

Legislation Review Committee



PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest



Digest No. 4/58 – 19 September 2023

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



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

ISSN: 1448-6954

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

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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. City of Sydney Amendment Bill 2023](#)

No issues identified

[2. Health Legislation Amendment \(Miscellaneous\) Bill 2023](#)

Issue identified	Conclusion of Committee
Property right - the right to compensation	Referred
Wide powers of search and seizure	Referred

[3. Mining Amendment \(Mineral Claims-Opal\) Bill 2023](#)

Issue identified	Conclusion of Committee
Rule of law and retrospectivity	Referred
Excludes access to review – claim for compensation or other legal action	Referred
Significant matters delegated to regulations	Referred

[4. Paintball Amendment Bill 2023](#)

Issue identified	Conclusion of Committee
Penalty notice and absolute liability offences	No further comment
Absolute liability offence	No further comment
Application of laws outside NSW	Referred

[5. Parliamentary Evidence Amendment \(Ministerial Accountability\) Bill 2023*](#)

Issue identified	Conclusion of Committee
Rule of law – unclear application with constitutional principles	Referred
The separation of powers and cabinet secrecy	Referred

[6. Petroleum \(Onshore\) Amendment \(Liverpool Plains Prohibition\) Bill 2023*](#)

Issue identified	Conclusion of Committee
Removal of right to compensation	Referred
Uncertain application of provision	Referred

[7. Radiation Control Amendment Bill 2023](#)

Issue identified	Conclusion of Committee
Absolute liability offence	Referred
Additional punishment for same offending conduct	Referred
Right to the presumption of innocence	Referred
Retrospectivity	Referred
Lack of clarity – referral to a code	Referred
Liability for costs – meaning of 'contributed to'	Referred
Commencement by proclamation	Referred

8. Rural Fires Amendment (Red Fleet) Bill 2023*

No issues identified

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

No issues identified

PART TWO – REGULATIONS**1. Tattoo Industry Regulation 2023**

Issue identified	Conclusion of Committee
Freedom of association	Referred

Summary of Conclusions

PART ONE – BILLS

1. City of Sydney Amendment Bill 2023

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

2. Health Legislation Amendment (Miscellaneous) Bill 2023

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

Property right - the right to compensation

The Bill inserts sections 45A and 45B into the *Poisons and Therapeutic Goods Act 1966*, which permits the Secretary to make a forfeiture order and subsequently direct the disposal of forfeited goods. These provisions also exclude liability for compensation to a person whose goods are disposed of under these orders. The Committee notes that the compulsory acquisition of property may entitle the owner to financial compensation, which is extinguished by section 45B. Therefore, the Bill may impact a person's property rights.

The Committee acknowledges the Secretary must make 'reasonable efforts' to find and give notice to the apparent owner of the seized goods under section 45A, including considering any submission made by the proposed owner on why the forfeiture order should not be made. Further, the Committee acknowledges the provision is intended to expedite matters and reduce volumes of disposal order applications made to the courts.

However, the Committee notes that the exclusion of a right to compensation is strictly applied. There also appears to be no provisions for a person to seek a review or challenge of the disposal of forfeited goods directed by the Secretary. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Wide powers of search and seizure

The Bill amends sections 7A, 21A, and 40 to empower a person other than an inspector under the *Public Health Act 2010* to exercise the functions of an inspector, including to seize and dispose of tobacco and smokeless tobacco products.

The Committee acknowledges that these provision are intended to empower inspectors under other Acts to seize other illegal goods such as illegal tobacco, when discovered under a legal search. The Committee recognises that these provisions are intended strengthen the enforcement and compliance of the legislative framework regulating both tobacco and e-cigarettes.

However, the provisions are worded widely to encompass any person appointed as an inspector under any Act administered by the Minister for Health who is on a premises in accordance with those relevant Acts. Further, the widening of the scope of the number of inspectors, their affiliates or an appointed person that may legally enter premises under a different Act and proceed to

search and seize goods prescribed by the *Public Health (Tobacco) Act 2008*, may infringe on an individual's property rights. It may also make it difficult for individuals to know under what authority a person is supposedly exercising enforcement powers under law. For these reasons, the Committee refers the matter to Parliament for its consideration.

3. Mining Amendment (Mineral Claims-Opal) Bill 2023

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

Rule of law and retrospectivity

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992* which validates mineral claims between 2015 and 2023 affected by non-compliance with certain requirements under the Act. This includes current and expired claims, purported transfers and devolutions made in this period. The Bill also confirms the validity of actions taken by the Department of Regional NSW and other stakeholders related to the affected claims. It also provides that the Bill, when enacted, will be taken to have commenced on 14 February 2023.

The Committee notes that the Bill has the effect of retrospectively validating certain administrative decisions that did not meet statutory prerequisites. In validating a decision that is 'invalid', the Bill does not require that the decision was lawfully made in accordance with section 266(4) of the Act. The Committee notes that the affected mineral claims will be deemed as 'legally valid' notwithstanding that the Secretary may lawfully redetermine the claims. The date of this redetermination is also not specified in any provisions.

The Committee further notes that it is difficult to determine whether there may be unintended consequences of this retrospective application. It is not clear from the wording of the provision why retrospective application is necessary, nor do the provisions deal with potential disadvantages to individuals resulting from the invalidity of the original decision being validated retrospectively. Clause 207 also excludes compensation claims or legal actions related to the original invalid claim. Therefore, retrospective application of the Bill may potentially affect a person's rights, including property rights of landholders.

The Committee recognises that the Bill aims to protect stakeholders who acted on invalid claims. The Committee also acknowledges that its application is limited to specific claims arising over a specific period. However, given the potential unintended consequences of the Bill's retrospective provisions, the Committee refers the matter to Parliament for its consideration.

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

Excludes access to review – claim for compensation or other legal action

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992*. Clause 207 prevents any legal claims against the Crown or anyone else which arises from invalid mineral claims made in the relevant period. It also provides that claims for compensation, which includes damages or other forms of monetary compensation, is not payable on the grounds that the Secretary has failed to comply with section 266(4).

The Committee notes that it is unclear whether the retrospective validation of affected mineral claims may have adverse and/or unintended consequences for affected individuals. The Committee further notes that the broad drafting of 'compensation' appears to exclude compensation in relation to any adverse consequences that may arise from this retrospective validation. Therefore, by preventing a person's ability to seek legal remedies or access judicial

review, the Bill may provide for a non-reviewable decision in respect to invalid mineral claims which may affect a person's right to compensation.

The Committee acknowledges that the provision is intended to mitigate any legal risk arising out of actions taken while affected mineral claims were invalid. However, the Committee notes that the Bill may exclude access to any legal remedy, including compensation for any loss arising from the operation of the provisions, and does not otherwise provide recourse for affected individuals. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Significant matters delegated to regulations

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992*, which includes regulation making powers in respect of Part 28 under clause 210. This allows regulations to prescribe certain aspects of how provisions of Part 28 will operate, including circumstances in which these provisions may not apply or the dates that some provisions come into effect or cease to have effect.

The Committee notes that the matters deferred to regulations have a retrospective element as they deal with affected mineral claims made in the past. The Bill also provides that the regulations have the power to override anything contrary to them in Part 28 and clarifies the power is in addition to the existing regulation-making powers under the Act.

The Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility in the regulatory scheme, particularly in relation to matters that are more administrative in nature. However, the scope of matters that could be prescribed by the regulations may be broad and retrospective in nature. The operation of these provisions may affect the rights of individuals, and uncertainty around their application may make it hard for individuals to ascertain how their rights are affected. The Committee also notes such matters should be included in primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter to Parliament for its consideration.

4. Paintball Amendment Bill 2023

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

Penalty notice and absolute liability offences

The Bill creates absolute liability and penalty notice offences by inserting sections 36A and 36B into the *Paintball Act 2018*. Under section 36A, it is an offence for holders of a paintball venue permit to not display their permit. Section 36B creates an offence for holders of a venue permit failing to ensure an individual does not use their own paintball marker at the venue, unless that individual has first shown a paintball marker permit to the holder or employee of the venue permit.

Absolute liability offences depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability. Further, penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that an individual retains the right to elect to have their matter heard and decided by a court. It also acknowledges that absolute liability and penalty notice offences are not uncommon in regulatory frameworks to encourage compliance. Given the

potential risks to consumer safety associated with the improper use of paintball markers, the Committee makes no further comment.

Absolute liability offence

Section 41B inserted by the Bill into the *Paintball Act 2018* would establish an absolute liability offence for a paintball marker permit holder who does not show their permit before entering a paintball venue and using their own marker. The Committee generally comments on absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

However, the Committee notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance. Further the maximum penalties for this offence is monetary and not custodial. The Committee also notes that absolute liability offences already apply under the Act to contraventions of other legislated conditions of paintball marker permits. Given these circumstances, the Committee makes no further comment.

Application of laws outside NSW

The Bill inserts section 82 into the *Paintball Act 2018* which provides that the Act is intended to have extraterritorial application. This extends the legislative jurisdiction of the Act beyond the State of NSW. The Committee generally comments where legislation may have extraterritorial application because it may create uncertainty for individuals about what laws apply to them at any one time, particularly where absolute liability offences apply under the Act.

The Committee recognises that this amendment is intended to close a regulatory gap which currently allows NSW consumers to purchase paintball markers from unverified interstate suppliers. However, the Committee notes that the extraterritorial application is broadly worded to apply the Act 'so far as the legislative powers of the State allow'. It may be unclear for an individual to understand the scope of the 'legislative powers' of NSW beyond the State's geographical boundaries. For these reasons, the Committee refers the matter to Parliament for its consideration.

5. Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023*

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

Rule of law – unclear application with constitutional principles

The Bill amends the *Parliamentary Evidence Act 1901* to permit the Clerk of either House of NSW Parliament to summon Ministers to give evidence before either House or a parliamentary committee. This summons power over Ministers is not currently authorised by the Act, the Standing Orders of the Legislative Assembly or Legislative Council practice.

The *Constitution Act 1902* establishes two separate and sovereign Houses of Parliament. Both Houses have exclusive authority to regulate their internal affairs, in accordance with the principle of 'exclusive cognisance'. This is reflected in and possibly implied by the NSW Constitution and is a long-established principle inherited from the UK Westminster system. The proposed amendments may represent a significant departure from the Westminster system where Ministers are accountable to the House in which they sit.

Past common law decisions have upheld the principle of 'exclusive cognisance' and may suggest parliamentary procedure could override statute law in the event of inconsistency with the principle. The amendments proposed by the Bill may therefore conflict with these existing conventions, rules and procedures.

The Committee notes that it is unclear how the exclusive cognisance of the Houses and their exclusive ability to regulate their internal proceedings might interact with the Bill. In the event that conflict does arise, it is not clear how such conflict would be resolved. For these reasons, the Committee refers the matter to Parliament for its consideration.

The separation of powers and cabinet secrecy

The Bill proposes to amend the *Parliamentary Evidence Act 1901* to enable the Clerk to summon Ministers to give evidence before either House of Parliament or a parliamentary committee. Under section 11 of the Act, a witness is potentially liable for contempt of Parliament if they refuse to answer a lawful question. The Act does not provide exceptions to this penalty on any grounds, even on grounds of cabinet secrecy.

The amendments may result in a Minister being summonsed and required to give evidence that may inadvertently reveal cabinet information. Even where a Minister chooses not to answer a question for reasons of cabinet secrecy, this may inadvertently reveal details about that cabinet information.

Therefore, the Bill may impact the separation of powers – in this case the independence of the Executive from the Parliament, as it relates to cabinet confidentiality. Under the Westminster model of responsible government and collective responsibility, NSW and other Commonwealth systems have long recognised the public interest in protecting cabinet deliberations from disclosure.

As the Act subjects witnesses to penalties for refusing to answer, it would be difficult for a Minister to refuse to give evidence on the grounds of cabinet confidentiality without indirectly disclosing details about that information. This may infringe upon the separation of powers and may constitute an intrusion from the Legislature into the functioning of the Executive. For this reason, the Committee refers this matter to Parliament for its consideration.

6. Petroleum (Onshore) Amendment (Liverpool Plains Prohibition) Bill 2023*

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

Removal of right to compensation

The Bill amends the *Petroleum (Onshore) Act 1991* to prevent the granting of petroleum titles in the Liverpool Plains gas exclusion zone. Subsection 10(3) provides that compensation is not payable by or on behalf of the Crown if a petroleum title is cancelled or an application relating to a title is refused upon the commencement of section 10, including refunds for title fees.

