister (for regulation reports).

Where the Committee concludes to **make no further comment** on an identified issue in the report, the Committee considers that the issue may technically engage with the criteria under section 8A or 9 of the Act but, given counterbalancing considerations (e.g. legislated safeguards), it is unlikely in practice to raise the issues under the relevant section. The Committee invites but does not otherwise require the Member with carriage (for Bill reports) or the responsible Minister (for regulation reports) to comment on these identified issues.

Digest Snapshot

PART ONE – BILLS

[1. Anti-Discrimination Amendment \(Religious Vilification\) Bill 2023](#)

Issue identified	Conclusion of Committee
Right to freedom of expression	Noted

[2. Constitution Amendment \(Sydney Water and Hunter Water\) Bill 2023](#)

No issues identified

[3. Crimes Amendment \(Breaking and Entering\) Bill 2023*](#)

Issue identified	Conclusion of Committee
Rule of law – unclear application of laws	Referred

[4. Crimes Legislation Amendment \(Assaults on Retail Workers\) Bill 2023](#)

Issue identified	Conclusion of Committee
Unclear application of new offences	Noted

[5. Criminal Legislation Amendment \(Knife Crimes\) Bill 2023](#)

Issue identified	Conclusion of Committee
Strict liability offences	No further comment
Commencement by proclamation	No further comment

[6. Drug Misuse and Trafficking Amendment \(Appointed Persons\) Bill 2023](#)

Issue identified	Conclusion of Committee
Wide powers of delegation	Referred

[7. Electoral Funding Amendment \(Registered Clubs\) Bill 2023](#)

Issue identified	Conclusion of Committee
Implied freedom of political communication – prohibition on political donations	Noted

[8. Electoral Funding Amendment Bill 2023](#)

No issues identified

[9. Environmental Planning and Assessment Amendment \(Housing and Productivity Contributions\) Bill 2023](#)

Issue identified	Conclusion of Committee
Matters contained in Ministerial planning orders	Noted
Matters deferred to the regulations	Noted
Commencement by proclamation	Noted

[10. First Home Buyer Legislation Amendment Bill 2023](#)

No issues identified

[11. Fiscal Responsibility Amendment \(Wellbeing Budget\) Bill 2023*](#)

No issues identified

12. Forestry Amendment (Koala Habitats) Bill 2023*

No issues identified

13. Forestry Amendment (Timber Harvesting Safety Zones) Bill 2023*

Issue identified	Conclusion of Committee
Strict liability offences carrying custodial penalties and right to peaceful assembly	Referred

14. Government Sector Finance Amendment (Grants) Bill (No 2) 2023

No issues identified

15. Government Sector Finance Amendment (Grants) Bill 2023

Issue identified	Conclusion of Committee
Privacy – publication of personal information	No further comment
Incorporation of guidelines into legislation	Noted

16. ICAC and LECC Legislation Amendment Bill 2023

No issues identified

17. Independent Commission Against Corruption Amendment (Validation) Bill 2023*

Issue identified	Conclusion of Committee
Retrospectivity and the rule of law	Referred

18. Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2023

Issue identified	Conclusion of Committee
Right to silence – exclusion of privilege against self-incrimination	Noted

19. Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023*

No issues identified

20. Parliamentary Remuneration Amendment Bill 2023

No issues identified

21. Prevention of Cruelty to Animals Amendment (Battery Cage Prohibition) Bill 2023*

Issue identified	Conclusion of Committee
Strict liability offence	Referred

22. Prevention of Cruelty to Animals Amendment (Gassing Devices Prohibition) Bill 2023*

Issue identified	Conclusion of Committee
Strict liability offence	Referred

23. Property Services Council Bill 2023*

Issue identified	Conclusion of Committee
Wide regulation-making power	Noted
Wide delegation power	Noted

24. Residential Tenancies Amendment (Rent Freeze) Bill 2023*

Issue identified	Conclusion of Committee
Freedom of contract and real property rights	Referred
Strict liability offences	No further comment

25. Residential Tenancies Amendment (Rental Fairness) Bill 2023

Issue identified	Conclusion of Committee
Strict liability offences	No further comment
Penalty notice offences – right to a fair trial	No further comment
Interference with privacy rights	Noted
Commencement by proclamation	Noted

26. Revenue Legislation Amendment Bill 2023

Issue identified	Conclusion of Committee
Incorporation of external document not tabled in Parliament	No further comment

27. Revenue, Fines and Other Legislation Amendment Bill 2023

Issue identified	Conclusion of Committee
Privacy rights – use of personal information	Disclosure of personal information

28. Road Transport Amendment (Demerit Point Reduction Trial) Bill 2023

Issue identified	Conclusion of Committee
Significant matters deferred to statutory rules	Noted

29. Road Transport Amendment (Medicinal Cannabis) Bill 2023*

Issue identified	Conclusion of Committee
Reversal of onus of proof	No further comment

30. State Insurance and Care Governance Amendment (ICNSW Board) Bill 2023

Issue identified	Conclusion of Committee
Commencement by proclamation	No further comment

31. Statute Law (Miscellaneous Provisions) Bill 2023

Issue identified	Conclusion of Committee
Wide powers of delegation	Noted
Statutory rule expressed to commence before publication on NSW legislation website	Noted

32. Statutory and Other Offices Remuneration Amendment Bill 2023

No issues identified

33. Water Management Amendment (Transfer of Water) Bill 2023*

No issues identified

Summary of Conclusions

PART ONE – BILLS

1. Anti-Discrimination Amendment (Religious Vilification) Bill 2023

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

Right to freedom of expression

The Bill amends the *Anti-Discrimination Act 1977* to insert Part 4BA regarding religious vilification. This Part make it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of their religious belief or affiliation or religious activity.

The Committee acknowledges that the intention of the Bill is to protect individuals and groups of persons from vilification on the basis of religious belief or affiliation. As acknowledged in the Attorney General's second reading speech, the provisions of the Bill mirror existing vilification provisions regarding race, homosexuality, transgender status and HIV status. The Bill also provides that certain communications are not unlawful, including for good faith discussions in the public interest.

However, by restricting public communications, the Bill limits a person's right to freedom of expression, which is a core right contained in article 19 of the International Covenant on Civil and Political Rights. The Committee recognises this right is not absolute and carries with it special duties and responsibilities. It may be limited by laws necessary for, among other things, respect of the rights of other people.

The Committee notes that the protection in Part 4BA is drafted broadly. In particular, it applies to both 'a person or a group of persons' and covers a broad range of communications constituting a 'public act'. The Bill also does not define the grounds of protection, being a 'religious belief or affiliation' or 'religious activity'. The broad nature of this protection makes its application unclear and could therefore unduly limit an individual's right to freedom of expression. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration

2. Constitution Amendment (Sydney Water and Hunter Water) Bill 2023

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

3. Crimes Amendment (Breaking and Entering) Bill 2023*

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

Rule of law – unclear application of laws

The Bill amends the *Crimes Act 1900* by replacing references to 'break and entry' with 'entry without consent'. This may change the physical element of 'break and entry' offences and remove the precondition of trespass in certain aggravated offences. The absence of consent is an

aggravating factor to an offence only if coupled with a person's intention to commit a serious indictable offence in the home, and that the Bill provides for what is not actual consent.

The Committee notes that the Bill does not provide a definition of what constitutes consent, or when it is or can be revoked. In the circumstances, it is unclear whether the Bill may have a broader application than the circumstances of relationship breakdown. This may be in circumstances where the lack of consent to enter premises is an aggravating factor for certain offences and will attract higher custodial penalties than the non-aggravated counterpart for these offences.

The Committee acknowledges that the Bill addresses a legal technicality around 'break and entry' offences, highlighted in the court's decision in *BA v The King* [2023] HCA 14. It further notes that it is intended to protect victims of domestic violence by preventing former partners from entering their homes without their consent, regardless of whether they can legally enter the home.

However, in the absence of clear definitions around what amounts to consent or its revocation, it is unclear how different legal rights will interact, particularly where the accused has a legal right to occupy the home of the victim. Given the high custodial penalties associated with the aggravated offences, together with their potentially broad application, the Committee refers the matter to Parliament for its consideration of whether the provisions could benefit from further clarification.

4. Crimes Legislation Amendment (Assaults on Retail Workers) Bill 2023

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

Unclear application of new offences

The Bill creates 3 new offences in the *Crimes Act 1900* for assaults and other acts of violence against retail workers, and includes a broad definition of a 'retail worker'.

The Committee notes that these new offences contain higher maximum penalties than the comparable provisions under the Act for assaults against other persons. This means that a person may be subject to a higher custodial sentence when a relevant offence is committed against a retail worker. The Committee also notes that the new offences for common assault and assault occasioning actual bodily harm may be dealt with summarily unless elected otherwise, which would allow a lower maximum penalty to be imposed for those offences.

The Committee acknowledges that the Bill intends to deter violent behaviours against retail workers to recognise the essential nature of their services. However, it also notes that the protection in the Bill is broad, with the new offences applying when a retail worker is not on duty as long as the offences are connected to their duty. This may create uncertainty as to the exact persons and circumstances when they are protected, and make it unclear when the new offences, with their higher maximum custodial sentences, apply instead of the Act's general assault provisions.

The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

5. Criminal Legislation Amendment (Knife Crimes) Bill 2023

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

Strict liability offences

The Bill amends the *Crimes Act 1900* to transfer offences from the *Summary Offences Act 1988* for the possession of a knife in a public place or school and for using a knife in a public place or school.

These offences do not require a mental element to prove fault of the crime, and are therefore strict liability offences. However, the Committee also notes that these offences already exist in the *Summary Offences Act 1988*. Further, that reasonable excuse defences are available to the accused. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

The Bill commences (as an Act) by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons. In particular, it notes that the Bill relates to offences affecting individuals, although those offences currently exist under law.

However, the Committee also notes the Attorney General's comments on the intended amendment to the *Criminal Procedure Regulation 2017* prior to commencement of the Bill (as an Act). The flexible start date appears to help ensure the effective transfer of legislative provisions from the *Summary Offences Act 1988* to the *Crimes Act 1900*, and consistency in the continued issuing of penalty infringement notices. In the circumstances, the Committee makes no further comment.

6. Drug Misuse and Trafficking Amendment (Appointed Persons) Bill 2023

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

Wide powers of delegation

The Bill inserts section 43(5)(b) into the *Drug Misuse and Trafficking Act 1985*, which allows a person prescribed by the regulations to appoint individuals who may issue certificates for the result of the analysis of a plant or substance. That certificate can be used in any legal proceeding under the Act as 'prima facie evidence' of the identity or quantity or mass of the plant or substance analysed.

This certificate is accepted as 'prima facie' evidence under section 43 of the Act, which removes a need for the appointed certificate issuer to demonstrate their relevant expertise. This may shift the burden onto a defendant to contest their evidence and relieves the prosecution of meeting the requirements under the *Evidence Act 1995* for expert evidence. Given this potential impact on defendants, allowing regulations to prescribe who can appoint relevant certificate issuers may amount to a wide power of delegation. This is particularly the case for those defendants charged with indictable offences under the Act, which carry custodial penalties.

The Committee acknowledges that allowing regulations to prescribe who can appoint relevant certificate issuers builds flexibility into the scheme. However, it would prefer these provisions to have been drafted with more specificity. In addition, they should be included in the primary legislation and rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers this matter to the Parliament for its consideration.

7. Electoral Funding Amendment (Registered Clubs) Bill 2023

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

Implied freedom of political communication – prohibition on political donations

The Bill amends the *Electoral Funding Act 2018* to prohibit political donations from registered clubs undertaking gambling activities. This brings registered clubs within the scope of 'gambling and liquor entities' (other entities prohibited from political donations include property developers, alcohol businesses and tobacco businesses) prohibited from making political donations, and extends this prohibition to individuals who are directly connected with the operation of those registered clubs.

As acknowledged in the second reading speech, the amendment burdens the implied freedom of political communication. Specifically, it limits the funds available for political parties and candidates to use for political communication by restricting the source of those funds. This freedom is not absolute, and can be burdened if there is a legitimate justification that is compatible with representative government.

The Committee acknowledges that the Bill aims to address a gap in existing prohibitions for the purpose of preventing gambling entities in registered clubs from exerting or being perceived to exert undue political influence over government. It also acknowledges the High Court's ruling in *McCloy v New South Wales* [2015] HCA 34, that a prohibition on political donations from property developers did not impermissibly burden the implied freedom of political communication.

The Committee further notes that the prohibition on individuals is confined to the club secretary, governing body member or the spouse of either, and does not generally restrict individuals from making political donations. Additionally, the Bill creates an exemption to the prohibition that would allow the venues of registered clubs to be used by an elected member, candidate, party or group associated with an election or the duties of that member.

Given that the amendments burden the implied freedom of political communication, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

8. Electoral Funding Amendment Bill 2023

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

9. Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023

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

Matters contained in Ministerial planning orders

The Bill provides the Minister with the power to determine a broad range of significant matters affecting the operation of the legislative scheme by Ministerial planning orders. This includes requiring the payment of housing and productivity contributions and related matters, regions to which contributions apply (including, in certain circumstances, land outside of the state), the way in which contributions are determined, as well as exemptions.

Unlike legislation, a Ministerial planning order is not subject to disallowance or parliamentary scrutiny. The Committee notes that the powers of the Minister to set and shape key aspects of the legislative scheme by issuing these orders is significant. In particular, it notes that the requirement for contributions along with their level, nature and application are set by order, rather than legislation. While the Minister must consult with the Treasurer before issuing an order, the Bill does not appear to contain limits on the level of contributions or provide input on their determination. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

Matters deferred to the regulations

The Bill defers a number of matters to the regulations, including to allow the regulations to specify monies paid in to and out of the SBC Fund and HAP Fund. The regulations may also make transitional provisions for the continued application of special infrastructure contributions (SIC). For example, to amend the areas to which determinations or directions made under the former SIC provisions apply.

The Committee acknowledges that section 10.4 of the Act allows general savings and transitional provisions to be included in the regulations. However, it notes the broad ambit of matters that the regulations may make provision for, and that these matters affect the continued operation of the former SIC scheme and the payment of monies in and out of the SBC and HAP Funds. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

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 those affected by the Bill's provisions.

The Committee acknowledges that there appears to be practical reasons for imposing a flexible starting date, particularly as the Bill establishes a new framework for the payment of contributions by developers. It also notes the Minister's comments in his second reading speech that the Bill would commence on 1 October 2023, to allow time to train users on a digital system to calculate contributions. It is therefore unclear whether a flexible start date is required. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

10. First Home Buyer Legislation Amendment Bill 2023

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

11. Fiscal Responsibility Amendment (Wellbeing Budget) Bill 2023*

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

12. Forestry Amendment (Koala Habitats) Bill 2023*

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

13. Forestry Amendment (Timber Harvesting Safety Zones) Bill 2023*

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

Strict liability offences carrying custodial penalties and right to peaceful assembly

The Bill introduces various strict liability offences into the principal Act for certain activities in relation to timber safety harvesting zones. This includes strict liability offences incurring a maximum monetary penalty of 120 penalty units (\$13 200) and/or a custodial sentence of 12 months where a person re-enters a timber harvesting safety zone or another zone, contrary to an authorised officer's direction not to do so. These penalties also apply where a person interferes with or obstructs timber harvesting or related forestry operations being carried out in a zone. Other strict liability offences may incur a maximum monetary penalty of 60 penalty units (\$6 600).

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is relevant to establishing liability for an offence. The Committee acknowledges that strict liability offences with monetary penalties are not uncommon in regulatory settings to encourage compliance. Further, the Bill limits the application of certain offences in specific circumstances, including where notice of the timber harvesting safety zone was not given in accordance with the Bill's requirements.

However, the Committee notes that a number of strict liability offences are introduced by this Bill and that certain offences can result in both custodial and monetary penalties being imposed on an individual. The Committee notes the seriousness of the Bill's custodial sentences and their impact on the right to personal liberty. Further, that the lawful exercise of personal rights such as the right to peaceful assembly may still attract liability for certain offences. This may discourage peaceful protest.

The Bill also increases the maximum penalty for certain strict liability offences under section 83(2) from 50 penalty units (\$5 500) and/or imprisonment for 6 months to 120 penalty units (\$13 200) and/or imprisonment for 12 months. These offences include assaulting or bribing an authorised officer. The Committee acknowledges that the introduction of increased penalties intends to strengthen deterrence and reflects the seriousness of these offences. However, the Committee again notes the severity of the custodial sentences and their impact on the right to personal liberty. In the circumstances, the Committee refers the matter to Parliament for its consideration.

14. Government Sector Finance Amendment (Grants) Bill (No 2) 2023

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

15. Government Sector Finance Amendment (Grants) Bill 2023

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

Privacy – publication of personal information

The Bill requires that a Minister or other government official make certain information relating to grants administered or proposed to be administered by an agency publicly available, including the name and location of grant recipients. It is unclear whether information relating to individuals applying for individual grants must be published under the mandatory requirements of the Grants Administration Guide. If so, this may impact upon their privacy. The Committee notes the objective of the amendments to foster transparency in grants administration. It also notes that, in accordance with the Guide, personal information may not be published to comply with privacy laws. 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

Incorporation of guidelines into legislation

The Bill incorporates the Grants Administration Guide into the *Government Sector Finance Act 2018* and *Government Information (Public Access) Regulation 2018*. The Guide is issued periodically by the Premier and published in the Gazette. There does not appear to be a requirement that the Guide is tabled in Parliament. The Guide and any revisions to it are therefore not subject to parliamentary scrutiny.

The Committee generally prefers that substantive matters are set out in legislation where they can be subjected to parliamentary scrutiny. In this case, substantive matters set out in the Guide, rather than legislation, include mandatory requirements for Ministers and government officials, the key matters that must be considered when approving or declining a grant, the type of open access information to be published and the website where open access information is published. The Committee also notes that certain information, if published, may impact on the privacy of individual grant recipients.

While the Committee acknowledges that including the procedural aspects of grants administration in the Guide enables flexibility, it notes the substantive matters included in that document and that those matters may impact on individuals' privacy. Further, that revisions to the Guide which may impact on individuals' privacy would not be subject to parliamentary review. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

16. ICAC and LECC Legislation Amendment Bill 2023

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

17. Independent Commission Against Corruption Amendment (Validation) Bill 2023*

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

Retrospectivity and the rule of law

The Bill inserts clause 35A into the *Independent Commission Against Corruption Act 1988*, which provides that Schedule 4, clause 35 of the Act does not apply to a person who had proceedings pending in the Supreme Court, including the Court of Appeal, on 8 May 2015, relating to a finding by the ICAC of corrupt conduct. This provision operates retrospectively.

The Committee generally comments on provisions drafted to have retrospective effect, as they may impact on the principle of the rule of law. That is, a person is entitled to know the law to which they are subject at any given time. The Committee further notes that clause 35A(1) has the effect of excluding certain individuals from the operation of a substantive provision of the Act. This may be inconsistent with the rule of law principle that the law be applied equally and fairly, with no person above the law.

Clause 35A may also interfere with the judicial process, as it specifically provides that Schedule 4, clause 35 does not apply to a person who had pending proceedings in the NSW Supreme Court or Court of Appeal on 8 May 2015. Further, clause 35A(2) extends the limitation period for bringing those proceedings by excluding the days between 8 May 2015 to the date of the Bill's assent (as an Act). This may undermine the finality of the court's decision, by reopening proceedings which have been tried in fact.

The Committee acknowledges that the Bill aims to address an issue of retrospectivity arising from a 2015 amending Act, and the effects of that Act on select persons. However, as the Bill also acts retrospectively and specifically for the proceedings of select persons, the Committee refers the matter to Parliament for its consideration.

18. Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2023

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

Right to silence – exclusion of privilege against self-incrimination

The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) to enable digital evidence access orders (DEAOs) to be sought by ICAC officers in relation to search warrants issued under the *Independent Commission Against Corruption Act 1988* (ICAC Act), before or after the search warrant has been executed. This expands the application of the DEAO scheme.

It is an offence under the Act, without reasonable excuse, to either provide false or misleading information to, or not comply with a direction of, an officer executing a DEAO. This includes a direction to provide an officer with information and assistance which is reasonable and necessary to allow them to access or copy data from a computer. This offence incurs a maximum penalty of five years' imprisonment and/or \$11 000. It is not a reasonable excuse if compliance with the DEAO, or a requirement made in accordance with it, would tend to incriminate or expose a person to a penalty. By excluding the privilege against self-incrimination in the exercise of enforcement powers, the Bill may impact the right to silence of affected persons.

The Committee acknowledges that the Bill intends to enable more fulsome ICAC investigations by permitting access to digital devices, which would be restricted without the expansion of the DEAO scheme. However, by expanding the circumstances in which a DEAO can be sought, the Bill extends the application of DEAOs and the associated non-compliance offence to more people. Specifically, people given directions in connection with search warrants under the ICAC Act.

Noting the impact of this offence on the right to silence of affected persons, the Committee would usually refer the expansion of the DEAO scheme to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

19. Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023*

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

20. Parliamentary Remuneration Amendment Bill 2023

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

21. Prevention of Cruelty to Animals Amendment (Battery Cage Prohibition) Bill 2023*

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

Strict liability offence

The Bill introduces a new strict liability offence into the Act, which prohibits confining any laying hen in a cage for commercial purposes. The maximum penalty for this offence for individuals is 400 penalty units (\$44 000) and/or up to a one year imprisonment.

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 establishing liability. The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises the Bill's aim to address animal cruelty issues.

However, the Committee notes that the maximum penalty for this offence includes a custodial penalty. It also notes that the Bill limits access to defences which are available for other offences under Part 2 of the Act (excluding section 19A, which prohibits game parks). In the circumstances, the Committee refers this matter to Parliament for its consideration.

22. Prevention of Cruelty to Animals Amendment (Gassing Devices Prohibition) Bill 2023*

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

Strict liability offence

The Bill introduces a new strict liability offence into the *Prevention of Cruelty to Animals Act 1979*, which prohibits the using, causing, or permitting the use of a gassing device on a pig in an abattoir.

The maximum penalty for this offence for individuals is 1 000 penalty units (\$110 000) and/or up to 2 years imprisonment.

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 establishing liability. The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises the Bill's aim to address animal cruelty issues.

However, the Committee notes that the maximum penalty for this offence includes a custodial penalty. It also notes that the Bill limits access to defences which are available for other offences under Part 2 of the Act. In the circumstances, the Committee refers this matter to Parliament for its consideration.

23. Property Services Council Bill 2023*

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 19. This section allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or giving effect to the Bill.

There are 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, subordinate legislation is not passed by Parliament and Parliament does not control when it commences.

The Committee recognises that these provisions may enable flexibility and efficiency in the new regulatory framework proposed by the Bill. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters without limit and may include broad powers that impact personal rights, such as the prosecution of offences, undertaking investigations and accessing premises and documents. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill was negatived, it instead notes this matter for Parliament's consideration.

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

Wide delegation power

Section 16 of the Bill allows the exercise of functions of the Property Services Council and Property Services Commissioner to be delegated to a person or class of persons authorised to do so by the regulations. Significant functions of the Council under the Bill and other Acts include advising the Minister, prosecuting offences, conducting mediations and undertaking investigations. The Commissioner is responsible for the day-to-day management of the Council in accordance with the Council Board's policies and general directions.

The Bill does not specify the persons or the class of persons to whom functions may be delegated, or any qualifications required by those persons. Further, it does not include any constraints on the way in which delegated functions can be exercised.

