Legislation Review Committee

PARLIAMENT OF
NEW SOUTH WALES

Legislation Review Digest

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

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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 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.

Part Three: Regulations without comment

The Committee reviews all disallowable regulations which have been tabled in Parliament. However, unlike Bills, the Committee is only required by statute to report on those regulations with identified issues under section 9, rather than reporting on every regulation made.

Part Three to the Digest contains a brief summary of the regulations that do not engage with any issues under section 9 or, in the Committee's view, do not warrant further comment.

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. Combat Sports Amendment Bill 2024

Issue identified	Conclusion of Committee
Absolute liability offences	Referred
Right to the presumption of innocence – disciplinary actions without conviction	Referred
Privacy and property rights – powers of combat sport inspectors	Referred
Lack of clarity – what falls within the 'public interest'	Referred
Incorporation of extrinsic material	No further comment

2. Electoral Funding Amendment (Local Government Expenditure Caps) Bill 2024

No issues identified

3. Environmental Legislation Amendment (Hazardous Chemicals) Bill 2024

Issue identified	Conclusion of Committee
Offence regime – absolute liability offences and executive liability offences	Referred
Enforcement powers of officers – property rights	No further comment
Procedural fairness – prima facie evidence in respect to absolute liability offences	No further comment
Henry VIII clause and incorporation of laws from another jurisdiction – the IChEMS register	No further comment

4. Environmental Planning and Assessment Amendment (Sea Bed Mining and Exploration) Bill 2024

Issue identified	Conclusion of Committee
Henry VIII clause	No further comment

5. Independent Commission Against Corruption Amendment Bill 2024

Issue identified	Conclusion of Committee
Privacy rights and procedural fairness – information-sharing with unknown recipients	Referred
Non-reviewable decision to disclose/communicate information	Referred

6. Local Government Amendment (De-amalgamations) Bill 2024

Issue identified	Conclusion of Committee
Henry VIII clauses	No further comment

7. Prevention of Cruelty to Animals Amendment (Virtual Stock Fencing) Bill 2024*

No issues identified

8. Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2023*

Issue identified	Conclusion of Committee
Freedom of contract and real property rights	Referred
Freedom of contract – broad discretionary powers of the Tribunal	Referred
Absolute liability offence	No further comment
Retrospectivity	Referred
Matters deferred to regulations	Referred

PART TWO – REGULATIONS

1. Biosecurity Order (Permitted Activities) Amendment Order (No 2) 2023

Issue identified	Conclusion of Committee
Information gathering power set out in a note	Referred

2. Childcare and Economic Opportunity Fund Regulation 2023

Issue identified	Conclusion of Committee
Wide delegation of administrative power	Referred

3. Health Practitioner Regulation (Adoption of National Law) Regulation 2023

Issue identified	Conclusion of Committee
Regulations incorporating new criminal offences subject to regulations made outside NSW	Referred

4. Motor Accidents (Lifetime Care and Support) Act 2006 – the Lifetime Care and Support Guidelines

Issue identified	Conclusion of Committee
Right of autonomy – no requirement for injured persons' consent	Referred

5. Transport Administration (General) Amendment (Northern Rivers Rail Trail-Bentley to Lismore) Regulation 2023

Issue identified	Conclusion of Committee
Removal of right to compensation	No further comment

6. Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation (No 2) 2023

Issue identified	Conclusion of Committee
Henry VIII clause	No further comment

Summary of Conclusions

PART ONE – BILLS

1. Combat Sports Amendment Bill 2024

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

Absolute liability offences

The Bill proposes to insert a number of new absolute liability offences into the *Combat Sports Act 2013* and the *Combat Sports Regulation 2014* concerning registered persons, attending medical practitioners and referees. Failure to comply with these provisions will amount to offences that carry a maximum penalty ranging from 20 penalty units ($2 200) to 1 000 penalty units ($110 000). Under proposed section 66A of the Act, a referee who fails to comply with the requirements under the provision would constitute an offence carrying a maximum penalty that may include 12 months imprisonment. 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.

The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance, which in this case is intended to protect the health and safety of combat sport contestants. The Committee also notes that most of the offences under the proposed amendments only carry a monetary penalty. In these circumstances, the Committee makes no further comment about the creation of absolute liability offences generally.

However, proposed section 66A would impose on a referee the requirement to immediately suspend and then not resume a contest in certain circumstances. Failure to do so would constitute an offence carrying a monetary and custodial penalty of $55 000 (500 penalty units) and/or imprisonment for 12 months. While the Committee acknowledges this absolute liability offence is also intended to protect the health and safety of combatants, the potential custodial penalty of up to 12 months imprisonment would significantly impact an individual referee's rights to liberty and freedom of movement. Given the potential custodial penalty, the Committee refers this provision to Parliament for its consideration.

Right to the presumption of innocence – disciplinary actions without conviction

The Bill seeks to insert Part 2A into the *Combat Sports Act 2013*. Division 2 of Part 2A would empower the Combat Sports Authority to take disciplinary action against an attending medical practitioner, whether or not the practitioner has been convicted of an offence against the Act, the regulations or any other law.

This may mean that an attending medical practitioner could be disciplined for alleged (or likely) contravention of the Act or the Regulation, which may constitute an offence, without the need for the practitioner to be charged or convicted of that contravention. By permitting disciplinary actions which are a form of punishment against practitioners without a conviction of any relevant offence, the Bill may therefore impact an individual's right to the presumption of innocence. This right protects an accused person's privilege to be presumed innocent until proved guilty according to law.

The Committee acknowledges that the provision is intended to ensure compliance with new accreditation requirements for attending medical practitioners, therefore ensuring the safety of

combat sports for combatants. It also recognises that the Authority must consider any response given by the attending medical practitioner in deciding whether to take disciplinary action, or not. However, the Committee notes that a disciplinary action is a corrective action or punishment which has a lower standard of proof than criminal proceedings. Because a disciplinary action could lead to the cancellation or suspension of a practitioner's accreditation, an individual could be prevented from working as an attending practitioner on the basis of a contravention of the Act or Regulation without having to establish the offence of that contravention. For these reasons, the Committee refers this matter to Parliament for its consideration.

Privacy and property rights – powers of combat sport inspectors

The Bill proposes to grant broad entry, search and seizure powers to combat sport inspectors by inserting sections 85A to 85C into the *Combat Sports Act 2013*. These include powers to enter premises with or without a search warrant, search the premises for evidence, require production of any documents and seize any documents or things suspected to relate to an offence under the Act for the purpose of exercising the inspector's functions under section 85. Entry to and search of premises without the occupier's consent can be authorised by applying for a search warrant from an authorised officer. By providing for broad powers to enter, search and seize items, the Bill may impact on a person's privacy and property rights.

The Committee notes that a combat sport inspector may only enter premises where they reasonably believe combat sports related activities will take place, or to apply for a search warrant and execute a search where they reasonably believe a premises is connected with a contravention or offence under the Act, the regulations or the rules. The Committee also acknowledges that the enforcement powers are intended to protect health and safety by preventing unregulated or non-permitted combat sports activities. However, the Committee notes that the Authority can appoint a public service employee as a combat sport inspector under the Act, who may be able to exercise these broad powers to ensure the compliance of a combat sport contest. Given the broad range of 'public service employees', this may make it difficult for a lay person to identify who is an inspector and therefore authorised to exercise such broad enforcement powers. 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

Lack of clarity – what falls within the 'public interest'

The Bill proposes to amend the *Combat Sports Act 2013* to prescribe the ground of 'contrary to the public interest' for refusal by the Authority of an application for registration as a combatant, industry participant or promoter, and for the Authority to take disciplinary action against a registered combatant, industry participant or promoter on this ground.

The Bill or the Act does not appear to have provisions which would help narrow what the 'public interest' means. Also, it appears that the Authority is not required to provide reasons when refusing an application or taking disciplinary action of the ground of public interest. Therefore, the Bill may provide the Authority with a broad discretionary power to refuse a registration application, or to take disciplinary action, which may impact applicants or registrants capacity to conduct combat sports activities and businesses.

The Committee acknowledges that an applicant may apply to the Civil and Administrative Tribunal for an administrative review of any decisions made under sections 13 and 25 of the Act, as well as under Division 4 of Part 2. However, the Committee notes that without legislative definitions or limitations, 'contrary to the public interest' could be, broadly interpreted, which may make it

difficult for affected persons to understand or navigate the regulatory framework, or seek a review of a registration refusal or decision to take disciplinary action. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of extrinsic material

The Bill proposes to replace section 16 of the *Combat Sports Act 2013*, to provide the Authority with the power to prescribe guidelines relating to the registration of former professional combatants in amateur classes. These guidelines would be published on the Authority's website and must be considered when deciding whether to register a former professional into an amateur class, or not.

The guidelines may prescribe circumstances that could impact the eligibility of a combatant to be registered and compete as an amateur, which may affect individual combatants' right to compete. The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.

However, the Committee recognises that the proposed amendments are intended to promote the development of the combat sports sector and protect health and safety of combatants. The Committee also acknowledges that prescribing such information in guidelines may enable greater flexibility and responsiveness to changing regulatory practices. For these reasons, the Committee makes no further comment.

2. Electoral Funding Amendment (Local Government Expenditure Caps) Bill 2024

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

3. Environmental Legislation Amendment (Hazardous Chemicals) Bill 2024

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

Offence regime – absolute liability offences and executive liability offences

The Bill looks to amend the *Protection of the Environment Operations Act 1997* to insert Part 9.3E, which includes provisions establishing a number of new criminal offences for contravening or failing to comply with the regulation of industrial chemicals under that Part. These offences carry a maximum penalty of $250 000 or $500 000 for individuals and $1 million or $2 million for other entities, as well as an additional penalty of $60 000 for individuals and $120 000 for other entities for each day the offence continues. The Bill therefore may provide for absolute liability offences. 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.

Additionally, the Bill proposes to amend sections 169 and 169A of the Act to include these new offences as 'special executive liability offences' and 'general executive liability offences' respectively. This would extend the criminal liability for an offence committed by a corporation to its executive, directors or other person with influence over the corporation's decision-making.

For the new offences that would be classified as 'special executive liability offences', an executive may be charged, prosecuted and even convicted with requiring the corporation to be proceeded against or convicted. These executives are also taken to have committed the offence that the corporation is alleged to have committed unless they can prove they could not influence that contravening conduct or used due diligence to try and prevent it.

Therefore, the Bill may also allow for the conviction of people through the extension of criminal liability for corporate offending, without having to convict and thus establish beyond a reasonable doubt that the corporation committed that offence. This may mean an accused person may be convicted of an offence arising from corporate criminal conduct not otherwise punished by law.

Additionally, by providing that an accused person is taken to have committed the corporate offence unless they can prove certain defences, the Bill may also reverse the onus of proof in criminal actions. 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 absolute liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that these offences are intended to strengthen compliance with the regulations around hazardous chemicals, which go towards protecting the wider community from dangerous environmental impacts. It also acknowledges that the maximum penalties carried by the strict liability offences are not custodial and only monetary. In the circumstances, the Committee makes no further comment regarding the creation of new absolute liability offences proposed by the Bill.

However, the Committee notes that individuals who are convicted of the special executive liability offences may be sentenced to the maximum penalty carried by the underlying offence which was committed by the corporation. These maximum penalties for corporations are significantly high monetary sums, even though they do not include custodial penalties. It further notes that this may result in individuals being punished more severely than the corporations guilty of committing the underlying offence. For these reasons, the Committee refers the matter of extending special executive criminal liability to Parliament for its consideration.

Enforcement powers of officers – property rights

The Bill amends the *Protection of the Environment Operations Act 1997* to grant authorised officers under the Act wide enforcement powers relating to industrial and environmentally hazardous chemicals. These include powers to enter premises, stop and detain vehicles, take samples from vehicles, seize substances, require those substances to be kept in a place by an occupier, and require a person assist the officer in carrying out certain functions.

The Bill may therefore grant authorised officers wide powers of enforcement. The exercise of these enforcement powers may impact an individual's property rights by permitting officers to enter land, detain vehicles and seize materials without the consent of the owners.

However, the Committee recognises that these provisions are intended to strengthen the enforcement and compliance of the legislative framework regulating the management and use of dangerous chemicals which may have a harmful impact on public health and the environment if

misused. The Committee also acknowledges that similar compliance powers apply to the regulation of other serious environmental issues like hazardous waste. In the circumstances, the Committee makes no further comment.

Procedural fairness – prima facie evidence in respect to absolute liability offences

The Bill proposes to insert additional subsections (v) to (z) to section 261(2) of the *Protection of the Environment Operations Act 1997*. This would expand the matters for which the CEO of the EPA or a designated officer may issue a certificate as prima facie evidence of the matters set out in the certificate. Specifically, proposed subsections (v) to (z) concern matters relating to a chemical control order, chemical use notice, or matters concerning the NSW IChEMS register. These certificates would be admissible in any proceedings under the Act.

In common law, evidence that is deemed prima facie evidence means that it proves the matters set out in it without requiring the party who is admitting that evidence to establish its credibility or validity. It requires an opposing party to rebut the prima facie presumption – that is, prove that the evidence does not sufficiently prove the matters it seeks to establish.

The Committee notes that the matters proposed by the amendments may relate to whether a person has contravened an absolute liability offence provision of the Act relating to industrial and environmentally hazardous chemicals. Therefore, the Bill may impact an accused person's right to procedural fairness as it enables the admission of evidence as prima facie proof of matters which may establish the commission of the offence.