Therefore, the Bill may prevent an entity from being compensated for the loss of revenue or equity related to a petroleum title, to which an applicant or title holder might otherwise be entitled. The Committee notes that the denial of a right to compensation might not be able to be challenged in a court. Therefore, the Bill may restrict access to justice as an affected party may be unable to protect their property rights attached to a relevant petroleum title. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Uncertain application of provision

The Bill proposes to insert section 10 into the *Petroleum (Onshore) Act 1991* to provide for the cancellation of petroleum titles and the refusal of certain applications and renewals of petroleum titles in the Liverpool Plains gas exclusion zone.

A petroleum title, application to grant or application to renew can be cancelled 'immediately' before the commencement of the section 10. It may be difficult to identify which titles or applications might be cancelled or refused by the operation of the Bill because the relevant period of time which constitutes 'immediately before' its commencement is not specified.

The Committee notes that this uncertainty may undermine an applicant's right to procedural fairness regarding decisions made about their petroleum title or prospective title. For these reasons, the Committee refers the matter to Parliament for its consideration.

7. Radiation Control Amendment Bill 2023

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

Absolute liability offence

The Bill amends the *Radiation Control Act 1990* by expanding the range of offending conduct in respect of licensing requirements under section 6. Amendments to subsection 6(6) requires a responsible person to ensure that regulated material is not consigned for transport or disposed by a person that does not hold an appropriate licence. This offence carries a monetary and custodial penalty of \$27 500 and/or imprisonment for 2 years.

Therefore, the Bill may establish an absolute liability offence over additional conduct. Absolute liability offences depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. The Committee also acknowledges that these new offences are intended to strengthen oversight of activities involving dangerous regulated material.

However, the Committee notes that the maximum penalty for these offences includes a custodial penalty of up to 2 years imprisonment. The Committee also notes that these absolute liability offences apply to a person other than the person consigning or disposing of regulated material without an appropriate licence. Given the potential custodial penalty, the Committee refers the matter to Parliament for its consideration.

Additional punishment for same offending conduct

The Bill amends sections 23B and 28 of the *Radiation Control Act 1990* to enable that the Environment Protection Authority to recover costs and expenses of an investigation of an offence from the offender.

The Bill also proposes to amend section 26 of the Act to expand the forfeiture and disposal provisions. Section 26 provides that a person who is convicted of an offence against the Act may be required to forfeit regulated material or substance to the Crown. The amendments would also

permit a court to order a person to pay the costs incurred by the Authority for disposing of the forfeited matter.

The Committee notes that these amendments may result in a person who has been investigated and convicted of an offence to potentially pay costs in addition to any criminal penalties imposed on them in sentencing. Therefore, the Bill may permit a person to receive additional punishment for the same offending conduct.

The Committee acknowledges that the cost recovery provisions are intended to reduce the costs burden of the Authority resulting from unsafe management of radiation sources. However, the Committee notes that an individual may be subjected to additional punishment for costs which are incurred in the course of an investigation that may contribute to evidence establishing criminal liability. The provisions may also operate in circumstances where a person's property rights are impacted, by requiring them to pay the expenses of disposing their own forfeited property. For these reasons, the Committee refers the matter to Parliament for its consideration.

Right to the presumption of innocence

The Bill amends section 33A of the *Radiation Control Act 1990* to expand the offences for abandoning radioactive substances. Section 33A(1) increases the maximum penalty for the offence of abandoning a radioactive substance without reasonable excuse, to \$250 000. Section 33A(4) provides that a person charged with this offence has the onus of proving that they had a reasonable excuse. Section 33A(2) creates an offence of up to \$1 000 000 for an individual who intentionally or negligently abandons a radioactive substance.

The defence under section 33A(4) may reverse the onus of proof to the absolute liability offence under subsection (1), by requiring the defendant to prove whether they had a reasonable excuse. In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence, as contained in Article 14 of the ICCPR. The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law. The Committee notes that the Bill does not outline what amounts to a reasonable excuse.

The Committee acknowledges that these amendments are intended to deter persons from abandoning radioactive sources, which may endanger public safety. However, the Committee notes that section 33A(3) may permit a court to find an individual who is not guilty of an offence of intentionally or negligently abandoning a radioactive substance to be guilty of abandoning a radioactive substance without reasonable excuse under subsection (1). This may require an individual charged under subsection 33A(2) to answer cases for both offences, which may increase the burden on a defendant in criminal proceedings. For these reasons, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

The Bill inserts Part 10 into Schedule 2 of the *Radiation Control Act 1990*, which provides that some amendments apply to certain offences that were committed before the commencement of the Bill. This includes amendments for the increased maximum penalty imposed by the Local Court and the making of court orders for the recovery of costs incurred by the Environment Protection Authority. The Committee generally comments on provisions that are drafted to have retrospective effect. This is because they impact on the rule of law principle that a person is entitled to understand the law that applies to them at any given time.

The Committee notes that the amendments only apply to offences which are not already subject of proceedings when the Bill commences. However, these amendments would still allow individuals to be subject to new provisions not existing prior to the amendments, at the time of the

offending conduct. Those individuals would not have known that the offences would attract higher pecuniary penalties or that they could be liable to pay additional costs. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Lack of clarity – referral to a code

The Bill inserts new section 33C into the *Radiation Control Act 1990* which prohibits a person from causing a radioactive substance to be transported other than in line with the *Code for the Safe Transport of Radioactive Material*. This offence provision replaces the existing offence under the *Radiation Control Regulation 2013*. Section 33C also provides that, if the Code is replaced by another code, individuals must transport radioactive substances in accordance with 'the other code'.

The Committee notes that, if the existing Code is replaced, individuals may be guilty of an offence under another code which is not explicitly referred to in the legislation. Therefore, a person may find it difficult to ascertain what 'code' applies in respect to an offence which attracts a maximum penalty of up to \$27 500. For these reasons, the Committee refers the matter to Parliament for its consideration.

Liability for costs – meaning of 'contributed to'

The Bill proposes to amend section 105 of the *Protection of the Environment Operations Act 1997* to allow a person who has been given a compliance cost notice to recover the costs payable under the notice as a debt from the person who 'contributed to' the pollution or pollution incident.

There appears to be no provisions of the Bill which define or narrow the scope of what is meant by an individual who has 'contributed to' pollution or a pollution incident. Given the potential broad extension of liability for costs, the Committee refers the matter to Parliament for its consideration.

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

Commencement by proclamation

Section 2(b) of the Bill states that certain provisions will commence by proclamation. This includes provisions which impose stricter penalties on offences relating to abandoning radioactive substances, the transport and disposal of material, and for providing false or misleading information. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the provisions may impact individual rights and obligations.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation of relevant administrative arrangements to give effect to these amendments. However, the parts of the Bill that commence by proclamation establish costs recovery provisions that may apply retrospectively. For these reasons, the Committee refers the matter to Parliament for its consideration.

8. Rural Fires Amendment (Red Fleet) Bill 2023*

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

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

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

PART TWO – REGULATIONS

1. Tattoo Industry Regulation 2023

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

Freedom of association

The Regulation prescribes additional grounds for the Commissioner of Police to refuse and revoke visiting tattooist licences and permits. Under these new grounds, the Commissioner may refuse a visiting tattooist permit if they are satisfied that a close associate of the applicant is not a 'fit and proper person', or the applicant is currently or was, within the last year, a member of a prescribed criminal organisation under Schedule 3. Therefore, the Regulation may infringe on an applicant's freedom of association which is contained in Article 22 of the ICCPR. This freedom protects a person's right to form and join associations to pursue common goals.

The Committee notes that limits on the freedom of association may be justified for the protection of public safety. However, the scope of the Commissioner's power to refuse permits on these grounds extends to 'close associates'. The grounds for refusal on the basis of association with a prescribed criminal organisation is also extended by a time period of 12 months into the past. For these reasons, the Committee refers the matter to Parliament for its consideration.



Part One – Bills

1. City of Sydney Amendment Bill 2023

Date introduced	13 September 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Ron Hoenig MP
Portfolio	Local Government

Purpose and description

- 1.1 The object of this Bill is to amend the *City of Sydney Act 1988* (the **Act**) for the following purposes:
- (a) to repeal special provisions that apply to elections for the Council of the City of Sydney (the **City Council**)
 - (b) to dissolve the Central Sydney Traffic and Transport Committee (the **Traffic Committee**) and repeal provisions relating to the functions and operations of the Committee.

Background

- 1.2 In his second reading speech, the Hon. Ron Hoenig MP, Minister for Local Government, described the Bill's proposed amendments to the Act as:
- (a) abolishing the special rules for non-residential voting currently prescribed under Part 3, and replacing these rules with the voting rules under the *Local Government Act 1993*
 - (b) repealing all provisions relating to the Traffic Committee and any definitions relevant to its operations.
- 1.3 The Minister described the current provisions under the Act as providing 'an unfair weighting on the votes cast by non-residential electors in City of Sydney elections over those cast by residential electors'. He said the Bill would effectively bring the City Council in line with other local government areas in NSW and that:
- Eligible non residential electors will still be able to apply to be included on the non-residential roll and to exercise their right to vote at elections for the City of Sydney.
- 1.4 The Minister noted that this amendment may address administrative challenges faced by the City Council and the NSW Electoral Commission in maintaining the current system and following up with enforcement actions.
- 1.5 The Bill also repeals Part 4A of the Act, and makes consequential amendments to abolish the Traffic Committee, which the Minister said had 'now become inoperative. Dissolving the committee will remove an unnecessary barrier to transport decision-making in the Sydney CBD'.

- 1.6 The Bill proposed to insert section 36 into Schedule 3 of the Act. This would provide that the members of the Traffic Committee will cease to be members and will not receive compensation for their loss of office.

Issues considered by the Committee

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

2. Health Legislation Amendment (Miscellaneous) Bill 2023

Date introduced	12 September 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Ryan Park MP
Portfolio	Minister for Health

Purpose and description

- 2.1 The object of this Bill is to make miscellaneous amendments to various Acts relating to health and associated matters.

Background

- 2.2 The Hon. Ryan Park MP, Minister for Health, indicated in his second reading speech that the Bill 'is part of the Government's regular review and monitoring of legislation to ensure that it remains up to date and relevant'. The Bill amends the following Acts:

- (a) *Health Administration Act 1982*
- (b) *Health Care Complaints Act 1993*
- (c) *Health Practitioner Regulation (Adoption of National Law) Act 2009*
- (d) *Human Tissue Act 1983*
- (e) *Mental Health Act 2007*
- (f) *Poisons and Therapeutic Goods Act 1966*
- (g) *Public Health Act 2010*
- (h) *Public Health (Tobacco) Act 2008*.

- 2.3 The proposed amendment to the *Health Administration Act 1982* would clarify and extend the authority of the Health Secretary to require health services (including hospitals) to conduct reviews of incidents that are deemed serious and reportable. If the Secretary considers an incident was a 'reportable incident' or a serious incident that may be the result of systemic problems, they would be able to direct that organisation to carry out a 'serious adverse event review' (SAER) of the incident. The Bill also seeks to mitigate any potential delays in the SAER process, by proposing an alternate mechanism for the appointment of assessors.

- 2.4 The Bill would amend the *Health Care Complaints Act 1993* to revise the definition of a 'disciplinary body'. The Minister described this amendment as a 'fix' to an error made in a 2022 amendment that reintroduced the Professional Standards Committee, which determines complaints of unsatisfactory professional conduct against medical practitioners.

- 2.5 Similarly, the Bill seeks to amend the *Health Practitioner Regulation (Adoption of National Law) Act 2009* to revise the offence of unsatisfactory professional conduct. It is intended to remove any confusion made by the term "unprofessional conduct" which is commonly used in Queensland and not used in New South Wales. The Minister explained the amendment would:

... ensure that New South Wales makes it an offence to direct or incite a registered health practitioner to engage in unsatisfactory professional conduct.

- 2.6 The Bill also proposes a significant change to the handling of information of a deceased person who was an organ donor. The amendment would allow the next of kin to consent to the release of information. It is currently an offence under the *Human Tissue Act 1983* for a medical practitioner or hospital staff to disclose information about a deceased donor. The Minister explained that the Bill seeks to:

... align with legislative changes happening at the Commonwealth level, which are aimed at ensuring consistency across jurisdictions and ensuring that there is no bar to family members sharing their stories, including publicly commemorating donors.

- 2.7 The Bill also proposes amendments to the *Public Health (Tobacco) Act 2008*, to allow inspectors to search areas that include spaces or receptacles they believe could be used to store a regulated product. The Minister described this amendment as a recognition of the requirement that tobacco and e-cigarettes be hidden from public view.