The Committee generally prefers provisions setting out which persons and class of persons can be delegated functions under primary legislation to be specific to ensure an appropriate level of parliamentary oversight, particularly if those functions are significant. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill was negatived, it instead notes this matter for Parliament's consideration.

24. Residential Tenancies Amendment (Rent Freeze) Bill 2023*

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

Freedom of contract and real property rights

The Bill inserts section 40A into the *Residential Tenancies Act 2010* to prohibit rent increases for 2 years. Section 40A provides that a landlord or their agent must not increase the rent payable under a residential tenancy agreement during the 2-year freeze period. For premises rented out on 30 June 2023, the rent payable at the time applies. For premises not rented out at 30 June 2023, the rent payable is the median rent specified in a document published by the Department of Communities and Justice.

The Bill regulates the terms of future and existing tenancy agreements, including to set the maximum rents payable under, and incorporate terms into, those agreements. In doing so, the Bill impacts on landlords' real property rights and freedom of contract, with persons free to agree on the contractual terms to which they are subject. This affects the rights and obligations of parties to the relevant tenancy agreements, and appears to particularly affect landlords. However, the Committee acknowledges that this Bill aims to ensure tenants have access to secure and affordable housing. Further, that statutory limitations on real property rights and freedom of contract are not uncommon including, for freedom of contract, to address unequal bargaining power between parties. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

Strict liability offences

The Bill inserts strict liability offences into the *Residential Tenancies Act 2010* where a landlord or their agent increases the rent payable under a residential tenancy agreement during the 2-year rent freeze period, or induces a tenant to enter into an agreement with rent payable that is higher than the maximum rent specified in new section 40A(3). Where an individual commits an offence, a maximum penalty of 50 penalty units (\$5 500) applies.

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 imposing liability. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance: in this case, to encourage compliance with new offences aiming to freeze rent prices. It also notes the maximum penalties are monetary, not custodial. In the circumstances, the Committee makes no further comment.

25. Residential Tenancies Amendment (Rental Fairness) Bill 2023

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

Strict liability offences

The Bill inserts strict liability offences under new sections 22A and 22B into the *Residential Tenancies Act 2010* for conduct relating to advertising and soliciting higher amounts of rent for residential premises, and advising applicants and potential applicants of the highest offer of rent.

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 imposing liability. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance: in this case, to encourage compliance with new offences aiming to address rent bidding. It also notes the maximum penalties are monetary, not custodial. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

The Bill amends the *Residential Tenancies Regulation 2019* to provide that the offences created by new sections 22A(1), 22A(3), 22B(2) and 22B(3) are penalty notice offences.

The Committee notes that penalty notices allow an individual to pay a specified monetary amount in lieu of electing to have the matter heard by a Court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that individuals retain the right to elect to have their matter dealt with before a Court, and that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including cost effectiveness and ease of administration. The amounts payable for offences created under this Bill are also in line with other penalties provided for by the *Residential Tenancies Regulation 2019*. In the circumstances, the Committee makes no further comment.

Interference with privacy rights

The Bill introduces section 22A(5) to the *Residential Tenancies Act 2010*, which allows the regulations to provide for matters relating to the provision of information by a person for the purposes of monitoring the operation of sections 22A and 22B of the Bill.

The Committee acknowledges that, under section 22A(5), the provision of information is limited to the purposes of monitoring the operation of both section 22A and 22B of the Act. It also notes the Minister's comments that the amendment will enable information gathering from owners and agents.

However, the Bill does not specify the persons required to give information, the type of information required and whether this includes personal information, or if the collection, use and disclosure of information is limited. This may impact on the privacy of persons required to give information, or who that information relates to. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

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

Commencement by proclamation

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

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for administrative arrangements and other reforms to be implemented. However, it notes that this may also make it difficult for landlords, landlord agents and prospective tenants to understand their obligations and rights under the Bill. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

26. Revenue Legislation Amendment Bill 2023

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

Incorporation of external document not tabled in Parliament

The Bill amends Schedule 1A of the *Land Tax Management Act 1956* to include a new clause 6(7B), which provides that the Treasurer may approve and publish guidelines in the Gazette that the Chief Commissioner must consider when making a decision under clause 6(7A). Specifically, whether to extend the tax exemption period for a person's principal place of residence.

There does not appear to be a requirement that the guidelines be tabled in Parliament. The guidelines, and any revisions to it, are therefore not subject to parliamentary scrutiny. The Committee generally prefers that substantive matters, in this case matters informing the exercise of the Chief Commissioner's discretionary power under clause 6(7A), are set out in legislation where they can be subjected to parliamentary scrutiny.

However, the Committee notes that the guidelines are only incorporated into the Act for the purposes of the Chief Commissioner making a decision under clause 6(7A). Further, that a decision of the Chief Commissioner under the Act can be reviewed by the NSW Civil and Administrative Tribunal. In the circumstances, the Committee makes no further comment.

27. Revenue, Fines and Other Legislation Amendment Bill 2023

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

Privacy rights – use of personal information

The Bill inserts section 78A into the *Valuation of Land Act 1916* which authorises the Valuer General to use applicable information for a purpose connected with their functions, sell that information or make that information publicly available.

Subsection 78A(3)(b) defines applicable information to include personal information, which has the same meaning as under the *Privacy and Personal Information Protection Act 1998*. That is, information about an individual whose identity is known or can be ascertained. Therefore, the Bill might impact an individual's privacy rights by authorising the Valuer General to disclose and use (including the ability to sell) personal information.

The Committee acknowledges that the provision is intended to address the practical need for the Valuer General to receive and use property sales information to exercise their functions. However, the power to use, sell and disclose information does not specifically limit the scope of 'personal information' to property sales information. Further, there does not appear to be any safeguards, decision-making criteria or recourse for individuals whose personal information is used, sold or published by the Valuer General. In these circumstances, the Committee refers this matter to the Parliament for its consideration.

Disclosure of personal information

The Bill amends the *Fines Act 1996* by inserting section 117A(1)(a4), which authorises the Commissioner of Fines Administration to disclose personal information to the Chief Executive Officer of Service NSW. This expands the scope of the Commissioner's existing power to disclose personal information to agencies under the Act.

The disclosure of an individual's personal information may infringe on a person's privacy rights. However, the Committee notes that the power of disclosure is limited to a government agency. It further notes that the authority to disclose personal information already exists under the Act and the Bill simply adds Service NSW as an additional authority to which such information may be disclosed. In the circumstances, the Committee makes no further comment.

28. Road Transport Amendment (Demerit Point Reduction Trial) Bill 2023

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

Significant matters deferred to statutory rules

The Bill inserts a new section 32A into the *Road Transport Act 2013* to allow the statutory rules to prescribe the operative dates of the demerit points reduction trial, as well as the date that the provisions will expire.

The Committee notes that the Minister's second reading speech provides that the trial period will be 12 months, from 17 January 2023 to 16 January 2024, and that the provisions relating to the trial will expire on 31 January 2025. However, the Bill's provisions do not limit the duration of this trial to 12 months where the period is prescribed by the statutory rules. It is therefore unclear whether the statutory rules may prescribe a trial period that is shorter or longer than 12 months, as well as an alternative expiry date.

While the deferral of these matters to the statutory rules builds flexibility into the regulatory framework, it may create uncertainty around when the trial, and the legislative provisions relating to it, operate. The Committee generally prefers such matters essential to the operation of legislation to be included in the primary legislation, so that they are subject to an appropriate level of parliamentary oversight. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

29. Road Transport Amendment (Medicinal Cannabis) Bill 2023*

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

Reversal of onus of proof

The Bill amends section 111 of the *Road Transport Act 2013* to create a defence to the offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine. The proposed defence is available where the defendant can prove, to the court's satisfaction, that delta-9-tetrahydrocannabinol (THC) is the only illicit drug in their system, and that the THC was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1996* or a corresponding Act of another State or Territory.

By requiring the defendant to prove the THC was used in accordance with the defence, even on the balance of probabilities, this may be a reversal of the onus of proof. With regard to criminal actions, a reversed onus may undermine the presumption of innocence. Ordinarily, the prosecution is required to prove all elements of an offence before a defendant can be found guilty, consistent with the presumption of innocence.

However, the Committee acknowledges that the proposed defence is comparable to the 'medicinal purposes' defence for the presence of morphine under section 111(5) of the Act. It further notes that there is otherwise no defence to the strict liability offence concerning the presence of THC. For these reasons, the Committee makes no further comment.

30. State Insurance and Care Governance Amendment (ICNSW Board) Bill 2023

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 those affected by the Bill's provisions. As the Bill alters the constitution of the ICNSW board, commencement by proclamation may make the office of existing directors uncertain.

The Committee acknowledges that there may be practical reasons for including a flexible starting date, including to allow time for the nomination and appointment of new directors nominated by an employee body or employer body. Further, the Bill provides for a transitionary period to accommodate this appointment and confirms the status of existing directors following commencement of the Bill as an Act. In the circumstances, the Committee makes no further comment.

31. Statute Law (Miscellaneous Provisions) Bill 2023

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

Wide powers of delegation

The Bill inserts clause 57(1A) into the *Hunter Water Act 1991* to permit the Secretary of the Department of Planning and Environment to delegate its direction and approval functions for special areas to an employee of the Department or a person prescribed by the regulations. This broadens who is able to exercise the Secretary's functions under the Act.

The Committee acknowledges that the delegation of legislative functions is a common practice intended to facilitate cost effective and efficient administration, and that the amendments are intended to modernise the Act to align with current regulatory and governance practices.

However, it notes that, where the Secretary's functions are delegated to a person prescribed by the regulations, there are no restrictions on who may be appointed. For example, to restrict delegation to employees with a certain level of seniority or expertise or working for an appropriate agency. The Committee generally prefers these provisions to be more specific and for such persons or classes of persons to be included in the primary legislation to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

Statutory rule expressed to commence before publication on NSW legislation website

Schedule 4, clause 5 of the Bill allows the Governor to make regulations containing provisions of a savings or transitional nature consequent on enactment of the Bill as an Act. It also provides that those provisions may take effect on a date earlier than the date of publication of those regulations.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. Under this section, provisions of statutory rules commence on the day they are published on the NSW legislation website or at a later specified date. The Bill's provisions enabling the retrospective commencement of regulations may make it difficult for individuals to ascertain the commencement date of regulations made under this Bill and the laws applying to them. This is contrary to the rule of law principle that people are entitled to know the law to which they are subject at any given time. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

32. Statutory and Other Offices Remuneration Amendment Bill 2023

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

33. Water Management Amendment (Transfer of Water) Bill 2023*

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



Part One – Bills

1. Anti-Discrimination Amendment (Religious Vilification) Bill 2023

Date introduced	28 June 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 1.1 The object of this Bill is to amend the *Anti-Discrimination Act 1977* to make it unlawful to vilify a person or group of persons on the ground of the person's or group's religious belief or affiliation or engagement in religious activity.

Background

- 1.2 The Bill introduces section 49ZE into the *Anti-Discrimination Act 1977*, to make it unlawful to vilify a person or group of persons on the grounds of religious belief or affiliation or religious activity.

- 1.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General, advised that the Bill is intended to provide protection from religious vilification:

The Act's provisions on racial vilification currently apply to vilification on the basis of "ethno-religious origin", because race is defined to include this term. However, this concept has been narrowly interpreted. The amendment in the bill means that religious vilification complaints can be considered through their own separate ground without needing to inquire into whether an ethno-religious origin can be established.

- 1.4 The Attorney General noted that the Bill will complement the criminal offence in section 93Z of the *Crimes Act 1900*, which prohibits publicly threatening or inciting violence towards a person or group on grounds including religious belief or affiliation. The Attorney General highlighted that the threshold for section 49ZE in the *Anti-Discrimination Act 1977* will be lower. The Attorney General stated that:

Complaints of religious vilification will be able to be made to the president of the Anti-Discrimination Board, who will encourage mediation if possible, and who can otherwise refer a complaint to the NSW Civil and Administrative Tribunal. The tribunal can then order a range of remedies, including damages or an apology or retraction, if it finds a complaint substantiated.

- 1.5 As acknowledged in the second reading speech, the provisions in the Bill have been drafted to be consistent with civil protections against religious vilification in other States and Territories.

- 1.6 The Bill passed Parliament on 3 August 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill

which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Right to freedom of expression

- 1.7 The Bill amends the *Anti-Discrimination Act 1977* to insert Part 4BA, regarding religious vilification, including sections 49ZD and 49ZE.
- 1.8 Section 49ZE provides that it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that they have or do not have a specific religious belief or affiliation or engage in or do not engage in religious activity.
- 1.9 Section 49ZD provides that a 'public act' includes:
- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material
 - (b) any conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia
 - (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the religious belief, affiliation or activity of the person or members of the group.
- 1.10 Section 49ZE(2) further provides that the following is not unlawful:
- (a) a fair report of a public act
 - (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.
- 1.11 In his second reading speech, the Attorney General provided that it is important the Bill strikes a balance between protection from vilification and ensuring appropriate freedom of expression and religion. He stated that:
- The bill does this by including appropriate exceptions that make conduct that may otherwise amount to vilification lawful, particularly for good-faith discussions in the public interest.
- 1.12 The Attorney General went on to say that the provisions of the Bill are not intended to silence criticism or debate; rather the Bill's purpose is to give appropriate remedies to people subjected to incitements of hatred, serious contempt or severe ridicule on the basis of religion.

- 1.13 Part 9 of the Act provides that person may make a complaint to the Anti-Discrimination Board alleging that a named person or persons have contravened a provision of the Act. The Board's functions include investigating the complaint and referring them to the NSW Civil and Administrative Tribunal.

The Bill amends the *Anti-Discrimination Act 1977* to insert Part 4BA regarding religious vilification. This Part make it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of their religious belief or affiliation or religious activity.

The Committee acknowledges that the intention of the Bill is to protect individuals and groups of persons from vilification on the basis of religious belief or affiliation. As acknowledged in the Attorney General's second reading speech, the provisions of the Bill mirror existing vilification provisions regarding race, homosexuality, transgender status and HIV status. The Bill also provides that certain communications are not unlawful, including for good faith discussions in the public interest.

However, by restricting public communications, the Bill limits a person's right to freedom of expression, which is a core right contained in article 19 of the International Covenant on Civil and Political Rights. The Committee recognises this right is not absolute and carries with it special duties and responsibilities. It may be limited by laws necessary for, among other things, respect of the rights of other people.

The Committee notes that the protection in Part 4BA is drafted broadly. In particular, it applies to both 'a person or a group of persons' and covers a broad range of communications constituting a 'public act'. The Bill also does not define the grounds of protection, being a 'religious belief or affiliation' or 'religious activity'. The broad nature of this protection makes its application unclear and could therefore unduly limit an individual's right to freedom of expression. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration

2. Constitution Amendment (Sydney Water and Hunter Water) Bill 2023

Date introduced	10 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Chris Minns MP
Portfolio	Premier

Purpose and description

- 2.1 The object of this Bill is to amend the *Constitution Act 1902* to ensure the continued public ownership of the Sydney Water Corporation and the Hunter Water Corporation and their main undertakings.

Background

- 2.2 The Bill inserts a new Part 10 (Public ownership of Sydney Water Corporation and Hunter Water Corporation) into the *Constitution Act 1902*, which provides that a water corporation and/or a main undertaking of a water corporation cannot be sold or otherwise disposed of unless authorised by an Act of Parliament.
- 2.3 Part 10 does not prevent a sale or disposal that is in the ordinary course of the business of a water corporation and results in the main undertakings of the water corporation remaining in public ownership.
- 2.4 In his second reading speech, the Hon. Chris Minns MP, Premier emphasised that the reforms focus on ensuring continued public ownership of Sydney Water and Hunter Water. He indicated that they are not intended to limit or constrain the corporations' day-to-day operations or ability to enter into commercial arrangements, provided their main undertakings remain in public ownership.
- 2.5 The Bill passed Parliament on 1 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

3. Crimes Amendment (Breaking and Entering) Bill 2023*

Date introduced	3 August 2023
House introduced	Legislative Assembly
Member responsible	Mr Alister Henskens MP
*Private Members Bill	

Purpose and description

- 3.1 The object of this Bill is to amend the *Crimes Act 1900* to reform and modernise the law relating to breaking and entering residential premises.
- 3.2 Part 4, Division 4 of the Act deals with offences relating to housebreaking, including section 112, which creates an offence of breaking and entering, and committing a serious indictable offence in certain residential premises.
- 3.3 The High Court has held in *BA v The King* [2023] HCA 14 that the composite elements of “breaks and enters” in the *Crimes Act 1900*, section 112 require a trespass, involving entry into premises of another without lawful authority.
- 3.4 The Bill amends Part 4, Division 4 to replace the elements of various offences involving a break and entry into premises with the requirement for entry without the consent of the occupier of the premises.
- 3.5 The Bill also makes consequential amendments to the *Criminal Procedure Act 1986* and the *Crimes (Sentencing Procedure) Act 1999*.

Background

- 3.6 In his second reading speech, Mr Alister Henskens MP described that the purpose of the Bill is to reform and modernise the law relating to breaking and entering residential premises. He highlighted that it specifically aims to make women more secure in their homes after a breakup.
- 3.7 As remarked in his second reading speech, the Bill is also a response to *BA v The King* [2023] HCA 14. In that case, the High Court of Australia ruled that the current law under the *Crimes Act 1900* (the **Act**) required a trespass without lawful authority in order to establish the element of 'breaking'.
- 3.8 Mr Henskens explained that the Bill replaces the element of breaking and entering across various offences in the Act with the requirement for entry without consent of the ordinary occupier. He described these reforms as providing a legal right for a person 'who continues to occupy the previously shared home to stop their former partner, who has left the home and left the relationship, from re-entering at will and by the use of force.'
- 3.9 The Bill also makes consequential amendments to the *Criminal Procedure Act 1986* and the *Crimes (Sentencing Procedure) Act 1999* to reflect the new language.

Issues considered by the Committee

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

Rule of law – unclear application of laws

- 3.10 The Bill amends Part 4, Division 4 of the Act by replacing the concept of "break and enter" with the concept of "enter without consent" in the following offences:
- (a) enter a dwelling house and assault a person with intent to commit murder or inflict grievous bodily harm (section 110)
 - (b) entering dwelling house with the intent to commit an indictable offence (section 112)
 - (c) entering dwelling house with intent to commit a serious indictable offence (section 113).
- 3.11 To ensure consistency, the Bill also replaces the aggravating factor of 'breaking and entering' with circumstances involving entry without consent for the following offences in Part 3 of the Act:
- (a) aggravated sexual assault (section 61J)
 - (b) sexual intercourse involving a child between 10 and 16 (section 66C)
 - (c) aggravated sexual act involving a child between 10 and 16 (section 66DE)
 - (d) use of children for production of child abuse material (section 91G).
- 3.12 In his second reading speech, Mr Henskens described the Bill as offering specific protection to women, by allowing them to exclude their former partners from entering their homes against their will:
- This amendment will change the existing law so that if a person has ceased to live in a property, even though their name is still on the lease, they will not be able to enter lawfully without the consent of the actual occupant.
- 3.13 The Bill does not create a standalone offence of entering premises without consent but treats it as an aggravating factor that attracts higher penalties for certain serious indictable offences under the Crimes Act.
- 3.14 New section 105A(4)(a) establishes that the consent to enter must be actual and not obtained by force, threat or deception for the purposes of establishing an offence under sections 110, 112 or 113. The Bill enables a person to be found guilty under these sections where they entered the building originally with the owner's consent but the consent is subsequently withdrawn.
- 3.15 New section 105A(4)(b) also clarifies that the offences will apply if the person is not an ordinary resident of the concerned premises, regardless of whether the person had a legal right of occupation.

The Bill amends the *Crimes Act 1900* by replacing references to 'break and entry' with 'entry without consent'. This may change the physical element of 'break and entry' offences and remove the precondition of

trespass in certain aggravated offences. The absence of consent is an aggravating factor to an offence only if coupled with a person's intention to commit a serious indictable offence in the home, and that the Bill provides for what is not actual consent.

The Committee notes that the Bill does not provide a definition of what constitutes consent, or when it is or can be revoked. In the circumstances, it is unclear whether the Bill may have a broader application than the circumstances of relationship breakdown. This may be in circumstances where the lack of consent to enter premises is an aggravating factor for certain offences and will attract higher custodial penalties than the non-aggravated counterpart for these offences.

The Committee acknowledges that the Bill addresses a legal technicality around 'break and entry' offences, highlighted in the court's decision in *BA v The King* [2023] HCA 14. It further notes that it is intended to protect victims of domestic violence by preventing former partners from entering their homes without their consent, regardless of whether they can legally enter the home.

However, in the absence of clear definitions around what amounts to consent or its revocation, it is unclear how different legal rights will interact, particularly where the accused has a legal right to occupy the home of the victim. Given the high custodial penalties associated with the aggravated offences, together with their potentially broad application, the Committee refers the matter to Parliament for its consideration of whether the provisions could benefit from further clarification.

4. Crimes Legislation Amendment (Assaults on Retail Workers) Bill 2023

Date introduced	21 June 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

4.1 The objects of this Bill are to:

- (a) amend the *Crimes Act 1900* to create new offences in relation to assaults on, and other actions in relation to, retail workers
- (b) amend the *Criminal Procedure Act 1986* to provide for certain of the new offences to be triable summarily.

Background

4.2 In his second reading speech, the Hon. Michael Daley MP, the Attorney General, indicated that the Bill responds to firsthand accounts of abuse and violence from retail workers across New South Wales.

4.3 Following consultation with the Shop, Distributive and Allied Employees' Association, the Bill seeks to amend the *Crimes Act 1900* (the **Crimes Act**) and the *Criminal Procedure Act 1986* (the **Criminal Procedure Act**) to create new offences for assaults and other acts of violence against retail workers.

4.4 Schedule 1 of the Bill inserts new section 60G into the Crimes Act, with 3 new offences for assaults and other acts of violence against retail workers. Specifically, for:

- (a) assaulting, throwing a missile at, stalking, harassing or intimidating a retail worker in the course of the worker's duty, although no actual bodily harm is caused, with a maximum penalty of 4 years' imprisonment (section 60G(1))
- (b) assault occasioning actual bodily harm, with a maximum penalty of 6 years' imprisonment (section 60G(2))
- (c) reckless grievous bodily harm or reckless wounding, with a maximum penalty of 11 years' imprisonment (section 60G(3)).

4.5 The Attorney General provided that the amendments recognise such behaviours warrant higher penalties than general assault provisions under the Act:

The structure of these offences is modelled on the offence structure for the existing provisions for assaults and other actions against police, law

enforcement officers, frontline health workers and frontline emergency workers under part 3, division 8A of the Crimes Act. However, the maximum penalties for the retail worker offence provisions reflect the different nature and level of risk faced by retail workers.

- 4.6 The Attorney General explained that the harsher penalties will set community standards and act as a stronger deterrent against violence, abuse or threats towards retail workers. He said that this recognises the essential nature of services provided by retail workers and the consequent need to ensure their safety:

Retail workers keep our economy running and ensure that the people of New South Wales can obtain essential goods. Deliberate acts of violence against retail workers in the course of their duties, such as those seen in some instances during the COVID-19 pandemic, are unacceptable.