However, the Committee recognises that the Bill does not prevent an accused person from rebutting the matters that are established as prima facie under the Act. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause and incorporation of laws from another jurisdiction – the IChEMS register

The Bill proposes to insert section 296A into the *Protection of the Environment Operations Act 1997* which would broadly apply an industrial chemicals environmental management register set out in Commonwealth law in NSW. Proposed section 296A would also provide a regulation-making power to modify the Commonwealth register as it applies in NSW, including adding, changing or removing a matter. These regulations modifying the Commonwealth register would prevail in any inconsistency with later amendments to the Commonwealth register.

The Bill may therefore broadly apply Commonwealth laws in NSW, which may amount to a wide delegation of the NSW Parliament's legislative powers to the Commonwealth and the Executive who may make regulations modifying Commonwealth laws. The Committee also notes that the regulation-making power proposed by section 296A amounts to a Henry VII clause, by allowing the Executive to alter or amend the operation of a provision of the Act. The Committee generally considers Henry VIII clauses in bills to be an inappropriate delegation of legislative powers, as regulations do not receive the same level of parliamentary scrutiny as primary legislation.

However, the Committee acknowledges that the application of the Commonwealth register is intended to ensure consistency in the environmental management of potentially harmful chemicals across Australia. It also recognises that the power to amend the application of a Commonwealth register in NSW by way of regulation may be intended to build in administrative flexibility, to ensure that the management of these chemicals can be efficiently updated. In the circumstances, the Committee makes no further comment.

4. Environmental Planning and Assessment Amendment (Sea Bed Mining and Exploration) Bill 2024

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

Henry VIII clause

The Bill proposed to insert Schedule 10 into the *Environmental Planning and Assessment Act 1979*. Section 3 of this proposed Schedule provides for a regulation-making power to exempt certain activities from the prohibition under subsection 2(1) of the Schedule, namely sea bed mineral exploration or recovery and sea bed petroleum exploration or recovery. Before making such regulations, subsection 3(2) would require the Minister to consult with the Minister administering the *Protection of the Environment Operations Act 1997*.

Therefore, the Bill would insert a provision that may amount to a Henry VIII clause by allowing the Executive to make regulations that alter the operation of the parent Act without reference to the Parliament. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers.

However, the Committee recognises that any regulations made under this provision must be tabled in Parliament and are therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. It also notes that the Minister must consult with the Minister administering the *Protection of the Environment Operations Act 1997* before making any such regulations. Further, it is intended that regulations can only be made in limited circumstances. As a result, the Committee makes no further comment.

5. Independent Commission Against Corruption Amendment Bill 2024

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

Privacy rights and procedural fairness – information-sharing with unknown recipients

The Bill seeks to amend the *Independent Commission Against Corruption Act 1988* to allow the recipient of protected information under the Act to record or disclose the information to another person, if it is in accordance with a direction made by a Commissioner or Inspector of the Independent Commission Against Corruption (ICAC) under subsection 111(4)(c). This information is information acquired by reason of, or in the course of, the exercise of a person's functions under the Act and is protected from recording or disclosure under section 111. One of the principal functions of the ICAC is to investigate any allegation or complaint of corrupt conduct that may have occurred, may be occurring or may be about to occur.

Therefore, the Bill may have the potential to impact an individual's privacy rights by permitting protected information, including private information relating to an ICAC investigation into corrupt conduct, being recorded or further disclosed to a third person. The Committee notes that the proposed amendments do not require the direction to name who the person or authority may disclose further information to, and it is unclear whether that person is prohibited from further recording or communicating the information.

The Committee also notes that the Bill does not appear to provide an avenue for parties affected by a direction to further disclose information to be heard before the direction is given. Therefore, the Bill may limit a person's right to procedural fairness, in circumstances where the information being released may implicate them in corrupt conduct investigations.

The Committee acknowledges that the ICAC has a number of significant investigative powers and secrecy protections to enable it to carry out its functions. Providing an avenue for a person who may be the subject of an investigation to be heard on whether or not to disclose information affecting them may impede on the ICAC's ability to perform these functions. It also recognises that subsection 111(4A)(b) proposed by the Bill provides that the Commissioner or Inspector's direction may include conditions or restrictions on the making of a recording or disclosure of information.

However, these conditions or restrictions are not legislated and are at the discretion of the Commissioner or Inspector. The Committee recognises that the decision to allow disclosures of otherwise protected information may have serious adverse consequences on individuals, including reputational damage and loss of employment. For these reasons, 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

Non-reviewable decision to disclose/communicate information

The Bill seeks to amend the *Independent Commission Against Corruption Act 1988* to allow a Commissioner or Inspector to make a direction under subsection 111(4)(c) that the recipient of otherwise protected information under the Act may further record or communicate that information to a third person. This information which would be otherwise protected from being disclosed under subsection 111(2) is information acquired by reason of, or in the course of, the exercise of a person's functions under the Act.

The Committee notes that there does not appear to be any provisions in the Act or Bill which sets a reviewable standard or legislated considerations that must be satisfied before the otherwise protected information can be further recorded or communicated to a third party. As noted earlier, the proposed amendments would not require the direction to name who may receive disclosed protected information under a direction or that any affected person to be given an opportunity to be heard before a direction is made. In the absence of a legislated standard or considerations, the Committee notes that these decisions may amount to non-reviewable decisions for affected parties, including individuals whose privacy rights may be affected.

The Committee acknowledges that the subsection 111(4)(c) requires the Commissioner or Inspector to certify that an initial disclosure is necessary in the public interest. However, it is not clear from the proposed amendments whether the Commissioner or Inspector must also certify that the further recording or disclosure of information to a third person is necessary in the public interest. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Local Government Amendment (De-amalgamations) Bill 2024

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

Henry VIII clauses

The Bill proposes to insert a further Part into Schedule 8 of the *Local Government Act*, which would retrospectively apply proposed section 218CD to de-amalgamation proposals made before the Bill commences as an Act. Clause (3) of this Part would provide a regulation-making power to address savings or transitional issues relating to existing de-amalgamation proposals, including making provisions in regulations that are inconsistent with the Act.

By allowing regulations to make operative provisions that are inconsistent with the Act, this clause may amount to a Henry VIII clause by allowing the Executive to alter the operation of the parent Act without reference to the Parliament. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers.

However, the Committee notes that any regulations made under this clause would have to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. It also acknowledges the regulation-making power is limited to transitional and savings provisions and are unlikely to impact personal rights and liberties. In the circumstances, the Committee makes no further comment.

7. Prevention of Cruelty to Animals Amendment (Virtual Stock Fencing) Bill 2024*

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

8. Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2023*

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

Freedom of contract and real property rights

The Bill seeks to amend the *Residential Tenancies Act 2010* to remove the right of landlords to give 'no grounds' termination notices for tenancies in New South Wales. The proposed amendments prescribe specific grounds for a landlord to issue a termination notice for a fixed term or periodic residential tenancy agreement, effectively requiring that the landlord give 'reasons' for terminating a tenancy agreement. This would place restrictions and limits on the rights and obligations of landlords who are contracting parties to a residential tenancy agreement. Therefore, the Bill may impact a property owner's contract and property rights by limiting the way in which they may use their property.

The Committee recognises that the Bill would provide tenants with some protections from eviction by requiring that certain grounds are met. It also acknowledges that the proposed amendments are intended to ensure that evictions of tenants are on genuine grounds. However, the Committee notes that the right of a property owner to use their private property and freedom of contract are fundamental legal rights. The grounds proposed by the Bill provide for limited reasons for which a landlord may issue a termination notice and does not allow for other circumstances where a property owner may wish to end a tenancy agreement. For these reasons, the Committee refers this matter to Parliament for its consideration.

Freedom of contract – broad discretionary powers of the Tribunal

The Bill seeks to amend the *Residential Tenancies Act 2010* to grant the NSW Civil and Administrative Tribunal broad discretionary powers. Proposed subsections 84(3) and 85(3) would enable the Tribunal to make termination orders if it is satisfied that it is 'appropriate in the circumstances', among other things. The Bill also proposes to insert new section 85B into the Act, which would allow the Tribunal to make a broad range of orders relating to remedies to tenants for the termination of a residential tenancy agreement. This includes the power to make an order that a residential tenancy contract exists between a landlord and a tenant, if the Tribunal considers it 'appropriate in the circumstances'.

Therefore, the Bill may provide the Tribunal with a discretionary power to interfere with the fundamental common law principle of freedom of contract. A principle of contract law is that contracts are to be freely entered into by consenting parties without interference by tribunals or courts, and that the parties are free to choose the contractual terms to which they are subject. While courts may be asked to give effect to the intentions of the parties to a contract, it does not have the power to make or remake a contract. Caselaw has reiterated this view.

The Committee recognises that allowing the Tribunal to make these discretionary orders is intended to encourage compliance with the requirements for grounds on termination proposed by the Bill, and to provide remedies to tenants for non-compliance. However, the Committee notes that allowing the Tribunal to enforce or create a contract on the broad discretionary ground of 'appropriateness' may impact the common law principle of freedom of contract. Given how fundamental an individual's right to freedom of contract is to the common law on contracts, the Committee refers this matter to Parliament for its consideration.

Absolute liability offence

The Bill seeks to amend the *Residential Tenancies Act 2010* to require landlords use a premises the subject of a terminated residential tenancy agreement in accordance with the ground on which a termination notice was issued and given effect. Failure to comply with this requirement is an offence which carries a maximum penalty of 100 penalty units ($11 000).

The Bill may therefore establish absolute liability offences. 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 recognises that absolute liability offences are not uncommon in regulating compliance in these circumstances. It also notes that the offence carries a maximum penalty that is monetary, not custodial, and similar to penalties for offences related to false or misleading conduct. The Committee also notes that section 93 of the Act allows a landlord to apply to the Tribunal for a termination order if it is satisfied that the landlord would suffer undue hardship otherwise. In the circumstances, the Committee makes no further comment.

Retrospectivity

The Bill seeks to insert a transitional provision into Schedule 2 of the *Residential Tenancies Act 2010*, to provide that the Bill's provisions extend to a residential tenancy agreement entered into before the commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

While the Committee acknowledges that this retrospective application may be intended to ensure that all tenants have access to the proposed protections, the proposed amendments may impact individuals' fundamental rights as well as creating new absolute liability offences and broad remedies. For this reason, the Committee refers this matter to Parliament for its consideration.

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

Matters deferred to regulations

The Bill seeks to amend the *Residential Tenancies Act 2010* to require grounds to be given in order to issue a termination notice. Proposed subsections 84(1)(d) and 85(1)(d) would allow other grounds to be prescribed by regulations. Failure to establish or validly use land for the grounds given may result in the Tribunal not making a termination order or making orders requiring the

landlord to remedy a tenant who received a termination notice, or otherwise may expose the landlord to criminal liability. The Committee generally prefers that such substantive matters which may impact an individual's rights, liberties or obligations under law to be set out in primary legislation, to ensure an appropriate level of parliamentary scrutiny.

The Committee acknowledges that delegating the prescription of further grounds for termination to regulations may be intended to build more flexibility into the regulatory framework. However, the Committee notes that what amounts to a ground for termination may impact a person's freedom of contract, property rights and their potential compensation or criminal liability. Therefore, it is the Committee's view that these matters should be clearly specified in primary legislation to ensure that individuals are able to clearly ascertain their rights and obligations. For these reasons, the Committee refers the matter to Parliament for its consideration.

PART TWO – REGULATIONS

1. Biosecurity Order (Permitted Activities) Amendment Order (No 2) 2023

Form or intention calls for elucidation: s 9(1)(b)(vii) of the LRA

Information gathering power set out in a note

This Order replaces clause 96 of the *Biosecurity Order (Permitted Activities) 2019*. New subclause 96(2) allows a person to import a grain harvester or comb trailer from Queensland if certain requirements have been met. It also includes a new note that 'an authorised officer may direct a person to provide a copy of the delivery manifest to the officer'.

While unclear, this note could be made in accordance with section 93 of the *Biosecurity Act 2015*, which provides that an authorised officer can require a person to furnish the officer with information and records for an authorised purpose. However, the note in clause 96 of the Regulation does not refer to any provision of the Act and does not clarify the source of the power to direct the provision of a delivery manifest. This may mean that it is unclear to a lay person what is the operative effect of the note if any, and the potential consequence for failure to comply with the request. For these reasons, the Committee refers this matter to Parliament for its consideration.

2. Childcare and Economic Opportunity Fund Regulation 2023

The regulation may not have been within the general objects of the legislation under which it was made: s 9(1)(b)(iii) of the LRA

Wide delegation of administrative power

The Regulation provides that the Childcare and Economic Opportunity Fund Board, the Chairperson of that Board or the Minister administering the *Childcare and Economic Opportunity Fund Act 2022* can delegate their functions to a staff member of the Department of Education. Under the Act, these functions include approving the payment of funds from the Childcare and Economic Opportunity Fund.

Therefore, the regulation may permit a staff member of the Department to approve the payment of funds, if that function is delegated by the Board to a staff member as a category of authorised

persons. This may provide for a broad delegation of significant administrative powers exercised under the Act.

The Committee acknowledges that delegating functions to departmental staff members may be intended to support administrative efficiency. However, the Committee notes that 'staff of the Department of Education' includes a very broad and diverse range of public servants employed by the Department. As the approval of payments from public funds is a significant administrative power, the Committee considers that the broadly-worded delegation may weaken the Board's oversight of the decision-making process and therefore limit Executive accountability. The public may expect decisions about funding to be informed by the expertise of the Board, which is anticipated by the objects of the Act. For these reasons, the Committee refers this matter to Parliament to consider specifying which members of staff of the Department may be delegated functions in regulations, to limit the potentially wide delegation.