Issues considered by the Committee

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

Property right - the right to compensation

- 2.8 The Bill amends the *Poisons and Therapeutic Goods Act 1966* to remove the judicial approval before seized goods can be disposed of. New section 45B would give the Secretary the power to dispose of goods seized under section 45A of that Act.
- 2.9 Under new section 45A(1), the Secretary may declare the goods to be forfeited by written order. The forfeiture order can be made for a number of reasons that are detailed in 45A(2)(a), for example, if a person has been convicted of an offence in connection with the seized goods, or the order can be made in circumstances prescribed by the regulations.
- 2.10 New section 45A(3) provides for the steps the Secretary must take prior to issuing an order. The Secretary must make 'reasonable efforts' to give the apparent owner of the seized goods written notice of their intention to make the order, the time period in which the apparent owner may make a submission, and the way in which a submission may be made. The Secretary must give consideration to a valid submission under new section 45A(3).
- 2.11 The disposal of seized goods is provided for by new section 45B. The existing power to order the forfeiture of seized items under the Act is provided under the regulation making power at section 45C(1B)(a). This provision empowers magistrates to:

order the forfeiture of regulated goods and other things seized under this Act and to order payments to be made to meet costs incurred in seizing, storing and disposing of goods or things so seized.

- 2.12 The Minister explained that the proposed change mirrored the powers of the Secretary for Health in the *Medicines, Poisons and Therapeutic Goods Act 2022* and gave the rationale:

Getting a magistrate's order will often not be practical, as I am sure members can understand, particularly when there is a high volume, such as seizing e-cigarettes containing nicotine

- 2.13 New section 45B(3) states that 'no compensation is payable to a person if goods are disposed of in accordance with this section'.

The Bill inserts sections 45A and 45B into the *Poisons and Therapeutic Goods Act 1966*, which permits the Secretary to make a forfeiture order and subsequently direct the disposal of forfeited goods. These provisions also exclude liability for compensation to a person whose goods are disposed of under these orders. The Committee notes that the compulsory acquisition of property may entitle the owner to financial compensation, which is extinguished by section 45B. Therefore, the Bill may impact a person's property rights.

The Committee acknowledges the Secretary must make 'reasonable efforts' to find and give notice to the apparent owner of the seized goods under section 45A, including considering any submission made by the proposed owner on why the forfeiture order should not be made. Further, the Committee acknowledges the provision is intended to expedite matters and reduce volumes of disposal order applications made to the courts.

However, the Committee notes that the exclusion of a right to compensation is strictly applied. There also appears to be no provisions for a person to seek a review or challenge of the disposal of forfeited goods directed by the Secretary. For these reasons, the Committee refers this matter to Parliament for its consideration.

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

Wide powers of search and seizure

- 2.14 The Bill inserts subsections 7A(8), 21A(8) and 40(6) into the *Public Health (Tobacco) Act 2008* which permits a person who is not an inspector (as defined by the Act) to exercise the functions of an inspector. However, this provision would only apply if the person is 'appointed as an inspector under another Act' and on the premises 'in accordance with another Act'.

- 2.15 Under the Act, inspectors have extensive powers of search and seizure. Section 44 makes provisions for the powers of inspectors to enter premises and what they may do in those premises. For example, section 44(1)(a) provides that an inspector may enter and inspect any premises, either alone or with a person that the inspector considers necessary. There are significant penalties for non-compliance with the

directions or requirements of inspectors provided for by section 46 of the Act, at a maximum of 100 penalty units (\$11,000).

- 2.16 In his second reading speech, the Minister provided a practical example of the operation of this amendment:

For example, if inspectors under the Poisons and Therapeutic Goods Act inspect premises for illegal e-cigarettes containing nicotine and also come across illegal tobacco, the inspectors will be able to seize the illegal tobacco.

- 2.17 The Minister emphasised that the changes will 'help inspectors to effectively undertake their compliance and enforcement activities to ensure illegal tobacco can be seized when found on premises'.

The Bill amends sections 7A, 21A, and 40 to empower a person other than an inspector under the *Public Health Act 2010* to exercise the functions of an inspector, including to seize and dispose of tobacco and smokeless tobacco products.

The Committee acknowledges that these provision are intended to empower inspectors under other Acts to seize other illegal goods such as illegal tobacco, when discovered under a legal search. The Committee recognises that these provisions are intended strengthen the enforcement and compliance of the legislative framework regulating both tobacco and e-cigarettes.

However, the provisions are worded widely to encompass any person appointed as an inspector under any Act administered by the Minister for Health who is on a premises in accordance with those relevant Acts. Further, the widening of the scope of the number of inspectors, their affiliates or an appointed person that may legally enter premises under a different Act and proceed to search and seize goods prescribed by the *Public Health (Tobacco) Act 2008*, may infringe on an individual's property rights. It may also make it difficult for individuals to know under what authority a person is supposedly exercising enforcement powers under law. For these reasons, the Committee refers the matter to Parliament for its consideration.

3. Mining Amendment (Mineral Claims-Opal) Bill 2023

Date introduced	14 September 2023
House introduced	Legislative Council
Minister responsible	The Hon. Courtney Houssos MLC
Portfolio	Natural Resources

Purpose and description

- 3.1 The object of this Bill is to amend the *Mining Act 1992* (the **Act**) to validate certain mineral claims purportedly in effect since 2015 (the **affected mineral claims**) and to set out other related matters, including to:
- (a) make clear that an affected mineral claim is validly granted, renewed or transferred, by inserting certain proposed provisions related to:
 - (i) expired and current affected mineral claims
 - (ii) applications related to affected mineral claims
 - (iii) ensuring relevant decision-makers have adequate powers in relation to the determination or redetermination of affected mineral claims and that the process complements the existing determination process in the Act
 - (b) ensure a person who had a mineral claim transferred or devolved to the person is not disadvantaged by a failure to comply with the Act, section 266(4) between 1 January 2015 and 13 February 2023 (the **relevant period**)
 - (c) ensure compliance action may be taken if a person failed to comply with a condition of an affected mineral claim during the relevant period
 - (d) make clear that it was lawful for the Department of Regional NSW (the **Department**) to collect or refund fees, levies and duties in relation to affected mineral claims before, on and after the commencement of the proposed Act
 - (e) make clear that claims cannot be made against the State, the Minister, the Secretary or a member of staff of the department, or any other person, in relation to any loss or harm arising from or related to non-compliance with section 266(4) of the Act.

Background

- 3.2 The Bill seeks to amend the Act to retrospectively validate 'affected mineral claims' which were made in the relevant period from 2015 to 2023. In her second reading speech, the Hon. Courtney Houssos MLC, Minister for Natural Resources, described the context for proposing these amendments:

Earlier this year, following a review of its processes, the [Department of Regional NSW] identified the invalidity issue associated with the mineral

claims. Over 3,000 mineral claims granted, renewed or transferred between 1 January 2015 and 13 February 2023 were affected. Approximately 1,230 affected mineral claims had no lawful right to mine, and mining needed to stop.

- 3.3 The Minister explained that the Bill aims to remedy the invalidity of these claims and return affected stakeholders to 'the same, or as close as possible to the same, position they thought they were in before the invalidity issue was discovered'. She noted that the Bill was developed after consultations with stakeholders, including opal miners, landholders and the Crown reserve.
- 3.4 She further noted that the Bill's provisions 'complement' the administrative validation program of the Department. This program is lawfully redetermining the affected decisions. However, she remarked that 'retrospective legislation' is needed because this program 'cannot address the fact that past mining occurred under the mineral claims without lawful approval'.

Issues considered by the Committee

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

Rule of law and retrospectivity

- 3.5 Section 2 of the Bill provides that, on enactment, its provisions will be taken to have commenced on 14 February 2023. The Statement of Public Interest on the Bill provides that the retrospective commencement 'ensures that the benefits of the bill can be realised immediately, addressing invalidity issues'.
- 3.6 The Bill's substantive provisions contained in Part 28 amend Schedule 6 of the Act. These provisions also apply to decisions made prior to the commencement of the Bill that relate to 'affected mineral claims', and actions arising out of these decisions. Clause 196 of Part 28 defines 'affected mineral claim' as a mineral claim which is:
- (a) purportedly granted, renewed or transferred during the relevant period, and
 - (b) that, but for the operation of this part, would be invalid because of a failure to comply with section 266(4) [of the Act].
- 3.7 The Bill validates expired or current affected mineral claims despite any non-compliance with section 266(4) of the Act, by validating any grants, renewals, variations, transfers or cancellation of these claims. The Bill also validates any conditions, approvals, authorisations, terms, use of land, or other rights associated with these claims.
- 3.8 Under section 266(4), the Secretary of the Department must ensure that the applicant has paid the standard compensation before granting a small-scale title. For a mineral claim renewal, the Secretary must also be satisfied that the applicant has provided notice and paid outstanding compensation amounts to the landholder. The Secretary can grant a small-scale title in the absence of these requirements, when these requirements are not satisfied only because the applicant is unable to identify the relevant landholder.
- 3.9 The Bill also establishes processes for the Secretary to make determinations regarding the affected mineral claims which are deemed valid only by the operation

of the Part 28. The Secretary is also empowered to make decisions regarding transfer of claims, expired mineral claims, and devolution of rights.

3.10 In her second reading speech, the Minister advised that the Bill would:

...deem mineral claims to be legally valid from the time the original application was purportedly granted until the date the department lawfully determines the application through the administrative validation project.

3.11 Finally, the Bill clarifies that actions related to rehabilitation and compliance measures for mineral claims, as well as the collection, expenditure, and refund of fees, levies, duties and other financial transactions related to the affected mineral claims are valid.

3.12 Proposed clause 207 states that no claim for compensation or other legal action can be made against the Crown or any other person as a result of a decision related to a mineral claim, if that claim would be invalid or unlawful but for this part.

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992* which validates mineral claims between 2015 and 2023 affected by non-compliance with certain requirements under the Act. This includes current and expired claims, purported transfers and devolutions made in this period. The Bill also confirms the validity of actions taken by the Department of Regional NSW and other stakeholders related to the affected claims. It also provides that the Bill, when enacted, will be taken to have commenced on 14 February 2023.

The Committee notes that the Bill has the effect of retrospectively validating certain administrative decisions that did not meet statutory prerequisites. In validating a decision that is 'invalid', the Bill does not require that the decision was lawfully made in accordance with section 266(4) of the Act. The Committee notes that the affected mineral claims will be deemed as 'legally valid' notwithstanding that the Secretary may lawfully redetermine the claims. The date of this redetermination is also not specified in any provisions.

The Committee further notes that it is difficult to determine whether there may be unintended consequences of this retrospective application. It is not clear from the wording of the provision why retrospective application is necessary, nor do the provisions deal with potential disadvantages to individuals resulting from the invalidity of the original decision being validated retrospectively. Clause 207 also excludes compensation claims or legal actions related to the original invalid claim. Therefore, retrospective application of the Bill may potentially affect a person's rights, including property rights of landholders.

The Committee recognises that the Bill aims to protect stakeholders who acted on invalid claims. The Committee also acknowledges that its application is limited to specific claims arising over a specific period. However, given the potential unintended consequences of the Bill's retrospective provisions, the Committee refers the matter to Parliament for its consideration.

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

Excludes access to review – claim for compensation or other legal action

- 3.13 Clause 207 of Part 28 inserted by the Bill explicitly prevents a claim for compensation or other legal action against the Crown or any other person which results from a decision on the affected mineral claim. This applies only if the original decision be invalid or unlawful because of a failure to comply with section 266(4) of the Act prior to the commencement of Part 28. Compensation is defined to include 'damages' and 'other forms of monetary compensation'.
- 3.14 As noted, a landholder is entitled to compensation under section 266 of the Act for any loss as a result of the exercise of rights under a small-scale title granted to another person. Subsection 266(4) requires the Secretary to be satisfied that this compensation has been paid before granting a small-scale title, unless the applicant is unable to identify the landholder.
- 3.15 In her second reading speech, the Minister stated that this provision is necessary to:

...minimise exposure to legal risk because of the invalid grant, renewal or transfer of mineral claims between 2015 and 2023. Without this legislation, opal miners who thought they had a valid mineral claim could be exposed to the risk of legal action for undertaking illegal mining activity and trespassing on land.

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992*. Clause 207 prevents any legal claims against the Crown or anyone else which arises from invalid mineral claims made in the relevant period. It also provides that claims for compensation, which includes damages or other forms of monetary compensation, is not payable on the grounds that the Secretary has failed to comply with section 266(4).