- 4.7 The Bill passed Parliament on 29 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Unclear application of new offences

- 4.8 The Bill creates 3 new offences for assaults against retail workers under new section 60G. It also inserts new section 60F into the Crimes Act to define a 'retail worker' as 'a person whose duties primarily involve working in an area of a shop open to the public'. A 'shop' is defined as 'the whole or a part of a building, place, stall, structure, tent, vehicle or yard in which goods are sold, or offered or exposed for sale, by retail, including by auction'.
- 4.9 In his second reading speech, the Attorney General highlighted that, under new section 60G, individuals will incur higher maximum penalties compared to when the offending conduct is committed against other persons under the Act's general offence provisions. Specifically for:
- (a) an offence under section 60G(1), the maximum penalty is higher by 2 years than for common assault under section 61
 - (b) assault occasioning actual bodily harm under section 60G(2), the maximum penalty is higher by 1 year than for the general offence provision under section 59
 - (c) reckless grievous bodily harm under section 60G(3), the maximum penalty is higher by 1 year than for the general offence provision under section 35(2)
 - (d) reckless wounding under section 60G(3), the maximum penalty is higher by 4 years than for the offence under section 35(4).
- 4.10 Section 60G(4) clarifies that the offences will apply when retail workers are not on duty, as long as the offences are carried out as a consequence of, or in retaliation for, actions undertaken by a retail worker in the course of their duty.

- 4.11 Further, Schedule 2 of the Bill amends Criminal Procedure Act to provide that the new offences under sections 60G(1) and 60G(2) can be dealt with summarily unless an election is made for the offence to be dealt with on indictment.

The Bill creates 3 new offences in the *Crimes Act 1900* for assaults and other acts of violence against retail workers, and includes a broad definition of a 'retail worker'.

The Committee notes that these new offences contain higher maximum penalties than the comparable provisions under the Act for assaults against other persons. This means that a person may be subject to a higher custodial sentence when a relevant offence is committed against a retail worker. The Committee also notes that the new offences for common assault and assault occasioning actual bodily harm may be dealt with summarily unless elected otherwise, which would allow a lower maximum penalty to be imposed for those offences.

The Committee acknowledges that the Bill intends to deter violent behaviours against retail workers to recognise the essential nature of their services. However, it also notes that the protection in the Bill is broad, with the new offences applying when a retail worker is not on duty as long as the offences are connected to their duty. This may create uncertainty as to the exact persons and circumstances when they are protected, and make it unclear when the new offences, with their higher maximum custodial sentences, apply instead of the Act's general assault provisions.

The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

5. Criminal Legislation Amendment (Knife Crimes) Bill 2023

Date introduced	20 June 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 5.1 The object of this Bill is to amend the *Crimes Act 1900* to create offences of:
- (a) having custody of a knife in a public place or a school
 - (b) using or visibly carrying a knife in a public place or a school.
- 5.2 The offences are currently in the *Summary Offences Act 1988* and are being transferred to the *Crimes Act 1900* with increased maximum penalties.

Background

- 5.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General, acknowledged that the NSW Sentencing Council is currently in the process of reviewing sentencing for firearms, knives and other weapons offences. In the meantime, the Bill immediately responds to serious incidents involving knives.
- 5.4 The Bill moves, with amendments, existing offences currently in sections 11C and 11E of the *Summary Offences Act 1988* into sections 93IB and 93IC of the *Crimes Act 1900*:
- (a) section 93IB provides an offence for the possession of a knife in a public place or school
 - (b) section 93IC provides an offence for using or carrying a knife in a public place or school.
- 5.5 The Bill doubles the maximum penalties for those offences.
- 5.6 In his second reading speech, the Attorney General acknowledged the increase in potential penalties, stating that:
- The maximum penalty for comparable offences in other Australian jurisdictions ranges from six months to two years imprisonment. The proposed reforms will mean that New South Wales will have the highest maximum penalties in the country for the possession or use of a knife in a public place or school.
- 5.7 The Attorney General went on to refer to recent incidents of knife crime. He emphasised that harm to people in public places or schools should not be caused by

the possession of knives. He highlighted that the penalties for the possession or use of knives must reflect the seriousness and gravity of the harm caused, stating that:

These reforms recognise the significant risk posed by the possession and use of knives by individuals in public places and schools, the high rates of recidivism for people convicted of knife possession, and the risk of harm to the community posed by knife crime.

- 5.8 The Bill also repeals section 29A of the *Summary Offences Act 1988*, which provides that a first offence against section 11C may be dealt with by a penalty infringement notice of \$550. This provision will be moved to the *Criminal Procedure Regulation 2017*. The Attorney General stated that:

This will ensure that a police officer can continue to issue a penalty infringement notice to an adult for a first offence of having custody of a knife. This is an important diversionary measure that will also promote efficiency in the broader justice system.

- 5.9 The Bill passed Parliament on 29 June 2023 with amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Strict liability offences

- 5.10 As stated, the Bill introduces sections 93IB and 93IC into the *Crimes Act 1900*. These sections provide that person that has custody of a knife or visibly uses a knife in a public place or school is guilty of an offence.
- 5.11 Section 93IB(2) provides that it is a defence to an offence against the section if the accused person proves they had a reasonable excuse. Section 93IB(3) sets out a non-exhaustive list of reasonable excuses, such as the lawful pursuit of a person's occupation, education or training, and genuine religious purposes. Section 93IB(4) provides that it is not a reasonable excuse for a person to be in possession of a knife for self-defence or for the defence of another person.
- 5.12 Section 93IC also provides for a reasonable excuse defence. However, unlike section 93IB, examples of what constitutes a reasonable excuse are not provided.

The Bill amends the *Crimes Act 1900* to transfer offences from the *Summary Offences Act 1988* for the possession of a knife in a public place or school and for using a knife in a public place or school.

These offences do not require a mental element to prove fault of the crime, and are therefore strict liability offences. However, the Committee also notes that these offences already exist in the *Summary Offences Act 1988*. Further, that reasonable excuse defences are available to the accused. In these circumstances, the Committee makes no further comment.

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

Commencement by proclamation

- 5.13 Section 2 provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.
- 5.14 The Bill repeals section 29A of the *Summary Offences Act 1988*, which provides that for a first offence against section 11C, an infringement notice can be issued. The Attorney General explained in his second reading speech that to ensure there is no gap in the ability to issue penalty infringement notices for a first offence of having custody of a knife, similar provisions will be inserted in the *Criminal Procedure Regulation 2017*.
- 5.15 In his second reading speech, the Attorney General stated that the Bill's commencement on proclamation is intended to allow the amendments to the *Criminal Procedure Regulation 2017* to be drafted. He indicated that the drafting will occur 'swiftly'.

The Bill commences (as an Act) by proclamation. The Committee generally prefers legislation to commence on a fixed date or assent to provide certainty for affected persons. In particular, it notes that the Bill relates to offences affecting individuals, although those offences currently exist under law.

However, the Committee also notes the Attorney General's comments on the intended amendment to the *Criminal Procedure Regulation 2017* prior to commencement of the Bill (as an Act). The flexible start date appears to help ensure the effective transfer of legislative provisions from the *Summary Offences Act 1988* to the *Crimes Act 1900*, and consistency in the continued issuing of penalty infringement notices. In the circumstances, the Committee makes no further comment.

6. Drug Misuse and Trafficking Amendment (Appointed Persons) Bill 2023

Date introduced	2 August 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 6.1 The object of this Bill is to amend the *Drug Misuse and Trafficking Act 1985* (the **Act**) to:
- (a) provide that certain persons may appoint a person to give certificate evidence relating to the result of a plant or substance analysis
 - (b) provide that appointments made before the commencement of the proposed Act are taken to be, and always have been, validly made.

Background

- 6.2 In his second reading speech, the Hon. Michael Daley MP, the Attorney General, stated that the Bill addresses an issue with the validity of appointments of persons to give evidentiary certificates under section 43 of the Act.
- 6.3 Section 43 provides that a certificate signed by a suitably qualified person appointed under the Act is prima facie evidence of the identity, quantity or mass and analysis results of a plant or substance in any legal proceeding.
- 6.4 Under current section 43(5), the Secretary of the Department of Industry, Skills and Regional Development has the function of appointing a suitably qualified person to issue a certificate under section 43(4).
- 6.5 The Attorney General explained that a number of departmental changes have occurred which affect the reference to the Department of Industry, Skills and Regional Development. The department has not existed since 2017. It was first replaced by the Department of Planning, Industry and Environment and later the Department of Regional NSW.
- 6.6 The Attorney General further outlined that changes had not previously been made to the Act to ensure that the reference to the Secretary of the Department of Industry, Skills and Regional Development in section 43(5) could be construed as the Secretary of the Department of Regional NSW.
- 6.7 Therefore the current Bill would amend section 43(5) of the Act so that the Executive Director of the Royal Botanic Gardens and Domain Trust or a person prescribed by regulation is responsible for appointing persons to issue evidentiary certificates.

- 6.8 The Attorney General also warned that the persons appointed under section 43(5) of the Act made by the Secretary of the Department of Regional NSW were invalid. He further expressed concerns that this invalidity could mean convictions of persons which rely on certificates of evidence may be unsafe and liable to challenge.
- 6.9 The Attorney General highlighted that this issue has arisen due to a technical error, emphasising that the suitability of individuals who have been appointed to issue certificates since 2020 is not in question. For this reason, Schedule 3, Part 5 of the Bill provides that an appointment made before the commencement of the Bill and related certificates are valid.

Issues considered by the Committee

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

Wide powers of delegation

- 6.10 The Bill inserts section 43(5)(b) into the Act. This would allow a person prescribed by the regulations to appoint someone to issue a certificate of evidence on the result of the analysis of a plant or substance for use in a legal proceeding.
- 6.11 In his second reading speech, the Attorney General explained the reason for extending the power of appointment to the regulations as a 'further safeguard' and stated that it would 'facilitate any future changes that may be necessary to ensure that an appropriate person is able to carry out this important function.'
- 6.12 Under sections 43(2) and 43(4) of the Act, the production of a certificate on the result of the analysis of a plant or substance can be used in 'any legal proceeding under [the] Act'. The Act also sets out a number of drug use and trafficking offences, including both summary and indictable offences.

The Bill inserts section 43(5)(b) into the *Drug Misuse and Trafficking Act 1985*, which allows a person prescribed by the regulations to appoint individuals who may issue certificates for the result of the analysis of a plant or substance. That certificate can be used in any legal proceeding under the Act as 'prima facie evidence' of the identity or quantity or mass of the plant or substance analysed.

This certificate is accepted as 'prima facie' evidence under section 43 of the Act, which removes a need for the appointed certificate issuer to demonstrate their relevant expertise. This may shift the burden onto a defendant to contest their evidence and relieves the prosecution of meeting the requirements under the *Evidence Act 1995* for expert evidence. Given this potential impact on defendants, allowing regulations to prescribe who can appoint relevant certificate issuers may amount to a wide power of delegation. This is particularly the case for those defendants charged with indictable offences under the Act, which carry custodial penalties.

The Committee acknowledges that allowing regulations to prescribe who can appoint relevant certificate issuers builds flexibility into the scheme. However, it would prefer these provisions to have been drafted with more specificity. In addition, they should be included in the primary legislation and rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers this matter to the Parliament for its consideration.

7. Electoral Funding Amendment (Registered Clubs) Bill 2023

Date introduced	11 May 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

- 7.1 The object of this Bill is to prohibit political donations from registered clubs involved in gambling.

Background

- 7.2 The *Electoral Funding Act* (the **Act**) makes provision for the disclosure, capping and prohibition of certain political donations and electoral expenditure for parliamentary and local election campaigns.
- 7.3 The Bill amends the Act to prohibit donations from a registered club if the business of that club involves wagering, betting or other gambling, including poker machines.
- 7.4 Under the Act, it is unlawful for a 'prohibited donor' to make a political donation. A 'prohibited donor' currently includes tobacco businesses, property developers, alcohol businesses and other gambling industries.
- 7.5 The Bill prohibits donations from a registered club by expanding the scope of a 'liquor or gambling industry business entity', which is a 'prohibited donor'. The prohibition includes a person who has a professional connection with the registered club or that person's spouse.
- 7.6 The Bill also amends the *Electoral Regulation 2018* (the **regulations**) to qualify the proposed prohibition so that it does not prevent the premises of a registered club being used by an elected member, candidate, party or group for a specified purpose.
- 7.7 In his second reading speech, the Hon. John Graham MLC, Special Minister of State, stated:

The Government has considered the policy objectives of the prohibited donor provisions and consider that they remain valid and will be more effectively advanced by the amendments that the bill will make to the Electoral Funding Act.

- 7.8 The Statement of Public Interest on the Bill provides:

The objective is to ensure that registered clubs involved in gambling are brought within the scope of the prohibition on political donations from the gambling industry and can't continue to exercise (or be perceived to exercise) an outsized influence through political donations because of gaps in the law. There is a strong public interest in ensuring that the provisions of the Act are achieving their object of helping prevent

corruption and undue influence in the government of the State or in local government.

- 7.9 The Bill passed Parliament on 1 June 2023 with amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Implied freedom of political communication – prohibition on political donations

- 7.10 Schedule 1 of the Bill prohibits a registered club, as defined by the *Registered Clubs Act 1976*, and a person with a professional connection to that club, from making political donations by designating them as a 'liquor or gambling industry business entity', which are 'prohibited donors' in the Act.
- 7.11 The Bill proposes to expand the definition of 'liquor or gambling industry business entity' set out in section 53 of the Act, to include:
- (a) a registered club within the meaning of the *Registered Clubs Act 1976*, if the business undertaken by the registered clubs includes wagering, betting or other gambling
 - (b) a person who, for a registered club referred to in the paragraph above is:
 - (i) the secretary of the registered club
 - (ii) a member of the governing body of the registered club, or
 - (iii) the spouse of the secretary or member of the governing body.
- 7.12 The Bill amends the regulations to provide an exemption to the prohibition. Specifically, to provide that the use of part of the premises of a registered club is not a political donation for the purposes of the Act if that use:
- (a) is by or on behalf of: an elected member, a candidate for an election, a party, or a group
 - (b) is associated with an election, or an elected member's duties as an elected member.
- 7.13 The Bill includes an example of the type of use that would fall within the exemption, which is to meet with members of the community or hold a meeting.
- 7.14 The Minister stated in his second reading speech:

The Government accepts that the bill will burden the implied freedom of political communication under the Commonwealth Constitution because it restricts the funds available to political parties and candidates to meet the costs of political communication. However, the Government considers that the bill is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the system of representative and

responsible government established by the Constitution for exactly the same reasons that saw the prohibition on property developer donations upheld by the High Court in the *McCloy* case.

- 7.15 The majority judgement in *McCloy v New South Wales* [2015] HCA 34 described the nature of the implied freedom of political communication:

It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.¹

- 7.16 The majority of the High Court held that provisions of the *Electoral Funding, Expenditure and Disclosures Act 1981* prohibiting property developers from making political donations did not impermissibly burden the implied freedom of political communication in a way that was contrary to the Constitution. That prohibition was found to be a rational and proportionate means of pursuing the legitimate objective of removing the risk and perception of corruption and undue influence in politics by property developers, compatible with the system of representative and responsible government.

The Bill amends the *Electoral Funding Act 2018* to prohibit political donations from registered clubs undertaking gambling activities. This brings registered clubs within the scope of 'gambling and liquor entities' (other entities prohibited from political donations include property developers, alcohol businesses and tobacco businesses) prohibited from making political donations, and extends this prohibition to individuals who are directly connected with the operation of those registered clubs.

As acknowledged in the second reading speech, the amendment burdens the implied freedom of political communication. Specifically, it limits the funds available for political parties and candidates to use for political communication by restricting the source of those funds. This freedom is not absolute, and can be burdened if there is a legitimate justification that is compatible with representative government.

The Committee acknowledges that the Bill aims to address a gap in existing prohibitions for the purpose of preventing gambling entities in registered clubs from exerting or being perceived to exert undue political influence over government. It also acknowledges the High Court's ruling in *McCloy v New South Wales* [2015] HCA 34, that a prohibition on political donations from property developers did not impermissibly burden the implied freedom of political communication.

The Committee further notes that the prohibition on individuals is confined to the club secretary, governing body member or the spouse of either, and does not generally restrict individuals from making political donations. Additionally, the Bill creates an exemption to the prohibition that would allow the venues of registered clubs to be used by an elected member, candidate, party or group associated with an election or the duties of that member.

¹ [McCloy v New South Wales](#) [2015] HCA 34 at [2].

Given that the amendments burden the implied freedom of political communication, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

8. Electoral Funding Amendment Bill 2023

Date introduced	3 August 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Member introducing	The Hon. Anthony D'Adam MLC
Portfolio	Special Minister of State

Purpose and description

- 8.1 The object of this Bill is to amend the *Electoral Funding Act 2018* to increase the cap on electoral expenditure by third-party campaigners for State election campaigns from \$20 000 to \$225 900, indexed for inflation in line with other caps on electoral expenditure under the Act. This amendment implements a recommendation of the Joint Standing Committee on Electoral Matters in its report entitled *Caps on third-party campaigners' electoral expenditure in s29(11) and s35 of the Electoral Funding Act 2018*.

Background

- 8.2 The *Electoral Funding Act 2018* (the **Act**) regulates the conduct of elections in NSW. This includes providing for the disclosure, caps and prohibition of certain political donations and expenditure in state and local government election campaigns, and the public funding of election campaigns.
- 8.3 Division 4 of the Act creates a cap on the expenditure of third-party campaigners that is permitted during State election campaigns, with section 29 prescribing the applicable caps on such political expenditure. The Bill amends section 29 to increase the cap on political expenditure for third-party campaigners for State election campaigns.
- 8.4 In his second reading speech on behalf of the Minister, the Hon. Anthony D'Adam MLC, explained that the Bill replaces the following amounts as the applicable electoral expenditure cap for a third-party campaigner:
- (a) \$20 000 with \$225 900 under section 29(11), which applies for each by-election for the Legislative Assembly
 - (b) \$24 700 with \$225 900 under section 29(12)(b), which applies
 - (i) for each electorate during a State general election or by-election in more than one electorate
 - (ii) to expenditure 'incurred substantially for the purposes of an election in a particular electoral district'.
- 8.5 The Parliamentary Secretary noted the High Court decision in *Unions NSW v New South Wales* [2023] HCA 4 that the cap of \$20 000 impermissibly burdened the implied freedom of political communication. He stated that, as a result, 'there is

presently no effective cap on electoral expenditure for a third-party campaigner for a by-election' but that the Bill will reinstate and increase the cap 'as recommended by the [NSW Parliament's] Joint Standing Committee on Electoral Matters.'

- 8.6 On the Bill's second amendment to section 29(12)(b), the Parliamentary Secretary explained that this amendment would 'ensure the intent of the recommendation from the Joint Standing Committee on Electoral Matters is given effect to.'

Issues considered by the Committee

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

9. Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023

Date introduced	23 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

Purpose and description

- 9.1 The object of this Bill is to establish a housing and productivity contribution scheme to facilitate the provision of regional infrastructure that supports and promotes housing and economic activity.

Background

- 9.2 The *Environmental Planning and Assessment Act 1979* (the **Act**) sets out the legislative framework for, among other things, the promotion of the social and economic welfare of the community and a better environment through the proper management, development and conservation of the State's natural and other resources.

- 9.3 The Bill amends the Act to:

- (a) provide for housing and productivity contributions, to replace special infrastructure contributions (**SIC**) under the Act
- (b) establish two separate funds, the Strategic Biodiversity Contributions Fund (**SBC Fund**) and the Housing and Productivity Fund (**HAP Fund**), to replace the Special Contributions Areas Infrastructure Fund under the Act.

- 9.4 In his second reading speech, the Hon. Paul Scully MP, Minister for Planning and Public Spaces noted that the Bill addresses the lack of housing supply in NSW in response to the housing crisis. The Minister stated:

The bill is underpinned by principles of the Productivity Commissioner's recommendations for how State infrastructure should be funded by developers and where the Government should rely on other sources.

- 9.5 Schedule 1 of the Bill replaces Division 7.1, subdivisions 4 and 5 of the Act. New subdivision 4 of the Bill provides for housing and productivity contributions to be required by Ministerial planning orders. Under section 7.24, the object of the new subdivision is:

...to facilitate the provision of regional infrastructure that supports and promotes housing and economic activity in a region by enabling a contribution (a housing and productivity contribution) to be required.

- 9.6 The Bill defines 'regional infrastructure' to include infrastructure such as public amenities, affordable housing, transport, roads, and/or 'measures to conserve or enhance the natural environment'.
- 9.7 New subdivision 4 also creates the SBC Fund, which is administered by the Secretary of the Department of Planning and Environment. The SBC Fund includes payments relating to a strategic biodiversity component of a housing and productivity contribution. The assets of the Fund may be applied to (among other things) payments to public authorities for the provision of regional infrastructure that is a measure to conserve or enhance the natural environment.
- 9.8 New subdivision 5 establishes the HAP Fund, which is administered by the Secretary of the Treasury. Payments into this Fund include (among other amounts) housing and productivity contributions (except for amounts required to be paid into the SBC Fund). Section 7.31B in the new subdivision 5 provides that the purpose of the HAP Fund is to 'support housing and promote economic activity in each region for which a housing and productivity contribution is required'.
- 9.9 The Bill also makes transitional provisions for the continuation of special infrastructure contributions. These contributions are removed from the Act in favour of housing and productivity contributions.
- 9.10 On 30 May 2023, the Bill was referred by the Legislative Council Selection of Bills Committee to the Portfolio Committee No. 7 – Planning and Environment for inquiry and report. The Committee tabled its report on 26 June 2023.²
- 9.11 The Bill passed Parliament on 28 June 2023 with amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Matters contained in Ministerial planning orders

- 9.12 The Bill allows the Minister to issue Ministerial planning orders (**MPO**) in relation to certain matters which direct the legislative scheme.
- 9.13 For example, the Bill provides that the Minister, through a Ministerial planning order (**MPO**), has the power to require productivity and housing contributions towards regional infrastructure. The Minister can also specify matters relating to those contributions, such as the region to which they apply and exemptions.
- 9.14 Section 7.26 in new Division 7.1, subdivision 4 of the Bill includes the content of an MPO. Subsection (1) provides that the order *must* specify certain matters regarding the contribution including:

² Portfolio Committee No. 7 – Planning and Environment, [Environmental Planning and Assessment Amendment \(Housing and Productivity Contributions\) Bill 2023](#), report no. 19, Parliament of New South Wales, June 2023.

- (a) its level and nature
- (b) the classes of development to which it will apply
- (c) the region or part of the region to which it applies. That is, the area of land identified in the MPO as a region. Under section 7.24(5) of the Bill, a contribution may apply to land outside of the state to the extent it is for measures to conserve or enhance the natural environment (as provided by section 7.25 of the Bill)
- (d) the way in which the contribution is determined and required
- (e) the time at which the contribution is determined and required
- (f) whether it includes components relating to identified transport infrastructure and biodiversity certified land
- (g) whether it is required when a complying development certificate is issued for development.

9.15 Subsection (2) provides for matters the MPO *may* specify. These include, among other things:

- (a) conditions that must be imposed as a condition of the development consent, including terms
- (b) whether the conditions require the beneficiary of the development consent to obtain a decision from the Planning Secretary about the contribution required or other obligations arising under the order
- (c) exemptions.

9.16 The Minister must obtain the concurrence of the Treasurer before making an MPO requiring a housing and productivity contribution.