3. Health Practitioner Regulation (Adoption of National Law) Regulation 2023

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

Regulations incorporating new criminal offences subject to regulations made outside NSW

The Regulation inserts section 115A into the *Health Practitioner Regulation National Law Act 2009* which creates an offence for medical practitioners or other persons who are not members of a surgical class misrepresenting themselves as surgeons. These offences attract maximum penalties of $60,000 and/or 3 years imprisonment for individuals. The Committee generally prefers criminal offences to be created by primary legislation rather than regulations, to ensure an appropriate level of parliamentary scrutiny. This is particularly the case where the offences carry potential custodial penalties.

Additionally, the Regulation makes amendments by way of a Henry VIII clause, to incorporate amendments to a model national law which is contained in an Act of Queensland Parliament. The amendments incorporated allows the Ministerial Council, made up of the relevant Health Ministers across all participating Australian jurisdictions, to prescribe classes of medical practitioners as a surgical class by way of 'national regulations'. Under the model national law, a national regulation continues to have effect in every participating jurisdiction until a majority of jurisdictions disallow it. The Committee notes that the criminal liability of individuals in NSW may be dependent on delegation legislation which is enacted by a council which sits outside of the Executive of NSW. This may effectively delegate legislative power of the NSW Parliament to the Ministerial Council, which cannot be removed by the NSW Parliament once in place without a majority of other jurisdictions.

The Committee acknowledges that the amendments are intended to protect public safety and maintain a national standard for the regulation of Australian health practitioners. The Committee recognises that allowing the Ministerial Council to prescribe additional classes of practitioners as a 'surgical class' by the making of regulations may allow for needed administrative flexibility in the regulatory scheme. It further acknowledges that there is greater parliamentary oversight by requiring regulations to adopt amendments made in Queensland to the model national law, rather than automatically applying, and that the regulations are still subject to disallowance under section 41 of the *Interpretation Act*.

However, the new offences inserted by the Regulation carries a potentially significant custodial penalty. The scope of these offences can be dependent on 'national regulations' made by an external body, which takes these regulations outside the scrutiny of the NSW Parliament.

Additionally, even though national regulations can be disallowed, they may have continuing effect in NSW after disallowance, if a majority of participating jurisdictions have not also disallowed the regulation. For these reasons, the Committee refers the matter to Parliament for its consideration.

4. Motor Accidents (Lifetime Care and Support) Act 2006 – the Lifetime Care and Support Guidelines

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

Right of autonomy – no requirement for injured persons' consent

The Lifetime Care and Support Guidelines sets out provisions for the administration of the Lifetime Care and Support Scheme established by the *Motor Accidents (Lifetime Care and Support) Act 2006*. Clause 1.2 of the Guidelines echoes sections 8 and 9 of the Act, by providing that an insurer may make an application for an injured person to participate in the Scheme, without the injured person's consent.

The Committee previously reported in Digest No.3 of 2006 on the *Motor Accidents (Lifetime Care and Support) Bill 2006,* which enacted the Act. Consistent with the Committee's comments on subsection 8(2), the Committee notes that the Guidelines remove the need to obtain the consent of injured persons from becoming participants in the Scheme. Therefore, the Guidelines may impact an injured person's right to personal autonomy by permitting significant decisions about their ongoing care to be made without their consent.

The Committee further notes that, consistent with its previous comments, participation in the Scheme without consent may subject an injured person to ongoing assessment of treatment and care needs by the Authority, to which they may reasonably wish to object. Additionally, an injured person may wish to seek damages which may not be available to them if they are accepted as lifetime participants.

The Committee acknowledges that the Guidelines do not go further than the Act, which permits applications to be made for an injured person without their consent. However, the Committee notes that both the Act and the Guidelines do not appear to provide an injured person with the option of withdrawing an application to participate, or their participation once accepted in the Scheme. Because the Guidelines do not provide any additional guidance on the rights of injured persons who are participants or the subject of applications to the Scheme without consent, the Committee refers the matter to Parliament for further consideration.

5. Transport Administration (General) Amendment (Northern Rivers Rail Trail-Bentley to Lismore) Regulation 2023

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

Removal of right to compensation

The Regulation amends the *Transport Administration (General) Regulation 2018* to allow the owner of transport infrastructure in a specified rail corridor to lease land for specified purposes. It inserts section 15C to provide that a sublease of an authorised lease may be entered into, also for the same specified purposes. It also inserts part 2, section 6 to provide that the lessee of land is not liable to pay compensation to their sublessee, if the sublease is terminated because the lease is terminated by the Minister.

The Regulation excludes the right of a sublessee to seek compensation if the sublease is terminated which includes compensation for losses resulting from the termination. By removing this right to compensation, the Regulation may therefore limit an individual's contractual rights available under common law.

However, the Committee acknowledges that the Regulation deals with land that is vested in a state owned corporation and the provisions may provide certainty over the State's compensation liability in administering the land. For this reason, the Committee makes no further comment.

6. Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation (No 2) 2023

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

Henry VIII clause

The Regulation replaces subclause 252(2) of the *Water Management (General) Regulation 2018* to effectively limit the lands designated as floodplains by clause 12 of Schedule 9 to the *Water Management Act 2000.* The Regulation provides that only the 15 lands listed are to be designated floodplains for the Water Management Act. This amendment removes previously eligible land under Schedule 9 of the Water Management Act.

Under the Water Management Act, replacement floodplain harvesting access licences can be granted to landholders who had fully constructed eligible floodplain harvesting works on their land before 3 July 2008. Eligible works are dependent on whether they are constructed on a 'floodplain'. Therefore, the Regulation may effectively change how the floodplain harvesting access licence regime under the Act operates by way of a Henry VIII clause. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers and prefers changes to how Acts operate be done through amending Acts to ensure it is subject to appropriate parliamentary scrutiny.

However, the Committee notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. It also recognises that allowing regulations to limit what lands are eligible for replacement licences may provide necessary administrative flexibility over technical matters. In the circumstances, the Committee makes no further comment.

Part One – Bills

1. Combat Sports Amendment Bill 2024

Date introduced	7 February 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Stephen Kamper MP
Portfolio	Sport

Purpose and description

1.1 The object of this Bill is to amend the *Combat Sports Act 2013* (the **Act**) and the *Combat Sports Regulation 2014* (the **Regulation**) for the purposes of implementing particular recommendations arising from the Combat Sports Authority (the **Authority**) of NSW's review of the Act, including to:

(a) prescribe the circumstances in which a contest should be stopped or suspended for combatant health and safety

(b) provide for mandatory training relating to the management of concussion and head injuries for industry participants, promoters, referees, combat sports inspectors and combatants

(c) provide for the accreditation of attending medical practitioners to ensure attending medical practitioners have relevant qualifications, skills and experience including mandatory training relating to the management of concussion and head injuries

(d) provide for the rules to mandate the medical equipment required to be available at combat sport contests

(e) provide for improved management of pre-contest and post-contest medical examinations and medical suspensions

(f) strengthen incentives for industry participants and combatants to self-report failed medical examinations and medical suspensions imposed in other jurisdictions

(g) clarify the period for which serological certificates remain current

(h) improve match-making requirements and processes and fight card provisions

(i) update and simplify provisions relating to registration, including initial eligibility for registration and renewals, and enable the Authority to prescribe prerequisite skills and training

(j) provide for the registration of amateur referees, judges and timekeepers

(k) make particular information included on the registers of registered combatants, industry participants and promoters publicly available

(l) strengthen penalties and offences

(m) increase the maximum term for which the Authority members may be appointed from 6 to 9 years,

(n) introduce other minor legislative changes to clarify requirements and obligations and reduce red tape and administrative burden relating to the regulation of combat sports in New South Wales.

Background

1.2 In his second reading speech, the Hon. Stephen Kamper MP, Minister for Sport, explained that the amendments proposed by the Bill would implement recommendations from the second phase of the statutory review of the Act and the Regulation.[1] He noted that these amendments are intended to both 'minimise the risk to combatants of concussion and other serious head injuries' and 'modernise the regulation of combat sports'. The Minister further stated that the Bill 'includes important safety reforms' and, in introducing the reforms, said:

> This bill will improve the combat sports legislative framework to promote the health and safety of combatants and reduce the regulatory burden. These amendments are significant for the combat sports sector and have been the subject of extensive consultation.

1.3 The Minister explained that the Bill seeks to implement key reforms, including:

(a) changing the way in which amateur and professional combat sport contests are distinguished

(b) introducing a new definition of 'close associate' for those applying to be registered as promoters or managers

(c) introducing automatic suspensions of a combatant's registration

(d) creating a public register of registered persons to help organise contests

(e) including mandatory concussion and other serious head injury training for all registered persons

(f) introducing an accreditation class for attending medical practitioners.

[1] NSW Government Office of Sport, *Review of the Combat Sports Act 2013*, February 2024.

Issues considered by the Committee

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

Absolute liability offences

1.4 The Bill proposes to insert several new absolute liability offences into the Act and the Regulation relating to all registered persons. These provisions would, at the pain of criminal penalty, require:

(a) a registered person to comply with the conditions on the approval, the registration or the permit (proposed sections 8(4A), 14(6), 27(5) and 42(4) of the Act).

(b) a combatant to notify the Authority of particular medical suspensions, the medical practitioner's certificate and any refusal by the medical practitioner to issue a certificate of fitness (proposed sections 16E(2) and 50(3) of the Act and proposed clause 9B(2) of the Regulation).

(c) a combatant to notify the Authority about results of directed examinations and results of combat sport contests outside New South Wales (proposed clauses 9C(2) and 9D of the Regulation).

(d) the match-maker to comply with the requirements for combatants included on fight card (proposed clause 24A of the Regulation).

(e) the promoter of an amateur combat sport contest to make sure that a representative of the relevant approved amateur body attends the weigh-in (proposed clause 25(3) of the Regulation).

(f) the promoter to supply medical equipment as required (proposed clause 41A of the Regulation).

(g) the promoter to ensure that at least one medical practitioner and one representative of the approved amateur body attends all combat sport contests (proposed clauses 50A and 50B of the Regulation).

(h) a combatant to only engage in a relevant combat sport contest if registration requirements have been met (proposed clauses 59(5), 59(6) and 59(8) of the Regulation).

1.5 Failure to comply with these provisions would carry a maximum penalty, ranging from $2 200 (20 penalty units) to $11 000 (100 penalty units).

1.6 Under proposed Part 2A of the Act, new offences relating to the accreditation of attending medical practitioners would be established, including:

(a) failure to be accredited as attending medical practitioners, carrying a maximum penalty of $5 500 (50 penalty units) (proposed section 37A(1)).

(b) failure to engage an accredited medical practitioner at a contest, carrying a maximum penalty of $55 000 (500 penalty units) or $110 000 (1 000 penalty units) for other entities (proposed section 37A(2)).

(c) failure to comply with the conditions imposed on the persons' accreditation, carrying a maximum penalty of $5 500 (50 penalty units) (proposed section 37D(5)).

(d) carrying out an activity as, or exercising a function of an attending medical practitioner while suspended, carrying a maximum penalty of $5 500 (50 penalty units) (proposed section 37K).

1.7 The Bill also proposes to insert section 66A into the Act, which would require the referee for a combat sport contest to immediately suspend the contest in certain circumstances (subsection (1)) and, after suspending the contest, to not resume the contest until certain conditions are met (subsection (4)). Failure of a referee to comply with section 66A would be an offence which carries a maximum penalty of $55 000 (500 penalty units) and/or imprisonment for 12 months.

The Bill proposes to insert a number of new absolute liability offences into the *Combat Sports Act 2013* and the *Combat Sports Regulation 2014* concerning registered persons, attending medical practitioners and referees. Failure to comply with these provisions will amount to offences that carry a maximum penalty ranging from 20 penalty units ($2 200) to 1 000 penalty units ($110 000). Under proposed section 66A of the Act, a referee who fails to comply with the requirements under the provision would constitute an offence carrying a maximum penalty that may include 12 months imprisonment. 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.

The Committee acknowledges that absolute liability offences are not uncommon in regulatory frameworks to encourage compliance, which in this case is intended to protect the health and safety of combat sport contestants. The Committee also notes that most of the offences under the proposed amendments only carry a monetary penalty. In these circumstances, the Committee makes no further comment about the creation of absolute liability offences generally.

However, proposed section 66A would impose on a referee the requirement to immediately suspend and then not resume a contest in certain circumstances. Failure to do so would constitute an offence carrying a monetary and custodial penalty of $55 000 (500 penalty units) and/or imprisonment for 12 months. While the Committee acknowledges this absolute liability offence is also intended to protect the health and safety of combatants, the potential custodial penalty of up to 12 months imprisonment would significantly impact an individual referee's rights to liberty and freedom of movement. Given the potential custodial penalty, the Committee refers this provision to Parliament for its consideration.

Right to the presumption of innocence – disciplinary actions without conviction

1.8 Division 2 of Part 2A of the Act proposed by the Bill makes provisions in respect to disciplinary actions against an attending medical practitioner that could be taken by the Authority. Proposed section 37F sets out the grounds on which the Authority may take disciplinary action:

- attending medical practitioners no longer being medical practitioners or having their practitioner's registration suspended
- attending medical practitioners not being able to satisfactorily exercise the functions of an attending medical practitioner
- contravening, or is believed on reasonable grounds to be likely to contravene, the Act, regulations or rules, or any other law that would be considered a contravention of these laws,
- not complying, or is believed on reasonable grounds to be likely to not comply, with a condition of their accreditation
- no longer holding appropriate current medical indemnity insurance
- any other ground prescribed by the regulations.

1.9 Under proposed section 37I(3), the Authority may take disciplinary action against the attending medical practitioner regardless of 'whether or not the attending medical practitioner has been convicted of an offence against this Act, the regulations or any other law'.