The Committee notes that is unclear whether the retrospective validation of affected mineral claims may have adverse and/or unintended consequences for affected individuals. The Committee further notes that the broad drafting of 'compensation' appears to exclude compensation in relation to any adverse consequences that may arise from this retrospective validation. Therefore, by preventing a person's ability to seek legal remedies or access judicial review, the Bill may provide for a non-reviewable decision in respect to invalid mineral claims which may affect a person's right to compensation.

The Committee acknowledges that the provision is intended to mitigate any legal risk arising out of actions taken while affected minerals claims were invalid. However, the Committee notes that the Bill may exclude access to any legal remedy, including compensation for any loss arising from the operation of the provisions, and does not otherwise provide recourse for affected individuals. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Significant matters delegated to regulations

- 3.16 The Bill proposed to insert Part 28 into Schedule 6 of the Act. Clause 210 provides the power to create regulations that relate to certain aspects of the Bill.
- 3.17 The regulations may cover:
- (a) circumstances in which a provision in Part 28 will not apply to a mineral claim or a class of mineral claims
 - (b) the dates on which provisions of Part 28 will come into effect or cease to have effect in relation to a claim or a class of mineral claims
 - (c) the expiration date for affected mineral claims or a class of affected mineral claims, which should be within 5 years of the purported effective date.
- 3.18 Subclause 210(2) clarifies that this regulation-making power is in addition to the existing regulation making powers under the Act. Subclause 210(3) also clarifies that regulations made under clause 210 have effect despite any conflicting provisions in Part 28.

The Bill inserts Part 28 into Schedule 6 of the *Mining Act 1992*, which includes regulation making powers in respect of Part 28 under clause 210. This allows regulations to prescribe certain aspects of how provisions of Part 28 will operate, including circumstances in which these provisions may not apply or the dates that some provisions come into effect or cease to have effect.

The Committee notes that the matters deferred to regulations have a retrospective element as they deal with affected mineral claims made in the past. The Bill also provides that the regulations have the power to override anything contrary to them in Part 28 and clarifies the power is in addition to the existing regulation-making powers under the Act.

The Committee acknowledges that allowing regulations to prescribe certain matters provides flexibility in the regulatory scheme, particularly in relation to matters that are more administrative in nature. However, the scope of matters that could be prescribed by the regulations may be broad and retrospective in nature. The operation of these provisions may affect the rights of individuals, and uncertainty around their application may make it hard for individuals to ascertain how their rights are affected. The Committee also notes such matters should be included in primary legislation rather than the regulations, to ensure an appropriate level of parliamentary oversight. For these reasons, the Committee refers the matter to Parliament for its consideration.

4. Paintball Amendment Bill 2023

Date introduced	13 September 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Anoulack Chanthivong MP
Portfolio	Better Regulation and Fair Trading

Purpose and description

- 4.1 The object of this Bill is to amend the *Paintball Act 2018* (the **Act**) to make amendments resulting from a review of the Act.

Background

- 4.2 The Bill proposes a number of changes to the Act, most of which follow recommendations made in the 2022 statutory review of the Act.¹ In his second reading speech, the Hon. Anoulack Chanthivong MP, Minister for Better Regulation and Fair Trading described these amendments as generally clarifying the Act's operation, improving consumer and public safety and addressing the needs of paintball venue operators.
- 4.3 The Bill proposes to amend section 5 to allow the secretary to authorise the use of paintball markers at a place other than an authorised paintball game venue. The section also allows a regulation to prescribe certain matters around the authorisation of venues. The Minister explained that this is for flexibility and to 'ensure there are number of limits and appropriate safeguards on the secretary's authorisation power'.
- 4.4 The proposed amendment to section 9 seeks to address a regulatory gap for interstate paintball marker permits, by recognising that interstate paintball marker suppliers hold equivalent licences or permits. The insertion of section 82 further supports this by allowing the extraterritorial application of the Act.
- 4.5 The Minister also explained that a number of amendments are intended to cut down the administrative burden for paintball marker permit holders. This includes the proposed amendments to:
- section 12, to allow a holder of a paintball marker permit to purchase and possess one or more paintball markers under a single permit
 - section 13, to allow the holder of an international permit to also have one or more markers under a single permit.
- 4.6 The Bill also seeks to amend section 34 of the Act to require a paintball marker to be transported in a covered and locked bag or container. Finally, the Bill proposes a number of changes around displaying permits. Currently, permit holders are not required to display or show their permits.

¹ NSW Fair Trading, [Final Report – Statutory Review of the *Paintball Act 2018*](#), June 2022..

Issues considered by the Committee

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

Penalty notice and absolute liability offences

- 4.7 Section 36A of the Bill would require a holder of a paintball venue to display a copy of their paintball venue permit and the name of the permit holder at the entry of their venue, on their website and/or on social media. Failure to do so carries a maximum penalty of \$2 200 (20 penalty units).
- 4.8 Section 36B requires a holder of a paintball venue permit to ensure a person does not use their own paintball marker at the venue, unless that person has shown a paintball marker permit to the holder or employee of the venue permit. Non-compliance with this section carries a maximum penalty of \$22 000 (200 penalty units).
- 4.9 In his second reading speech, the Minister said that the new requirements are intended to 'improve consumer safety and awareness'.
- 4.10 The Bill also proposes to amend the *Paintball Regulation 2019* to prescribe offences against section 36A and 36B as penalty notice offences. The maximum penalties for individuals is \$330 under section 36A and \$720 under section 36B.

The Bill creates absolute liability and penalty notice offences by inserting sections 36A and 36B into the *Paintball Act 2018*. Under section 36A, it is an offence for holders of a paintball venue permit to not display their permit. Section 36B creates an offence for holders of a venue permit failing to ensure an individual does not use their own paintball marker at the venue, unless that individual has first shown a paintball marker permit to the holder or employee of the venue permit.

Absolute liability offences depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability. Further, penalty notices allow an individual to pay a specified monetary amount instead of appearing before a court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that an individual retains the right to elect to have their matter heard and decided by a court. It also acknowledges that absolute liability and penalty notice offences are not uncommon in regulatory frameworks to encourage compliance. Given the potential risks to consumer safety associated with the improper use of paintball markers, the Committee makes no further comment.

Absolute liability offence

- 4.11 Part 4 of the Act sets out various conditions, including conditions of all permits and conditions of paintball venue permits. The Bill inserts Division 3 into Part 4 of the Act, which sets out a number of conditions that will apply to every paintball marker permit. Under Division 3, section 41B provides that a holder of a paintball marker permit must not use their own marker at a paintball venue, unless they have shown their permit to the relevant person at the venue before entry.
- 4.12 Section 28 of the Act provides that a holder of a permit who contravenes a condition of their permit is guilty of an offence up to \$110 000 (1 000 penalty units). Further,

under section 42(c) of the Act, the Secretary may take disciplinary action against the holder of a permit if they fail to comply with a condition of the permit.

Section 41B inserted by the Bill into the *Paintball Act 2018* would establish an absolute liability offence for a paintball marker permit holder who does not show their permit before entering a paintball venue and using their own marker. The Committee generally comments on absolute liability offences as they depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

However, the Committee notes that absolute liability offences are not uncommon in regulatory settings to encourage compliance. Further the maximum penalties for this offence is monetary and not custodial. The Committee also notes that absolute liability offences already apply under the Act to contraventions of other legislated conditions of paintball marker permits. Given these circumstances, the Committee makes no further comment.

Application of laws outside NSW

- 4.13 The Bill introduces section 82 which provides that the Act is intended to have extraterritorial application 'so far as the legislative powers of the State allow'.
- 4.14 In his second reading speech, the Minister highlighted that there is currently a 'regulatory gap' because the Act does not apply to suppliers in jurisdictions outside of NSW. He noted that this means NSW consumers can purchase paintball markers from interstate suppliers that are not vetted or approved. He said section 82 is intended to help close this gap and 'enhance consumer and public safety' by supporting the recognition of equivalent interstate authorisations.

The Bill inserts section 82 into the *Paintball Act 2018* which provides that the Act is intended to have extraterritorial application. This extends the legislative jurisdiction of the Act beyond the State of NSW. The Committee generally comments where legislation may have extraterritorial application because it may create uncertainty for individuals about what laws apply to them at any one time, particularly where absolute liability offences apply under the Act.

The Committee recognises that this amendment is intended to close a regulatory gap which currently allows NSW consumers to purchase paintball markers from unverified interstate suppliers. However, the Committee notes that the extraterritorial application is broadly worded to apply the Act 'so far as the legislative powers of the State allow'. It may be unclear for an individual to understand the scope of the 'legislative powers' of NSW beyond the State's geographical boundaries. For these reasons, the Committee refers the matter to Parliament for its consideration.

5. Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023*

Date introduced	13 September 2023
House introduced	Legislative Council
Member responsible	The Hon. Damien Tudehope MLC
	*Private Members Bill

Purpose and description

- 5.1 The object of this Bill is to amend the *Parliamentary Evidence Act 1901* (the **Act**) to provide that Ministers of the Crown may be summonsed to attend and give evidence before a House of Parliament or a committee of Parliament.

Background

- 5.2 The Act regulates the summonsing, attendance and examination of witnesses before either House of Parliament or parliamentary committees. This Act also applies to Members by incorporating and consolidating procedural rules observed in the British House of Commons. The Bill proposes to amend the Act to enable Ministers to be summonsed to give evidence before Parliament, including parliamentary committees.
- 5.3 During his second reading speech, the Hon. Damien Tudehope MLC noted that the amendments contained in the Bill are intended to expand the existing powers of the Parliament to summon witnesses. He explained that the power to issue summonses and compel evidence 'is a key power of the House to conduct its work' and said that 'the power should also be available in relation to Ministers of the Crown.'
- 5.4 Finally, the Bill also seeks to insert section 6(3) into the Act, to provide that Ministers would be ineligible for payment of their expenses if they are summonsed to appear as a witness, unlike other witnesses summonsed to give evidence under the Act.

Issues considered by the Committee

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

Rule of law – unclear application with constitutional principles

- 5.5 Section 4 of the Act sets out how witnesses may be summonsed to appear before Parliament. The Bill removes the words 'not being a Member of the Council or the Assembly' from section 4(1) of the Act, which would remove the current prohibition on any Member of the Legislative Assembly or the Legislative Council being summonsed by the Clerk of the relevant House of Parliament to attend and give evidence before that House. This would enable a Member to be summonsed by the Clerk of either House of the NSW Parliament to give evidence in either House or a parliamentary committee by notice of a summon signed by the Clerk and served on the relevant Member.

- 5.6 However, having removed the restriction on summoning Members of either House under subsection (1), the Bill also inserts subsection 4(3) to clarify that only a Minister (as a subset of the Members of both Houses) may be summonsed under section 4.
- 5.7 The Bill also inserts the words 'other than a Minister of the Crown' into section 5, to remove Ministers from the group of Members whose attendance as witnesses to give evidence before the Council or the Assembly or a committee is obtained 'in accordance with the procedures of the House of Commons'. Those procedures would continue to apply to all other Members in either House. As a result, the attendance and giving of evidence by Ministers would be regulated in accordance with the provisions of the Act under these amendments.
- 5.8 Each House of the NSW Parliament has "exclusive cognisance" over the administration of that House, and exclusive authority to regulate internal proceedings, such as the summoning of witnesses. This principle of exclusive cognisance was inherited by the colonies from the United Kingdom. It is also reflected in (and possibly implied by) section 15 of the *Constitution Act 1902* (the **NSW Constitution**), which empowers the Legislative Council and Legislative Assembly to prepare and adopt Standing Rules and Orders which regulate:
- (a) the orderly conduct of such Council and Assembly respectively, and...
 - (g) any other matter that, by or under this Act, is required or permitted to be regulated by Standing Rules and Orders.
- 5.9 Further, certain caselaw may suggest that the Parliament's exclusive control over the administration of its internal operations by reason of 'exclusive cognisance' may apply to an extent that might contradict legislation.² As noted by *Blackstone's Commentaries* (1830):
- ... the whole of the law and custom of parliament has its origin from this one maxim, 'that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.'³
- 5.10 The Legislative Assembly and the Legislative Council have procedures concerning the attendance of witnesses. These procedures are informed by and consistent with the procedures of the House of Commons of the United Kingdom, as prescribed in section 5 of the Act.
- 5.11 The UK House of Commons sets out procedures for the attendance of their Officers and Members in *Erskine May*.⁴ Erskine May notes that select committees of the Commons cannot formally summon Members of the Commons, including Ministers, to attend as witnesses before select committees of that House (the Committee on Standards and Privileges is an exception to this rule). In accordance with a House of Commons resolution dating back to 1688, non-attendance of a Member of the

² *Bradlaugh v Gosset* (1884) 12 QBD 271.