The Bill provides the Minister with the power to determine a broad range of significant matters affecting the operation of the legislative scheme by Ministerial planning orders. This includes requiring the payment of housing and productivity contributions and related matters, regions to which contributions apply (including, in certain circumstances, land outside of the state), the way in which contributions are determined, as well as exemptions.

Unlike legislation, a Ministerial planning order is not subject to disallowance or parliamentary scrutiny. The Committee notes that the powers of the Minister to set and shape key aspects of the legislative scheme by issuing these orders is significant. In particular, it notes that the requirement for contributions along with their level, nature and application are set by order, rather than legislation. While the Minister must consult with the Treasurer before issuing an order, the Bill does not appear to contain limits on the level of contributions or provide input on their determination. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

Matters deferred to the regulations

- 9.17 The Bill states that the regulations may provide for various matters in new Division 7.1, subdivisions 4 and 5.
- 9.18 For example, under section 7.31(3)(d) of the Bill, monies that must be paid into the SBC Fund include 'other money' under the Act, the regulations, or other legislation. At section 7.31(4)(c), other money can similarly be directed or authorised to be paid from the SBC Fund by the Act or regulations.
- 9.19 Similar provisions are made in the Bill for the HAP Fund under sections 7.31C(d) and 7.31D(1)(c).
- 9.20 As noted earlier, the Bill provides for housing and productivity contributions in place of SIC. However, the Bill also provides at Schedule 4, Part 1, Section 1(4), that the regulations may make provision about the continued application of SIC. Specifically, the regulations may make provisions:
- (a) specifying determinations and directions made under the former sections 7.23 and 7.24, respectively, to which the former SIC provisions do not apply
 - (b) excluding specified land, being land subject to the former SIC provisions, from the application of new Division 7.1, subdivision 4 of the Bill providing for housing and productivity contributions
 - (c) amending the areas to which a 7.23 determination or a 7.24 direction applies
 - (d) providing how the Bill (as an Act) and regulations, including former provisions, apply to the former SIC provisions.
- 9.21 Section 10.15 of the Act provides that the regulations may contain general provisions of a savings or transitional nature.

The Bill defers a number of matters to the regulations, including to allow the regulations to specify monies paid in to and out of the SBC Fund and HAP Fund. The regulations may also make transitional provisions for the continued application of special infrastructure contributions (SIC). For example, to amend the areas to which determinations or directions made under the former SIC provisions apply.

The Committee acknowledges that section 10.4 of the Act allows general savings and transitional provisions to be included in the regulations. However, it notes the broad ambit of matters that the regulations may make provision for, and that these matters affect the continued operation of the former SIC scheme and the payment of monies in and out of the SBC and HAP Funds. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

Commencement by proclamation

- 9.22 Section 2 of the Bill provides that it commences on a day or days to be appointed by proclamation.

9.23 However, the Minister in his second reading speech stated:

A commencement date of 1 October 2023 will allow time to train users on the digital system that makes it easy to calculate the contribution and apply it to development. The same digital system will also make it simpler to pay the contribution when the time comes.

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for those affected by the Bill's provisions.

The Committee acknowledges that there appears to be practical reasons for imposing a flexible starting date, particularly as the Bill establishes a new framework for the payment of contributions by developers. It also notes the Minister's comments in his second reading speech that the Bill would commence on 1 October 2023, to allow time to train users on a digital system to calculate contributions. It is therefore unclear whether a flexible start date is required. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

10. First Home Buyer Legislation Amendment Bill 2023

Date introduced	23 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

Purpose and description

- 10.1 The objects of this Bill are:
- (a) to amend the *Duties Act 1997*:
 - (i) to require a person to reside in a home as the person's principal place of residence for a continuous period of at least 12 months to be eligible for a duty exemption or concession
 - (ii) to revise values for property to be eligible for the purposes of the First Home Buyers Assistance Scheme
 - (b) to amend the *Property Tax (First Home Buyer Choice) Act 2022* to prevent a person making an election to pay property tax rather than stamp duty on a transfer of land occurring on or after 1 July 2023
 - (c) to amend the *First Home Owner Grant and Shared Equity Act 2000* to require first home buyers to reside in the home as their principal place of residence for a continuous period of at least 12 months to be eligible for a First Home Owner Grant.

Background

- 10.2 In his second reading speech, the Hon. Paul Scully MP, Minister for Planning and Public Spaces, indicated that the Bill amends three Acts to address housing affordability for first home buyers in the \$650,000 to \$1 million price range.
- 10.3 First, the *Duties Act 1997* is amended to increase the thresholds that apply under the First Home Buyer Assistance Scheme. From 1 July 2023:
- (a) the first home buyer stamp duty exemption threshold for the purchase of a dwelling will increase from \$650,000 to \$800,000
 - (b) the stamp duty concession threshold will increase from \$800,000 to \$1 million.
- 10.4 The Bill amends the *Duties Act 1997* to increase the residence requirement under the First Home Buyer Assistance Scheme from 6 to 12 months. The Bill provides that, to be eligible for the scheme, a first home buyer must start occupying the property as their principal place of residence for a continuous period of at least 12 months, within 12 months of completion of the agreement or transfer. The Minister stated that this 'will target the benefits to owner-occupiers, not investors'.

- 10.5 The Bill also extends the residence requirement under the *Duties Act 1997* from 6 to 12 months for:
- (a) deferral of liability for duty for properties purchased off the plan
 - (b) exemption of duty for certain property transactions by a purchaser or borrower who is a tenant of the Department of Housing, Community Tenancy Scheme, or Aboriginal Housing Office.
- 10.6 Second, amendments are made to the *Property Tax (First Home Buyer Choice) Act 2022* to close off access to the First Home Buyer Choice land tax scheme from 1 July 2023. This scheme allows first home buyers of property valued less than \$1.5 million to pay annual property tax rather than stamp duty.
- 10.7 First home buyers entering into contracts of sale or transfer on or after 1 July 2023 will not have access to the scheme. First home buyers who have already opted into the scheme by this date continue paying annual land tax until they sell the property.
- 10.8 Third, the *First Home Owner Grant and Shared Equity Act 2000* is amended to extend the residence requirement from 6 to 12 months to be eligible for a first home owner grant. The Minister indicated that this ensures consistency with the revised residence requirement in the First Home Buyer Assistance Scheme.
- 10.9 The Bill passed Parliament on 1 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

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*.

11. Fiscal Responsibility Amendment (Wellbeing Budget) Bill 2023*

Date introduced	21 June 2023
House introduced	Legislative Council
Member responsible	Ms Abigail Boyd MLC
*Private Members Bill	

Purpose and description

- 11.1 This Bill amends the *Fiscal Responsibility Act 2012* to make further provision about the principles of sound financial management in the conduct of fiscal policy and reporting requirements in relation to those principles.

Background

- 11.2 The object of the *Fiscal Responsibility Act 2012* (the **Act**) is to maintain the AAA credit rating of the State of New South Wales and, in furthering that object, it provides a legislative framework of fiscal targets and principles while also requiring budget reporting in relation to those targets and principles.
- 11.3 In her second reading speech, Ms Abigail Boyd MLC said that the Bill ‘redefines the principles of sound financial management for our State’ and indicated that it seeks to support the wellbeing of the people and nature of NSW by amending budget reporting indicators.
- 11.4 The Bill makes several amendments to the Act to expand the objects of the Act and principles of sound financial management and create additional budget reporting requirements in relation to those principles.
- 11.5 The Bill replaces section 3(1) of the Act to provide that, in addition to maintaining the State’s AAA credit rating, the objects of the Act include to establish:
- (a) principles for sound financial management in the conduct of fiscal policy
 - (b) reporting requirements on the extent to which the Government’s fiscal policy is consistent with the principles referred to in the paragraph above.
- 11.6 It then inserts section 3(2)(d) and (e) to provide that the purposes of the Act’s objects are:
- (a) to maintain essential public assets and services under public ownership and control, enabling the State to meet the needs of current and future generations without reliance on the private sector
 - (b) to increase the long term economic, social, environmental and cultural wellbeing of the State.
- 11.7 Section 7 of the Act prescribes three principles of sound financial management, in accordance with which the Government should pursue its policy objectives to support

the objects of the Act. Subsection (4) includes the principle of achieving intergenerational equity, with section 7(4)(b) providing that this includes ensuring that the current generation funds the costs of its services. The Bill amends subsection 7(4)(b) to remove the words 'the costs of its services' and inserts instead 7(4)(b)(i) and (ii), to provide that the current generation funds:

- (i) the cost of the current generation's services
- (ii) the cost of repairing the social, environmental and cultural damage caused by the current generation and previous generations.

11.8 Under section 8 of the Act, as part of budget reporting, the Treasurer is to include certain matters in budget papers. The Bill inserts section 8(f) into the Act to require the inclusion of a report on the measures taken, and the effectiveness of measures, to ensure the long-term economic, social, environmental and cultural wellbeing of the State, including in relation to matters set out in sections 8(f)(i)-(xiv) of the Bill. For example, the cost of living, housing affordability and levels of greenhouse gas emissions.

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*.

12. Forestry Amendment (Koala Habitats) Bill 2023*

Date introduced	11 May 2023
House introduced	Legislative Council
Member responsible	Ms Sue Higginson MLC
*Private Members Bill	

Purpose and description

- 12.1 The object of this Bill is to prohibit forestry operations from being carried out in koala habitats.

Background

- 12.2 The *Forestry Act 2012* (the **Act**) provides for the dedication, management and use of State forests and other Crown-timber land for forestry and other purposes.

- 12.3 The Bill amends the Act to make it a condition of integrated forestry operations approvals that forestry operations are not to be carried out in koala habitats.

- 12.4 Ms Higginson introduced an identical Bill on 9 November 2022, which lapsed on the prorogation of the 57th Parliament. In her second reading speech for this Bill, Ms Higginson stated:

The bill seeks to resolve the single biggest threat to koalas—the destruction of their habitat—which will have a positive impact on the single most significant compounding influence on threats to koalas: climate change and subsequent extreme bushfires and droughts.

- 12.5 The Bill amends the Act to make it a requirement of integrated forestry operations approvals that forestry operations are not carried out in koala habitats, being:

- (a) an area of regional koala significance identified in the Koala Prioritisation Project – Areas of Regional Koala Significance Database, or
- (b) an area declared by the Minister, by order published in the Gazette, as koala habitat. The Minister must declare an area a koala habitat if they receive an assessment by a suitably qualified person that the area is koala habitat. That assessment must be tabled in each House of Parliament.

Issues considered by the Committee

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

13. Forestry Amendment (Timber Harvesting Safety Zones) Bill 2023*

Date introduced	2 August 2023
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak, MLC
*Private Members Bill	

Purpose and description

- 13.1 The object of this Bill is to amend the *Forestry Act 2012* (the **principal Act**) to:
- (a) establish offences relating to certain areas in which timber harvesting operations are carried out (**timber harvesting safety zones**)
 - (b) increase the maximum penalties for certain obstruction offences.

Background

- 13.2 The principal Act provides for the dedication, management and use of State forests and other Crown-timber land for forestry and other purposes.
- 13.3 The Bill inserts a new Part 5C into the principal Act. This Part introduces notice requirements for timber harvesting safety zones, various offences relating to these zones and the power for authorised officers to give certain directions to persons in these zones.
- 13.4 Part 5C defines *timber harvesting safety zone* as an area specified or shown on a notice given under section 69ZC and includes:
- (a) roads within the zone that have been closed to enable timber harvesting and related forestry operations to be carried out
 - (b) all land within 150m of a zone boundary that is part of a State forest.
- 13.5 The Bill also increases maximum penalties for offences under section 83 of the principal Act.
- 13.6 In his second reading speech, the Hon. Mark Banasiak MLC stated that the Bill introduces certain obstruction offences to deter 'illegal and dangerous activities'. He further emphasised that the Bill is intended to protect workplace safety for forestry workers, authorised personnel and security personnel.
- 13.7 The Committee notes that the Bill includes substantially similar provisions as the Forestry Amendment (Timber Harvesting Safety Zones) Bill 2022, which was introduced in the 57th Parliament by Mr Banasiak on 16 November 2022 and lapsed upon prorogation on 27 February 2023. This report on the Bill therefore reflects the

Committee's comments on the 2022 bill, as reported in Digest No. 1/58 (22 August 2023).³

Issues considered by the Committee

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

Strict liability offences carrying custodial penalties and right to peaceful assembly

- 13.8 The Bill introduces various strict liability offences for individuals under the new Part 5C for certain activities in relation to timber safety harvesting zones.
- 13.9 Custodial and/or monetary penalties apply for certain new offences including strict liability offences. Specifically, where:
- (a) a person who is not an authorised person enters a timber harvesting safety zone in contravention of an authorised officer's direction not to re-enter the zone, or not to enter other timber harvesting safe zones, whether specified or not. A penalty of 120 penalty units (\$13 200) or imprisonment for 12 months, or both, applies (section 69ZD(5))
 - (b) a person obstructs or interferes with timber harvesting or related forestry operations carried out within a timber harvesting safety zone. A penalty of 120 penalty units (\$13 200) or imprisonment for 12 months, or both, applies (Section 69ZE(2)).
- 13.10 A monetary penalty of 60 penalty units (\$6 600) applies for other new offences including strict liability offences. for example, where:
- (a) a person who is not an authorised person enters or remains in a timber harvesting safe zone (section 69ZD(1))
 - (b) a person who is not an authorised person possesses an item that is reasonably capable of being used to obstruct or interfere with timber harvesting without reasonable excuse within the zone (section 69ZE(1))
 - (c) a person who is not an authorised person alters, removes or destroys a notice of a timber harvesting safety zone displayed in accordance with the requirements in the Bill (section 69ZF(1)(a))
 - (d) a person who is not an authorised person dismantles, damages or destroys a fence or other barrier erected to restrict or prevent access to a timber harvesting safety zone (section 69ZF(1)(b))
 - (e) a person does not comply with the direction of an authorised officer to stop or relocate their vehicle or remove a dog from a timber harvesting safety zone, as applicable (section 69ZG).
- 13.11 A person does not commit an offence under section 69ZE or 69ZF if notice of the timber harvesting is not given in accordance with the Bill's requirements, or while

³ Legislation Review Committee, Legislation Review Digest No. 1/58, 22 August 2022.

carrying out functions as an authorised officer or work they are engaged to carry out in the zone.

- 13.12 Section 69ZB provides that an *authorised person* means an authorised officer, a person engaged to carry out work in a timber harvesting safety zone and a person authorised to enter a timber harvesting safety zone by the holder of the relevant timber licence.
- 13.13 The Bill also increases the maximum penalty applying to offences under section 83(2) of the principal Act. Section 82(2) provides that it is an offence for a person to:
- (a) assault, threaten or intimidate an authorised officer
 - (b) bribe an authorised officer without lawful excuse.
- 13.14 The Bill increases the maximum penalty applying to offences under section 83(2) from 50 penalty units (\$5 500) or imprisonment for 6 months, or both, to 120 penalty units (\$13 200) or imprisonment for 12 months, or both.

The Bill introduces various strict liability offences into the principal Act for certain activities in relation to timber safety harvesting zones. This includes strict liability offences incurring a maximum monetary penalty of 120 penalty units (\$13 200) and/or a custodial sentence of 12 months where a person re-enters a timber harvesting safety zone or another zone, contrary to an authorised officer's direction not to do so. These penalties also apply where a person interferes with or obstructs timber harvesting or related forestry operations being carried out in a zone. Other strict liability offences may incur a maximum monetary penalty of 60 penalty units (\$6 600).

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element is relevant to establishing liability for an offence. The Committee acknowledges that strict liability offences with monetary penalties are not uncommon in regulatory settings to encourage compliance. Further, the Bill limits the application of certain offences in specific circumstances, including where notice of the timber harvesting safety zone was not given in accordance with the Bill's requirements.

However, the Committee notes that a number of strict liability offences are introduced by this Bill and that certain offences can result in both custodial and monetary penalties being imposed on an individual. The Committee notes the seriousness of the Bill's custodial sentences and their impact on the right to personal liberty. Further, that the lawful exercise of personal rights such as the right to peaceful assembly may still attract liability for certain offences. This may discourage peaceful protest.

The Bill also increases the maximum penalty for certain strict liability offences under section 83(2) from 50 penalty units (\$5 500) and/or imprisonment for 6 months to 120 penalty units (\$13 200) and/or imprisonment for 12 months. These offences include assaulting or bribing an authorised officer. The Committee acknowledges that the introduction of increased penalties intends to strengthen deterrence and reflects the seriousness of these offences. However, the Committee again notes the severity of the custodial sentences and their impact on

the right to personal liberty. In the circumstances, the Committee refers the matter to Parliament for its consideration.

14. Government Sector Finance Amendment (Grants) Bill (No 2) 2023

Date introduced	22 June 2023
House introduced	Legislative Assembly
Member responsible	Mr Gareth Ward MP
*Private Members Bill	

Purpose and description

14.1 The objects of this Bill are to:

- (a) provide that a breach of the *Government Sector Finance Act 2018*, section 10.3A(1) or (2) by a Minister is taken to be a substantial breach of a ministerial code of conduct prescribed or adopted under the *Independent Commission Against Corruption Act 1988*, section 9(3)
- (b) require a Minister approving certain grants to promptly give details of those grants to each member of the Legislative Assembly who represents an electorate in which the grant will be administered.

Background

14.2 The *Government Sector Finance Amendment (Grants) Act 2023* (the **Act**) was assented to on 31 May 2023 and will commence on 1 July 2023. The Act introduces section 10.3A into the *Government Sector Finance Act 2018*, and provides that:

- (a) under subsection (1), a Minister must not knowingly breach a mandatory requirement contained in the Grants Administration Guide
- (b) under subsection (2), a Minister must not approve a grant to which the Guide applies unless satisfied that its expenditure is efficient, effective, economical and ethical, and achieves value for money.

14.3 The Bill introduces subsections 10.3A(2A) and (2B) into the *Government Sector Finance Act 2018*:

- (a) subsection 10.3A(2A) provides that non-compliance with the sections 10.3A(1) or (2) would be a substantial breach of a relevant ministerial code.
- (b) subsection 10.3A(2B) provides that as soon as possible after approving the grant, the Minister must give details of a grant to each member of the Legislative Assembly who represents an electorate in which the grant is administered.

14.4 In his second reading speech, Mr Ward stated that:

By elevating non-compliance with the grants amendment provisions to a breach of the ministerial code, the Parliament is expressing a statement of seriousness to a Minister about compliance and failure to comply with their obligations with respect to grants.

- 14.5 The Bill was negatived in the Legislative Assembly on 3 August 2023. In accordance with its usual practice, the Committee has considered the Bill as introduced.

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*.

15. Government Sector Finance Amendment (Grants) Bill 2023

Date introduced	11 May 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

- 15.1 The objects of this Bill are:
- (a) to amend the *Government Sector Finance Act 2018* to impose certain duties on Ministers and other government officials when approving or declining government grants
 - (b) to amend the *Government Information (Public Access) Act 2009* and the *Government Information (Public Access) Regulation 2018* to provide that certain information about government grants is open access information that must be made publicly available.

Background

- 15.2 The *Government Sector Finance Act 2018* (**GSF Act**) establishes a framework for government sector financial and resource management in New South Wales. The *Government Information (Public Access) Act 2009* (**GIPA**) facilitates public access to government information.
- 15.3 The amendments proposed by the Bill are grouped within three schedules, which deal with the following:
- (a) Schedule 1 amends the GSF Act by transferring obligations for Ministers and other government officials to follow mandatory requirements in the Grants Administration Guide (the **Guide**) from Schedule 1, clause 31 to proposed section 10.3A. It further extends duties for grant decision makers, stipulating that a person must have regard to the principles in the Guide when approving or declining a grant. The Guide is issued periodically by the Premier and published in the Gazette.
 - (b) Schedule 2 amends the GIPA to provide that open access information under section 18(g) of the GIPA may be required to be made publicly available on a 'relevant website' prescribed by the regulations, rather than a website maintained by the agency.
 - (c) Schedule 3 amends the *Government Information (Public Access) Regulation 2018* to prescribe information issued by an agency relating to administered grants as open access information if the information is required to be published on a website specified in the Guide. This website is also prescribed as the 'relevant website' on which open access information under section 18(g) of GIPA may be published.

- 15.4 The Statement of Public Interest provides that one of the primary objectives of the Bill is to ensure that grants are administered in the best interests of the community and serve a public purpose. In his second reading speech, The Hon. John Graham MLC, Special Minister of State, noted that the Bill will strengthen the existing framework for the regulation of government grants to ensure the government delivers effective, efficient and economical grants for the people of NSW.
- 15.5 Regarding the Bill's requirement that the grant decision-maker has regard to the key principles set out in the Guide, the Minister stated that the principles in the Guide provide a strong foundation for grants administration and that these procedural aspects of grants administration should remain in the Guide to ensure that they are flexible and can be easily changed.
- 15.6 The Bill also provides for certain information about grants administration to be publicly available, on which the Minister stated:
- These amendments will work to reinforce the importance of transparency in grants administration and are consistent with existing publication requirements under the guide.
- 15.7 The Bill passed Parliament on 25 May 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Privacy – publication of personal information

- 15.8 Schedule 3 of the Bill inserts clause 6A into the *Government Information (Public Access) Regulation 2018*. Clause 6A prescribes information relating to grants administered by an agency as 'open access information' if required under a mandatory requirement of the Guide. That information must be made publicly available on the website specified in the Guide.
- 15.9 The Guide relates to both grant programs and individual grants. A key objective of the Guide is to ensure the principles of transparency, accountability and probity are reflected in the delivery of all NSW Government grants. As part of this purpose, the Guide provides that officials must publish the following information about grants:
- (i) upcoming grant opportunities
 - (ii) open grant opportunity guidelines
 - (iii) all grants awarded
 - (iv) the exercise of Ministerial discretion in making grant decisions that vary from the recommendation of officials, including the reasons for any such decision

(v) program evaluations.⁴

- 15.10 Appendix A of the Guide details the information and data publication requirements for NSW Government grants. Certain personal information such as the name of the grantee and location may not be published in some circumstances to comply with privacy laws.⁵

The Bill requires that a Minister or other government official make certain information relating to grants administered or proposed to be administered by an agency publicly available, including the name and location of grant recipients. It is unclear whether information relating to individuals applying for individual grants must be published under the mandatory requirements of the Grants Administration Guide. If so, this may impact upon their privacy. The Committee notes the objective of the amendments to foster transparency in grants administration. It also notes that, in accordance with the Guide, personal information may not be published to comply with privacy laws. 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**

Incorporation of guidelines into legislation

- 15.11 As detailed above, the Bill incorporates the Guide into the GSF Act and the *Government Information (Public Access) Regulation 2018*.
- 15.12 Schedule 1 of the Bill inserts section 10.3A into the GSF Act. This section maintains the requirement included in Schedule 1, clause 31 of the GSF Act, that Ministers and government officials must not knowingly breach a mandatory requirement contained in the Guide. It also includes a new provision, that decision makers must have regard to the key principles of the Guide when approving or declining a grant.
- 15.13 Schedule 3 of the Bill provides that information about grants administered is 'open access information' if the information must be published under the Guide. As stated above, this may include information about grant recipient name and location.
- 15.14 The website where the information is published is also set out in the Guide. The Bill amends the GIPA Act to provide that a 'relevant website' where open access information is the website specified in the Guide.