The Bill seeks to insert Part 2A into the *Combat Sports Act 2013*. Division 2 of Part 2A would empower the Combat Sports Authority to take disciplinary action against an attending medical practitioner, whether or not the practitioner has been convicted of an offence against the Act, the regulations or any other law.

This may mean that an attending medical practitioner could be disciplined for alleged (or likely) contravention of the Act or the Regulation, which may constitute an offence, without the need for the practitioner to be charged or convicted of that contravention. By permitting disciplinary actions which are a form of punishment against practitioners without a conviction of any relevant offence, the Bill may therefore impact an individual's right to the presumption of innocence. This right protects an accused person's privilege to be presumed innocent until proved guilty according to law.

The Committee acknowledges that the provision is intended to ensure compliance with new accreditation requirements for attending medical practitioners, therefore ensuring the safety of combat sports for combatants. It also recognises that the Authority must consider any response given by the attending medical practitioner in deciding whether to take disciplinary action, or not. However, the Committee notes that a disciplinary action is a corrective action or punishment which has a lower standard of proof than criminal proceedings. Because a disciplinary action could lead to the cancellation or suspension of a practitioner's accreditation, an individual could be prevented from

working as an attending practitioner on the basis of a contravention of the Act or Regulation without having to establish the offence of that contravention. For these reasons, the Committee refers this matter to Parliament for its consideration.

Privacy and property rights – powers of combat sport inspectors

1.10 Under section 84 of the Act, the Authority may appoint a public service employee to be a combat sport inspector with the approval of the Chief Executive of the Office of Sport. A combat sport inspector has the following functions under section 85 of the Act:

(a) to monitor and report to the Authority on the compliance of relevant persons

(b) to attend combat sport contests and weigh-ins for combat sport contests.

1.11 The Bill proposes to amend the Act by inserting sections 85A to 85C, to provide combat sport inspectors with greater regulatory powers. These sections would expand inspectors' powers to:

(a) enter premises where an inspector knows or reasonably believes a combat sport contest or related activity is to be held, within 24 hours before the scheduled start of that activity or at any time if it is the location of sparring, without a warrant (section 85A)

(b) apply to an authorised officer (i.e. a magistrate, local court registrar or authorised employee of the Attorney General's Department) for a search warrant of premises the inspector reasonably believes was the site of a contravention (section 85B(1))

(c) enter premises with a search warrant and search the premises for evidence of a contravention (section 85B(3)(a) and (b))

(d) after entering premises with a search warrant, require any person on the premises to produce any document on the premises (section 85C(1)(b)) and seize any document, or any other thing that the inspector reasonably believes it connected with an offence under the Act, the regulations or the rules (section 85C(1)(f)).

1.12 In his second reading speech, the Minister explained that these powers 'are necessary to ensure that combat sport inspectors have appropriate powers to stop non-permitted events from taking place'.

The Bill proposes to grant broad entry, search and seizure powers to combat sport inspectors by inserting sections 85A to 85C into the *Combat Sports Act 2013*. These include powers to enter premises with or without a search warrant, search the premises for evidence, require production of any documents and seize any documents or things suspected to relate to an offence under the Act for the purpose of exercising the inspector's functions under section 85. Entry to and search of premises without the occupier's consent can be authorised by applying for a search warrant from an authorised officer. By providing

for broad powers to enter, search and seize items, the Bill may impact on a person's privacy and property rights.

The Committee notes that a combat sport inspector may only enter premises where they reasonably believe combat sports related activities will take place, or to apply for a search warrant and execute a search where they reasonably believe a premises is connected with a contravention or offence under the Act, the regulations or the rules. The Committee also acknowledges that the enforcement powers are intended to protect health and safety by preventing unregulated or non-permitted combat sports activities. However, the Committee notes that the Authority can appoint a public service employee as a combat sport inspector under the Act, who may be able to exercise these broad powers to ensure the compliance of a combat sport contest. Given the broad range of 'public service employees', this may make it difficult for a lay person to identify who is an inspector and therefore authorised to exercise such broad enforcement powers. 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

Lack of clarity – what falls within the 'public interest'

1.13 Sections 9 and 20 of the Act provide for the registration requirements for combatants, industry participants and promoters. Failure to comply with these registration requirements is an offence that carries a maximum penalty of 6 months imprisonment.

1.14 Sections 13(2) and 25(2) prescribe the circumstances in which the Authority must refuse to register an applicant as a combatant, industry participant or promoter. The Bill proposes to insert subsections 13(2)(c2) and 25(2)(c1) into the Act, which expands the circumstances in which the Authority must refuse to register an applicant to include where the Authority believes that granting the registration would be 'contrary to the public interest'.

1.15 The Bill also proposes to insert subsection 30(1)(e) into the Act, which adds 'contrary to the public interest' as an additional ground on which disciplinary action may be taken against a registered combatant, industry participant or promoter.

The Bill proposes to amend the *Combat Sports Act 2013* to prescribe the ground of 'contrary to the public interest' for refusal by the Authority of an application for registration as a combatant, industry participant or promoter, and for the Authority to take disciplinary action against a registered combatant, industry participant or promoter on this ground.

The Bill or the Act does not appear to have provisions which would help narrow what the 'public interest' means. Also, it appears that the Authority is not required to provide reasons when refusing an application or taking disciplinary action of the ground of public interest. Therefore, the Bill may provide the Authority with a broad discretionary power to refuse a registration application, or to take disciplinary action, which may impact applicants or registrants capacity to conduct combat sports activities and businesses.

The Committee acknowledges that an applicant may apply to the Civil and Administrative Tribunal for an administrative review of any decisions made under sections 13 and 25 of the Act, as well as under Division 4 of Part 2. However, the Committee notes that without legislative definitions or limitations, 'contrary to the public interest' could be, broadly interpreted, which may make it difficult for affected persons to understand or navigate the regulatory framework, or seek a review of a registration refusal or decision to take disciplinary action. For these reasons, the Committee refers the matter to Parliament for its consideration.

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

Incorporation of extrinsic material

1.16 The Bill proposes to replace section 16 of the Act, which provides that the Authority may determine guidelines concerning the registration of former professional combatants in amateur classes. Under proposed subsection 16(3), the Authority must publish any guidelines relating to these determinations on the Authority's website.

1.17 New subsection 16(5) would require the Authority to have regard to any guidelines published under subsection (3) when it decides whether it is appropriate to register former professional combatants in amateur combat sports classes.

1.18 In his second reading speech, the Minister said that the amendments would align NSW with other jurisdictions and ensure that the 'best athletes' can 'represent Australia'.

The Bill proposes to replace section 16 of the *Combat Sports Act 2013*, to provide the Authority with the power to prescribe guidelines relating to the registration of former professional combatants in amateur classes. These guidelines would be published on the Authority's website and must be considered when deciding whether to register a former professional into an amateur class, or not.

The guidelines may prescribe circumstances that could impact the eligibility of a combatant to be registered and compete as an amateur, which may affect individual combatants' right to compete. The Committee generally comments on any legislative provisions that permits the incorporation of external materials like guidelines and gives those materials legal force. It also prefers substantive matters to be set out in legislation or to be published in the Gazette and tabled in Parliament as regulations, where they can be subject to disallowance and therefore to appropriate parliamentary scrutiny.

However, the Committee recognises that the proposed amendments are intended to promote the development of the combat sports sector and protect health and safety of combatants. The Committee also acknowledges that prescribing such information in guidelines may enable greater flexibility and responsiveness to changing regulatory practices. For these reasons, the Committee makes no further comment.

2. Electoral Funding Amendment (Local Government Expenditure Caps) Bill 2024

Date introduced	8 February 2024
House introduced	Legislative Council
Minister with carriage	The Hon. John Graham MLC
Portfolio	Special Minister of State

Purpose and description

2.1 The object of this Bill is to amend the *Electoral Funding Act 2018* (the **Act**):

(a) to clarify certain indexation provisions about local government election campaign electoral expenditure caps

(b) to make other minor amendments.

Background

2.2 Under the Act, the end of an election period triggers the indexation of the amounts for the electoral expenditure cap and for office accommodation to be excluded from the caps.

2.3 The Bill proposes amendments to Schedule 1, clauses 3(3) and 5B(3) of the Act to clarify that local government general elections held on a day other than the ordinary day scheduled by the *Local Government Act 1993* are to be disregarded for the purpose of determining the end of an election period. It also proposes to insert subclauses 3(8) and (9) into Schedule 1 to define the end date of a specific election period as 4 December 2021.

2.4 In his second reading speech, the Hon. John Graham MLC, Special Minister of State, explained that these amendments are intended to set 'the adjustment of the current amounts as if the first election period ended on 4 December 2021, being the date of the last local government elections'. He further stated that these amendments are intended to resolve the 'uncertainty' around when to index expenditure caps, caused by the postponement of local government elections in 2020 during the COVID-19 pandemic.

2.5 Subclauses 3(4A) and 5B(4A) proposed to be inserted into Schedule 1 would clarify that, where a local government election is delayed for no more than 28 days by an order under the *Local Government Act 1993*, the electoral expenditure cap amounts and the office accommodation amounts to be excluded from the caps continue to apply.

2.6 The Bill also seeks to amend sections 32, 103, 106, 108, 129, 130 and 158, which the Minister noted were 'requested by officers of the NSW Electoral Commission to improve administration and enforcement of the Act'.

Issues considered by the Committee

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

3. Environmental Legislation Amendment (Hazardous Chemicals) Bill 2024

Date introduced	8 February 2024
House introduced	Legislative Council
Minister with carriage	The Hon. Penny Sharpe MLC
Portfolio	Environment

Purpose and description

3.1 The object of this Bill is to amend the *Protection of the Environment Operations Act 1997* (the **Act**) to implement national reforms to the management and control of certain chemicals by—

(a) applying the Commonwealth register under the *Industrial Chemicals Environmental Management (Register) Act 2021* of the Commonwealth to New South Wales (the **NSW IChEMS register**), and

(b) enabling the Environment Protection Authority (the **EPA**) to publish chemical use notices to require information to be given to the EPA, and

(c) creating offences relating to compliance with the NSW IChEMS register and chemical use notices, and

(d) dealing with certain licences, applications, orders and offences in the Act as a consequence of the repeal of the *Environmentally Hazardous Chemicals Act 1985* (the **Repealed Act**), and

(e) making other consequential amendments.

Background

3.2 The Bill proposes a package of significant reforms to update the broader legislative framework regulating the use and management of hazardous chemicals in NSW. The Statement of Public Interest attached to the Bill summarises the broad effect of the proposed amendments:[2]

(a) Implementing the 'Industrial Chemicals Environmental Management Standard' (**IChEMS**) which was developed collectively by all governments in Australia to ensure consistency in the management of industrial chemicals across Australian jurisdictions.

(b) Enabling the EPA to require manufacturers and users of specified chemicals in NSW to give the Authority information about that chemical, to support the oversight and implementation of the IChEMS on those substances.

[2] Tabled document, NSW Government, Statement of Public Interest – Environmental Legislation Amendment (Hazardous Chemicals) Bill 2024, 8 February 2024.

(c) Streamlining the regulatory framework for managing the environmental risks of industrial chemicals by repealing and transferring over key provisions of the Repealed Act to the Act.

3.3 In her second reading speech on the Bill, the Hon. Penny Sharpe MLC, Minister for the Environment, said that the amendments proposed are intended to 'strengthen the regulation of industrial chemicals in New South Wales'. She went on to highlight the importance of properly overseeing and managing the use of these chemicals:

> Industrial chemicals can, and do, provide benefits that make life better for all of us. Most of the chemicals used in Australia do not pose significant risks to people or the environment. But some, if not managed responsibly, can endanger ecosystems and affect human health. That is because they are toxic to living things and do not readily break down in the environment.
>
> There can also be significant economic consequences associated with cleaning up and remediating contaminated sites. A number of major environmental incidents in New South Wales have been attributed to poor industrial chemical management practices.

Issues considered by the Committee

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

Offence regime – absolute liability offences and executive liability offences

3.4 The Bill proposes to insert a number of provisions into the Act, including inserting Part 9.3E which provides for the management and control of certain industrial chemicals. Proposed Part 9.3E would establish new offences relating to the use, management and control of these chemicals. These include offences for:

- Doing anything that is prohibited in the NSW IChEMS register, unless it is authorised by an environment protection licence or done in a way that is an exception to the prohibition (section 296C).
- A licence holder if any person contravenes a 'phase-out' condition of an environment protection licence (section 296E).
- Failing to comply with a chemical use notice, which requires a person to provide information by a certain time and pay a fee to the EPA (section 296F).
- Carrying on an activity relating to a chemical which contravenes a chemical control order (section 296L).

3.5 These offences carry a maximum penalty of $250 000 or $500 000 (and $60 000 for each day the offence continues) for individuals, and $1 million or $2 million (and $120 000 for each day the offence continues) for entities.

3.6 Additionally, the Bill seeks to amend sections 169 and 169A of the Act, which extends liability for the above listed offences to directors or other people who are concerned in the management of a corporation that commits one of these offences. Specifically, for the offences under proposed sections 296C and 296E, the inclusion of these offences under section 169 as 'special executive liability offences' would permit an executive to charged, prosecuted and convicted of these offences regardless of whether the corporation has been 'proceeded against or convicted'.

3.7 Section 169 also provides that the directors and/or managers are taken to have committed the offence unless they can satisfy the court that they were not in a position to influence the contravening conduct of the corporation or that they used all due diligence to prevent that conduct.

The Bill looks to amend the *Protection of the Environment Operations Act 1997* to insert Part 9.3E, which includes provisions establishing a number of new criminal offences for contravening or failing to comply with the regulation of industrial chemicals under that Part. These offences carry a maximum penalty of $250 000 or $500 000 for individuals and $1 million or $2 million for other entities, as well as an additional penalty of $60 000 for individuals and $120 000 for other entities for each day the offence continues. The Bill therefore may provide for absolute liability offences. 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.