³ *Blackstone's Commentaries* (1830), 17th ed, vol 1, p 163, quoted in G Carney, '[Parliamentary privilege - part 2: Exclusive cognisance of internal affairs](#)', *Australasian Parliamentary Review*, vol 32, issue 1, March 2017, p 19, viewed 14 September 2023.

⁴ Sir D Natzler KCB and M Hutton (eds), *Erskine May's treatise on the law, privileges, proceedings and usage of Parliament*, 25th edn, 2019, [paragraph 38.34](#), accessed 14 September 2023.

Commons before a select committee of that House is a matter to be reported to the House:

... if any Member of the House refuse, upon being sent to, to come to give evidence or information as a witness to a committee, the committee ought to acquaint the House therewith, **and not summon such Member to attend the committee.** (emphasis added)

5.12 Members of the House of Lords, including Ministers, may not be formally summonsed to attend House of Commons committees. According to *Erskine May*, procedure in the House of Lords governing attendance of their Members at Select Committees of the Commons provides that 'any Lords Members requested by a committee of the Commons to attend as a witness have leave before it or before any sub-committee appointed by it, is given leave to attend *if they think fit* (emphasis added). In these cases, the UK Houses of Parliament do not exchange formal communications in the way of messages. Similarly, the Standing Orders of the House of Commons provide that the House 'has given a general leave to attend to any Member requested to attend as a witness before a Lords committee or its sub-committees, *if the Member thinks fit* (emphasis added).⁵

5.13 Chapter 24 of the Legislative Assembly's Standing Orders regulate the appearance of witnesses before the Assembly. Standing Order 324 provides that:

The Clerk shall summons a witness, **not being Members**, to attend before the House. (emphasis added)

5.14 A similar approach is provided for in the Assembly's Standing Orders 327 and 328, made pursuant to section 15 of the NSW Constitution. Under Standing Order 327, a committee of the Assembly seeking to examine a Member of the Legislative Council is to make such request to the Assembly, which sends a message to the Council requesting that it grant leave. Similarly, where the Council seeks to examine an Assembly Member, Standing Order 328, provides that the Assembly 'may authorise the Member to attend *if the Member agrees*' (emphasis added).

5.15 The Legislative Council sets out the practice for summoning of Members of Parliament in Chapter 21 of the *New South Wales Legislative Council Practice*.⁶ As in the Assembly, Ministers cannot be compelled to give evidence through summons but may be invited by the Council or its committees.

5.16 Relevant expert commentary has pointed to the constitutional implications of legislative proposals to provide for statutory powers to examine Ministers. Writing on ministerial accountability and responsibility to Parliament, and the powers of a House to obtain information from a Minister, Enid Campbell has previously noted:

The *Egan* litigation, it needs to be emphasised, was concerned primarily with the powers exercisable by a house in relation to a minister who is one of its *own* members. ...If the responsible minister is not a member of the house which seeks the information, the inquiry should be directed to the

⁵ Ibid.

⁶ S Frappell and D Blunt (eds), [New South Wales Legislative Council Practice](#), 2nd edn, Federation Press, 2021, pp 796-807.

member of the house who represents that minister in proceedings before the House.⁷

5.17 Professor Anne Twomey has also noted the *Egan v Willis* case did not 'address the problem of a conflict between the Houses, where the documents sought are those of a Minister in the other House'. Professor Twomey likewise referenced the practice whereby a Minister in one House is represented by a Minister in the other House, who can be called upon to produce documents held by the first Minister.⁸

5.18 Notwithstanding ministerial responsibility and the accountability of Ministers to Parliament for Executive action, there are constitutional difficulties with legislating to compel Ministers in one House to attend and produce evidence in the other House. In particular, the significance of the principle of comity that underpins sections 4 and 5 of the Act is outlined in *NSW Legislative Council Practice*:

A second aspect of the principle of comity between the Houses is that neither House may exercise authority over a member of the other House. In support, Hatsell's *Precedents of Proceedings in the House of Commons* of 1818 observes:

'The leading principle, which appears to pervade all the proceedings between the two Houses of Parliament, is, That there shall subsist a perfect equality with respect to each other; and that they shall be, in every respect, totally independent one of the other. – From hence it is, that neither House can claim, much less exercise, any authority over a Member of the other; but if, there is any grounds of complaint against an Act of the House itself, against any individual Member, or against any of the Officers of either House, this complaint ought to be made to that House of Parliament, where the offence is charged to be committed; and the nature and mode of redress, or punishment, if punishment is necessary, must be determined upon and inflicted by them.'

This principle is reflected in sections 4 and 5 of the *Parliamentary Evidence Act 1901*, which provides that members of one House should not be summoned to appear and give evidence before the other House or a committee of that House. Rather, their attendance shall be procured in conformity (so far as practicable) with the mode of procedure observed in the House of Commons.⁹

5.19 There has also been recent legislative proposals in the UK concerning the appearance of Ministers. Following recent inquiries into options for strengthening committee powers, the UK House of Commons' Committee of Privileges recommended in June 2022 that legislation be introduced to provide for a criminal offence for failing to comply with a summons issued by a select committee, subject to a fine or imprisonment. However, the Committee of Privileges did not recommend

⁷ Enid Campbell, *Parliamentary Privilege*, Federation Press, 2003, pp.161-2.

⁸ Professor Anne Twomey, *The Constitution of New South Wales*, The Federation Press, 2004, p. 519, fn 209.

⁹ S Frappell and D Blunt (eds), [New South Wales Legislative Council Practice](#), 2nd edn, Federation Press, 2021, p 848.

that any bill should include powers to summon Members of the House, or for one House to summon Members of the other House.¹⁰ The Committee further noted that there was strong justification in excluding Members of the Commons from the ambit of the draft Bill, given the sanctions of suspension and expulsion that the House already possessed for dealing with its own Members.¹¹

5.20 Expert witnesses to the Commons' Committee of Privileges inquiry also observed that:¹²

- (a) 'There would be challenges of constitutional propriety in giving such powers to committees and of reciprocity if members of the House of Lords were to be included...' (Mark Hutton, former Clerk of the Journals, House of Commons).
- (b) '... one would want to have very compelling reasons, and perhaps issues that had gone dramatically wrong, to make one feel that the convention should no longer be the convention' (Lord Gardiner, Senior Deputy Speaker, House of Lords).
- (c) '...subjecting recalcitrant Members of one House to the criminal law for defying a summons of the other House would be a very serious attack on the constitutional need for comity between the two Houses' (Paul Evans, former Clerk of Committees, House of Commons).

5.21 The Committee notes that the UK Parliament has yet to legislate to provide for such powers in relation to the examination of Members of Parliament as witnesses.

The Bill amends the *Parliamentary Evidence Act 1901* to permit the Clerk of either House of NSW Parliament to summon Ministers to give evidence before either House or a parliamentary committee. This summons power over Ministers is not currently authorised by the Act, the Standing Orders of the Legislative Assembly or Legislative Council practice.

The *Constitution Act 1902* establishes two separate and sovereign Houses of Parliament. Both Houses have exclusive authority to regulate their internal affairs, in accordance with the principle of 'exclusive cognisance'. This is reflected in and possibly implied by the NSW Constitution and is a long-established principle inherited from the UK Westminster system. The proposed amendments may represent a significant departure from the Westminster system where Ministers are accountable to the House in which they sit.

Past common law decisions have upheld the principle of 'exclusive cognisance' and may suggest parliamentary procedure could override statute law in the event of inconsistency with the principle. The amendments proposed by the Bill may therefore conflict with these existing conventions, rules and procedures.

¹⁰ House of Commons Committee of Privileges, *Select committees and contempts: review of consultation on Committee proposals*, [First Report of Session 2022-23](#), HC 401, June 2022.

¹¹ House of Commons Committee of Privileges, *Select committees and contempts: review of consultation on Committee proposals*, [First Report of Session 2022-23](#), HC 401, June 2022, p 29.

¹² House of Commons Committee of Privileges, *Select committees and contempts: review of consultation on Committee proposals*, [First Report of Session 2022-23](#), HC 401, 16 June 2022, pp.28-29.

The Committee notes that it is unclear how the exclusive cognisance of the Houses and their exclusive ability to regulate their internal proceedings might interact with the Bill. In the event that conflict does arise, it is not clear how such conflict would be resolved. For these reasons, the Committee refers the matter to Parliament for its consideration.

The separation of powers and cabinet secrecy

5.22 The separation of powers is a fundamental principle implied by the NSW Constitution which ensures that the judiciary, legislature and Executive cannot interfere with the functioning of the other branches as a separate power. In practice, there is no strict separation between the Legislature and the Executive as Ministers sit in both branches of government under the concept of 'responsible government'. The operation of the Bill concerns this dual role.

5.23 Under section 11 of the Act, a witness before the Parliament may be held liable for contempt of Parliament, if they wilfully refuse to answer a lawful question. The Bill would enable the Clerk to summon a Minister to give evidence before either House or a parliamentary committee, including in respect to matters potentially covered by cabinet in confidence.

5.24 Citing the decision of Spiegelman CJ in *Egan v Chadwick*,¹³ Professor Twomey notes in *The Constitution of NSW* that:

...a House does not have the power to require the production of documents which directly or indirectly reveal the deliberations of Cabinet, as this would undermine the collective responsibility of Ministers, contrary to the principle of responsible government.¹⁴

5.25 Past decisions of the High Court have acknowledged the public interest against disclosing cabinet deliberations. The majority in the High Court case of *Commonwealth v Northern Land Council* held that:

...the view is generally been taken that collective responsibility would not survive in practical terms if cabinet deliberations were not kept confidential.¹⁵

The Bill proposes to amend the *Parliamentary Evidence Act 1901* to enable the Clerk to summon Ministers to give evidence before either House of Parliament or a parliamentary committee. Under section 11 of the Act, a witness is potentially liable for contempt of Parliament if they refuse to answer a lawful question. The Act does not provide exceptions to this penalty on any grounds, even on grounds of cabinet secrecy.

The amendments may result in a Minister being summonsed and required to give evidence that may inadvertently reveal cabinet information. Even where a Minister chooses not to answer a question for

¹³ *Egan v Chadwick* (1999) 46 NSWLR 563, p 579.

¹⁴ Professor Anne Twomey, *The Constitution of New South Wales*, The Federation Press, 2004, p 520.

¹⁵ *Commonwealth of Australia v Northern Land Council* [1993] HCA 24, para 6.

reasons of cabinet secrecy, this may inadvertently reveal details about that cabinet information.

Therefore, the Bill may impact the separation of powers – in this case the independence of the Executive from the Parliament, as it relates to cabinet confidentiality. Under the Westminster model of responsible government and collective responsibility, NSW and other Commonwealth systems have long recognised the public interest in protecting cabinet deliberations from disclosure.

As the Act subjects witnesses to penalties for refusing to answer, it would be difficult for a Minister to refuse to give evidence on the grounds of cabinet confidentiality without indirectly disclosing details about that information. This may infringe upon the separation of powers and may constitute an intrusion from the Legislature into the functioning of the Executive. For this reason, the Committee refers this matter to Parliament for its consideration.

6. Petroleum (Onshore) Amendment (Liverpool Plains Prohibition) Bill 2023*

Date introduced	13 September 2023
House introduced	Legislative Council
Member responsible	The Hon. Jeremy Buckingham MLC
	*Private Members Bill

Purpose and description

- 6.1 The objects of this Bill are:
- (a) to amend the *Petroleum (Onshore) Act 1991* (the **Petroleum Act**) to prevent the granting of petroleum titles in the Liverpool Plains, Gunnedah, Narrabri and Warrumbungle Shire local government areas (the **Liverpool Plains gas exclusion zone**)
 - (b) to amend the *Environmental Planning and Assessment Act 1979* to prohibit development for the purpose of facilitating petroleum extraction in the Liverpool Plains gas exclusion zone.

Background

- 6.2 The Petroleum Act regulates the discovery and development of petroleum resources in New South Wales and facilitates economic development which is consistent with legislated principles of ecologically sustainable development. The *Environmental Planning and Assessment Act 1979* (the **EP&A Act**) regulates the assessment, approval and compliance of development activities within New South Wales.
- 6.3 In his second reading speech, the Hon. Jeremy Buckingham MLC explained that the Bill would amend these Acts:
- ... to prohibit prospecting for or mining of coal seam gas in the Liverpool Plains area to prohibit development for the purposes of coal seam gas prospecting or mining in the Liverpool Plains area.
- 6.4 The Bill proposes to insert section 9(1)(a1) into the Petroleum Act, to include the Liverpool Plains gas exclusion zone (the '**Liverpool Plains exclusion zone**') as an area over which petroleum titles may not be granted under the Act. The Bill would also insert a definition for the 'Liverpool Plains gas exclusion zone' into section 3(1) of the Act.
- 6.5 The Bill also proposes to insert section 10 into the Petroleum Act, to provide for the cancellation of a petroleum title and the refusal of an application to grant or renew a petroleum title in the Liverpool Plains exclusion zone. It would also prevent compensation being payable by the Crown for a cancellation or refusal of a petroleum title that results from section 10.