The Bill incorporates the Grants Administration Guide into the *Government Sector Finance Act 2018* and *Government Information (Public Access) Regulation 2018*. The Guide is issued periodically by the Premier and published in the Gazette. There does not appear to be a requirement that the Guide is tabled in Parliament. The Guide and any revisions to it are therefore not subject to parliamentary scrutiny.

⁴ State of NSW Government Department of Premier and Cabinet, [Grants Administration Guide](#), September 2022, pp 32-33.

⁵ State of NSW Government Department of Premier and Cabinet, [Grants Administration Guide](#), September 2022, p 39.

The Committee generally prefers that substantive matters are set out in legislation where they can be subjected to parliamentary scrutiny. In this case, substantive matters set out in the Guide, rather than legislation, include mandatory requirements for Ministers and government officials, the key matters that must be considered when approving or declining a grant, the type of open access information to be published and the website where open access information is published. The Committee also notes that certain information, if published, may impact on the privacy of individual grant recipients.

While the Committee acknowledges that including the procedural aspects of grants administration in the Guide enables flexibility, it notes the substantive matters included in that document and that those matters may impact on individuals' privacy. Further, that revisions to the Guide which may impact on individuals' privacy would not be subject to parliamentary review. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

16. ICAC and LECC Legislation Amendment Bill 2023

Date introduced	3 August 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Member introducing	The Hon. Anthony D'Adam MLC
Portfolio	Special Minister of State

Purpose and description

- 16.1 The object of this Bill is to amend the *Independence Commission Against Corruption Act 1988* (the **ICAC Act**) and the *Law Enforcement Conduct Commission Act 2016* (the **LECC Act**) to implement responses to recommendations of the Joint Committee on the Independent Commission Against Corruption (**ICAC**).

Background

- 16.2 The Bill amends the ICAC Act and the LECC Act, to implement the Government's responses to certain recommendations made by:
- (a) the reports of the NSW Parliament's Joint Committee on the Independent Commission Against Corruption (**ICAC Committee**) titled 'Review of the 2020-2021 Annual Reports of the ICAC and the Inspector of the ICAC' and 'Review of Aspects of the ICAC Act 1988'
 - (b) the report of the Inspector of the ICAC titled 'Inspector's Special Report 2023/01: Audit of the welfare of witnesses and other people involved in ICAC investigations'.
- 16.3 Section 57B sets out the Inspector's principal functions, which include issuing reports and recommendations to deal with complaints about the ICAC. The Bill amends section 57C of the ICAC Act to provide the Inspector with additional powers to require the ICAC to respond to any report or recommendations they make when exercising their principal functions.
- 16.4 In his second reading speech on behalf of the Minister, the Hon. Anthony D'Adam MLC highlighted that these new powers would 'create a more formal process for communication between the ICAC and the ICAC Inspector'. He further highlighted that this 'will provide enhanced transparency into these specific accountability mechanisms for the Inspector overseeing the ICAC'.
- 16.5 The Bill also inserts section 74E into the ICAC Act, which requires the ICAC to develop time standards for the release of its reports and to report on its own performance against those time standards. The Parliamentary Secretary explained this new section:

... only requires ICAC to publish reasons for any noncompliance with the time standards at the time the relevant report is released and in its annual report.

- 16.6 The Bill amends the current information protection provisions in sections 112 and 114 of the ICAC Act, which currently prohibits individuals from sharing certain information that forms part of an ICAC investigation. These sections set out exceptions for individuals required to appear and give evidence to the ICAC, to allow them to disclose certain matters to a registered medical practitioner or registered psychologist.
- 16.7 The proposed amendments would expand those exceptions to also include individuals who have been summoned to give evidence or produce a statement of information in relation to an investigation by the ICAC. The Parliamentary Secretary outlined that these changes are proposed to 'better accommodate the welfare of witnesses before the ICAC.'
- 16.8 The Bill also increases the maximum term of the Inspector of the LECC and assistant inspectors from five to ten years to ensure consistency with the term of the Inspector of the ICAC. Additionally, the Bill enables the term of the current commissioners to be increased by up to 12 months to allow the Government to stagger the commencement dates of incoming commissioners.

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*.

17. Independent Commission Against Corruption Amendment (Validation) Bill 2023*

Date introduced	31 May 2023
House introduced	Legislative Council
Member responsible	The Hon. Rod Roberts MLC
*Private Members Bill	

Purpose and description

- 17.1 The *Independent Commission Against Corruption Amendment (Validation) Act 2015* inserted a provision into the *Independent Commission Against Corruption Act 1988* to validate certain previous actions of the Independent Commission Against Corruption following the decision of the High Court in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.
- 17.2 The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* to provide that the validation provision does not apply in relation to a person who had proceedings pending in the Supreme Court or the Court of Appeal on 8 May 2015 relating to a finding by the Commission of corrupt conduct.
- 17.3 The Bill also provides that in calculating a limitation period for a proceeding brought by or on behalf of a person of that kind, the period between 8 May 2015 and the date of assent to the proposed Act is to be disregarded in the calculation of the limitation period and that the new provisions inserted by the Bill apply whether or not the person of that kind is deceased, including for a proceeding brought on behalf of a deceased person.

Background

- 17.4 The Bill amends the *Independent Commission Against Corruption Act 1988* (the **Act**) to provide that the validation provision set out in Schedule 4, clause 35 of the Act does not apply to a person who had proceedings pending in the Supreme Court or the Court of Appeal on 8 May 2015 related to a finding by the Independent Commission Against Corruption (**Commission** or **ICAC**) of corrupt conduct.
- 17.5 It also provides that any relevant limitation period does not include the time between 8 May 2015 and the date of assent of this Bill (as an Act).
- 17.6 In his second reading speech to the Bill, the Hon. Rod Roberts MLC, outlined that the Bill specifically concerned the High Court case of *ICAC v Cunneen* [2015] HCA 14 (**Cunneen**):

In short, in the Cunneen matter, the High Court of Australia... found that the ICAC had misinterpreted the definition of "corrupt conduct". The High Court's decision threw into doubt earlier ICAC corrupt conduct findings

where the wrongful interpretation had been used and applied. That decision was handed down on 15 April 2015.

As a result of the finding, the ICAC requested that the government of the day amend the ICAC Act with retrospective force. That was because of ICAC's concern that the High Court Decision in Cunneen impacted a number of past investigations. Hence the Independent Commission Against Corruption Amendment (Validation) Act 2015... was introduced and passed by this Parliament.

...The effect of the new legislation was to validate certain conduct of the ICAC before 15 April 2015, including findings of corrupt conduct.

17.7 Mr Roberts referred to the 2021 report of the Joint Committee on the ICAC, on the reputational impact of an individual being adversely named in the ICAC's investigations. That report recommended that the *Independent Commission Against Corruption Amendment (Validation) Act 2015* be amended to put certain persons in the same position they would have been in on 8 May 2015 (the date set for the Court of Appeal proceeding) had that Act not applied to them.⁶

17.8 Mr Roberts provided that the 2015 Act resulted in five individuals not being able to have findings of corrupt conduct set aside. He stated:

The Bill has been specifically drafted to apply only to the gentlemen that had the undertaking of both the ICAC and the Court of Appeal to have their findings annulled.

17.9 The Bill includes the same provisions as the *Independent Commission Against Corruption Amendment (Validation) Bill 2022 (Validation Bill 2022)*, which was introduced by the Hon. Rod Roberts MLC in the 57th Parliament on 9 November 2022. The Validation Bill 2022 lapsed upon prorogation on 27 February 2023.

17.10 The Committee reported on the Validation Bill 2022 in Digest No. 51/57.⁷ In this Digest, the Committee noted that the provisions of the Validation Bill 2022 operated retrospectively and referred it to Parliament for its consideration.

Issues considered by the Committee

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

Retrospectivity and the rule of law

17.11 The Bill inserts clause 35A into the Act. Subclause 35A(1) provides that Schedule 4, clause 35 of the Act does not apply in relation to a person who had proceedings pending in the Supreme Court, including the Court of Appeal, on 8 May 2015 relating to a finding by the Commission of corrupt conduct.

17.12 Subclause 35A(2) provides that the period between 8 May 2015 and the date of assent of this Bill (as an Act) is disregarded in the calculation of any limitation period

⁶ Committee on the Independent Commission Against Corruption, [Reputational impact on an individual being adversely named in the ICAC's investigations](#), November 2021, p 33 (Recommendation 7).

⁷ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 51/57](#), 15 November 2022.

for a proceeding brought by or on behalf of a person specified in sub-clause 35A(1) in relation to a finding of corrupt conduct.

- 17.13 Under subclause 35A(3), clause 35A applies whether or not the person of that kind is deceased, including for a proceeding brought on behalf of a deceased person.

The Bill inserts clause 35A into the *Independent Commission Against Corruption Act 1988*, which provides that Schedule 4, clause 35 of the Act does not apply to a person who had proceedings pending in the Supreme Court, including the Court of Appeal, on 8 May 2015, relating to a finding by the ICAC of corrupt conduct. This provision operates retrospectively.

The Committee generally comments on provisions drafted to have retrospective effect, as they may impact on the principle of the rule of law. That is, a person is entitled to know the law to which they are subject at any given time. The Committee further notes that clause 35A(1) has the effect of excluding certain individuals from the operation of a substantive provision of the Act. This may be inconsistent with the rule of law principle that the law be applied equally and fairly, with no person above the law.

Clause 35A may also interfere with the judicial process, as it specifically provides that Schedule 4, clause 35 does not apply to a person who had pending proceedings in the NSW Supreme Court or Court of Appeal on 8 May 2015. Further, clause 35A(2) extends the limitation period for bringing those proceedings by excluding the days between 8 May 2015 to the date of the Bill's assent (as an Act). This may undermine the finality of the court's decision, by reopening proceedings which have been tried in fact.

The Committee acknowledges that the Bill aims to address an issue of retrospectivity arising from a 2015 amending Act, and the effects of that Act on select persons. However, as the Bill also acts retrospectively and specifically for the proceedings of select persons, the Committee refers the matter to Parliament for its consideration.

18. Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Bill 2023

Date introduced	24 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

- 18.1 The object of this Bill is to permit digital evidence access orders to be sought in conjunction with search warrants issued under the *Independent Commission Against Corruption Act 1988*.

Background

- 18.2 The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (the **Act**) to allow an officer of the Independent Commission Against Corruption to apply for a digital evidence access order (**DEAO**) in connection with a search warrant issued under section 40 of the *Independent Commission Against Corruption Act 1988* (**ICAC Act**).

- 18.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General, provided that the amendments:

...were raised with the Government directly by the Independent Commission Against Corruption [ICAC] and they work to ensure that the ICAC's powers to investigate corruption and maladministration in New South Wales remain current and fit for purpose.

- 18.4 He went on to state:

These powers reflect the emerging need to support the modern realities of serious investigations. Search warrants provide the authority to search a place and the things found within it, including digital devices. But unlike traditional physical documents, such as paper files or journals, digital devices are frequently protected by passwords or other forms of security that can frustrate the exercise of these powers.

- 18.5 The Bill amends two definitions in the Act to allow an ICAC officer to make an application for a DEAO in relation to a computer that is subject to a search warrant. First, it amends the definition of 'eligible applicant' to include an 'officer of the Commission'. Under the ICAC Act, this means a Commissioner, Assistant Commissioner, staff member or person engaged by the Commission to provide services, information or advice. Second, it includes a search warrant issued by ICAC in the definition of 'search warrant'.

- 18.6 The Attorney General stated that together these amendments will enable ICAC officers to make an application for a DEAO under section 76AB of the Act.
- 18.7 The Bill inserts subsection 76AB(2)(d) into the Act, to provide that an ICAC officer can apply for a DEAO in connection with a search warrant relating to a matter being investigated under the ICAC Act. An ICAC officer can apply for the DEAO at the same time as the application for the search warrant or after it has been issued, before or after the search warrant has been executed.
- 18.8 The Bill also inserts subsection 76AF(1)(d)(ia) into the Act, to prescribe information that must be included in an application for a DEAO in connection with a search warrant under the ICAC Act. Specifically, the Bill requires that the application includes particulars of the grounds on which the application is based, including the grounds for suspecting material connected with a matter being investigated under the ICAC Act is held in or accessible from the computer to which the application relates.
- 18.9 The Attorney General outlined the objective of expanding the application of DEAOs to ICAC investigations:
- There is a clear public interest in ensuring that the ICAC is able to execute investigations in a fulsome manner, without being frustrated by access controls on digital devices.
- 18.10 The Bill passed Parliament on 29 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Right to silence – exclusion of privilege against self-incrimination

- 18.11 Part 5, Division 4A of the Act provides for the granting and execution of a DEAO. Under section 76AB, an 'eligible applicant' can apply for a DEAO in connection with a search warrant. If granted, the 'executing officer' of a DEAO can direct a person to give them any information or assistance reasonable and necessary to allow them to access or copy data from a computer covered by the DEAO, under section 76AM(1).
- 18.12 It is an offence under section 76AO to fail to comply with such direction, or to give the executing officer false or misleading information, without reasonable excuse. It is not a reasonable excuse that compliance with the DEAO or a requirement made in accordance with it would tend to incriminate or expose a person to a penalty. Significant penalties apply for non-compliance, including a maximum penalty of five years imprisonment and/or a fine of 100 penalty units (\$11 000).
- 18.13 The Committee commented on the introduction of the DEAO scheme by the *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access*

Orders) Bill 2022 in [Digest No. 48/57](#).⁸ In this Digest, the Committee noted that the offence in section 76AO may exclude a person's privilege against self-incrimination.

- 18.14 The Bill expands the application of the DEAO scheme, so that DEAOs can be sought by an ICAC officer in relation to search warrants issued under section 40(1) of the ICAC Act. Under section 40, an ICAC officer can apply for a search warrant if they have reasonable grounds for believing that there is in or on any premises a document or other thing connected with any matter that is being investigated under the ICAC Act, or that such document or other thing may be brought into or onto the premises within the next 72 hours.
- 18.15 In accordance with the definition of 'executing officer' in section 46 of the Act, a police officer would be the executing officer of a DEAO issued to an ICAC officer.

The Bill amends the *Law Enforcement (Powers and Responsibilities) Act 2002* (the Act) to enable digital evidence access orders (DEAOs) to be sought by ICAC officers in relation to search warrants issued under the *Independent Commission Against Corruption Act 1988* (ICAC Act), before or after the search warrant has been executed. This expands the application of the DEAO scheme.

It is an offence under the Act, without reasonable excuse, to either provide false or misleading information to, or not comply with a direction of, an officer executing a DEAO. This includes a direction to provide an officer with information and assistance which is reasonable and necessary to allow them to access or copy data from a computer. This offence incurs a maximum penalty of five years' imprisonment and/or \$11 000. It is not a reasonable excuse if compliance with the DEAO, or a requirement made in accordance with it, would tend to incriminate or expose a person to a penalty. By excluding the privilege against self-incrimination in the exercise of enforcement powers, the Bill may impact the right to silence of affected persons.

The Committee acknowledges that the Bill intends to enable more fulsome ICAC investigations by permitting access to digital devices, which would be restricted without the expansion of the DEAO scheme. However, by expanding the circumstances in which a DEAO can be sought, the Bill extends the application of DEAOs and the associated non-compliance offence to more people. Specifically, people given directions in connection with search warrants under the ICAC Act.

Noting the impact of this offence on the right to silence of affected persons, the Committee would usually refer the expansion of the DEAO scheme to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

⁸ Parliament of New South Wales, Legislation Review Committee, [Legislation Review Digest No. 48/57](#), 11 October 2022.

19. Minerals Legislation Amendment (Offshore Drilling and Associated Infrastructure Prohibition) Bill 2023*

Date introduced	22 June 2023
House introduced	Legislative Assembly
Member responsible	Mr Rory Amon MP
*Private Members Bill	

Purpose and description

- 19.1 The objects of the Bill are to:
- (a) prohibit the granting of permits and licences for the purposes of undertaking or facilitating seabed petroleum exploration or recovery
 - (b) prohibit the granting of licences permitting offshore exploration or mining activities, except licences for or in relation to the recovery of sand for the purpose of beach nourishment
 - (c) prohibit development for the purposes of undertaking or facilitating seabed petroleum exploration or recovery or seabed mineral exploration or recovery.

Background

- 19.2 The Bill amends:
- (a) the *Petroleum (Offshore) Act 1982* to prohibit the Minister from granting permits and licences for the purposes of undertaking or facilitating seabed petroleum exploration or recovery
 - (b) the *Offshore Minerals Act 1999* to prohibit the Minister from granting licences under that Act, except licences for or in relation to the recovery of sand for beach nourishment
 - (c) the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) to prohibit a person from carrying out certain development for the purposes of undertaking or facilitating certain seabed petroleum or seabed mineral exploration or recovery. Under the EP&A Act, a person includes an unincorporated group of persons or a person authorised to represent that group.
- 19.3 The Bill provides that contravention of the prohibition in the EP&A Act incurs a Tier 1 monetary penalty, being a maximum penalty of:
- (a) for a corporation, \$5 million and \$50,000 for each day the offence continues

(b) for an individual, \$1 million and \$10,000 for each day the offence continues.

19.4 In his second reading speech, Mr Rory Amon MP stated that this Bill would:

...prohibit any development within the State of New South Wales itself, or the waters within its jurisdiction, to support mineral or petroleum exploration or mining off the coast of New South Wales in general. The bill, in effect, would prevent, as far as New South Wales law permits, any petroleum or mineral exploration or recovery off the coast of New South Wales.

19.5 Mr Amon further provided that these amendments were to protect the State's coastline and provide certainty to coastal communities.

19.6 This Bill was referred by the Legislative Assembly to the Legislative Assembly Standing Committee on Environment and Planning on 29 June 2023 for the purpose of inquiring into, among other matters, constitutional issues or unintended consequences raised by the Bill. The Committee is due to report by 21 November 2023.⁹

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 New South Wales Legislative Assembly, [Votes and Proceedings \(Revised Proof\)](#), 29 June 2023, pp. 183-184; 186-187.

20. Parliamentary Remuneration Amendment Bill 2023

Date introduced	1 June 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

- 20.1 The object of this Bill is to provide for a freeze, until 30 June 2025, on increases to the basic salary of members of both Houses of Parliament.

Background

- 20.2 The *Parliamentary Remuneration Act 1989* (the **Act**) relates to the remuneration of members of Parliament, Ministers of the Crown and certain office holders in Parliament.

- 20.3 The Statement of Public Interest tabled on 1 June 2023 provides that:

The Parliamentary Remuneration Amendment Bill 2023 (**Bill**) proposes the insertion of a new provision in the *Parliamentary Remuneration Act 1989* (**Act**) that will have the effect of freezing the basic salary of members of both Houses of Parliament (**Members**) for two years.

- 20.4 In his second reading speech on the Bill, the Hon. John Graham MLC, Special Minister of State, explained:

This bill inserts a new section 4A into the Act that imposes temporary arrangements for the determination of basic salary. The new provision provides that a determination of basic salary by the tribunal must not fix an amount that would increase the basic salary to an amount that is more than the amount determined to have effect from 1 July 2022.

- 20.5 He highlighted that the Bill does not impact the Parliamentary Remuneration Tribunal's annual determinations regarding additional entitlements.

- 20.6 Section 4A(3) of the Bill provides that the temporary arrangement will be repealed at the end of the day on 30 June 2025.

- 20.7 The Bill passed Parliament on 29 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

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*.

21. Prevention of Cruelty to Animals Amendment (Battery Cage Prohibition) Bill 2023*

Date introduced	31 May 2023
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
*Private Members Bill	

Purpose and description

21.1 The objects of this Bill are to:

- (a) amend the *Prevention of Cruelty to Animals Act 1979* (the **Act**) to:
 - (i) make it an offence to confine a laying hen in a cage
 - (ii) clarify that guidelines prescribed or adopted by regulations made under the Act have no effect to the extent of an inconsistency with the Act or the regulations
- (b) make consequential amendments to the *Prevention of Cruelty to Animals Regulation 2012*.

Background

21.2 In her second reading speech to the Bill, the Hon. Emma Hurst MLC emphasised that the Bill is intended to protect hens by prohibiting the use of battery cages.

21.3 The Bill introduces a new offence into the Act, which prohibits confining any laying hen in a cage for commercial purposes. This would prevent the use of cages but would not affect the transport of hens. The prohibition on cages would apply regardless of any existing defences in section 24 of the Act and could not be overridden by industry standards or guidelines.

21.4 In her second reading speech, Ms Hurst referred to the findings of the Select Committee on the Use of Battery Cages for Hens in the Egg Production Industry, which was established in 2019. She noted that the submissions for that inquiry mostly supported a move away from battery cages and that the report made it clear that battery cages place significant restrictions on a hen's ability to move freely.

21.5 Ms Hurst remarked that furnished cages are being used as alternatives in some countries where battery cages are banned. She expressed concern that some egg producers may use furnished-cage eggs without making changes to the conditions the hens are in. Ms Hurst explained that the offence therefore covers all types of cages.

21.6 The Bill provides for a one-year phase-in period, which is consistent with the position of major supermarkets to phase out cage eggs by 2025. Ms Hurst said that this

timeframe is 'more reasonable' than the 13 year timeframe proposed by the Australian Animal Welfare Standards and Guidelines for Poultry.

Issues considered by the Committee

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

Strict liability offence

- 21.7 Part 2 of the Act includes a number of animal cruelty offences, which are subject to penalties with the possibility of imprisonment up to two years, depending on the offence.
- 21.8 The Bill introduces section 21D into Part 2 of the Act, which makes it an offence to keep laying hens in cages. Non-compliance results in a maximum penalty of 400 penalty units (\$44 000) and/or imprisonment for an individual. A penalty of 2 000 penalty units (\$220 000) applies to a corporation.
- 21.9 The Bill also introduces section 24(3) into the Act, which states that the defences in section 24 of the Act do not apply to a person accused of an offence under section 21D for confining a laying hen to a cage.
- 21.10 Section 24 of the Act provides for certain defences for an offence against Part 2 of the Act or the regulations if it can be proved that the accused's act or omission is covered under section 24. For example, a defence would apply to a person accused of an offence if they were authorised to act for the purpose of carrying out animal research under section 24(1)(e)(i).

The Bill introduces a new strict liability offence into the Act, which prohibits confining any laying hen in a cage for commercial purposes. The maximum penalty for this offence for individuals is 400 penalty units (\$44 000) and/or up to a one year imprisonment.

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 establishing liability. The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises the Bill's aim to address animal cruelty issues.

However, the Committee notes that the maximum penalty for this offence includes a custodial penalty. It also notes that the Bill limits access to defences which are available for other offences under Part 2 of the Act (excluding section 19A, which prohibits game parks). In the circumstances, the Committee refers this matter to Parliament for its consideration.

22. Prevention of Cruelty to Animals Amendment (Gassing Devices Prohibition) Bill 2023*

Date introduced	28 June 2023
House introduced	Legislative Council
Member responsible	The Hon. Emma Hurst MLC
*Private Members Bill	

Purpose and description

- 22.1 The object of this Bill is to amend the *Prevention of Cruelty to Animals Act 1979* (the **Act**) to make it an offence to use gassing devices on pigs in abattoirs and to clarify that guidelines prescribed or adopted under section 34A(1) of the Act have no effect to the extent of an inconsistency with the Act or regulations made under the Act.