Additionally, the Bill proposes to amend sections 169 and 169A of the Act to include these new offences as 'special executive liability offences' and 'general executive liability offences' respectively. This would extend the criminal liability for an offence committed by a corporation to its executive, directors or other person with influence over the corporation's decision-making.

For the new offences that would be classified as 'special executive liability offences', an executive may be charged, prosecuted and even convicted with requiring the corporation to be proceeded against or convicted. These executives are also taken to have committed the offence that the corporation is alleged to have committed unless they can prove they could not influence that contravening conduct or used due diligence to try and prevent it.

Therefore, the Bill may also allow for the conviction of people through the extension of criminal liability for corporate offending, without having to convict and thus establish beyond a reasonable doubt that the corporation committed that offence. This may mean an accused person may be convicted of an offence arising from corporate criminal conduct not otherwise punished by law.

Additionally, by providing that an accused person is taken to have committed the corporate offence unless they can prove certain defences, the Bill may also reverse the onus of proof in criminal actions. 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.[3] 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 absolute liability offences are not uncommon in regulatory settings to encourage compliance. It further notes that these offences are intended to strengthen compliance with the regulations around hazardous chemicals, which go towards protecting

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

the wider community from dangerous environmental impacts. It also acknowledges that the maximum penalties carried by the strict liability offences are not custodial and only monetary. In the circumstances, the Committee makes no further comment regarding the creation of new absolute liability offences proposed by the Bill.

However, the Committee notes that individuals who are convicted of the special executive liability offences may be sentenced to the maximum penalty carried by the underlying offence which was committed by the corporation. These maximum penalties for corporations are significantly high monetary sums, even though they do not include custodial penalties. It further notes that this may result in individuals being punished more severely than the corporations guilty of committing the underlying offence. For these reasons, the Committee refers the matter of extending special executive criminal liability to Parliament for its consideration.

Enforcement powers of officers – property rights

3.8 The Bill looks to amend the Act to extend the compliance and enforcement powers of authorised officers to matters relating to industrial chemicals. Specifically, it proposes to insert:

- Subsection 196(b1) to allow an authorised officer to enter premises that they reasonably suspect is the site where an industrial or environmentally hazardous chemical offence is being or likely to be committed.

- Section 206A to empower an authorised officer to stop, take samples of and detain a vehicle that they suspect on reasonable grounds is transporting an industrial or environmentally hazardous chemical. The authorised officer can also seize and remove the substance and the vehicle or its container and direct the occupier of a place to keep that seized substance, if the officer suspects on reasonable grounds that substance or vehicle is connected with an offence under the Act.

- Subsection 206A(3) extends sections 199A to 202 of the Act to the exercise of the above listed powers under section 206A. This extension would empower an officer to request assistance in carrying out their compliance powers under proposed section 206A, although the officer would be required to take care when exercising those functions and to compensate an affected person for any damage caused.

The Bill amends the *Protection of the Environment Operations Act 1997* to grant authorised officers under the Act wide enforcement powers relating to industrial and environmentally hazardous chemicals. These include powers to enter premises, stop and detain vehicles, take samples from vehicles, seize substances, require those substances to be kept in a place by an occupier, and require a person assist the officer in carrying out certain functions.

The Bill may therefore grant authorised officers wide powers of enforcement. The exercise of these enforcement powers may impact an individual's property rights by permitting officers to enter land, detain vehicles and seize materials without the consent of the owners.

However, the Committee recognises that these provisions are intended to strengthen the enforcement and compliance of the legislative framework regulating the management and use of dangerous chemicals which may have a harmful impact on public health and the environment if misused. The Committee also acknowledges that similar compliance powers apply to the regulation of other serious environmental issues like hazardous waste. In the circumstances, the Committee makes no further comment.

Procedural fairness – prima facie evidence in respect to absolute liability offences

3.9 Section 261 of the Act provides that a document signed by the CEO of the EPA or a designated officer which certifies any of the matters listed in subsection (2) is admissible in any proceedings under the Act as 'prima facie evidence of the matters so certified'.

3.10 The Bill proposes to insert subsections (v) and (z) to section 261(2) to include the following in that list of matters which can be the subject of a certificate of prima facie evidence:

> (v) that, at a specified time, a chemical was or was not the subject of a chemical control order,
>
> (w) that, at a specified time, a chemical control order was or was not subject to specified conditions,
>
> (x) that, at a specified time, a chemical was or was not the subject of a chemical use notice,
>
> (y) that, at a specified time, an industrial chemical was or was not listed in the NSW IChEMS register,
>
> (z) that, at a specified time, a risk management measure was or was not specified in the NSW IChEMS register for an industrial chemical.

The Bill proposes to insert additional subsections (v) to (z) to section 261(2) of the *Protection of the Environment Operations Act 1997*. This would expand the matters for which the CEO of the EPA or a designated officer may issue a certificate as prima facie evidence of the matters set out in the certificate. Specifically, proposed subsections (v) to (z) concern matters relating to a chemical control order, chemical use notice, or matters concerning the NSW IChEMS register. These certificates would be admissible in any proceedings under the Act.

In common law, evidence that is deemed prima facie evidence means that it proves the matters set out in it without requiring the party who is admitting that evidence to establish its credibility or validity. It requires an opposing party to rebut the prima facie presumption – that is, prove that the evidence does not sufficiently prove the matters it seeks to establish.

The Committee notes that the matters proposed by the amendments may relate to whether a person has contravened an absolute liability offence provision of the Act relating to industrial and environmentally hazardous chemicals. Therefore, the Bill may impact an accused person's right to

procedural fairness as it enables the admission of evidence as prima facie proof of matters which may establish the commission of the offence.

However, the Committee recognises that the Bill does not prevent an accused person from rebutting the matters that are established as prima facie under the Act. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause and incorporation of laws from another jurisdiction – the IChEMS register

3.11 As noted earlier, the Bill proposes amendments to the Act that would incorporate the IChEMS in NSW. Specifically, it looks to insert section 296A into the Act, which provides that the Commonwealth IChEMS register set out in the *Industrial Chemicals Environmental Management (Register) Act 2021* (Cth) applies in NSW as the NSW IChEMS register.

3.12 Proposed subsections 296A(2) would allow regulations to modify the Commonwealth register for the purposes of the NSW register 'including by adding, varying or omitting matter'. Additionally, proposed subsection (3) provides that any such regulation prevail to the extent of any inconsistency with a later amendment to the Commonwealth register.

The Bill proposes to insert section 296A into the *Protection of the Environment Operations Act 1997* which would broadly apply an industrial chemicals environmental management register set out in Commonwealth law in NSW. Proposed section 296A would also provide a regulation-making power to modify the Commonwealth register as it applies in NSW, including adding, changing or removing a matter. These regulations modifying the Commonwealth register would prevail in any inconsistency with later amendments to the Commonwealth register.

The Bill may therefore broadly apply Commonwealth laws in NSW, which may amount to a wide delegation of the NSW Parliament's legislative powers to the Commonwealth and the Executive who may make regulations modifying Commonwealth laws. The Committee also notes that the regulation-making power proposed by section 296A amounts to a Henry VII clause, by allowing the Executive to alter or amend the operation of a provision of the Act. The Committee generally considers Henry VIII clauses in bills to be an inappropriate delegation of legislative powers, as regulations do not receive the same level of parliamentary scrutiny as primary legislation.

However, the Committee acknowledges that the application of the Commonwealth register is intended to ensure consistency in the environmental management of potentially harmful chemicals across Australia. It also recognises that the power to amend the application of a Commonwealth register in NSW by way of regulation may be intended to build in administrative flexibility, to ensure that the management of these chemicals can be efficiently updated. In the circumstances, the Committee makes no further comment.

4. Environmental Planning and Assessment Amendment (Sea Bed Mining and Exploration) Bill 2024

Date introduced	7 February 2024
House introduced	Legislative Assembly
Minister responsible	The Hon. Paul Scully MP
Portfolio	Planning and Public Spaces

Purpose and description

4.1 The object of this Bill is to amend the *Environmental Planning and Assessment Act 1979* (the **Act**) to prohibit the carrying out of sea bed petroleum and mineral exploration and recovery and related development.

Background

4.2 The Bill proposes to make amendments to the Act to prohibit sea bed petroleum and mineral exploration and recovery, and related development within NSW.

4.3 In his second reading speech, the Hon. Paul Scully MP, Minister for Planning and Public Spaces, explained that the Bill would amend the Act to 'prohibit the carrying out of seabed petroleum and mineral exploration and recovery' and 'other development anywhere within the State, including in the State's coastal waters, for the purposes of seabed petroleum or mineral exploration or recovery'.

4.4 The Bill seeks to give effect to this prohibition in the coastal waters of NSW by inserting Schedule 10 into the Act which establishes a new offence in section 2. This offence is subject to the maximum tier 1 monetary penalty, which is $5 000 000 for a corporation and $1 000 000 for an individual. Subsection 2(1) provides that a person must not carry out:

(a) sea bed petroleum exploration or recovery, or sea bed mineral exploration or recovery, in the coastal waters of the State,

(b) other development within the State for the purposes of sea bed petroleum or recovery or sea bed mineral exploration or recovery.

4.5 Subsection 3(3) of proposed Schedule 10 provides that 'sea bed petroleum exploration or recovery' and 'sea bed mineral exploration or recovery' in subsection 2(1) includes those activities 'whether within the coastal waters of the State or elsewhere.'

4.6 Section 4 of proposed Schedule 10 prohibits the Minister from granting or renewing an authorisation that relates to a development proposed to be prohibited in section 2, including authorisations under the *Offshore Minerals Act 1999* and *Petroleum (Offshore) Act 1982*.

Issues considered by the Committee

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

Henry VIII clause

4.7 Section 3 of Schedule 10 proposed to be inserted into the Act by the Bill sets out a regulation-making power to exempt certain activities from the proposed prohibition on sea bed petroleum and mineral activities under subsection 2(1). Subsection 3(2) requires the Minister to consult with the Minister administering the *Protection of the Environment Operations Act 1997* before making a regulation exempting activities.

4.8 The Minister stated in his second reading speech that this regulation-making power seeks to provide 'additional flexibility for exceptions' and is intended to 'accommodate other limited exceptions that offer an environmental or public benefit, and which are deemed necessary through the implementation of the Bill.'

> **The Bill proposed to insert Schedule 10 into the *Environmental Planning and Assessment Act 1979*. Section 3 of this proposed Schedule provides for a regulation-making power to exempt certain activities from the prohibition under subsection 2(1) of the Schedule, namely sea bed mineral exploration or recovery and sea bed petroleum exploration or recovery. Before making such regulations, subsection 3(2) would require the Minister to consult with the Minister administering the *Protection of the Environment Operations Act 1997*.**
>
> **Therefore, the Bill would insert a provision that may amount to a Henry VIII clause by allowing the Executive to make regulations that alter the operation of the parent Act without reference to the Parliament. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers.**
>
> **However, the Committee recognises that any regulations made under this provision must be tabled in Parliament and are therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. It also notes that the Minister must consult with the Minister administering the *Protection of the Environment Operations Act 1997* before making any such regulations. Further, it is intended that regulations can only be made in limited circumstances. As a result, the Committee makes no further comment.**

5. Independent Commission Against Corruption Amendment Bill 2024

Date introduced	7 February 2024
House introduced	Legislative Assembly
Minister with carriage	The Hon. Jo Haylen MP
Portfolio	Minister for Transport

Purpose and description

5.1 The object of this Bill is to amend the *Independent Commission Against Corruption Act 1988* (the **Act**):

(a) to allow certain information disclosed under the Act to be further disclosed by the recipient in particular circumstances,

(b) to provide that the Commission must give a copy of a corruption prevention recommendation made about a public authority to the relevant public authority and relevant Minister.

Background

5.2 In her second reading speech, the Hon. Jo Haylen MP, Minister for Transport, highlighted that the Bill's proposed amendments to the Act are intended to support the functions of the Independent Commission Against Corruption (**ICAC**):

> It is in the public interest that the ICAC is provided with an appropriate legislative framework that enables the efficient and effective exercise of its principal functions. The Government is committed to ensuring that the ICAC is effective, strong and independent. This bill is evidence of that commitment.

5.3 The Minister explained the amendments to section 111E proposed by the Bill would implement recommendation 8 of ICAC's report on 'Operation Keppel'.[4] These proposed amendments would require Ministers and the Presiding Officer of either House of Parliament to respond to corruption prevention recommendations made by ICAC. Currently, this requirement only applies to "a public authority".

5.4 The Bill further proposes amendments to section 111 of the Act. Section 111(2) of the Act prohibits certain people under subsection (1) from recording or communicating information obtained through their functions under the Act, although there are exceptions under subsections 111(3) and (4). Proposed subsections 111(4A) and 111(5A) would provide for recording or further disclosing information currently prohibited under the Act. The Minister noted in her second reading speech that these amendments were requested by the Chief Commissioner of the ICAC.

[4] Independent Commission Against Corruption New South Wales, *Investigation into the Conduct of the then Member of Parliament for Wagga Wagga and then Premier and Others (Operation Keppel)*, June 2023.

Issues considered by the Committee

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

Privacy rights and procedural fairness – information-sharing with unknown recipients

5.5 Section 111(4)(c) of the Act allows information that is otherwise prohibited from being recorded or communicated to be disclosed to an authority or person in accordance with a direction of a Commissioner or Inspector of the ICAC, if they certify that 'it is necessary to do so in the public interest'. Section 111(5) also prohibits an authority or person who receives the information under subsection (4)(c), as well as any person or employee under their control, from recording or further communicating that information unless it is for the purposes of an ICAC prosecution or disciplinary proceeding.