6.6 The Bill also seeks to amend the EP&A Act to prohibit petroleum exploration and development in the Liverpool Plains exclusion zone, by creating an offence for carrying out development related to petroleum exploration or production. The amendments would also insert a definition of 'Liverpool Plains exclusion zone' identical to the definition in the Petroleum Act. This offence under the EP&A Act carries a maximum penalty of:

- \$1 000 000 for individuals, with an additional \$10 000 each day the offence continues
- \$5 000 000 for corporations, with an additional \$50 000 for each day the offence continues.

6.7 While the Bill would introduce an absolute liability offence, it is unlikely that a person could inadvertently engage in the offending conduct.

Issues considered by the Committee

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

Removal of right to compensation

6.8 The Bill amends the Petroleum Act by inserting section 10 which would cancel a petroleum title and refuse an application relating to a petroleum title in the Liverpool Plains exclusion zone. Subsection 10(3) provides that compensation 'is not payable by the Crown or on behalf of the Crown' because of:

- (a) the enactment or operation of section 10
- (b) a direct or indirect consequence of its enactment or operation, or
- (c) conduct relating to its enactment or operation.

The Bill amends the *Petroleum (Onshore) Act 1991* to prevent the granting of petroleum titles in the Liverpool Plains gas exclusion zone. Subsection 10(3) provides that compensation is not payable by or on behalf of the Crown if a petroleum title is cancelled or an application relating to a title is refused upon the commencement of section 10, including refunds for title fees.

Therefore, the Bill may prevent an entity from being compensated for the loss of revenue or equity related to a petroleum title, to which an applicant or title holder might otherwise be entitled. The Committee notes that the denial of a right to compensation might not be able to be challenged in a court. Therefore, the Bill may restrict access to justice as an affected party may be unable to protect their property rights attached to a relevant petroleum title. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Uncertain application of provision

6.9 Subsection 10(1) inserted by the Bill into the Petroleum Act clarifies that a petroleum title granted immediately before the commencement of the section is cancelled under

section 10. Further, subsection 10(2) provides that an application made immediately before the commencement of the section is taken to be refused.

- 6.10 The Bill does not define what period of time constitutes "immediately before" the Bill is enacted as an Act. It also does not specify which applications or titles could be liable to be refused or cancelled under proposed section 10.

The Bill proposes to insert section 10 into the *Petroleum (Onshore) Act 1991* to provide for the cancellation of petroleum titles and the refusal of certain applications and renewals of petroleum titles in the Liverpool Plains gas exclusion zone.

A petroleum title, application to grant or application to renew can be cancelled 'immediately' before the commencement of the section 10. It may be difficult to identify which titles or applications might be cancelled or refused by the operation of the Bill because the relevant period of time which constitutes 'immediately before' its commencement is not specified.

The Committee notes that this uncertainty may undermine an applicant's right to procedural fairness regarding decisions made about their petroleum title or prospective title. For these reasons, the Committee refers the matter to Parliament for its consideration.

7. Radiation Control Amendment Bill 2023

Date introduced	14 September 2023
House introduced	Legislative Council
Minister responsible	The Hon. Penny Sharpe MLC
Portfolio	Environment

Purpose and description

- 7.1 The object of this Bill is to amend the *Radiation Control Act 1990* (the **principal Act**) to give effect to the recommendations from the statutory review of the principal Act, tabled in Parliament in December 2021 (the **Statutory Review**).¹⁶ This is achieved as follows:
- (a) amending the objects of the principal Act to include the promotion of the ecologically sustainable development principles (**recommendation 1**)
 - (b) by requiring a person who disposes of regulated material, or consigns regulated material for transport, to be licensed under the principal Act (**recommendation 2**)
 - (c) by moving certain offences from the Radiation Control Regulation 2013 to the principal Act and increasing the maximum penalties for the offences (**recommendations 3 and 4**)
 - (d) by requiring a person responsible for a security enhanced source to have a source transport security plan when transporting the source, even if the transportation originated from outside New South Wales (**recommendation 5**)
 - (e) by requiring security plans to be reviewed and endorsed by a radiation security assessor every 5 years (**recommendation 6**)
 - (f) by enabling a court to order that certain persons pay, and for the Environment Protection Authority (the **Authority**) to recover, the costs incurred by the Authority for investigating offences and for the disposal of articles, regulated material and substances forfeited to the Crown (**recommendation 7**)
 - (g) by increasing the maximum pecuniary penalty that may be imposed by the Local Court in proceedings for an offence against the principal Act or the regulations from 200 penalty units to 1,000 penalty units (**recommendation 8**)
 - (h) by increasing maximum penalties for certain offences relating to providing false or misleading information and abandoning radioactive substances to align with

¹⁶ Environmental Protection Authority, [Statutory Review: Radiation Control Act 1990 - Final report: November 2021](#), November 2021.

similar offences under the *Protection of the Environment Operations Act 1997* (**recommendations 9 and 10**)

- (i) by updating provisions relating to the governance and membership of the Radiation Advisory Council (**recommendation 11**).

7.2 The Bill also makes other minor and consequential amendments to the principal Act and other environmental legislation, including amendments of a savings and transitional nature or of a law revision nature.

Background

7.3 In her second reading speech, the Hon. Penny Sharpe MLC, Minister for the Environment said that the Bill introduces reforms to ensure that 'radiation is managed safely to protect human health and the environment.' The Bill proposes amendments to implement a number of recommendations made in the Statutory Review. This includes adding a commitment to the principles of ecologically sustainable development into the objects of the principal Act under section 3.

7.4 The Bill also proposes a number of changes to strengthen the regulatory framework, including expanding the licensing requirements and conditions in sections 6 and 13. Section 14 of principal Act would be amended by the Bill to require any high-activity source of material that is shipped through NSW also be subject to a transport security plan that is authorised by the Authority. This would apply shipments that originate interstate or outside Australia and any relevant transport security plan would need to be reviewed every five years.

7.5 The Bill also seeks to make changes to the Radiation Advisory Council, including to the membership, functions and reporting. The Minister explained in her second reading speech that these changes align with the Authority's 'role as an independent statutory authority'.

7.6 The Bill would amend the title of the principal Act to the 'Protection from Harmful Radiation Act 1990'. Finally, the Bill proposes minor changes to other environmental legislation.

Issues considered by the Committee

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

Absolute liability offence

7.7 The Bill amends section 6 of the principal Act, which expands licensing requirements to include consigning of radioactive material for transport and its disposal. Under amended subsection 6(6), a person responsible for 'regulated material' must ensure that the regulated material is 'consigned for transport' or 'disposed of' by somebody who holds an appropriate licence. Failure to do this may expose a responsible person to a monetary penalty up to \$27 500 (250 penalty units) and/or imprisonment for 2 years.

7.8 In her second reading speech, the Minister stated that the change 'will afford the EPA [Environmental Protection Authority] better oversight of these activities and the people who conduct them.'

The Bill amends the *Radiation Control Act 1990* by expanding the range of offending conduct in respect of licensing requirements under

section 6. Amendments to subsection 6(6) requires a responsible person to ensure that regulated material is not consigned for transport or disposed by a person that does not hold an appropriate licence. This offence carries a monetary and custodial penalty of \$27 500 and/or imprisonment for 2 years.

Therefore, the Bill may establish an absolute liability offence over additional conduct. Absolute liability offences depart from the common law principle that the mental element of 'fault' should be proven to establish criminal liability.

The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance. The Committee also acknowledges that these new offences are intended to strengthen oversight of activities involving dangerous regulated material.

However, the Committee notes that the maximum penalty for these offences includes a custodial penalty of up to 2 years imprisonment. The Committee also notes that these absolute liability offences apply to a person other than the person consigning or disposing of regulated material without an appropriate licence. Given the potential custodial penalty, the Committee refers the matter to Parliament for its consideration.

Additional punishment for same offending conduct

- 7.9 The Bill inserts a number of costs recovery provisions into the principal Act. This includes inserting subsection 23B(1)(g), which allows the court to order the offender to pay a specified amount to the Authority, if the court is satisfied that the Authority has reasonably incurred costs and expenses during the investigation of an offence. Section 28(4) inserted by the Bill also allows the Authority to recover the amount specified in an order under section 23B(1)(g) as a debt from the person specified.
- 7.10 The Bill also replaces section 26, to provide that the court may order the person convicted of an offence against the principal Act or regulations, to pay the Authority the costs which it incurred disposing of the forfeited matter. Under section 26(5), the Authority may recover the costs of disposing the forfeited matter as a debt from the person required to pay the costs.
- 7.11 In her second reading speech, the Minister explained that the Authority is regularly called to investigate incidents that involve radioactive material. The Minister noted that the Authority's investigation costs 'can be substantial in the radiation context', given that the Authority would often be dealing with a dangerous situation or disposing forfeited material.

The Bill amends sections 23B and 28 of the *Radiation Control Act 1990* to enable that the Environment Protection Authority to recover costs and expenses of an investigation of an offence from the offender.

The Bill also proposes to amend section 26 of the Act to expand the forfeiture and disposal provisions. Section 26 provides that a person who is convicted of an offence against the Act may be required to forfeit regulated material or substance to the Crown. The amendments would

also permit a court to order a person to pay the costs incurred by the Authority for disposing of the forfeited matter.

The Committee notes that these amendments may result in a person who has been investigated and convicted of an offence to potentially pay costs in addition to any criminal penalties imposed on them in sentencing. Therefore, the Bill may permit a person to receive additional punishment for the same offending conduct.

The Committee acknowledges that the cost recovery provisions are intended to reduce the costs burden of the Authority resulting from unsafe management of radiation sources. However, the Committee notes that an individual may be subjected to additional punishment for costs which are incurred in the course of an investigation that may contribute to evidence establishing criminal liability. The provisions may also operate in circumstances where a person's property rights are impacted, by requiring them to pay the expenses of disposing their own forfeited property. For these reasons, the Committee refers the matter to Parliament for its consideration.

Right to the presumption of innocence

- 7.12 The Bill replaces section 33A of the principal Act. These amendments include increasing the penalty to \$250,000 for a person who, without reasonable excuse, abandons a radioactive substance under subsection 33A(1). The Bill also inserts subsection 33A(2) which provides that a person must not intentionally or negligently abandon a radioactive substance. This carries a maximum penalty for an individual of:
- (a) \$1 000 000 for an offence committed intentionally
 - (b) \$500 000 for an offence committed negligently.
- 7.13 Subsection 33A(3) provides that, if a court finds that a person is not guilty of an offence under section 33A(2), the court may find them guilty of and subject to punishment under section 33A(1) if satisfied the evidence established guilt for that offence under subsection (1).
- 7.14 Subsection 33A(4) places the onus of proving that they had a reasonable excuse on a person charged with an offence under subsection (1).
- 7.15 In her second reading speech, the Minister noted that 'abandoning a radioactive source creates the potential for serious harm to human health and the environment.' The increases in the penalty are therefore intended to 'send a clear message'.

The Bill amends section 33A of the *Radiation Control Act 1990* to expand the offences for abandoning radioactive substances. Section 33A(1) increases the maximum penalty for the offence of abandoning a radioactive substance without reasonable excuse, to \$250 000. Section 33A(4) provides that a person charged with this offence has the onus of proving that they had a reasonable excuse. Section 33A(2) creates an offence of up to \$1 000 000 for an individual who intentionally or negligently abandons a radioactive substance.

The defence under section 33A(4) may reverse the onus of proof to the absolute liability offence under subsection (1), by requiring the

defendant to prove whether they had a reasonable excuse. In regards to criminal actions, a reverse onus may undermine a person's right to the presumption of innocence, as contained in Article 14 of the ICCPR.¹⁷ The right to the presumption of innocence protects an accused person's privilege to be presumed innocent until proved guilty according to law. The Committee notes that the Bill does not outline what amounts to a reasonable excuse.

The Committee acknowledges that these amendments are intended to deter persons from abandoning radioactive sources, which may endanger public safety. However, the Committee notes that section 33A(3) may permit a court to find an individual who is not guilty of an offence of intentionally or negligently abandoning a radioactive substance to be guilty of abandoning a radioactive substance without reasonable excuse under subsection (1). This may require an individual charged under subsection 33A(2) to answer cases for both offences, which may increase the burden on a defendant in criminal proceedings. For these reasons, the Committee refers the matter to Parliament for its consideration.