Background

- 22.2 The Act is for the prevention of cruelty to animals and for the promotion of their welfare.
- 22.3 The Bill introduces a new offence into the Act, which prohibits a person to use, cause or permit the use of a gassing device on a pig in an abattoir. The prohibition would apply regardless of existing defences under section 24(1)(b) and (c) of the Act, and could not be overridden by industry codes of practice.
- 22.4 In her second reading speech to the Bill, the Hon. Emma Hurst MLC emphasised that the Bill is intended to prohibit the use of gassing as an option to kill farmed pigs in New South Wales.
- 22.5 Ms Hurst stated:
- The bill makes no exceptions for standard industry practices in abattoirs by making it clear that the usual defences under the Prevention of Cruelty to Animals Act around killing animals for food do not apply to this new offence.
- 22.6 The Bill provides for a 1-year phase-in period.

Issues considered by the Committee

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

Strict liability offence

- 22.7 Part 2 of the Act includes a number of animal cruelty offences which are subject to penalties with the possibility of imprisonment up to 2 years, depending on the offence.

- 22.8 The Bill introduces section 16A into Part 2 of the Act, which makes it an offence to use, cause or permit the use of a gassing device on a pig in an abattoir. Non-compliance by an individual results in a maximum penalty of 1 000 penalty units (\$110 000) and/or imprisonment for 2 years. A maximum penalty of 5 000 penalty units (\$550 000) applies otherwise.
- 22.9 The Bill also introduces section 24(1A) into the Act, which states that the defences outlined in section 24(1)(b) and (c) of the Act do not apply to a person accused of an offence against section 16A. This includes the defence of destroying an animal for the purpose of producing food for human consumption in a manner that inflicted no unnecessary pain upon the animal (under section 24(1)(b)(ii)).
- 22.10 Section 24 of the Act provides for certain defences for an offence against Part 2 of the Act or the regulations if it can be proved that the accused's act or omission is covered under section 24. For example, a defence would apply to a person accused of an offence if they were authorised to act for the purpose of carrying out animal research under section 24(1)(e)(i).

The Bill introduces a new strict liability offence into the *Prevention of Cruelty to Animals Act 1979*, which prohibits the using, causing, or permitting the use of a gassing device on a pig in an abattoir. The maximum penalty for this offence for individuals is 1 000 penalty units (\$110 000) and/or up to 2 years imprisonment.

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 establishing liability. The Committee acknowledges that strict liability offences are not uncommon in regulatory settings to encourage compliance. It also recognises the Bill's aim to address animal cruelty issues.

However, the Committee notes that the maximum penalty for this offence includes a custodial penalty. It also notes that the Bill limits access to defences which are available for other offences under Part 2 of the Act. In the circumstances, the Committee refers this matter to Parliament for its consideration.

23. Property Services Council Bill 2023*

Date introduced	31 May 2023
House introduced	Legislative Council
Member responsible	The Hon. Mark Banasiak MLC
*Private Members Bill	

Purpose and description

- 23.1 The object of this Bill is to establish and confer functions on the Property Services Council for New South Wales.

Background

- 23.2 The Hon. Mark Banasiak MLC, in his second reading speech on the Bill identified two key parts of the Bill:

Firstly, it provides for the creation of the property service council. The council comprises an industry education, consumer and industry representatives along with the regulator. The Council is a forum within which all stakeholders can make a genuine contribution to the betterment of the industry. The council is charged with advising the Minister on matters such as consumer protection, agent education and training, refinements to the regulatory architecture and public information programs.

Secondly, the bill establishes the officer of the property services commissioner. The commissioner will have deep industry knowledge and will be exclusively focused on the regulatory controls for the property services industry as set out in the Property and Stock Agents Act 2002.

- 23.3 The Bill constitutes a body corporate NSW government agency to be known as the Property Services Council (**Council**).
- 23.4 The governance arrangements, objects and functions of the Council are set out in Parts 2 and 3 of the Bill.
- 23.5 The Bill identifies three objects of the Council; to promote appropriate standards for agents, protect the interests of people who deal with agents and facilitate dispute resolution between those people and agents.
- 23.6 Schedule 4 of the Bill amends other legislation, including to:
- (a) replace references to a 'relevant authority' with the term 'council' (being the Council) in the *Community Land Management Act 2021*, *Property and Stock Agents Act 2002* and *Strata Schemes Management Act 2015* to transfer certain functions from the Commissioner of Fair Trading to the Council
 - (b) amend the *Statutory and Other Officers Remuneration Act 1975* to include the Property Services Commissioner (**Commissioner**) as a public office for which the Tribunal can make a remuneration determination.

- 23.7 The Bill was negated in the Legislative Council on 28 June 2023. In accordance with its usual practice, the Committee has considered the Bill as introduced.

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

- 23.8 Section 19 of the Bill provides that the Governor may make regulations consistent with the Bill (as an Act) about a matter that is:

- (a) required or permitted by this Act to be prescribed, or
- (b) 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 19. This section allows regulations to prescribe a matter that is 'necessary or convenient' for carrying out or giving effect to the Bill.

There are 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, subordinate legislation is not passed by Parliament and Parliament does not control when it commences.

The Committee recognises that these provisions may enable flexibility and efficiency in the new regulatory framework proposed by the Bill. However, the Committee notes that the provisions may effectively allow regulations to prescribe matters without limit and may include broad powers that impact personal rights, such as the prosecution of offences, undertaking investigations and accessing premises and documents. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill was negated, it instead notes this matter for Parliament's consideration.

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

Wide delegation power

- 23.9 The Bill establishes the Council and Commissioner in sections 4 and 9 of the Bill, respectively.
- 23.10 The Bill allows the Council and Commissioner to perform functions under the Bill and functions under other Acts, through amendments to other Acts.
- 23.11 Section 12 of the Bill provides that the council has the following functions:
- (a) advising the Minister on business and training of agents, consumer protection, management of strata and other matters requested by the Minister
 - (b) provide public information and guidance programs

- (c) other functions conferred or imposed on the Council by or under this or any other Act.
- 23.12 The Council also performs functions in accordance with Schedule 4 of the Bill. The Bill amends the definition of 'relevant authority' to 'Council' (being the Property Services Council) in the *Community Land Management Act 2021*, *Property and Stock Agents Act 2002* and *Strata Schemes Management Act 2015*. This transfers certain functions exercised by the Commissioner of Fair Trading to the Council. Key functions transferred under the respective Acts include:
- (a) mediating disputes, conducting investigations and prosecuting offences under the *Community Land Management Act 2021*
 - (b) requesting information from agents, freezing trust accounts, determining licence applications and prosecuting offences under the *Property and Stock Agents Act 2002*
 - (c) mediating disputes, prosecuting offences and investigating and reporting on any matter referred by the Minister under the *Strata Schemes Management Act 2015*.
- 23.13 Under section 9 of the Bill, the Commissioner is responsible for the day-to-day management of the affairs of the Council in accordance with the policies and general directions of the Council Board. Any act, matter or thing done in the name of, or on behalf of, the Council by the Commissioner is taken to have been done by the Council.
- 23.14 The functions of each the Council and Commissioner can be delegated under section 16 of the Bill.
- 23.15 Section 16(1) provides that the Council may delegate any function to:
- (a) a member of staff of the Council, or
 - (b) a person or class of persons authorised for this section by the regulations.
- 23.16 Section 16(2) provides that the Commissioner may delegate any function to:
- (a) a member of staff of the Council, or
 - (b) a person or class of persons, authorised for this section by the regulations.
- 23.17 The Bill therefore allows for functions to be delegated to unspecified persons or classes of persons prescribed by the regulations.

Section 16 of the Bill allows the exercise of functions of the Property Services Council and Property Services Commissioner to be delegated to a person or class of persons authorised to do so by the regulations. Significant functions of the Council under the Bill and other Acts include advising the Minister, prosecuting offences, conducting mediations and undertaking investigations. The Commissioner is responsible for the day-to-day management of the Council in accordance with the Council Board's policies and general directions.

The Bill does not specify the persons or the class of persons to whom functions may be delegated, or any qualifications required by those

persons. Further, it does not include any constraints on the way in which delegated functions can be exercised.

The Committee generally prefers provisions setting out which persons and class of persons can be delegated functions under primary legislation to be specific to ensure an appropriate level of parliamentary oversight, particularly if those functions are significant. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill was negatived, it instead notes this matter for Parliament's consideration.

24. Residential Tenancies Amendment (Rent Freeze) Bill 2023*

Date introduced	29 June 2023
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong MP
*Private Members Bill	

Purpose and description

- 24.1 The objects of this Bill are to:
- (a) prohibit rent increases for residential premises for 2 years
 - (b) limit the rent payable under residential tenancy agreements entered into on or after 30 June 2023 for 2 years.

Background

- 24.2 The *Residential Tenancies Act 2010* (the **Act**) makes provisions with respect to the rights and obligations of landlords and tenants, rents, rental bonds and other matters relating to residential tenancy agreements.
- 24.3 The Bill inserts section 40A into the Act to prohibit rent increases for 2 years.
- 24.4 New section 40A makes it unlawful for a landlord or the landlord's agent to increase rent payable under a residential tenancy agreement during the freeze period, being two years from the date of the commencement of the provisions. The section sets out the rent payable under agreements entered into on or after 30 June 2023.
- 24.5 In her second reading speech, Ms Jenny Leong MP provided that the Bill would address housing and financial stress experienced by renters and the need to ensure secure and affordable housing for renters. She stated that:
- ...the intention of the bill is to introduce an interim two-year rent freeze to offer time to reform rental laws in the State and to deal with the immediate rental crisis.
- 24.6 The Bill also introduces section 229 into the Act, which provides that the Minister must carry out a review of section 40A within 1 year of its commencement to determine whether the objectives of the section remain valid and appropriate. A report of the outcome of the review is required to be tabled in each House of Parliament 6 months after the review is carried out.

Issues considered by the Committee

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

Freedom of contract and real property rights

- 24.7 The Bill amends the Act to prohibit rent increases for 2 years, by introducing section 40A.
- 24.8 The Bill provides that sections 40A(1) and 40A(2) are terms of every residential tenancy agreement entered into before the section commences or during the 'freeze period', being the 2 year period commencing 1 month after the date of assent. Specifically:
- (a) section 40A(1) provides that the rent payable under a residential tenancy agreement must not be increased during the freeze period
 - (b) section 40A(2) provides that a rent increase payable on or after 30 June 2023 has no effect.
- 24.9 Section 40A(3) sets out the rent payable under a residential tenancy agreement entered into on or after 30 June 2023. It must not be more than:
- (a) if the premises were under an agreement on 30 June 2023, the rent payable at that time
 - (b) otherwise, the median rent for the same type of dwelling set out in the document titled *Rent tables March 2023 quarter* published on the website of the Department of Communities.
- 24.10 Ms Leong explained the rationale for these provisions relating to the rental rates in her second reading speech, stating that 'the rent freeze is linked to the property, and not to an individual tenant or lease agreement'.

The Bill inserts section 40A into the *Residential Tenancies Act 2010* to prohibit rent increases for 2 years. Section 40A provides that a landlord or their agent must not increase the rent payable under a residential tenancy agreement during the 2-year freeze period. For premises rented out on 30 June 2023, the rent payable at the time applies. For premises not rented out at 30 June 2023, the rent payable is the median rent specified in a document published by the Department of Communities and Justice.

The Bill regulates the terms of future and existing tenancy agreements, including to set the maximum rents payable under, and incorporate terms into, those agreements. In doing so, the Bill impacts on landlords' real property rights and freedom of contract, with persons free to agree on the contractual terms to which they are subject. This affects the rights and obligations of parties to the relevant tenancy agreements, and appears to particularly affect landlords. However, the Committee acknowledges that this Bill aims to ensure tenants have access to secure and affordable housing. Further, that statutory limitations on real property rights and freedom of contract are not uncommon including, for freedom of contract, to address unequal bargaining power between parties. In the circumstances, the Committee refers this matter to the Parliament for its consideration.

Strict liability offences

24.11 Under section 40A(4), if a landlord or their agent increases rent payable during the freeze period or induces a tenant to enter into a residential tenancy agreement with rent which is higher than the rent payable specified in section 40A(3), the following penalties apply:

- (a) 50 penalty units (\$5 500) for an individual
- (b) 100 penalty units (\$11 100) for a corporation.

The Bill inserts strict liability offences into the *Residential Tenancies Act 2010* where a landlord or their agent increases the rent payable under a residential tenancy agreement during the 2-year rent freeze period, or induces a tenant to enter into an agreement with rent payable that is higher than the maximum rent specified in new section 40A(3). Where an individual commits an offence, a maximum penalty of 50 penalty units (\$5 500) applies.

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 imposing liability. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance: in this case, to encourage compliance with new offences aiming to freeze rent prices. It also notes the maximum penalties are monetary, not custodial. In the circumstances, the Committee makes no further comment.

25. Residential Tenancies Amendment (Rental Fairness) Bill 2023

Date introduced	10 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

Purpose and description

- 25.1 The object of this Bill is to amend the *Residential Tenancies Act 2010*, the *Property and Stock Agents Regulation 2022* and the *Residential Tenancies Regulation 2019* to:
- (a) prohibit advertising or otherwise offering a residential tenancy for premises unless a fixed amount is stated in the advertisement or offer as the amount of rent for the premises
 - (b) prohibit the soliciting of amounts of rent for residential properties that are higher than the advertised amount
 - (c) provide for additional regulation-making powers in relation to a rental bond roll-over scheme.

Background

- 25.2 The *Residential Tenancies Act 2010* (the **Act**) governs the rights and obligations of landlords and tenants, rents, rental bonds and other matters relating to tenancy agreements.
- 25.3 The Bill amends:
- (a) the Act, to prohibit certain practices in relation to advertising or offering amounts of rent for residential premises. This includes to:
 - (i) prohibit advertising a residential premises without a fixed rent amount stated
 - (ii) prohibit persons soliciting or inviting an offer for a higher rent than advertised
 - (iii) require that higher offers made voluntarily by acceptable applicants are notified to all other applicants and prospective tenants and updated in the rental advertisement
 - (b) the Act, to provide for the transfer of rental bonds and that amounts credited to the Rental Bond Account are held on trust by the Rental Bond Board
 - (c) the *Residential Tenancies Regulation 2019*, to provide for certain penalty notice offences

- (d) the *Property and Stock Agents Regulation 2022*, to make a consequential amendment.

25.4 In the second reading speech, the Hon. Anoulack Chanthivong MP, Minister for Better Regulation and Fair Trading, noted the Bill's aim to ensure renters have access to 'secure, safe and affordable housing' and highlighted that renters face poor security of tenure. He stated:

The changes to rent bidding will fix loopholes in New South Wales' current rent-bidding laws and boost transparency for everyone in the system. The bill does this by extending the existing ban on solicited rent bidding so that it also covers owners and third parties, not just real estate agents.

25.5 He further provided that extending the ban to third parties who may encourage renters to offer more for a rental property, including online rental application tools which collect application information and assign ratings to applicants, distinguishes this Bill from rental bidding bans in other States and Territories.

25.6 On 23 May 2023, the Bill was referred by the Legislative Assembly to a Legislative Assembly Select Committee for inquiry into and report on clause 22B, among other matters. The Committee is tabled its report on 9 June 2023.¹⁰

25.7 The Bill passed Parliament on 22 June 2023 with amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Strict liability offences

25.8 The Bill inserts sections 22A and 22B into the Act, to place prohibitions on matters relating to advertising or soliciting amounts of rent, and offering amounts of rent. These sections create strict liability offences under sections 22A(1), 22A(3), 22B(2), 22B(3).

25.9 Specifically, where:

- (a) under section 22A(1), a landlord or their agent advertises or offers a residential premises for rent without stating a fixed amount of rent
- (b) under section 22A(3), a person solicits or otherwise invites an offer of an amount of rent for residential premises, directly or indirectly, that is higher than the advertised amount of rent
- (c) under section 22B(2), a landlord or their agent does not:

¹⁰ Legislative Assembly Select Committee on the Residential Tenancies Amendment (Rental Fairness) Bill 2023, [*Residential Tenancies Amendment \(Rental Fairness\) Bill 2023*](#), report 1/58, Parliament of New South Wales, June 2023.

- (i) give all applicants written notice of the amount of a higher offer from an acceptable applicant within the specified period
 - (ii) take all reasonable steps to update advertisements with the higher offer being considered by the landlord, if another open house is scheduled
 - (iii) advise prospective tenants of the higher offer when they inspect or enquire about the premises
- (d) under section 22B(3), a landlord or their agent does not keep a copy of the written notice of the higher offer to all applicants for at least 3 years.
- 25.10 For each offence, a maximum penalty of 50 penalty units (\$5 500) applies for an individual (and 100 penalty units (\$11 000) otherwise).
- 25.11 Section 22A(4) of the Bill clarifies that a person does not contravene the prohibition on soliciting or inviting a higher offer under section 22A(3) merely by communicating with an applicant in accordance with section 22B.

The Bill inserts strict liability offences under new sections 22A and 22B into the *Residential Tenancies Act 2010* for conduct relating to advertising and soliciting higher amounts of rent for residential premises, and advising applicants and potential applicants of the highest offer of rent.

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 imposing liability. The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance: in this case, to encourage compliance with new offences aiming to address rent bidding. It also notes the maximum penalties are monetary, not custodial. In the circumstances, the Committee makes no further comment.

Penalty notice offences – right to a fair trial

- 25.12 Schedule 3 of the Bill amends the *Residential Tenancies Regulation 2019* to insert penalty notice offences for the offences created by sections 22A(1) and (3), 22B(2) and 22B(3). These offences are outlined above.
- 25.13 Section 203 of the Act allows the regulations to prescribe penalty notice offences.

The Bill amends the *Residential Tenancies Regulation 2019* to provide that the offences created by new sections 22A(1), 22A(3), 22B(2) and 22B(3) are penalty notice offences.

The Committee notes that penalty notices allow an individual to pay a specified monetary amount in lieu of electing to have the matter heard by a Court. This may impact a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee acknowledges that individuals retain the right to elect to have their matter dealt with before a Court, and that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including cost effectiveness and ease of

administration. The amounts payable for offences created under this Bill are also in line with other penalties provided for by the *Residential Tenancies Regulation 2019*. In the circumstances, the Committee makes no further comment.

Interference with privacy rights

- 25.14 The Bill provides at section 22A(5) that the regulations may provide for matters relating to the provision of information by a person, at the times and in the way and form approved by the Secretary, for the purposes of monitoring the operation of sections 22A and 22B.
- 25.15 In his second reading speech, the Minister provided that the regulation-making power will enable the Secretary to collect information from owners and agents:
- 25.16 The 'Secretary' is defined in the Act to mean the Commissioner for Fair Trading, Department of Customer Service, or the Secretary of the Department (if no one is employed as the Commissioner).

The Bill introduces section 22A(5) to the *Residential Tenancies Act 2010*, which allows the regulations to provide for matters relating to the provision of information by a person for the purposes of monitoring the operation of sections 22A and 22B of the Bill.

The Committee acknowledges that, under section 22A(5), the provision of information is limited to the purposes of monitoring the operation of both section 22A and 22B of the Act. It also notes the Minister's comments that the amendment will enable information gathering from owners and agents.

However, the Bill does not specify the persons required to give information, the type of information required and whether this includes personal information, or if the collection, use and disclosure of information is limited. This may impact on the privacy of persons required to give information, or who that information relates to. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

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

Commencement by proclamation

- 25.17 Clause 2 of the Bill provides that Schedules 1[1], 2 and 3 commence on a day or days to be appointed by proclamation.
- 25.18 The relevant provisions commencing by proclamation include new sections 22A and 22B of the Act, outlined above, and related provisions.

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.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date, which may allow time for administrative arrangements and other reforms to be implemented. However, it notes

that this may also make it difficult for landlords, landlord agents and prospective tenants to understand their obligations and rights under the Bill. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

26. Revenue Legislation Amendment Bill 2023

Date introduced	11 May 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

Purpose and description

- 26.1 The objects of this Bill are to:
- (a) remove a concession in the amount of duty payable by a public landholder
 - (b) provide for an extension of time during which unoccupied land may be treated as a person's principal place of residence in relation to the payment of land tax.

Background

- 26.2 The Hon. Paul Scully MP, Minister for Planning and Public Spaces, provided in his second reading speech that the Bill legislates two revenue measures announced by the former Government in the 2022-23 Half-Yearly Review.
- 26.3 First, the *Duties Act 1997* is amended to remove a concession that enabled a public landholder to only pay 10% of the duty payable by a private landholder for a relevant acquisition in a landholder. The Minister explained that a public landholder is a company listed on a recognised stock exchange or a public unit trust scheme holding land in NSW valued at \$2 million or more.
- 26.4 The Minister further provided that the Bill facilitates consistency in administration:
- Charging landholder duty on public landholders at the full general rate is consistent with arrangements in Western Australia and the Northern Territory. It is also consistent with the treatment of acquisitions of interests in private landholders—that is, in a company or unit trust scheme holding \$2 million or more of land in New South Wales which does not qualify as a public landholder.
- 26.5 Second, the Bill amends the *Land Tax Management Act 1956* to provide for an extension of time during which unoccupied land may be treated as a person's principal place of residence for land tax purposes. A person's principal place of residence is exempt from land tax.
- 26.6 The amendments permit the Chief Commissioner of State Revenue to extend the tax exemption period for a person's principal place of residence by up to a further 2 tax years in certain circumstances. In order to grant the extension, the Chief Commissioner must be satisfied that the owner cannot use and occupy the land because of unavoidable delays caused by exceptional circumstances beyond their control. The Minister provided that such circumstances include unforeseen events such as trade labour and material shortages associated with the COVID-19 pandemic.

- 26.7 The Bill allows the Chief Commissioner to extend any such tax exemption period that ended on or after 31 December 2019. The Minister said:

That will ensure that any owner who faced delays due to exceptional circumstances during the COVID-19 pandemic will have access to the extension. A property owner in exceptional circumstances will now have up to six tax years in total to complete building or renovation work and occupy the property as a principal place of residence before being charged land tax.

- 26.8 The Bill passed Parliament on 25 May 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Incorporation of external document not tabled in Parliament

- 26.9 The Bill amends Schedule 1A of the *Land Tax Management Act 1956* to include a new clause 6(7B), which provides that the Treasurer may approve and publish guidelines in the Gazette that the Chief Commissioner must consider when making a decision under clause 6(7A).
- 26.10 Under clause 6(7A) the Chief Commissioner may extend an owner's tax exemption period for their principal place of residence in certain circumstances.
- 26.11 Part 10 of the *Taxation Administration Act 1996* provides for objections to, and then administrative review by the NSW Civil and Administrative Tribunal of, a decision of the Chief Commissioner under the *Land Tax Management Act 1956*.

The Bill amends Schedule 1A of the *Land Tax Management Act 1956* to include a new clause 6(7B), which provides that the Treasurer may approve and publish guidelines in the Gazette that the Chief Commissioner must consider when making a decision under clause 6(7A). Specifically, whether to extend the tax exemption period for a person's principal place of residence.

There does not appear to be a requirement that the guidelines be tabled in Parliament. The guidelines, and any revisions to it, are therefore not subject to parliamentary scrutiny. The Committee generally prefers that substantive matters, in this case matters informing the exercise of the Chief Commissioner's discretionary power under clause 6(7A), are set out in legislation where they can be subjected to parliamentary scrutiny.