5.6 The Bill proposes to insert subsection 111(4A), which would allow a direction under subsection (4)(c) to specify that the authority or person who receives the information, or another person or employee under their control, may:

(a) make a record of that information, or

(b) share/communicate that information to another person.

5.7 Under the proposed amendments, the direction under subsection 111(4) may also include conditions or restrictions that apply to the making of the record or divulging or communicating of the information'. The Bill also proposes to insert 111(5A) which would exempt an authority or person (or somebody under their control) from the prohibition under subsection (5) for recording or disclosing information in accordance with a direction.

5.8 In her second reading speech, the Minister explained the public interest need for these amendments:

> There are circumstances where the further release of the information would not prejudice the ICAC's operations and would otherwise be appropriate or in the public interest. There will be circumstances where it is in the public interest to make certain information public but that is not currently provided for in the ICAC Act. Such an amendment ensures that the legislative protection of the secrecy of the ICAC's work is not applied beyond the circumstances in which it is necessary for the ICAC to perform its functions. This proposed amendment will increase the transparency of the ICAC and also retain the flexibility needed to ensure its effective operation, including by imposition of appropriate and adapted secrecy provisions.

The Bill seeks to amend the *Independent Commission Against Corruption Act 1988* to allow the recipient of protected information under the Act to record or disclose the information to another person, if it is in accordance with a direction made by a Commissioner or Inspector of the Independent Commission Against Corruption (ICAC) under subsection 111(4)(c). This information is information acquired by reason of, or in the course of, the exercise of a person's functions under the Act and is protected from recording or disclosure under section 111. One of the principal functions of the ICAC is to investigate any allegation or

complaint of corrupt conduct that may have occurred, may be occurring or may be about to occur.

Therefore, the Bill may have the potential to impact an individual's privacy rights by permitting protected information, including private information relating to an ICAC investigation into corrupt conduct, being recorded or further disclosed to a third person. The Committee notes that the proposed amendments do not require the direction to name who the person or authority may disclose further information to, and it is unclear whether that person is prohibited from further recording or communicating the information.

The Committee also notes that the Bill does not appear to provide an avenue for parties affected by a direction to further disclose information to be heard before the direction is given. Therefore, the Bill may limit a person's right to procedural fairness, in circumstances where the information being released may implicate them in corrupt conduct investigations.

The Committee acknowledges that the ICAC has a number of significant investigative powers and secrecy protections to enable it to carry out its functions. Providing an avenue for a person who may be the subject of an investigation to be heard on whether or not to disclose information affecting them may impede on the ICAC's ability to perform these functions. It also recognises that subsection 111(4A)(b) proposed by the Bill provides that the Commissioner or Inspector's direction may include conditions or restrictions on the making of a recording or disclosure of information.

However, these conditions or restrictions are not legislated and are at the discretion of the Commissioner or Inspector. The Committee recognises that the decision to allow disclosures of otherwise protected information may have serious adverse consequences on individuals, including reputational damage and loss of employment. For these reasons, 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

Non-reviewable decision to disclose/communicate information

5.9 As noted above, the Bill proposes to insert 111(4A), which would allow a direction under section 111(4)(c) to specify that the authority or person who receives protected information may:

(a) make a record of that information, or

(b) disclose or communicate that information to another person.

The Bill seeks to amend the *Independent Commission Against Corruption Act 1988* to allow a Commissioner or Inspector to make a direction under subsection 111(4)(c) that the recipient of otherwise protected information under the Act may further record or communicate that information to a third person. This information which would be otherwise protected from being disclosed under subsection 111(2) is

information acquired by reason of, or in the course of, the exercise of a person's functions under the Act.

The Committee notes that there does not appear to be any provisions in the Act or Bill which sets a reviewable standard or legislated considerations that must be satisfied before the otherwise protected information can be further recorded or communicated to a third party. As noted earlier, the proposed amendments would not require the direction to name who may receive disclosed protected information under a direction or that any affected person to be given an opportunity to be heard before a direction is made. In the absence of a legislated standard or considerations, the Committee notes that these decisions may amount to non-reviewable decisions for affected parties, including individuals whose privacy rights may be affected.

The Committee acknowledges that the subsection 111(4)(c) requires the Commissioner or Inspector to certify that an initial disclosure is necessary in the public interest. However, it is not clear from the proposed amendments whether the Commissioner or Inspector must also certify that the further recording or disclosure of information to a third person is necessary in the public interest. For these reasons, the Committee refers the matter to Parliament for its consideration.

6. Local Government Amendment (De-amalgamations) Bill 2024

Date introduced	6 February 2024
House introduced	Legislative Assembly
Minister responsible	The Hon. Ron Hoenig MP
Portfolio	Local Government

Purpose and description

6.1 The object of this Bill is to make amendments to the *Local Government Act 1993* (the **Act**) about the de-amalgamation of amalgamated local government areas.

Background

6.2 The Bill seeks to make amendments to the Act to facilitate the de-amalgamation of merged local government areas.

6.3 In his second reading speech, the Minister explained that the Bill is 'enshrining a permanent and effective pathway for councils that wish to demerge are able to do so'. He explained that the current section 218CC of the Act prevent councils giving effect to a de-amalgamation process.

6.4 The Bill proposes to insert section 218CD into the Act to allow councils to provide a business case for a de-amalgamation proposal to the Minister. The Minister can then approve the holding of a referendum on the proposal.

6.5 Proposed sub-section 218CD(7) provides that, if a proposal is supported by the majority of votes in the merged local government area, the Minister can recommend to the Governor that proclamations are made giving effect to the de-amalgamation proposal.

6.6 The Bill also proposes to insert Schedule 10 into the Act, to make further provisions about de-amalgamation. Part 2 of Schedule 10 includes provisions about the information that merged councils must include in a business case for a de-amalgamation proposal and Part 3 deals with how referendums can be held.

Issues considered by the Committee

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

Henry VIII clauses

6.7 The Bill proposes to insert a further Part into Schedule 8 of the Act, which makes savings and transitional provisions. The proposed Part includes provisions addressing de-amalgamation proposals submitted to the Minister before the Bill commences.

6.8 Clause (3) of this proposed Part would provide that regulations can be made addressing savings or transitional issues for de-amalgamation proposals that were

submitted under existing section 218CC of the Act. The proposed clause provides that the regulations may also include provisions inconsistent with the Act.

The Bill proposes to insert a further Part into Schedule 8 of the *Local Government Act*, which would retrospectively apply proposed section 218CD to de-amalgamation proposals made before the Bill commences as an Act. Clause (3) of this Part would provide a regulation-making power to address savings or transitional issues relating to existing de-amalgamation proposals, including making provisions in regulations that are inconsistent with the Act.

By allowing regulations to make operative provisions that are inconsistent with the Act, this clause may amount to a Henry VIII clause by allowing the Executive to alter the operation of the parent Act without reference to the Parliament. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers.

However, the Committee notes that any regulations made under this clause would have to be tabled in Parliament and therefore subject to disallowance under section 41 of the *Interpretation Act 1987*. It also acknowledges the regulation-making power is limited to transitional and savings provisions and are unlikely to impact personal rights and liberties. In the circumstances, the Committee makes no further comment.

7. Prevention of Cruelty to Animals Amendment (Virtual Stock Fencing) Bill 2024*

Date introduced	8 February 2024
House introduced	Legislative Assembly
Member responsible	Mr Philip Donato, MP
	*Private Members Bill

Purpose and description

7.1 The object of this Bill is to permit the use of virtual stock fencing devices for the purposes of confining, tracking and monitoring stock animals.

Background

7.2 The Bill proposes amendments to the *Prevention of Cruelty to Animals Act 1979* (the **Act**) to exclude virtual stock fencing devices from the prohibition on the use of certain electrical devices on animals under section 16(1) of the Act. The amendments would insert a definition of 'virtual stock fencing device' as a device:

(a) consisting of GPS-enabled sensors and collars capable of delivering electric pulses and cues to stock animals, and

(b) used for the purposes of confining, tracking and monitoring stock animals.

7.3 In his second reading speech on the Bill, Mr Philip Donato MP explained that the amendments are intended to 'allow farmers to lawfully use virtual fencing in New South Wales'.

Issues considered by the Committee

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

8. Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2023*

Date introduced	8 February 2024
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong MP
	*Private Members Bill

Purpose and description

8.1 The object of this Bill is to amend the *Residential Tenancies Act 2010* (the **Act**):

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

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

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

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

Background

8.2 Under sections 84 and 85 of the Act, a landlord may give a termination notice for a fixed term tenancy or periodic agreement respectively, as long as statutory minimum notice periods are met. The Act does not currently set grounds that must be met in order for a landlord to terminate tenancy agreements.

8.3 The Bill proposes to amend these sections of the Act to prohibit 'no grounds' terminations. In her second reading speech, Ms Leong stated that the Bill would replace these sections to 'prescribe a list of genuine grounds on which landlords could terminate a fixed-term or periodic agreement'.

8.4 The amendments proposed by the Bill also seek to place other limits and requirements on terminating fixed term or periodic residential tenancy agreements, including changes to the orders that the Tribunal may make in relation to termination orders.

8.5 Ms Leong introduced the Residential Tenancies Amendment (Tenant Protections and Flood Response) Bill 2022 on 24 March 2022, which proposed similar amendments in relation to grounds required for termination of tenancy agreements. That Bill lapsed

on 21 September 2022 in accordance with Standing Orders. The Committee reported on that Bill in Digest No. 41/57.[5]

Issues considered by the Committee

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

Freedom of contract and real property rights

8.6 The Bill proposes to insert subsections 84(1) and 85(1) to set the grounds on which a termination notice may be given for a fixed term or periodic residential tenancy agreement. These grounds are:

(a) if the landlord or a person associated with the landlord intends to occupy the residential premises for at least 12 months

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

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

(d) for another ground prescribed by the regulations.

8.7 Ms Leong described the effect of the Bill's proposed amendments to sections 84 and 85 in her second reading speech:

> …the bill amends sections 84 and 85 of the Residential Tenancies Act 2010, which currently give landlords the right to terminate a fixed-term or periodic agreement without grounds. The amended sections would instead prescribe a list of genuine grounds on which landlords could terminate a fixed-term or periodic agreement, reflecting The Greens' understanding that in certain circumstances there are reasonable grounds for eviction.

The Bill seeks to amend the *Residential Tenancies Act 2010* to remove the right of landlords to give 'no grounds' termination notices for tenancies in New South Wales. The proposed amendments prescribe specific grounds for a landlord to issue a termination notice for a fixed term or periodic residential tenancy agreement, effectively requiring that the landlord give 'reasons' for terminating a tenancy agreement. This would place restrictions and limits on the rights and obligations of landlords who are contracting parties to a residential tenancy agreement. Therefore, the Bill may impact a property owner's contract and property rights by limiting the way in which they may use their property.

The Committee recognises that the Bill would provide tenants with some protections from eviction by requiring that certain grounds are met. It also acknowledges that the proposed amendments are intended to ensure that evictions of tenants are on genuine grounds. However, the

[5] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 41/57, 29 March 2022

Committee notes that the right of a property owner to use their private property and freedom of contract are fundamental legal rights. The grounds proposed by the Bill provide for limited reasons for which a landlord may issue a termination notice and does not allow for other circumstances where a property owner may wish to end a tenancy agreement. For these reasons, the Committee refers this matter to Parliament for its consideration.

Freedom of contract – broad discretionary powers of the Tribunal

8.8 The Bill looks to insert section 85B into the Act, which would prescribe remedies for the use of premises after the termination of a residential tenancy agreement. Proposed subsection 85B(2) gives the Tribunal broad discretionary powers to make orders on an application by a tenant of a terminated tenancy agreement. Specifically, subsection 85B(2)(b) would provide that the Tribunal may make, if it considers appropriate:

> an order deeming the premises to be subject to a residential tenancy agreement between the landlord and the tenant for a term, and on the conditions, specified by the Tribunal.

8.9 This would allow the Tribunal to seemingly create a new agreement or contract between the landlord and tenant with terms and conditions that the Tribunal deems appropriate. The Tribunal would have the broad discretionary power to deem a residential premises be the subject of a residential tenancy agreement, taking the agreement terms and conditions away from the consideration of the landlord and tenant.

8.10 The Bill also seeks to insert subsections 84(3)(b)(iii) and 85(3)(b)(iii) into the Act, to require the Tribunal to make a termination order if it is satisfied that:

(a) the termination notice was validly given and the landlord has established the ground on which it was given,

(b) the termination is appropriate in the circumstances, and

(c) the tenant has not vacated the premises as required by the notice.

The Bill seeks to amend the *Residential Tenancies Act 2010* to grant the NSW Civil and Administrative Tribunal broad discretionary powers. Proposed subsections 84(3) and 85(3) would enable the Tribunal to make termination orders if it is satisfied that it is 'appropriate in the circumstances', among other things. The Bill also proposes to insert new section 85B into the Act, which would allow the Tribunal to make a broad range of orders relating to remedies to tenants for the termination of a residential tenancy agreement. This includes the power to make an order that a residential tenancy contract exists between a landlord and a tenant, if the Tribunal considers it 'appropriate in the circumstances'.