Retrospectivity

- 7.16 The Bill inserts Part 10 into Schedule 2, which makes savings and transitional provisions.
- 7.17 Clause 25 extends the increased maximum penalty in proposed amendments to section 25(3) of the principal Act to offences alleged to have been committed before the commencement of the Bill. The amendment is not extended to offences which are currently subject to legal proceedings.
- 7.18 Similarly, clause 27 extends the amendments to sections 23B, 26 and 28 relating to costs recovery to alleged offences committed before the commencement of the Bill. This does not apply if proceedings for the alleged offence commenced before the Bill commences.

The Bill inserts Part 10 into Schedule 2 of the *Radiation Control Act 1990*, which provides that some amendments apply to certain offences that were committed before the commencement of the Bill. This includes amendments for the increased maximum penalty imposed by the Local Court and the making of court orders for the recovery of costs incurred by the Environment Protection Authority. The Committee generally comments on provisions that are drafted to have retrospective effect. This is because they impact on the rule of law principle that a person is entitled to understand the law that applies to them at any given time.

The Committee notes that the amendments only apply to offences which are not already subject of proceedings when the Bill commences. However, these amendments would still allow individuals to be subject to new provisions not existing prior to the amendments, at the time of the offending conduct. Those individuals would not have known that the offences would attract higher pecuniary penalties or that they could be

¹⁷ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.

liable to pay additional costs. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Lack of clarity – referral to a code

- 7.19 The Bill transfers section 33C from the *Radiation Control Regulation 2013* into the principal Act, which establishes an offence for a person that does not cause a radioactive substance to be transported in line with the *Code for the Safe Transport of Radioactive Material* (the **Code**).
- 7.20 Section 33C also includes an additional subsection not in the regulations which provides that, if the Code is replaced by another code, a person must transport the substances in line with 'the other code, as in force from time to time.'
- 7.21 This offence carries a maximum penalty of \$27 500 (250 penalty units) for an individual.

The Bill inserts new section 33C into the *Radiation Control Act 1990* which prohibits a person from causing a radioactive substance to be transported other than in line with the *Code for the Safe Transport of Radioactive Material*. This offence provision replaces the existing offence under the *Radiation Control Regulation 2013*. Section 33C also provides that, if the Code is replaced by another code, individuals must transport radioactive substances in accordance with 'the other code'.

The Committee notes that, if the existing Code is replaced, individuals may be guilty of an offence under another code which is not explicitly referred to in the legislation. Therefore, a person may find it difficult to ascertain what 'code' applies in respect to an offence which attracts a maximum penalty of up to \$27 500. For these reasons, the Committee refers the matter to Parliament for its consideration.

Liability for costs – meaning of 'contributed to'

- 7.22 The Bill makes a number of amendments to the *Protection of the Environment Operations Act 1997*. This includes amending section 105 to permit a person who has been given a compliance cost notice to recover costs payable under the notice as a debt from a person who 'contributed to' the pollution or pollution incident.

The Bill proposes to amend section 105 of the *Protection of the Environment Operations Act 1997* to allow a person who has been given a compliance cost notice to recover the costs payable under the notice as a debt from the person who 'contributed to' the pollution or pollution incident.

There appears to be no provisions of the Bill which define or narrow the scope of what is meant by an individual who has 'contributed to' pollution or a pollution incident. Given the potential broad extension of liability for costs, the Committee refers the matter to Parliament for its consideration.

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

Commencement by proclamation

7.23 According to section 2(b), parts of the Bill commence by proclamation. These include amendments to sections 23B, 25, 26 and 28 of the principal Act, which set out mechanisms for the Authority to recover costs from offenders. It also includes amendments around sections 33A, 33C, 33D and 36B which impose significantly stricter penalties for existing offences.

Section 2(b) of the Bill states that certain provisions will commence by proclamation. This includes provisions which impose stricter penalties on offences relating to abandoning radioactive substances, the transport and disposal of material, and for providing false or misleading information. The Committee generally prefers legislation to commence on a fixed date, or on assent, to provide certainty for affected persons, particularly where the provisions may impact individual rights and obligations.

The Committee acknowledges that there may be practical reasons for imposing a flexible starting date such as allowing for training, education and implementation of relevant administrative arrangements to give effect to these amendments. However, the parts of the Bill that commence by proclamation establish costs recovery provisions that may apply retrospectively. For these reasons, the Committee refers the matter to Parliament for its consideration.

8. Rural Fires Amendment (Red Fleet) Bill 2023*

Date introduced	14 September 2023
House introduced	Legislative Assembly
Member responsible	The Hon. Adam Marshall MP
	*Private Members Bill

Purpose and description

- 8.1 The object of this Bill is to amend the *Rural Fires Act 1997* (the **Act**) to vest in the Commissioner of the NSW Rural Fire Service fire fighting equipment purchased or constructed wholly or partly from money to the credit of the New South Wales Rural Fire Fighting Fund (**Fund equipment**). Currently, Fund Equipment is vested in the council of the area for or on behalf of which the Fund equipment was purchased or constructed.

Background

- 8.2 The Act establishes a regulatory framework for the prevention of bush fires in local government areas, the coordination of fire fighting in the State and the protection of people, property and the environment from fire. Under the Act, 'the Commissioner' means the Commissioner of the NSW Rural Fire Service.

- 8.3 In his second reading speech, the Hon. Adam Marshall MP said that the Bill seeks to amend the Act to vest ownership of fire fighting equipment in the Commissioner so that:

Instead of those assets being vested in the local council, all of those assets right across the State will be vested in the Rural Fire Service.

- 8.4 The Bill would vest ownership of fire fighting equipment in the Commissioner by replacing the words 'the council of the area for or on behalf of which the fire fighting equipment has been purchased or constructed' in sub-section 119(2) with the words 'the Commissioner'. The Bill also proposes to remove sub-sections 119(3),(5) and (6) which make references to 'a council' and actions that 'a council' may take relating to firefighting equipment.

Issues considered by the Committee

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

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

Date introduced	13 September 2023
House introduced	Legislative Assembly
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Work Health and Safety

Purpose and description

- 9.1 The object of the Bill is to amend the *State Insurance and Care Governance Act 2015* (the **Act**) to make further provisions in relation to governance arrangements for Insurance and Care NSW (**ICNSW**), which is also known as icare.

Background

- 9.2 ICNSW was established under the Act, which sets out the agency's functions in overseeing insurance and care scheme service providers in NSW. The Act also provides for the responsible Minister and the Treasurer to provide directions to ICNSW and the ICNSW Board (the **Board**) to ensure appropriate oversight and governance.
- 9.3 In her second reading speech, the Hon. Sophie Cotsis MP, Minister for Work Health and Safety, noted that the Bill is part of a broader Government 'reform journey' to improve ICNSW and the workers compensation system'.
- 9.4 Proposed section 9A aims to establish clear statutory objectives for ICNSW and the Board to guide their decision-making and functions. The Minister described these objectives as a point of reference that aim 'to help the icare board and executives navigate overlapping statutory functions'.
- 9.5 The Bill seeks to make consequential amendments to section 7 of the Act, to ensure that the Board considers these objectives when asked to provide its opinion on a proposed Ministerial direction. This replaces the current requirement for the Board to consider whether complying with the direction would not be in the best interests of ICNSW.
- 9.6 The Bill would also insert a section 12A into the Act which grants the Treasurer the power to request information from ICNSW in relation to its activities. Proposed section 12A(3) allows the Treasurer to delegate this power to the Secretary of the Treasury. The Minister explained in her second reading speech that this provision is intended to enhance transparency and:
- .. makes clear that the Treasurer and, by implication, the Treasury have a clear interest in icare and its operations. It provides a clear signal and gives legislative expression to the concept that the Treasurer and Treasury have an enduring role in the financial governance and oversight of icare.

Issues considered by the Committee

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

Part Two – Regulations

1. Tattoo Industry Regulation 2023

Date tabled	LA: 12 September 2023 LC: 12 September 2023
Disallowance date	LA: 28 November 2023 LC: 28 November 2023
Minister responsible	The Hon. Yasmin Catley MP
Portfolio	Minister for Police and Counter-terrorism

Purpose and description

- 1.1 The object of this Regulation is to remake, with minor changes, the *Tattoo Industry Regulation 2013*, which was repealed on 1 September 2023 by the *Subordinate Legislation Act 1989* section 10(2).
- 1.2 The Regulation provides for the following:
- (a) additional requirements and information for licence applications under the *Tattoo Industry Act 2012* (the **Act**)
 - (b) additional conditions for licences granted under the Act
 - (c) additional grounds for the refusal of licence applications and the cancellation of master licences
 - (d) to enable permits to be granted for the carrying out of:
 - (i) body art tattooing shows and exhibitions, or
 - (ii) the performance of body art tattooing procedures by visiting overseas body art tattooists
 - (e) the keeping of records concerning body art tattooing businesses
 - (f) to create offences in connection with the misuse of licences
 - (g) to prescribe fees for licence applications, permits and replacement licences
 - (h) to prescribe offences under the Act and the regulation as penalty notice offences
 - (i) to prescribe criminal organisations
 - (j) to prescribe offences that disqualify applicants for permits and licences.
- 1.3 The Regulation is made under the Act.

Issues considered by the Committee

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

Freedom of association

- 1.4 The Regulation substantially remakes and repeals its previous iteration, the *Tattoo Industry Regulation 2013*. However, it makes additional changes in relation to licencing. In particular, it provides additional grounds for the refusal of licences and the refusal of visiting tattooist permits.
- 1.5 Subsection 17(d) of the Regulation enables the Commissioner of Police to refuse the grant of a visiting tattooist permit, if they are satisfied that 'a close associate' of the applicant is 'not a fit and proper person'.
- 1.6 Similarly, subsection 17(g) enables the Commissioner to refuse a visiting tattooist permit if they are satisfied that the applicant either:
- (a) is currently a member of a prescribed criminal organisation, or
 - (b) was a member of a prescribed criminal organisation within 12 months before making the application.
- 1.7 Schedule 3 of the Regulation lists organisations which are 'prescribed criminal organisations'.

The Regulation prescribes additional grounds for the Commissioner of Police to refuse and revoke visiting tattooist licences and permits. Under these new grounds, the Commissioner may refuse a visiting tattooist permit if they are satisfied that a close associate of the applicant is not a 'fit and proper person', or the applicant is currently or was, within the last year, a member of a prescribed criminal organisation under Schedule 3. Therefore, the Regulation may infringe on an applicant's freedom of association which is contained in Article 22 of the ICCPR. This freedom protects a person's right to form and join associations to pursue common goals.¹⁸

The Committee notes that limits on the freedom of association may be justified for the protection of public safety. However, the scope of the Commissioner's power to refuse permits on these grounds extends to 'close associates'. The grounds for refusal on the basis of association with a prescribed criminal organisation is also extended by a time period of 12 months into the past. For these reasons, the Committee refers the matter to Parliament for its consideration.

¹⁸ United Nations, Office of the High Commissioner for Human Rights, [International Covenant on Civil and Political Rights](#), 1966.



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. Animal Welfare Amendment Regulation 2023

The object of this Regulation is to amend the following regulations to remove provisions repealing the regulations on 1 September 2023:

- (a) the *Animal Research Regulation 2021*,
- (b) the *Exhibited Animals Protection Regulation 2021*.

The effect of the amendments is to make the regulations subject to the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

2. Aware Super Regulation 2023

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

The Regulation prescribes the following:

- (a) certain payments and non-cash employment benefits provided by an employer as part of an employee's salary or wages for which employers must make superannuation contributions for employees,
- (b) employee salary contribution percentages on which the levels of compulsory employer superannuation contributions under the *Aware Super Act 1992* are based, and the periods in which the percentages apply, to add to those provided for in the Act,
- (c) an exemption for employers from the obligation to make superannuation contributions for certain employees in relation to specified kinds of employment,
- (d) other machinery and savings matters.