However, the Committee notes that the guidelines are only incorporated into the Act for the purposes of the Chief Commissioner making a decision under clause 6(7A). Further, that a decision of the Chief Commissioner under the Act can be reviewed by the NSW Civil and Administrative Tribunal. In the circumstances, the Committee makes no further comment.

27. Revenue, Fines and Other Legislation Amendment Bill 2023

Date introduced	1 August 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Michael Daley MP
Portfolio	Attorney General

Purpose and description

27.1 The object of this Bill is to make miscellaneous amendments to the following Acts:

- (a) the *Duties Act 1997*
- (b) the *Fines Act 1996*
- (c) the *Government Sector Finance Act 2018*
- (d) the *Land Tax Management Act 1956*
- (e) the *Payroll Tax Act 2007*
- (f) the *Police Act 1900*
- (g) the *Property Tax (First Home Buyer Choice) Act 2022*
- (h) the *State Debt Recovery Act 2018*
- (i) the *Taxation Administration Act 1996*
- (j) the *Unclaimed Money Act 1995*
- (k) the *Valuation of Land Act 1916*
- (l) the *First Home Owner Grant and Shared Equity Act 2000*.

Background

- 27.2 The Bill makes several miscellaneous and substantive amendments to 12 different Acts broadly addressing taxation, fines, revenue and other state based financial matters.
- 27.3 In his second reading speech, the Hon. Michael Daley MP, Attorney General explained that the amendments are 'part of the Government's ongoing program of maintaining the integrity and effectiveness of the revenue legislation'. He further stated that the amendments fall within seven broad categories.
- 27.4 The first category of amendments concerns State taxation legislation by amending the *Duties Act 1997*, *Land Tax Management Act 1956*, *Payroll Tax Act 2007*, *Property Tax (First Home Buyer Choice) Act 2022*, *Valuation of Land Act 1916* and the *Taxation Administration Act 1996*. The Attorney General broadly described these amendments

as intended to 'enhance revenue integrity, ensure the equity of exemptions and concessions, address anomalies, respond to court decisions, close tax avoidance loopholes, increase penalties and reduce red tape'.

- 27.5 On the second category of amendments, the Bill amends the *Government Sector Finance Act 2018* to address the issue of 'act-of-grace' payments and enable Revenue NSW to use its enforcement and compliance powers under the *Taxation Administration Act 1996* concerning these payments. The Attorney General explained that these amendments would support 'the recovery of act-of-grace payments made under government programs'.
- 27.6 The Attorney General described the third category of amendments to the *Fines Act 1996* and the *State Debt Recovery Act 2018* as intended to permit information sharing between Revenue NSW and Service NSW and establish new offences to 'further deter the provision of false or misleading information to Revenue NSW'. The fourth category of amendments are made to the *Police Act 1990*, which the Attorney General explained would 'enable sharing of fines information between the NSW Police Force and Revenue NSW'.
- 27.7 The fifth category of amendments are to the *Unclaimed Money Act 1995*. Schedule 10 of the Bill makes several amendments to that Act to provide for the recovery of fines, procedural rights when reviewing fines and disputed money.
- 27.8 The sixth category of amendments are made to the *Valuation of Land Act 1916* and consequential amendments to the *Taxation Administration Act 1996*. These amendments were described by the Attorney General as providing for 'objection rights' as well as changing the handling of sales information.
- 27.9 The final category of amendments are made to the *First Home Owner Grant and Shared Equity Act 2000*. The Attorney General stated that Schedule 13 of the Bill amends this Act to ensure the 'proper and ongoing operation of the NSW Shared Equity Scheme Fund'. He further noted that Schedule 13 'includes a provision so that going forward the Treasurer will be able to direct money appropriated by Parliament to the Treasurer into the fund.'

Issues considered by the Committee

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

Privacy rights – use of personal information

- 27.10 The Bill inserts section 78A into the *Valuation of Land Act 1916*. Section 78A(1) provides that the Valuer General may:
- (a) use applicable information for a purpose connected with the Valuer-General's functions
 - (b) sell applicable information to a person, or
 - (c) make applicable information publicly available free of charge.
- 27.11 Subsection 78A(3)(b) defines applicable information to include information that is or may be personal information within the meaning of the *Privacy and Personal Information Act 1998*.

- 27.12 The Attorney General explained that this amendment is necessary to ensure that the Valuer General can 'continue to receive and use property sales information collected by the Registrar General' when carrying out their statutory functions. He further stated that these amendments would allow the Valuer General to 'provide property sales information to third parties'.

The Bill inserts section 78A into the *Valuation of Land Act 1916* which authorises the Valuer General to use applicable information for a purpose connected with their functions, sell that information or make that information publicly available.

Subsection 78A(3)(b) defines applicable information to include personal information, which has the same meaning as under the *Privacy and Personal Information Protection Act 1998*. That is, information about an individual whose identity is known or can be ascertained. Therefore, the Bill might impact an individual's privacy rights by authorising the Valuer General to disclose and use (including the ability to sell) personal information.

The Committee acknowledges that the provision is intended to address the practical need for the Valuer General to receive and use property sales information to exercise their functions. However, the power to use, sell and disclose information does not specifically limit the scope of 'personal information' to property sales information. Further, there does not appear to be any safeguards, decision-making criteria or recourse for individuals whose personal information is used, sold or published by the Valuer General. In these circumstances, the Committee refers this matter to the Parliament for its consideration.

Disclosure of personal information

- 27.13 The Bill amends the *Fines Act 1996* by inserting section 117A(1)(a4), which authorises the Commissioner of Fines Administration to disclose personal information about an individual obtained in the administration of the Act to the Chief Executive Officer of Service NSW. While the Commissioner is already authorised under the Act to disclose personal information to agencies, this amendment explicitly expands this power of disclosure.

- 27.14 Personal information for the purposes of section 117(1) has the same meaning as the definition in the *Privacy and Personal Information Protection Act 1998*.

The Bill amends the *Fines Act 1996* by inserting section 117A(1)(a4), which authorises the Commissioner of Fines Administration to disclose personal information to the Chief Executive Officer of Service NSW. This expands the scope of the Commissioner's existing power to disclose personal information to agencies under the Act.

The disclosure of an individual's personal information may infringe on a person's privacy rights. However, the Committee notes that the power of disclosure is limited to a government agency. It further notes that the authority to disclose personal information already exists under the Act and the Bill simply adds Service NSW as an additional authority to which such information may be disclosed. In the circumstances, the Committee makes no further comment.

28. Road Transport Amendment (Demerit Point Reduction Trial) Bill 2023

Date introduced	27 June 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Roads

Purpose and description

- 28.1 The object of this Bill is to amend the *Road Transport Act 2013* to provide for a trial of a demerit point reduction scheme.

Background

- 28.2 The *Road Transport Act 2013* (the **Act**) makes provision with respect to road transport law in NSW. The state's demerit points scheme is managed in accordance with Part 3.2 of the Act.
- 28.3 The Bill amends the Act to provide for a trial of a demerit points reduction scheme.
- 28.4 The Bill inserts section 32A into the Act, which allows for the removal of one demerit point from an eligible person's driving record if the person does not commit a relevant offence in the trial period. The Bill defines an 'eligible person' and 'relevant offence' for the purposes of this section.
- 28.5 The Hon. John Graham MLC, Minister for Roads, provided in his second reading speech that the new scheme would complement the penalty regime by creating an incentive for drivers to remain offence free during the 12-month trial.
- 28.6 Currently, demerit points incurred by a person accumulate in the demerit points register until they reach or exceed the applicable demerit point threshold and a licence sanction is implemented, such as a suspension. Section 31(5) of the Act provides that Transport for NSW cannot make changes to the register other than to correct errors.
- 28.7 The Bill amends section 31(5) to allow Transport for NSW to make changes to the register to implement the reduction in points for eligible drivers as soon as practicable after the trial period ends.
- 28.8 In his second reading speech, the Minister indicated that the trial period is proposed to start on 17 January 2023 and end on 16 January 2024.
- 28.9 The Bill passed Parliament on 2 August 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Significant matters deferred to statutory rules

- 28.10 New section 32A(2) of the Bill provides that the trial period for the demerit points reduction scheme means:
- (a) the period prescribed by the statutory rules, or
 - (b) if a period is not prescribed by the statutory rules, the period starting on 17 January 2023 and ending on 16 January 2024.
- 28.11 Similarly, the new section 32A(3) of the Act provides that new section 32A and amended section 31(5), being those provisions relating to the trial, will expire on the later of:
- (a) 31 January 2025, or
 - (b) a date prescribed by the statutory rules.
- 28.12 Section 4 of the Act defines 'statutory rules' as regulations and rules made by the Governor under the Act.
- 28.13 As stated above, the Minister indicated that the trial period is proposed to start on 17 January 2023 and end on 16 January 2024. He stated:
- It is intended that the 12-month trial start from 17 January 2023 as that earlier time will demonstrate the Government's commitment to returning the demerit point to drivers as soon as possible.
- 28.14 The Minister further stated that the intended expiry date of the trial provisions, being the later of 31 January 2025 or a date prescribed by the statutory rules, accounts for the time lag between the date an offence is committed and the date it is recorded on the register.

The Bill inserts a new section 32A into the *Road Transport Act 2013* to allow the statutory rules to prescribe the operative dates of the demerit points reduction trial, as well as the date that the provisions will expire.

The Committee notes that the Minister's second reading speech provides that the trial period will be 12 months, from 17 January 2023 to 16 January 2024, and that the provisions relating to the trial will expire on 31 January 2025. However, the Bill's provisions do not limit the duration of this trial to 12 months where the period is prescribed by the statutory rules. It is therefore unclear whether the statutory rules may prescribe a trial period that is shorter or longer than 12 months, as well as an alternative expiry date.

While the deferral of these matters to the statutory rules builds flexibility into the regulatory framework, it may create uncertainty around when the trial, and the legislative provisions relating to it, operate. The Committee generally prefers such matters essential to the operation of legislation to be included in the primary legislation, so that they are subject to an appropriate level of parliamentary oversight. For these

reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

29. Road Transport Amendment (Medicinal Cannabis) Bill 2023*

Date introduced	2 August 2023
House introduced	Legislative Council
Member responsible	The Hon. Jeremy Buckingham MLC
*Private Members Bill	

Purpose and description

- 29.1 The object of this Bill is to create a defence for users of medicinal cannabis for the offence relating to driving while a prescribed illicit drug is present in a person's oral fluid, blood or urine.

Background

- 29.2 The Bill inserts proposed section 111(1A) into the *Road Transport Act 2013* (the **Act**) to provide a defence for the offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine, in this case delta-9-tetrahydrocannabinol (**THC**).
- 29.3 In his second reading speech, the Hon. Jeremy Buckingham MLC, advised that the Bill would place New South Wales in line with Tasmania, which legislated a defence for medicinal cannabis to driving offences in 2020. He further noted that the United Kingdom, New Zealand, Norway, Germany and Ireland also provide a defence for medicinal cannabis patients who test positive to THC, if they are not impaired and are using the drug as directed by a medical practitioner.
- 29.4 Mr Buckingham also made reference to the Road Transport Amendment (Medicinal Cannabis – Exemptions from Offences) Bill 2021 that was introduced in the previous parliament and was referred to the Legislative Council Standing Committee on Law and Justice.¹¹

Issues considered by the Committee

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

Reversal of onus of proof

- 29.5 The Bill proposes to insert section 111(1A) into the Act. This would establish a defence to the offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine. The defence applies to a person who uses medicinal cannabis containing THC and drives with THC in their system under certain circumstances.

¹¹ Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, [Road Transport Amendment \(Medicinal Cannabis - Exemptions from Offences\) Bill 2021](#), report no. 81, August 2022.

29.6 The defence under proposed section 111(1A) arises only if a defendant can prove the following:

- (a) the only prescribed illicit drug present in their oral fluid, blood or urine was THC
- (b) the THC was obtained and administered in accordance with the Poisons and *Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory.

29.7 In his second reading speech, Mr Buckingham explained that the limited circumstance where this defence applies 'mirrors exactly the same defence that users of morphine have under that Act.'

The Bill amends section 111 of the *Road Transport Act 2013* to create a defence to the offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine. The proposed defence is available where the defendant can prove, to the court's satisfaction, that delta-9-tetrahydrocannabinol (THC) is the only illicit drug in their system, and that the THC was obtained and administered in accordance with *the Poisons and Therapeutic Goods Act 1996* or a corresponding Act of another State or Territory.

By requiring the defendant to prove the THC was used in accordance with the defence, even on the balance of probabilities, this may be a reversal of the onus of proof. With regard to criminal actions, a reversed onus may undermine the presumption of innocence. Ordinarily, the prosecution is required to prove all elements of an offence before a defendant can be found guilty, consistent with the presumption of innocence.

However, the Committee acknowledges that the proposed defence is comparable to the 'medicinal purposes' defence for the presence of morphine under section 111(5) of the Act. It further notes that there is otherwise no defence to the strict liability offence concerning the presence of THC. For these reasons, the Committee makes no further comment.

30. State Insurance and Care Governance Amendment (ICNSW Board) Bill 2023

Date introduced	28 June 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Work Health and Safety

Purpose and description

- 30.1 The object of this Bill is to amend the *State Insurance and Care Governance Act 2015* to provide for the appointment of directors nominated by employee and employer bodies to the ICNSW Board.

Background

- 30.2 The *State Insurance and Care Governance Act 2015* (the **Act**) establishes Insurance and Care NSW (**ICNSW**) and the State Insurance Regulatory Authority that together comprise the workplace compensation and insurance scheme in NSW.
- 30.3 Section 5(2) of the Act states that ICNSW board consists of the chief executive of ICNSW, and up to 8 other directors appointed by the Minister. Under section 8, the chief executive is employed by the ICNSW board, in consultation with the Minister.
- 30.4 The Bill amends the Act to provide that the board is constituted by 8 directors appointed by the Minister, including directors nominated by both an employee body and an employer body.
- 30.5 In her second reading speech, the Hon. Sophie Cotsis MP, Minister for Work Health and Safety, explained:
- ...the Bill will ensure that both employers and employees are appropriately represented on the icare board through the appointment of two nominee directors, one representing employers, and one appointment for unions representing workers. This change will ensure the board is more representative of the community.
- ...Most importantly, employer and employee nominee directors have the potential to contribute diverse perspectives to board decision-making. This can engender more robust discussion at board level and ensure that the board takes into account employer and employee needs and priorities in its decision-making.
- 30.6 The Bill replaces section 5(2)(b) of the Act to provide that the following directors are appointed by the Minister to the board of ICNSW:

- (i) 1 director nominated by an employee body

(ii) 1 director nominated by an employer body

(iii) up to 6 other directors.

- 30.7 The Bill defines an 'employee body' as Unions NSW, and an 'employer body' as a body that represents employers in NSW.
- 30.8 The Bill also inserts subsection 5(6) into the Act, which provide that if an employee body or employer body fails to nominate a person to the board then the Minister may appoint a director and that appointment is taken to be as if they were nominated by that respective body.
- 30.9 The Bill provides for a 12-month transitional period to accommodate the appointment of new board members.
- 30.10 The Bill passed Parliament on 3 August 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Commencement by proclamation

- 30.11 Section 2 of the Bill provides that the Bill commences (as an Act) on a day or days to be appointed by proclamation.
- 30.12 As stated above, the Bill provides for a 12-month transitional period to accommodate the appointment of new board members. New Schedule 4, Part 3, clause 13(1) of the Bill provides that existing directors continue to be directors and the board is not required to include the directors appointed under amended section 5(2)(b)(i) and (ii), being those directors nominated by an employee body or employer body, until 12 months after the commencement of the Bill.

The Bill commences by proclamation. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for those affected by the Bill's provisions. As the Bill alters the constitution of the ICNSW board, commencement by proclamation may make the office of existing directors uncertain.

The Committee acknowledges that there may be practical reasons for including a flexible starting date, including to allow time for the nomination and appointment of new directors nominated by an employee body or employer body. Further, the Bill provides for a transitional period to accommodate this appointment and confirms the status of existing directors following commencement of the Bill as an Act. In the circumstances, the Committee makes no further comment.

31. Statute Law (Miscellaneous Provisions) Bill 2023

Date introduced	25 May 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

- 31.1 The objects of this Bill are to:
- (a) make minor amendments to various Acts (Schedule 1)
 - (b) amend certain other Acts and instruments for the purpose of effecting statute law revision (Schedule 2)
 - (c) amend the *Interpretation Act 1978* and other Acts and instruments for the purpose of effecting statute law revision (Schedule 3)
 - (d) make other provisions of a consequential or ancillary nature (Schedule 4).

Background

- 31.2 In his second reading speech, the Hon. John Graham MLC, Special Minister of State, noted that the Bill 'continues the Statute Law Revision program, which has been in place for more than 35 years'. He provided that statute law bills:

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

- 31.3 The Statement of Public Interest on the Bill also identified that the Statute Law Revision program and the resulting bills ensure the NSW law statute book is accurate, coherent and current.
- 31.4 The Bill makes various amendments to a number of unrelated Acts which are grouped into Schedules according to the nature of the specific amendments. The Minister outlined the content of each schedule as follows:
- (a) Schedule 1 contains policy changes of a 'minor and non-controversial nature'. The Minister further indicated that the proposed amendments to 23 Acts are 'too inconsequential to warrant the introduction of a separate amending bill'.
 - (b) Schedule 2 relates only to statute law revisions and are minor technical changes to legislation that 'the Parliamentary Counsel considers are appropriate for inclusion in the bill'.

- (c) Schedule 3 makes 'minor and non-controversial' amendments to the *Interpretation Act 1987* to insert frequently used definitions and removes the need for them to be separately defined in individual Acts and instruments.
 - (d) Schedule 4 contains general savings and transitional provisions, as well as provisions dealing with the effect of amendments on amending provisions. It also includes a provision that allows regulations to be made for transitional or savings matters.
- 31.5 Some of the policy amendments to the various Acts amended by Schedule 1 of the Bill were addressed by the Minister in his second reading speech. These include amendments to:
- (a) the *Community Land Management Act 2021* relating to unit entitlements to provide the Registrar General with authority to replace the schedule of unit entitlements to give effect to a tribunal order
 - (b) the *Medicines, Poisons and Therapeutic Goods Act 2022* to ensure that the offence of prescribing, supplying or administering prescribed substances without an approval of the Health Secretary applies to veterinary practitioners like it does to health practitioners
 - (c) the *Plastic Reduction and Circular Economy Act 2021* to clarify that the requirement for a prohibited item to be unnecessary or problematic only applies to items prescribed by the regulations
 - (d) the *Fisheries Management Act 1994* to allow the Minister to vary the conditions of an aquaculture permit at the request of the permit holder
 - (e) the *Game and Feral Animal Control Act 2002* to permit the Secretary of the Department of Regional NSW to waive or refund fees for game hunting licences and applications for game hunting licences
 - (f) the *Subordinate Legislation Act 1989* to postpone the automatic repeal of ten regulations which cannot be further postponed by order. Of these, the automatic repeal of nine regulations are postponed by one year, and one regulation is postponed by two years.
- 31.6 The Bill passed Parliament on 21 June 2023 with amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

Issues considered by the Committee

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

Wide powers of delegation

- 31.7 Schedule 1, clause 1.12 of the Bill amends the *Hunter Water Act 1991* (**Hunter Water Act**) by introducing section 57(1A).
- 31.8 Section 57(1A) provides that the Secretary's approval and direction functions for engaging in activities in special areas can be delegated by the Secretary to:

- (a) an employee of the Department of Planning and Environment, or
- (b) a person prescribed by the regulations.

31.9 Functions the Secretary can exercise in relation to activities in special areas are set out in division 2 of the *Hunter Water Regulation 2015* (**Hunter Water Regulation**).

31.10 In his second reading speech, the Minister stated:

The department would like to amend section 57 of the Act to clarify that the regulations can authorise a secretary or a delegate, including Hunter Water, to carry out approval and direction functions in relation to special areas.

31.11 The Secretary's functions can currently be delegated to:

- (a) the Corporation or a director or officer of the Corporation under section 60 of the Hunter Water Act
- (b) an employee of the Department of Industry, Skills and Regional development under clause 6 of the Hunter Water Regulation.

31.12 The Bill broadens who the Secretary may delegate their significant approval and direction functions to, to include a person prescribed by regulations or an employee of the Department of Planning and Environment.

The Bill inserts clause 57(1A) into the *Hunter Water Act 1991* to permit the Secretary of the Department of Planning and Environment to delegate its direction and approval functions for special areas to an employee of the Department or a person prescribed by the regulations. This broadens who is able to exercise the Secretary's functions under the Act.

The Committee acknowledges that the delegation of legislative functions is a common practice intended to facilitate cost effective and efficient administration, and that the amendments are intended to modernise the Act to align with current regulatory and governance practices.

However, it notes that, where the Secretary's functions are delegated to a person prescribed by the regulations, there are no restrictions on who may be appointed. For example, to restrict delegation to employees with a certain level of seniority or expertise or working for an appropriate agency. The Committee generally prefers these provisions to be more specific and for such persons or classes of persons to be included in the primary legislation to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

Statutory rule expressed to commence before publication on NSW legislation website

31.13 Schedule 4, clause 5(1) of the Bill provides that the Governor may make regulations with provisions of a savings or transitional nature consequent on the enactment of the Bill as an Act. Subclause (2) states that, if those regulations provide, its provisions may be taken to have effect from the date of assent of the Bill as an Act or a later date.

31.14 Subclause 5(3) limits the effect of such provisions to the extent they take effect from a date before the regulation is published on the NSW legislation website. Specifically, to prevent those provisions operating in a way that would prejudicially affect any pre-existing rights of a person or impose liabilities on a person in respect to actions or omissions done before publication.

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

Neither the whole nor any part of a statutory rule is invalid 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.

Schedule 4, clause 5 of the Bill allows the Governor to make regulations containing provisions of a savings or transitional nature consequent on enactment of the Bill as an Act. It also provides that those provisions may take effect on a date earlier than the date of publication of those regulations.

This conflicts with section 39(2A) of the *Interpretation Act 1987*. Under this section, provisions of statutory rules commence on the day they are published on the NSW legislation website or at a later specified date. The Bill's provisions enabling the retrospective commencement of regulations may make it difficult for individuals to ascertain the commencement date of regulations made under this Bill and the laws applying to them. This is contrary to the rule of law principle that people are entitled to know the law to which they are subject at any given time. The Committee would usually refer this matter to Parliament for its consideration. However, as the Bill has passed both Houses of Parliament, it instead notes this matter for Parliament's consideration.

32. Statutory and Other Offices Remuneration Amendment Bill 2023

Date introduced	1 June 2023
House introduced	Legislative Council
Minister responsible	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

- 32.1 The object of this Bill is to provide for a temporary freeze on increases in remuneration for office holders under the *Statutory and Other Offices Remuneration Act 1975*, Part 3 and executive office holders and senior executives under that Act, Parts 3A and 3B.