Therefore, the Bill may provide the Tribunal with a discretionary power to interfere with the fundamental common law principle of freedom of contract. A principle of contract law is that contracts are to be freely entered into by consenting parties without interference by tribunals or courts, and that the parties are free to choose the contractual terms to which they are subject. While courts may be asked to give effect to the

intentions of the parties to a contract, it does not have the power to make or remake a contract. Caselaw has reiterated this view.[6]

The Committee recognises that allowing the Tribunal to make these discretionary orders is intended to encourage compliance with the requirements for grounds on termination proposed by the Bill, and to provide remedies to tenants for non-compliance. However, the Committee notes that allowing the Tribunal to enforce or create a contract on the broad discretionary ground of 'appropriateness' may impact the common law principle of freedom of contract. Given how fundamental an individual's right to freedom of contract is to the common law on contracts, the Committee refers this matter to Parliament for its consideration.

Absolute liability offence

8.11 The Bill would insert section 85A into the Act, which creates an offence for a landlord who fails to ensure that residential premises are used in accordance with the ground on which a termination order was made under section 84 or 85. This offence carries a maximum penalty of 100 penalty units ($11,000).

The Bill seeks to amend the *Residential Tenancies Act 2010* to require landlords use a premises the subject of a terminated residential tenancy agreement in accordance with the ground on which a termination notice was issued and given effect. Failure to comply with this requirement is an offence which carries a maximum penalty of 100 penalty units ($11 000).

The Bill may therefore establish absolute liability offences. 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 recognises that absolute liability offences are not uncommon in regulating compliance in these circumstances. It also notes that the offence carries a maximum penalty that is monetary, not custodial, and similar to penalties for offences related to false or misleading conduct. The Committee also notes that section 93 of the Act allows a landlord to apply to the Tribunal for a termination order if it is satisfied that the landlord would suffer undue hardship otherwise. In the circumstances, the Committee makes no further comment.

Retrospectivity

8.12 Clause 2 provides that the Bill would commence as an Act on the date that it is assented to. However, the Bill also seeks to insert a transitional provision at Schedule 2 to extend the amendments to a residential tenancy agreement entered into before the commencement of that Act.

8.13 The proposed amendments not only outlaw no grounds evictions, but also extend the powers of the Tribunal to issue orders relating to remedies and compensation to

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[6] See e.g. *Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd* [2004] NSWCA 114, [69]; *JPA Finance Pty Ltd (CAN 616 176 955) v Gordon Nominees Pty Ltd (CAN 004 707 617)* [2019] VSCA 159, [99].

tenants (proposed section 85B(2)(c)), and create offences for non-compliance (proposed section 85A).

The Bill seeks to insert a transitional provision into Schedule 2 of the *Residential Tenancies Act 2010*, to provide that the Bill's provisions extend to a residential tenancy agreement entered into before the commencement of the Bill as an Act. The Committee generally comments on provisions that are drafted to have retrospective effect because they impact on the rule of law principle that a person is entitled to have knowledge of the law that applies to them at any given time.

While the Committee acknowledges that this retrospective application may be intended to ensure that all tenants have access to the proposed protections, the proposed amendments may impact individuals' fundamental rights as well as creating new absolute liability offences and broad remedies. For this reason, the Committee refers this matter to Parliament for its consideration.

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

Matters deferred to regulations

8.14 As discussed, the Bill proposes to amend sections 84 and 85 of the Act to specify the grounds on which a landlord may give a termination notice. The grounds set out in the proposed amendments would include 'other grounds prescribed by the regulations'. Failure to use premises for the grounds given in a notice may expose a property owner to criminal liability as well as liability to remedy the tenant in accordance with an order of the Tribunal.

The Bill seeks to amend the *Residential Tenancies Act 2010* to require grounds to be given in order to issue a termination notice. Proposed subsections 84(1)(d) and 85(1)(d) would allow other grounds to be prescribed by regulations. Failure to establish or validly use land for the grounds given may result in the Tribunal not making a termination order or making orders requiring the landlord to remedy a tenant who received a termination notice, or otherwise may expose the landlord to criminal liability. The Committee generally prefers that such substantive matters which may impact an individual's rights, liberties or obligations under law to be set out in primary legislation, to ensure an appropriate level of parliamentary scrutiny.

The Committee acknowledges that delegating the prescription of further grounds for termination to regulations may be intended to build more flexibility into the regulatory framework. However, the Committee notes that what amounts to a ground for termination may impact a person's freedom of contract, property rights and their potential compensation or criminal liability. Therefore, it is the Committee's view that these matters should be clearly specified in primary legislation to ensure that individuals are able to clearly ascertain their rights and obligations. For these reasons, the Committee refers the matter to Parliament for its consideration.

Part Two – Regulations

1. Biosecurity Order (Permitted Activities) Amendment Order (No 2) 2023

Date tabled	LA: 21 November 2023 LC: 21 November 2023
Disallowance date	LA: 7 May 2024 LC: 7 May 2024
Minister responsible	The Hon. Tara Moriarty MLC
Portfolio	Agriculture

Purpose and description

1.1 This Order is made under section 404A of the *Biosecurity Act 2015* (the **Act**).

1.2 The object of this Order is to amend the *Biosecurity Order (Permitted Activities) 2019* (the **2019 Order**) which permits certain activities that would otherwise be prohibited by a mandatory measure or by a regulatory measure implemented for a biosecurity zone.

Issues considered by the Committee

Form or intention calls for elucidation: s 9(1)(b)(vii) of the LRA

Information gathering power set out in a note

1.3 This Order amends Division 5 of the 2019 Order, which makes provisions about parthenium weed carriers. It replaces clause 96 of the 2019 Order, including subclause 2 which provides that a person may import a grain harvester or comb trailer into the State from Queensland if certain requirements have been met.

1.4 Clause 96(2) amended by the Order includes a new note which states that 'an authorised officer may direct the person to provide a copy of the delivery manifest to the officer'.

> **This Order replaces clause 96 of the *Biosecurity Order (Permitted Activities) 2019*. New subclause 96(2) allows a person to import a grain harvester or comb trailer from Queensland if certain requirements have been met. It also includes a new note that 'an authorised officer may direct a person to provide a copy of the delivery manifest to the officer'.**
>
> **While unclear, this note could be made in accordance with section 93 of the *Biosecurity Act 2015*, which provides that an authorised officer can require a person to furnish the officer with information and records for an authorised purpose. However, the note in clause 96 of the Regulation does not refer to any provision of the Act and does not clarify the source**

of the power to direct the provision of a delivery manifest. This may mean that it is unclear to a lay person what is the operative effect of the note if any, and the potential consequence for failure to comply with the request. For these reasons, the Committee refers this matter to Parliament for its consideration.

2. Childcare and Economic Opportunity Fund Regulation 2023

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Prue Car MP
Portfolio	Education and Early Learning

Purpose and description

2.1 The object of this regulation is to make provision about the following:

(a) the members and procedure of the NSW Childcare and Economic Opportunity Fund Board (the **Board**)

(b) the matters that a commissioned person must consider when conducting an independent review

(c) the information that is relevant information for the preparation of a market monitoring report and the persons that can be compelled to give relevant information

(d) the use and disclosure of information obtained for the preparation of a market monitoring report

(e) the delegation of functions by the Minister for Education and Early Learning, the Board or the Chairperson of the Board,

(f) transitional arrangements for the financial year ending on 30 June 2023.

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

Issues considered by the Committee

The regulation may not have been within the general objects of the legislation under which it was made: s 9(1)(b)(iii) of the LRA

Wide delegation of administrative power

2.3 The Regulation is made under the *Childcare and Economic Opportunity Fund Act 2022* (the **Act**). The principal objective of the Act under section 4 is to increase participation in the NSW workforce, particularly for women, by making childcare more affordable and accessible. Under section 12 of the Act, the Board has numerous

functions, including to administer programs by approving the payment of money from the NSW Childcare and Economic Opportunity Fund.

2.4 Section 26 of the Act provides that the Minister, Board or Chairperson may delegate one of their functions to a member or officer of the Board, and to a person authorised by regulations. Under this delegation power, section 8 of the Regulation prescribes 'a member of staff of the Department of Education' as an authorised person who may be delegated.

The Regulation provides that the Childcare and Economic Opportunity Fund Board, the Chairperson of that Board or the Minister administering the *Childcare and Economic Opportunity Fund Act 2022* can delegate their functions to a staff member of the Department of Education. Under the Act, these functions include approving the payment of funds from the Childcare and Economic Opportunity Fund.

Therefore, the regulation may permit a staff member of the Department to approve the payment of funds, if that function is delegated by the Board to a staff member as a category of authorised persons. This may provide for a broad delegation of significant administrative powers exercised under the Act.

The Committee acknowledges that delegating functions to departmental staff members may be intended to support administrative efficiency. However, the Committee notes that 'staff of the Department of Education' includes a very broad and diverse range of public servants employed by the Department. As the approval of payments from public funds is a significant administrative power, the Committee considers that the broadly-worded delegation may weaken the Board's oversight of the decision-making process and therefore limit Executive accountability. The public may expect decisions about funding to be informed by the expertise of the Board, which is anticipated by the objects of the Act. For these reasons, the Committee refers this matter to Parliament to consider specifying which members of staff of the Department may be delegated functions in regulations, to limit the potentially wide delegation.

3. Health Practitioner Regulation (Adoption of National Law) Regulation 2023

Date tabled	LA: 21 November 2023 LC: 21 November 2023
Disallowance date	LA: 7 May 2024 LC: 7 May 2024
Minister responsible	The Hon. Ryan Park MP
Portfolio	Health

Purpose and description

3.1 The object of this Regulation is to apply an amendment to the Health Practitioner Regulation National Law, set out in the Schedule to the *Health Practitioner Regulation National Law Act 2009* of Queensland (the **National Law**), made by the *Health Practitioner Regulation National Law (Surgeons) Amendment Act 2023* of Queensland as an amendment to the *Health Practitioner Regulation National Law* (NSW).

Issues considered by the Committee

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

Regulations incorporating new criminal offences subject to regulations made outside NSW

3.2 The Regulation amends the *Health Practitioner Regulation National Law Act 2009* (the **Act**). It does so by using a Henry VIII clause contained in subsection 4(2) of the Act, which permits regulations to adopt amendments to the National Law made by an Act of Queensland Parliament into the NSW Act.

3.3 The Regulation inserted section 115A, introduced by the *Health Practitioner Regulation National Law (Surgeons) Amendment Bill 2023* (Qld), into the Act. Section 115A creates offences for medical practitioners and others knowingly or recklessly claiming themselves to be, or using the title of 'surgeon' when they are not a member of a surgical class. These offences carry maximum penalties of $60,000 and/or 3 years imprisonment for individuals and $120,000 for corporations.

3.4 The definition of 'surgical class' under subsection 115A(5) includes 'another class of medical practitioner prescribed as a surgical class by regulations made by the Ministerial Council'. Section 5 of the National Law defines the Ministerial Council as the Council of Australian Government's Health Council compromising the relevant health ministers of each Australian jurisdiction. Under section 245 of the National Law, the Ministerial Council may make national regulations for the purposes of the National Law and, once in force, these national regulations continue to have effect in each

participating jurisdiction until a majority of those jurisdictions disallow the national regulation.

The Regulation inserts section 115A into the *Health Practitioner Regulation National Law Act 2009* which creates an offence for medical practitioners or other persons who are not members of a surgical class misrepresenting themselves as surgeons. These offences attract maximum penalties of $60,000 and/or 3 years imprisonment for individuals. The Committee generally prefers criminal offences to be created by primary legislation rather than regulations, to ensure an appropriate level of parliamentary scrutiny. This is particularly the case where the offences carry potential custodial penalties.

Additionally, the Regulation makes amendments by way of a Henry VIII clause, to incorporate amendments to a model national law which is contained in an Act of Queensland Parliament. The amendments incorporated allows the Ministerial Council, made up of the relevant Health Ministers across all participating Australian jurisdictions, to prescribe classes of medical practitioners as a surgical class by way of 'national regulations'. Under the model national law, a national regulation continues to have effect in every participating jurisdiction until a majority of jurisdictions disallow it. The Committee notes that the criminal liability of individuals in NSW may be dependent on delegation legislation which is enacted by a council which sits outside of the Executive of NSW. This may effectively delegate legislative power of the NSW Parliament to the Ministerial Council, which cannot be removed by the NSW Parliament once in place without a majority of other jurisdictions.

The Committee acknowledges that the amendments are intended to protect public safety and maintain a national standard for the regulation of Australian health practitioners. The Committee recognises that allowing the Ministerial Council to prescribe additional classes of practitioners as a 'surgical class' by the making of regulations may allow for needed administrative flexibility in the regulatory scheme. It further acknowledges that there is greater parliamentary oversight by requiring regulations to adopt amendments made in Queensland to the model national law, rather than automatically applying, and that the regulations are still subject to disallowance under section 41 of the *Interpretation Act*.

However, the new offences inserted by the Regulation carries a potentially significant custodial penalty. The scope of these offences can be dependent on 'national regulations' made by an external body, which takes these regulations outside the scrutiny of the NSW Parliament. Additionally, even though national regulations can be disallowed, they may have continuing effect in NSW after disallowance, if a majority of participating jurisdictions have not also disallowed the regulation. For these reasons, the Committee refers the matter to Parliament for its consideration.

4. Motor Accidents (Lifetime Care and Support) Act 2006 – the Lifetime Care and Support Guidelines

Date tabled	LA: 28 November 2023 LC: 28 November 2023
Disallowance date	LA: 14 May 2024 LC: 14 May 2024
Minister responsible	The Hon. Sophie Cotsis MP
Portfolio	Work Health and Safety

Purpose and description

4.1 The Lifetime Care and Support Guidelines (the **Guidelines**) were issued under sections 28 and 58 of the *Motor Accidents (Lifetime Care and Support) Act 2006* (the **Act**). The Act provides 'a scheme for the lifetime care and support of persons injured in motor accidents; and for other purposes'.