This Regulation is made under the *Aware Super Act 1992*, including sections 4(1)(a), 8(2A) and (5) and 15, 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.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

3. Building Legislation Amendment Regulation 2023

The objects of this Regulation are as follows:

- (a) to amend the *Building and Development Certifiers Regulation 2020* to extend, to 30 June 2024, the period in which a professional indemnity insurance policy may exclude claims relating to building cladding,
- (b) to amend the *Design and Building Practitioners Regulation 2021* to provide that:
 - (i) registration as a building practitioner—body corporate may be granted to a body corporate that does not have a contractor licence under the *Home Building Act 1989*, subject to the restriction that no work is carried out for a class 2 building, and
 - (ii) the registration of a building practitioner—body corporate may be varied, suspended or cancelled if the body corporate's contractor licence under the *Home Building Act 1989* is suspended or cancelled,
- (c) to make minor and transitional amendments to the *Building Legislation Amendment (Building Classes) Regulation 2023* to address a number of minor policy clarifications and drafting errors.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

4. Community Housing Providers (Adoption of National Law) Regulation 2023

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

This Regulation prescribes the Aboriginal Housing Office as a Housing Agency for the provisions of the *Community Housing Providers (Adoption of National Law) Act 2012* in which the expression occurs.

This regulation is made under the *Community Housing Providers (Adoption of National Law) Act 2012*, including sections 4(2), definition of Housing Agency, paragraph (c), and 29, 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.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

5. Education and Care Services National Amendment (Bassinets) Regulations 2023

The Education Ministers Meetings made the Regulations under sections 301 and 324 of the *Education and Care Services National Law* as applied by the law of the States and Territories. The Regulations prohibit the use of bassinets at education and care service premises at any time during which children are being educated and cared for by the service.

The Regulations do not engage with the issues set out in section 9 of the *Legislation Review Act 1987*. Although it sets penalties up to \$2,200 for a breach of the prohibition of bassinets, this forms part of the national law and is for compliance purposes.

6. Gas Supply (Natural Gas Retail) Regulation 2023

The object of this Regulation is to remake, with changes, the *Gas Supply (Natural Gas Retail) Regulation 2014*, which is repealed on 1 September 2023 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following:

- (a) the facilitation of the Government's social programs for gas, including the adoption of a Social Programs for Energy Code,
- (b) a distributor service standard requiring reticulators that are distributors within the meaning of the National Energy Retail Law (NSW) to promptly issue post-disconnection notices to small customers,
- (c) caps on the civil monetary liability of a scheme operator and officers or employees of a scheme operator for negligent acts and omissions in exercising, or purporting to exercise, functions under a wholesale natural gas market scheme.

This Regulation, Part 2 is quasi-legislation because the Part incorporates codes that are non-legislative instruments.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

7. Health Legislation Amendment (Fees) Regulation 2023

The object of this regulation object of this Regulation is to increase certain licence and other fees charged under Acts administered by the Minister for Health.

This Regulation is made under the following provisions:

- (a) the Assisted Reproductive Technology Act 2007, section 7(2) and (8),
- (b) the Mental Health Act 2007, sections 115(2)(b), 118(b) and 119,
- (c) the Poisons and Therapeutic Goods Act 1966, sections 17(1)(a1) and 24(1)(f),
- (d) the Private Health Facilities Act 2007, sections 6(2)(f), 8(4), 14(1), 15(3)(b), 16(2)(b), 17(2)(e) and 24(2)(b).

This Regulation makes modest increases to fees and does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

8. Natural Resources Access Regulator Regulation 2023

The object of this Regulation is to repeal and remake, with minor amendments, the *Natural Resources Access Regulator Regulation 2018*, which would otherwise be repealed on 1 September 2023 by the Subordinate Legislation Act 1989, section 10(2).

This Regulation provides for the following:

- (a) to specify as additional functions of the Natural Resources Access Regulator certain enforcement functions of the Minister under the *Water Management Act 2000*,
- (b) to prescribe information that may be included in the register of information about enforcement actions taken by the Natural Resources Access Regulator,
- (c) to prescribe various persons and bodies as relevant agencies for the purposes of the *Natural Resources Access Regulator Act 2017* (the Act), section 16.

This Regulation is made under the Act, including sections 11, 12A, 16 and 18, 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 savings or transitional nature.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

9. Order Fixing Fees (2023-1325)

This Order is made pursuant to section 15 of the *Passenger Transport Act 1990* and prescribes fees relating to the application for issue of a bus driver authority.

This Order does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

10. Point to Point Transport (Taxis and Hire Vehicles) Amendment (Display of Taxi Fare Hotline Information) Regulation 2023

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

- (a) contact information for the Taxi Fare Hotline, and
- (b) a statement that the taxi meter must be on during a rank or hail trip.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

11. Private Health Facilities Amendment (Psychedelic-Assisted Therapy) Regulation 2023

This regulation prescribes psychedelic-assisted therapy as a service or treatment that may be conducted only on premises licensed under the *Private Health Facilities Act 2007*. Psychedelic-assisted therapy means psychotherapy involving the use of:

- (a) N, α -dimethyl-3,4-(methylenedioxy)phenylethylamine (MDMA) for the treatment of post-traumatic stress disorder, or
- (b) psilocybin for the treatment of treatment-resistant depression.

This Regulation also provides for the licensing standards that apply to a private health facility that provides psychedelic-assisted therapy.

This Regulation is made under the *Private Health Facilities Act 2007*, including sections 4(1), definition of private health facility, 5, 10(1) and 65, the general regulation-making power.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

12. Road Transport Legislation Amendment (Visiting Drivers) Regulation 2023

The objects of this Regulation are to:

- (a) amend the *Road Transport (Driver Licensing) Regulation 2017* to provide for the events that cause visiting drivers who hold temporary visas under the *Migration Act 1958* of the Commonwealth to be permanently ineligible to be exempt from driver licensing requirements, and
- (b) amend the *Road Transport (General) Regulation 2021* to enable penalty notices to be issued for certain kinds of offences under the *Road Transport Act 2013*, section 53(1) where the person driving a motor vehicle without being licensed for that purpose is a visiting driver.

The Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

13. State Authorities Non-contributory Superannuation Amendment Regulation 2023

The object of this Regulation is to declare employees who would be subject to a limitation on wage increases if the *Industrial Relations (Public Sector Conditions of Employment) Regulation 2014* had not been repealed to be relevant employees to whom certain public sector employers must pay additional contributions under the *State Authorities Non-contributory Superannuation Act 1987*, section 16A.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

14. Teacher Accreditation Regulation 2023

The object of this Regulation is to repeal and remake, without any significant changes, the *Teacher Accreditation Regulation 2015*, which would otherwise be repealed on 1 September 2023 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following:

- (a) to specify additional particulars to be included on the accreditation list,
- (b) to prescribe additional conditions for teachers who are accredited under the *Teacher Accreditation Act 2004* (the **Act**), Part 4,
- (c) to prescribe the process of determining the equivalent relevant period for casual or part-time teachers who are provisionally accredited under the Act, section 30,
- (d) to prescribe the process of determining the equivalent relevant period for casual or part-time teachers who are conditionally accredited under the Act, section 31,
- (e) to exempt NVR registered training organisations from the requirements in the Act, section 28(2) to employ accredited teachers in particular circumstances.

This Regulation comprises or relates to matters set out in the Subordinate Legislation Act 1989, Schedule 3, namely:

- (a) matters of a machinery nature, and

- (b) matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

Section 8 may be made under a Henry VIII provision because the exemption impliedly amends the Act by affecting the application of the Act.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

15. [Water Industry Competition \(General\) Amendment \(Postponement of Repeal\) Regulation](#)

The object of this Regulation is to extend the operation of the *Water Industry Competition (General) Regulation 2021* until 1 March 2024.

This Regulation is made under the *Water Industry Competition Act 2006*, including section 101, the general regulation-making power.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

16. [Water Management \(Murray River Traffic\) Regulation 2023](#)

The object of this regulation is to repeal and remake, with minor amendments, the *Water Management (River Murray Traffic) Regulation 2016*, which would otherwise be repealed on 1 September 2023 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following:

- (a) the control of vessels at certain locks on the Murray River,
- (b) the signals that must be given when entering and leaving the locks,
- (c) the signals that must be given near locks, weirs and other works located along the Murray River,
- (d) the circumstances in which a lock-keeper may refuse to allow a vessel to enter a lock,
- (e) the restrictions on approaching a weir if the navigable pass at the weir is closed,
- (f) offences with respect to locks, weirs and other works located along the Murray River,
- (g) the repeal of the *Water Management (River Murray Traffic) Regulation 2016* and savings consequent on the repeal.

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

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

17. [Workers Compensation \(Bush Fire, Emergency and Rescue Services\) Regulation 2023](#)

The object of this Regulation is to repeal and remake, with minor amendments, the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Regulation 2017*, which would otherwise be repealed on 1 September 2023 by the *Subordinate Legislation Act 1989*, section 10(2).

This Regulation provides for the following:

- (a) the persons who are emergency service workers and rescue association workers for the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* (the Act), Part 3,
- (b) the activities that are authorised activities in relation to emergency service workers and rescue association workers for the Act, Part 3,
- (c) the circumstances in which emergency service workers injured outside New South Wales, but within the Commonwealth of Australia, are covered by workers compensation provisions under the Act,
- (d) the activities that are associated operations or works in relation to fighting bush fires for the Act, Part 2.

This Regulation comprises or relates to matters set out in the *Subordinate Legislation Act 1989*, Schedule 3, namely:

- (a) matters of a machinery nature, and
- (b) matters that are not likely to impose an appreciable burden, cost or disadvantage on any sector of the public.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

18. [Workers' Compensation \(Dust Diseases\) Regulation 2023](#)

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

This Regulation provides for the following:

- (a) making applications for compensation,
- (b) requiring employers to provide certain information to the Workers Compensation (Dust Diseases) Authority,
- (c) authorising the appointed directors of the board of directors of Insurance and Care NSW as a class of persons to whom the Workers Compensation (Dust Diseases) Authority may delegate any of its functions,
- (d) other machinery and savings matters.

This Regulation is made under the *Workers' Compensation (Dust Diseases) Act 1942*, including sections 5AB(2), definition of authorised person, paragraph (b) and 10, 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.

This Regulation does not engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

Appendix Three – Unconfirmed extracts of minutes

Meeting no. 4

TIME & DATE: 3.03PM, 18 SEPTEMBER 2023

LOCATION: ROOM 1136 AND WEBEX

MEMBERS PRESENT

Lynda Voltz (**Chair**), Maryanne Stuart (**Deputy Chair**) (**by Webex**), Donna Davis (**by Webex**), Nathan Hagarty (**by Webex**), Sue Higginson, Dave Layzell, Jacqui Munro and Cameron Murphy.

APOLOGIES

Nil.

OFFICERS PRESENT

Sam Griffith, Anna Tran, Alex Read, Ashley Kim, Kate McCorquodale, Kayaneh Mouradian, Nicolle Gill and Isabella Ciampa.

AGENDA ITEM

1. Confirmation of minutes

Resolved, on the motion of Mr Murphy: That the minutes of the meeting of 11 September 2023 be confirmed.

2. Correspondence

...

3. Briefing note on the confidentiality of Committee proceedings and documents

Resolved, on the motion of Mr Hagarty: That the Committee notes the attached briefing note on the confidentiality of Committee proceedings and documents.

4. Consideration of Bills with comment for Legislation Review Digest 4/58

Resolved, on the motion of Mr Murphy: That the Committee adopts the following draft bill reports *in globa*.

- a. Health Legislation Amendment (Miscellaneous) Bill 2023
- b. Mining Amendment (Mineral Claims—Opal) Bill 2023
- c. Paintball Amendment Bill 2023
- d. Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023
- e. Petroleum (Onshore) Amendment (Liverpool Plains Prohibition) Bill 2023

- f. Radiation Control Amendment Bill 2023.

5. Consideration of Bills without comment for Legislation Review Digest 4/58

Resolved, on the motion of Mr Murphy: That the Committee adopts the following draft bill reports *in globa*.

- a. City of Sydney Amendment Bill 2023
- b. Rural Fires Amendment (Red Fleet) Bill 2023
- c. State Insurance and Care Governance Amendment (ICNSW Governance) Bill 2023.

6. Consideration of Regulations for Legislation Review Digest 4/58

Resolved, on the motion of Ms Stuart: That the Committee adopts the draft report regarding the *Tattoo Industry Regulation 2023*.

7. Regulations without comment for Legislation Review Digest 4/58 (Appendix Two)

Resolved, on the motion of Ms Munro: That the Committee adopts the regulations without comment as Appendix Two to Digest 4/58.

8. Legislation Review Digest 4/58

Resolved, on the motion of Mr Murphy:

- That appropriate minute extracts of this meeting be published as Appendix Three to the Digest.
- That the Committee adopts the Legislation Review Digest No. 4/58 and that it be signed by the Chair and presented to the House.

9. Regulations to be reviewed

The Committee noted the table attached listing the status of regulations and statutory instruments to be reviewed.

10. General business

...

11. Next Meeting

The meeting adjourned at 3.09pm until 9 October 2023 at 3.00pm.