Background

- 32.2 The *Statutory and Other Offices Remuneration Act 1975* (the **Act**) relates to the remuneration and allowances payable to holders of certain offices.
- 32.3 The Bill amends the Act to give effect to a two year pay freeze policy on the remuneration of statutory office holders.
- 32.4 The Statement of Public Interest tabled on 1 June 2023 provides that the Bill amends the Act, and regulations made under the Act, 'to freeze the pay of public sector executives, including judicial and non-judicial office holders'.
- 32.5 The Bill addresses remuneration determinations made by the Statutory and Other Offices Remuneration Tribunal (**Tribunal**) for office holders covered by Parts 3, 3A and 3B of the Act. In his second reading speech, the Hon. John Graham MLC, Special Minister of State explained:

Part 3 of the Act concerns judicial and non-judicial office holders, such as independent statutory appointees. A full list of the offices covered by Part 3 determinations is contained in schedules 1, 2 and 3 of the Act. Part 3A of the Act concerns executive office holders ...

Part 3B of the Act concerns senior executives, and includes secretaries of departments of the public service, the Commissioner of the NSW Police Force, public service senior executives under the Government Sector Employment Act 2013, NSW Police Force senior executives under the Police Act 1990, New South Wales health service executives under the Health Services Act 1997 and transport service senior executives under the Transport Administration Act 1988.

- 32.6 Schedule 1 of the Bill replaces section 6AA(2) of the Act with new subsections (2) and (3). New subsection (2) provides that when making a determination under Parts 3A and 3B, the Tribunal must give effect to any policy that is declared by the regulations to be an aspect of government policy required to be given effect to by the Tribunal. New subsection (3) provides that a regulation referred to in section 6AA(2)

may declare a policy by setting out the policy, or adopting a policy set out in a document referred to in the regulation.

- 32.7 The Minister stated that this 'is consistent with the requirement currently in section 6AB that relates to part 3 office holders'.
- 32.8 Schedule 2 of the Bill includes the *Statutory and Other Offices Remuneration (Executive Office Holders and Senior Executives) Regulation 2023 (Regulation)*, which sets out the policy the Tribunal must give effect to for the purpose of section 6AA(2) of the Bill. Specifically, clause 4 declares that the Tribunal is not to make a determination which has the effect of awarding an increase in remuneration that takes effect before 1 July 2025 (**temporary wages policy**).
- 32.9 This Regulation is taken to have the same commencement date as the Bill, being the day on which the Bill was first introduced into Parliament. While the Bill amends the Schedule 6 of the Act to provide that the Regulation is taken to be and have effect as a regulation made by the Governor, the Regulation is not disallowable (although its amendment or repeal by regulation would be). Schedule 2 of the Bill is repealed the day after it commences.
- 32.10 Schedule 3 of the Bill replaces clause 5A in the *Statutory and Other Offices Remuneration (Judicial and Other Office Holders) Regulation* to prescribe the temporary wages policy for the purpose of determining the remuneration of Part 3 office holders (other than chief executive or senior office holders) under section 6AB(3) of the Act. That is, the Tribunal is not to make a determination that has the effect of awarding an increase in remuneration that takes effect before 1 July 2025.
- 32.11 The Minister provided that 'the provisions of both the regulations established by and inserted by schedules 2 and 3 to the bill, which give effect to the pay freeze, will expire at the end of 30 June 2025'.
- 32.12 The Bill passed Parliament on 29 June 2023 without amendments, prior to the tabling of this Digest and therefore before the Committee could report on the Bill. Section 8A(2) of the *Legislation Review Act 1987* permits the Committee to report on a Bill which has passed or become an Act. In accordance with its usual practice, the Committee has considered the Bill as introduced.

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*.

33. Water Management Amendment (Transfer of Water) Bill 2023*

Date introduced	29 June 2023
House introduced	Legislative Assembly
Member responsible	Mrs Helen Dalton MP
*Private Members Bill	

Purpose and description

- 33.1 The object of this Bill is to amend the *Water Management Act 2000* (the **WM Act**) to restrict the transfer of water access licences to the Commonwealth or the State unless certain conditions are met.

Background

- 33.2 The WM Act provides for the protection, conservation and ecologically sustainable development of the water sources of the State.

- 33.3 The Bill inserts section 71ZA into the WM Act to prohibit the Minister for Water from registering a transfer of an access licence to:

- (a) the Commonwealth or the State, or
- (b) a Minister, public servant, agent, public authority or agency or subsidiary of the Commonwealth or the State,

unless:

- (c) an assessment is undertaken that demonstrates the transfer causes neutral or positive socio-economic impacts in the area, and
- (d) a report on that assessment has been published on a publicly available website.

- 33.4 During her second reading speech on the Bill, Mrs Helen Dalton MP explained:

Under the Bill the New South Wales water Minister would not be allowed to transfer water access licences to the Commonwealth or the State unless an assessment is undertaken. A report on the assessment will need to be published on a publicly available website that demonstrates that there will be no negative socio-economic impacts. If that is the case then the transfer will not go ahead, or it should not go ahead.

- 33.5 The assessment must have regard to the criteria set out in subsection (3). Those factors include production output levels, employment and psychological wellbeing, among others.

- 33.6 The Bill includes provisions addressing potential inconsistencies with the *Water Act 2007* (Cth) (**Commonwealth Act**). Subsection (4) provides that if section 71ZA is inconsistent with a provision of the Commonwealth Act that relies on a referral in the

Water (Commonwealth Powers) Act 2008, that referral is modified to the extent necessary so that it does not include the making of laws inconsistent with section 71ZA.

- 33.7 The Bill also declares that the prohibition in subsection (2) is an excluded matter and a water legislation displacement provision for the purposes of section 250D of the Commonwealth Act.

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*.



Appendices

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

9 Functions with respect to regulations

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

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

Appendix Two – Regulations without comment

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

1. Coal Mine Subsidence Compensation Amendment (Contributions) Regulation 2023

This Regulation amends the *Coal Mine Subsidence Compensation Regulation 2017* to specify the contributions to the Coal Mine Subsidence Compensation Fund that the Chief Executive of Subsidence Advisory NSW may levy on certain coal mines.

This Regulation is made under the *Coal Mine Subsidence Compensation Act 2017*, including sections 33 and 51, the general regulation-making power.

2. Dangerous Goods (Roads and Rail Transport) Amendment (Model Law) Regulation 2023

The object of this Regulation is to amend the *Dangerous Goods (Road and Rail Transport) Regulation 2022* as follows:

- (a) to give effect to recent amendments to the *Model Subordinate Instrument on the Transport of Dangerous Goods by Road or Rail* by making amendments consequent on the replacement of edition 7.7 with edition 7.8 of the *Australian Code for the Transport of Dangerous Goods by Road and Rail*
- (b) to clarify fees for the application, amendment, renewal and transfer of dangerous goods vehicle licences
- (c) to amend penalty notice amounts to correct errors.

This Regulation is made under the *Dangerous Goods (Road and Rail Transport) Act 2008*, including sections 13, 14 and 15.

3. Education and Care Services National Amendment Regulations 2023

The Regulations primarily make amendments relating to qualifications for family day care educators, early childhood teachers and centre-based services, including those in remote areas.

The Education Ministers Meeting made the regulations under sections 301 and 324 of the *Education and Care Services National Law*, as applied by in NSW by the *Children (Education and Care Services National Law Application) Act 2010*.

4. Education and Care Services National Further Amendment Regulations 2023

This Regulation amends the *Education and Care Services National Regulations (2011 SI 653)*. The amendments cover a range of matters including updating penalties for offences, prescribing minimum requirements, training and child protection processes.

This Regulation is made under sections 301 and 302 of the *Education and Care Services National Law* as applied in NSW through the *Children (Education and Care Services) National Law (NSW) No 104a of 2010*.

5. [Electricity Infrastructure Investment Amendment \(Infrastructure Planner\) Regulation 2023](#)

The object of this Regulation is to amend the *Electricity Infrastructure Investment Regulation 2021* to—

- (a) prescribe additional functions of an infrastructure planner for particular renewable energy zones to which an access scheme applies, and
- (b) update the dates for the prescribed reliability standard, and
- (c) make a minor amendment.

The Regulation is made under the *Electricity Infrastructure Investment Act 2020*.

6. [Energy and Utilities Administration Amendment \(Inspectors\) Regulation 2023](#)

The object of this Regulation is to amend the *Energy and Utilities Administration Regulation 2021* to prescribe a class of persons who may be appointed by the regulator as inspectors.

The Regulation is made under the *Energy and Utilities Administration Act 1987*.

7. [Environmental Planning and Assessment Amendment \(Fees\) Regulation 2023](#)

The object of this Regulation is to correct the formula for the adjustment of fees payable under the *Environmental Planning and Assessment Regulation 2023* for inflation.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*.

8. [Environmental Planning and Assessment Amendment \(Lismore City Local Planning Panel\) Regulation 2023](#)

The object of this Regulation is to remove the requirement for Lismore City Council to constitute a single local planning panel for the whole area of the Council.

The Regulation is made under the *Environmental Planning and Assessment Act 1979*.

9. [Environmental Planning and Assessment Amendment \(NSW Planning Portal\) Regulation 2023](#)

The objects of this Regulation are as follows--

- (a) to enable the Secretary of the Department of Planning and Environment to provide advice about the design of proposed State significant development before an environmental impact statement is prepared in relation to the development,
- (b) to update a reference to the *Parramatta City Centre Local Infrastructure Contributions Plan* adopted by the City of Parramatta Council on 22 May 2023,
- (c) to require submissions about certain development to be made through the NSW planning portal,

- (d) to make consequential amendments to clarify the use of the NSW planning portal for certain notices and applications.

This Regulation is made under the *Environmental Planning and Assessment Act 1979*, including sections 4.39, 7.12(5)(b) and 10.13, the general regulation-making power and Schedule 1, clause 22 and Schedule 3, clause 3.

10. Evidence (Audio and Audio Visual Links) Amendment (Bail Exemptions) Regulation 2023

The object of this Regulation is to ensure accused detainees held in custody at Newtown Police Station are not required to appear physically before a court in bail proceedings.

This Regulation is made under the *Evidence (Audio and Audio Visual Links) Act 1998*, including sections 5BA(2)(e) and 22, the general regulation-making power.

11. Fair Trading Amendment Regulation 2023

The objects of this Regulation are:

- (a) to allow for the waiver or refund, in whole or in part, of licence fees payable by commercial agents where the payment of the full fee would cause financial hardship or there are other special circumstances justifying the waiver or refund
- (b) to reduce the fixed component of the licence fee payable by commercial agents.

The Regulation is made under the *Fair Trading Act 1987*.

12. Fisheries Management Amendment (Threatened Species Conservation) Order 2023

This Order is made under the *Fisheries Management Act 1994*, section 220D.

The object of this Order is to give effect to the final determination of the Fisheries Scientific Committee to list the following species as critically endangered species:

- (a) *Eustacus vesper* (McCormack & Ahyong, 2017), Cudgegong Giant Spiny Crayfish
- (b) *Galaxias brevissimus* (Raadik, 2014), Short-tail Galaxias
- (c) *Galaxias supremus* (Raadik, 2014), Kosciuszko Galaxias.

13. Gaming Machines Amendment Regulation

The object of this Regulation is to amend the *Gaming Machines Regulation 2019* to prescribe a maximum number of gaming machine entitlements for the *Gaming Machines Act 2001*, section 10(1) to lower the overall State cap on those entitlements.

Section 3 of the Regulation may be made under a Henry VIII provision because the amendment of the *Gaming Machines Regulation 2019* has the effect of amending the matter set out in the *Gaming Machines Act 2001*, section 10(1).

The Regulation is made under the *Gaming Machines Act 2002*.

14. Government Sector Employment Amendment Regulation 2023

The object of this Regulation is to amend the *Government Sector Employment Regulation 2014*:

- (a) to provide that an overseas trade employee means a person who is employed in the Department of Enterprise, Investment and Trade to work in the area of international trade and investment and who ordinarily resides and works overseas
- (b) to update a definition consequence on amendments to the Government Sector Employment Act 2013 made by the Government Sector Employment Amendment Act 2022

This Regulation is made under the *Government Sector Employment Act 2013*, including section 88(1) and (3).

15. Government Sector Finance Amendment (Deemed Appropriations) Regulation 2023

The object of this Regulation is to amend the *Government Sector Finance Regulation 2018* to:

- (a) prescribe when deemed appropriation money is taken to have been given to a GSF agency
- (b) exclude income received by Crown land managers from the Crown Reserves Improvement Fund when determining the income for the agency
- (c) prescribe that certain common trusts are not reporting GSF agencies for the purposes of the *Government Sector Finance Act 2018*, section 7.3(2)
- (d) make amendments consequential on the *Treasury and Energy Amendment Act 2022*.

The Regulation is made under the *Government Sector Finance Act 2018*.

16. Heavy Vehicle (Adoption of National Law) Amendment (Infringement Notice Penalties) Regulation 2023

The object of this Regulation is to increase the amounts payable under infringement notices for offences under the *Heavy Vehicle National Law (NSW)*, *Heavy Vehicle (Fatigue Management) National Regulation (NSW)* and *Heavy Vehicle (Mass, Dimension and Loading) National Regulation (NSW)* to ensure the amounts are consistent nationally.

This Regulation is made under the *Heavy Vehicle (Adoption of National Law) Act 2013*, including sections 12(6) and 28, the local regulation-making power.

17. Inclosed Lands Protection Regulation 2023

The object of this Regulation is to repeal and remake, with no significant amendments, the *Inclosed Lands Protection Regulation 2018*, which would otherwise be repealed on 1 September 2023 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation prescribes offences under the *Inclosed Lands Protection Act 1901* that may be dealt with by issuing a penalty notice and prescribes the penalty amount for offences dealt with by penalty notice.

This Regulation is made under the *Inclosed Lands Protection Act 1901*, including sections 10(3) and 11, the general regulation-making power.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely, matters of a machinery nature.

18. Industrial Relations (General) Amendment (Fees) Regulation 2023

This Regulation amends the *Industrial Relations (General) Regulation 2020* to increase certain fees charged for proceedings in the Industrial Relations Commission in alignment with fees charged for similar matters in the Supreme Court, Land and Environment Court, District Court and Local Court.

This Regulation is made under the *Industrial Relations Act 1996*.

19. [Justice Legislation Amendment \(Fees\) Regulation 2023](#)

The object of this Regulation is to provide for the annual automatic indexation of Sheriff's fees in accordance with the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics.

This Regulation is made under:

- (a) the *Civil Procedure Act 2005*, section 18(1)(a), (c), (e) and (f)
- (b) the *Criminal Procedure Act 1986*, sections 4(1) and 4A(1)(a)-(c).

20. [Liquor Amendment \(Alternative Age Verification\) Regulation 2023](#)

The object of this Regulation is to amend the *Liquor Regulation 2018* to extend the operation of certain provisions relating to alternative age verification processes for same day liquor deliveries by 1 year.

This Regulation is made under the *Liquor Act 2007*.

21. [Liquor Amendment \(Special Events Extended Trading\) Regulation \(No 2\) 2023](#)

The object of this Regulation is to prescribe extended trading periods for hotels and registered clubs that provide a live broadcast of certain Women's FIFA World Cup 2023 matches.

This Regulation is made under the *Liquor Act 2007*, sections 13 and 159, the general regulation-making power.

22. [Notification of Fisheries Management \(Dogfish Possession Limit\) Order 2023](#)

The Order provides possession limits and restrictions on the fishing of several Dogfish species. Endorsement holders and recreational fishers must not possess the species listed in Schedule 1 and Schedule 2 lists the possession limits for specified species.

This Order was made by the Deputy Director General Fisheries Department of Regional NSW, with delegated authority under section 17C of the *Fisheries Management Act 1994*.

23. [Point to Point Transport \(Taxis and Hire Vehicles\) Amendment Regulation 2023](#)

The object of this Regulation is to amend the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* to:

- (a) increase the amounts payable for penalty notice offences under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*, section 76
- (b) increase the maximum penalties for offences and amounts payable for penalty notice offences under the *Point to Point Transport (Taxis and Vehicles) Regulation 2017*, clauses 77 and 81.

This Regulation is made under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016*.

24. [Poisons and Therapeutic Goods Amendment \(Authority Management\) Regulation 2023](#)

The object of this Regulation is to amend the *Poisons and Therapeutic Goods Regulation 2008* as follows:

- (a) to prescribe N,α-dimethyl-3,4-(methylenedioxy)phenylethylamine (MDMA) and psilocybine as type A drugs of addiction
- (b) to extend provisions relating to prescription monitoring to apply to substances that require an authority under the Ac or the Regulation, including:
 - (i) Managing authorities for substances that require an authority
 - (ii) Allowing certain persons prescribing, supply and administering the substances and the Secretary to record or include information on the database
 - (iii) Extending the purpose for which information in the database may be accessed, used and disclosed
 - (iv) Providing that a person has a lawful authority to access the database if accessed under the direction of a dentist, medical practitioner or nurse practitioner, for a particular purpose
 - (v) To make it clear that a person employed at a hospital or managed correctional centre who holds an authority under the *Poisons and Therapeutic Goods Regulation 2008*, Part 8 to administer a substance may do so
- (c) to remove ivermectin from the list of substances that are restricted substances requiring a particular authority
- (d) to allow a pharmacist to supply a repeat of a prescription for a restricted substance or a drug of addiction if the prescription fails to specify the patient's date of birth.

This Regulation is made under the *Poisons and Therapeutic Goods Act 1966*, including sections 17, 24, 28 and 45C, the general regulation-making power.

25. [Practice Note No. SC CA 1](#)

This Practice Note was issued on 1 May 2023 and commenced on 8 May 2023. It replaces the previous Practice Note issued on 13 December 2017. This Practice Note makes additional provisions for the preparation and conduct of proceedings in the Court of Appeal.

This Practice Note is made under the *Supreme Court Act 1970*.

26. [Public Notaries Appointment Amendment \(Fees\) Rule 2023 – under the Public Notaries Act 1997](#)

The Rule amends the *Public Notaries Appointment Rules 1998* to replace the Second Schedule (Fees) with a new Schedule of Fees.

The Rule is made under the *Public Notaries Act 1997*.

27. [Road Transport \(Vehicle Registration\) Amendment \(Heavy Vehicle Registration Charges\) Regulation 2023](#)

The object of this Regulation is to amend the *Road Transport (Vehicle Registration) Regulation 2017* to prescribe for the 2023-2024 financial year:

- (a) the fee for the issue of heavy vehicle number plates
- (b) the registration charges for chargeable heavy vehicles.

This Regulation is made under the *Road Transport Act 2013*.

28. [Statutory and Other Offices Remuneration \(Executive Office Holders and Senior Executives\) Regulation 2023](#)

This Regulation is made under the *Statutory and Other Offices Remuneration Amendment Act 2023*. It prescribes a temporary wages policy for the purposes of the Remuneration Tribunal determining the salary of relevant statutory and senior public office holders.

29. [Supreme Court \(Amendment No 434\) Rule 2023](#)

The object of this rule is to require that, with limited exceptions, non-contentious applications for a grant of probate or administration or for the resealing of a foreign grant are made and filed in the Supreme Court electronically.

The Rule is made under the *Supreme Court Act 1970*.

30. [Supreme Court Practice Note SC CL 2 – Criminal Proceedings](#)

This Practice Note is issued under section 128 of the *Criminal Procedure Act 1986* and replaces the previous Practice Note issued on 27 April 2021. The Practice Note directs prosecuting authorities to present all indictments in the District Court unless they fall within certain exemptions, in which case they are presented in the Supreme Court. The Practice Note also provides for other matters including arraignment proceedings, entering a plea, trial directions and appearing by way of AVL.

31. [Supreme Court Practice Note SC CL 2 – Supreme Court Common Law Division – Criminal Proceedings](#)

The Practice Note commences on 27 June 2023. It replaces the previous Practice Note issued on 2 June 2023 (reported on above).

The Practice Note replaces the previous version of SC CL 2 and makes the following substantive changes:

- (a) Creation of a requirement for the Director of Public Prosecutions to file and serve a Crown case statement specifying the basis of criminal liability no later than seven days in advance of the arraignment day
- (b) A reduction in the time from seven days to three days in advance of the arraignment day for the filing and service of the Trial Management Form
- (c) Extension of the time for the obligation to notify the Court of any change in circumstance that may affect the readiness of a matter to proceed or the estimate of trial given at arraignment. Advice must now be given to the List Judge or the Trial Judge *as soon as practicable* but no later than 5 days of such change becoming evident (an increase from 72 hours), or *immediately* where the listed date is less than 72 hours away.

This Practice Note is made under the *Supreme Court Act 1970*.

32. [Supreme Court Practice Note SC CL 6](#)

This Practice Note applies to proceedings in, or to be entered in, the Possession List.

The purpose of this Practice Note is to explain the operation of the Possession List, which is provided for by Uniform Civil Procedure Rule 45.4.

This Practice Note is made under the *Supreme Court Act 1970*.

33. [Supreme Court Practice Note SC EQ 01](#)

This Practice Note was issued under the *Supreme Court Act 1970* and commences on 1 July 2023. It replaces the previous Practice Note issued on 16 June 2023.

The Practice Note provides guidance on case management processes in the equity division.

34. [Supreme Court Practice Note SC EQ 01 – Case Management in the Equity General List](#)

The Practice Note was issued under the *Supreme Court Act 1970* and commences on 1 July 2023. It replaces the previous practice note issued on 31 August 2018.

The Practice Note provides guidance on case management processes in the equity division.

35. [Supreme Court Practice Note SC EQ 07 – Succession and Probate Lists](#)

The Practice Note was issued under the *Supreme Court Act 1970* and commences on 1 July 2023. It replaces the previous practice note issued on 12 February 2013.

The Practice Note creates the Succession and Probate List to be managed by the Succession and Probate List Judge. It provides case management guidance to Succession and Probate applications.

36. [Supreme Court Practice Note SC Eq 4](#)

This Practice Note was issued on 19 May 2023 and commenced on 22 May 2023. It replaces former Practice Note SC Eq 4 issued on 18 December 2018. This Practice Note relates to the structure and operation of the Corporations List in the Equity Division.

This Practice Note is made under the *Supreme Court Act 1970*.

37. [Supreme Court Practice Note SC Eq 9 – Commercial Arbitration List 2023](#)

The Practice Note replaces Practice Note SC Eq 9 issued on 26 September 2019. The purpose of the Practice Note is to provide for the entry of matters onto the Commercial Arbitration List and to prescribe the relevant criteria for entry onto the list.

This Practice Note is made under the *Supreme Court Act 1970*.

38. [Transport Administration \(General\) Amendment \(State Tax Exemption\) Regulation 2023](#)

The object of this Regulation is to postpone the repeal of the *Transport Administration (General) Regulation 2018*, clause 21A by 12 months to 1 July 2024.

39. Uniform Civil Procedure (Amendment No 100) Rule 2023

This rule makes a minor amendment to the *Uniform Civil Procedure Rules 20015* consequential on an amendment to the *Supreme Court Rules 1970* to provide for electronic filing of non-contentious applications for grant of probate or for the resealing of a foreign grant of probate.

The Rule is made under the *Civil Procedure Act 2005*.

40. Victim Rights and Support Amendment Regulation 2023

The object of this Regulation is to amend the *Victims Rights and Support Regulation 2019* as a consequence of the commencement of the *Modern Slavery Act 2018*.

The Regulation is made under the *Victims Rights and Support Act 2013*.

41. Water Management (General) Amendment (Access Licence Exemption) Regulation 2023

The object of this Regulation is to amend the *Water Management (General) Regulation 2018* to extend the temporary exemption from the requirement to hold a water access licence for the taking of more than 3ML of groundwater in a water year from specified groundwater sources to 30 June 2025.

The Regulation is made under the *Water Management Act 2000*.