4.2 Subsection 28(1) of the Act sets out that the Guidelines may make provision for or with respect to the assessment of the treatment and care needs of a participant in the Scheme. Subsection 58(1) of the Act sets out that the Lifetime Care and Support Authority (the **Authority**) may issue guidelines for or with respect to any matter that the Act requires or permits to be the subject of those guidelines.

4.3 The Guidelines became effective on Friday 24 November 2023, the date of gazettal in the NSW Government Gazette.

Issues considered by the Committee

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

Right of autonomy – no requirement for injured persons' consent

4.4 The Act establishes the Lifetime Care and Support Scheme (the **Scheme**) for the lifetime care and support of persons injured in motor accidents. Under sections 8 and 9 respectively, an injured person may be accepted as a participant in the Scheme without their consent. Specifically, subsection 8(2) enables insurers to make applications for persons who have suffered a motor accident injury for participation in the Scheme without their consent. Subsection 8(3) also allows the State Insurance Regulatory Authority to direct the insurer to make an application for injured persons to become a participant in the Scheme. If they are eligible, the Authority must accept them as a lifetime or interim participant under subsection 9(2).

4.5 Clause 1.2 of the Guidelines similarly provides that 'an application by an insurer does not require the consent of the [injured] person'. At the time it sends the application,

clause 2.14 also requires insurers to advise an injured person that an application has been made on their behalf and send them a copy of the application.

4.6 In accordance with clause 8 of the Guidelines, an injured person will normally be first accepted as an interim participant in the Scheme for a period of two years before an application for them to be lifetime participants can be made. This interim period is imposed 'because of the possibility of recovery and ongoing improvement in the injured person's condition' (clause 8.1). However, after two years passes, an application to become a lifetime participant may be made on injured person's behalf.

4.7 The Guidelines appear to make no provisions to allow an injured person to withdraw an application made on their behalf, or from being an interim or lifetime participant once accepted.

The Lifetime Care and Support Guidelines sets out provisions for the administration of the Lifetime Care and Support Scheme established by the *Motor Accidents (Lifetime Care and Support) Act 2006*. Clause 1.2 of the Guidelines echoes sections 8 and 9 of the Act, by providing that an insurer may make an application for an injured person to participate in the Scheme, without the injured person's consent.

The Committee previously reported in Digest No.3 of 2006 on the *Motor Accidents (Lifetime Care and Support) Bill 2006,* which enacted the Act.[7] Consistent with the Committee's comments on subsection 8(2), the Committee notes that the Guidelines remove the need to obtain the consent of injured persons from becoming participants in the Scheme. Therefore, the Guidelines may impact an injured person's right to personal autonomy by permitting significant decisions about their ongoing care to be made without their consent.

The Committee further notes that, consistent with its previous comments, participation in the Scheme without consent may subject an injured person to ongoing assessment of treatment and care needs by the Authority, to which they may reasonably wish to object. Additionally, an injured person may wish to seek damages which may not be available to them if they are accepted as lifetime participants.

The Committee acknowledges that the Guidelines do not go further than the Act, which permits applications to be made for an injured person without their consent. However, the Committee notes that both the Act and the Guidelines do not appear to provide an injured person with the option of withdrawing an application to participate, or their participation once accepted in the Scheme. Because the Guidelines do not provide any additional guidance on the rights of injured persons who are participants or the subject of applications to the Scheme without consent, the Committee refers the matter to Parliament for further consideration.

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[7] Legislation Review Committee, *Legislation Review Digest No. 3 of 2006*, Parliament of New South Wales, 24 March 2006.

5. Transport Administration (General) Amendment (Northern Rivers Rail Trail-Bentley to Lismore) Regulation 2023

Date tabled	LA: 21 November 2023 LC: 21 November 2023
Disallowance date	LA: 7 May 2024 LC: 7 May 2024
Minister responsible	The Hon. Jenny Aitchison MP
Portfolio	Regional Transport and Roads

Purpose and description

5.1 The object of this Regulation is to provide for the following matters consequent on the enactment of the *Transport Administration Amendment (Rail Trails) Act 2022*:

(a) the authorisation of the use and lease of land along the rail corridor for the disused Casino to Murwillumbah railway line between the Back Creek Bridge at Bentley and the Union Street railway bridge at Lismore for recreation, tourism or related purposes

(b) the circumstances in which a sublease or an authorised lease may be entered into

(c) the matters that must be included in an authorised lease or sublease,

(d) the termination of an authorised lease by the Minister administering the *Transport Administration Act 1988* (the **Act**).

Issues considered by the Committee

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

Removal of right to compensation

5.2 The Regulation amends the *Transport Administration (General) Regulation 2018* (the **Principal Regulation**) to provide for the authorisation of the lease and sub-lease of specified land along the Northern Rivers Rail Trail.

5.3 The Regulation inserts section 15B into the Principal Regulation. Section 15B allows the rail infrastructure owner of specified land to enter a lease with a local council or joint organisation for the use of that land for recreation, tourism or related purposes.

5.4 Separately, section 99E(9)(c) of the Act provides a regulation-making power in relation to the circumstances in which a 'sublease of an authorised lease may be entered into'. Under section 99E(c) of the Act, the Regulation adds Part 2, section 6 to the Principal Regulation to provide that a sublease is automatically terminated when the authorised lease is terminated by the Minister. This provision also clarifies that 'no compensation is payable by the lessee to the sublessee because of the termination'.

The Regulation amends the *Transport Administration (General) Regulation 2018* to allow the owner of transport infrastructure in a specified rail corridor to lease land for specified purposes. It inserts section 15C to provide that a sublease of an authorised lease may be entered into, also for the same specified purposes. It also inserts part 2, section 6 to provide that the lessee of land is not liable to pay compensation to their sublessee, if the sublease is terminated because the lease is terminated by the Minister.

The Regulation excludes the right of a sublessee to seek compensation if the sublease is terminated which includes compensation for losses resulting from the termination. By removing this right to compensation, the Regulation may therefore limit an individual's contractual rights available under common law.

However, the Committee acknowledges that the Regulation deals with land that is vested in a state owned corporation and the provisions may provide certainty over the State's compensation liability in administering the land. For this reason, the Committee makes no further comment.

6. Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation (No 2) 2023

Date tabled	LA: 6 February 2024 LC: 6 February 2024
Disallowance date	LA: 4 June 2024 LC: 4 June 2024
Minister responsible	The Hon. Rose Jackson MLC
Portfolio	Water

Purpose and description

6.1 The object of this regulation is to amend the *Water Management (General) Regulation 2018* (the **Principal Regulation**):

(a) to deal with the determination of the share component for certain replacement floodplain harvesting licences

(b) to clarify that the Minister must adopt the current conditions model, eligible water supply works scenario model and plan limit compliance model only after considering the submissions received from a landholder on the proposed share component of a replacement licence

(c) to require the Minister to give further written notice to the landholder if the proposed determination of the share component is less than the proposed amount first notified to the landholder, and to consider submissions received from the landholder on the proposed determination

(d) to clarify that the category of replacement licence is a floodplain harvesting (regulation river) access licence for an eligible landholder if, on or before 3 July 2008, a regulated river access licence was in force in relation to land on which the landholder's eligible water supply work is located

(e) to declare only certain floodplains designated under the *Water Act 1912* (the **1912 Act**), Part 8 to be floodplains for the *Water Management Act 2000* (the **Water Management Act**).

6.2 This regulation is made under the Water Management Act, including section 57A.

Issues considered by the Committee

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

Henry VIII clause

6.3 Clause 23B of the Principal Regulation sets out eligibility criteria for a replacement floodplain harvesting access licence (**replacement licence**). A landholder is eligible for a replacement licence if a water supply work capable of floodplain harvesting (**eligible supply work**) was fully constructed on that land before 3 July 2008. Under subclause 23B(2), this eligible supply work includes work done both:

(a) with a relevant approval, or

(b) without a relevant approval, if that approval was not required under Part 8 of the 1912 Act.

6.4 The definition of a 'controlled work' under Part 8, section 165A of the 1912 Act includes 'any work that is situated, or proposed to be constructed on land that is within a floodplain'. Under section 165 of the 1912 Act, floodplain is defined as 'any land which is so designated by an order in force under section 166(1)'.

6.5 Schedule 9, clause 12 of the Water Management Act provides any land designated as a floodplain under the 1912 Act is also a floodplain under the Water Management Act. However, clause 12 of Schedule 9 is 'subject to the regulations'. Subclause 252(2) of the Principal Regulation limits what floodplains designated under the 1912 Act are considered 'floodplains' for the Water Management Act.

6.6 Prior to the amendments made by the Regulation, subclause 252(2) clarified that land previously designated under the 1912 Act and is then declared to be a floodplain under the Water Management Act, is no longer a 'designated floodplain' due to Schedule 9, clause 12 of the Water Management Act. The Regulation replaced subclause 252(2) to effectively reduce the lands which are still designated (as floodplains for the purpose of the Water Management Act under Schedule 9, clause 12 of the Act, to only the 15 declared floodplains listed under new subclause (2).

The Regulation replaces subclause 252(2) of the *Water Management (General) Regulation 2018* to effectively limit the lands designated as floodplains by clause 12 of Schedule 9 to the *Water Management Act 2000.* The Regulation provides that only the 15 lands listed are to be designated floodplains for the Water Management Act. This amendment removes previously eligible land under Schedule 9 of the Water Management Act.

Under the Water Management Act, replacement floodplain harvesting access licences can be granted to landholders who had fully constructed eligible floodplain harvesting works on their land before 3 July 2008. Eligible works are dependent on whether they are constructed on a 'floodplain'. Therefore, the Regulation may effectively change how the floodplain harvesting access licence regime under the Act operates by way of a Henry VIII clause. The Committee generally considers Henry VIII clauses to be an inappropriate delegation of legislative powers and prefers changes to how Acts operate be done through amending Acts to ensure it is subject to appropriate parliamentary scrutiny.

However, the Committee notes that regulations must be tabled in Parliament and are subject to disallowance under section 41 of the *Interpretation Act 1987*. It also recognises that allowing regulations to limit what lands are eligible for replacement licences may provide necessary administrative flexibility over technical matters. In the circumstances, the Committee makes no further comment.

Part Three – Regulations without comment

Regulations without comment

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

1. Births, Deaths and Marriages Registration Amendment (Fees) Regulation 2023

The object of this Regulation is to increase certain fees charged under the *Births, Deaths and Marriages Registration Act 1995* and the *Relationships Register Act 2010*.

This Regulation is made under the following Acts:

(a) *Births, Deaths and Marriages Registration Act 1995,* including sections 50(2), 54 and 62, the general regulation-making power

(b) *Relationships Register Act 2010*, including sections 6(c), 11(2)(c) and 17, the general regulation-making power.

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

2. Building Legislation Amendment Regulation (No 2) 2024

The objects of this Regulation are as follows:

(a) to amend the *Design and Building Regulation 2021* as follows;

(i) to clarify that under the *Design and Building Practitioners Act 2020*, the term ***building elements*** includes the aspects of a vertical transportation product required to achieve compliance with the Building Code of Australia

(ii) for design compliance declarations—to clarify what is meant by building products used in a building

(iii) to amend the experience, knowledge and skills required for certain classes of registration

(iv) to update certain fees for professional engineers

(v) to make other minor and consequential amendments

(b) to amend the *Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020* to prescribe the use of vertical transportation products in building work as a serious defect if the use poses a safety risk to persons.

The Regulation is made under the *Design and Building Practitioners Act 2020* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

The amendment to the *Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 202*0 prescribes the use of specific machinery that could pose a risk of death or serious injury that would be deemed a 'serious defect'.

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

3. Casino Control Amendment Regulation 2023 (2023-668)

The object of this Regulation is to extend the term of appointment of the manager of the casino operated by The Star Pty Limited at Pyrmont from 19 January 2024 to 30 June 2024.

This Regulation is made under the *Casino Control Act 1992*, section 28(4).

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

4. District Court Criminal Practice Note 28 – Child Sexual Offence Evidence Practice Note

The object of the District Court Practice Note 28 Child Sexual Offence Evidence Practice is to outline the listing procedures in the District Court applicable to proceedings captured by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023*, which inserted sections 294E-294S into the *Criminal Procedure Act 1986*.

The Practice Note was issued on 8 December 2023 and commenced on 29 January 2024. It replaces Practice Note 11 Child Sexual Offence Evidence Program Scheme in the Downing Centre published on 6 August 2019.

The Committee previously reviewed the *Criminal Procedural Amendment (Child Sexual Offence Evidence) Bill 2023* which enacted the Act in its Digest 5 of 2023. However, the Practice Note merely gives effect to the Act and provides for administrative matters. Therefore, it does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

5. Electricity Supply (General) Amendment (Renewable Fuel Scheme) Regulation 2023

The object of this Regulation is to amend the *Electricity Supply (General) Regulation 2014* to prescribe the scheme penalty rate for the 2025 compliance period for the renewable fuel scheme.

The Regulation is made under the *Electricity Supply Act 1995,* specifically Schedule 4A, Clause 163(1). The 'scheme penalty rate' for a compliance period is defined by the Act and involves a calculation involving a base penalty rate set by the Act

As the amendment merely prescribes the fee per certificate with no change to the base rates or calculation process, the Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

6. Environmental Planning and Assessment Amendment (Housing) Regulation 2023

The object of this Regulation is to amend the *Environmental Planning and Assessment Regulation 2021* as a consequence of amendments to the *State Environmental Planning Policy (Housing) 2021*, including in relation to design review panels.

This Regulation also makes consequential amendments to the *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*.

The amendment replicates provisions relating to design review panels under the *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment*

Development (2002 EPI 530) into the principal Regulation. Therefore, the Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

7. Food Amendment (National Standard) Regulation 2023

The object of this Regulation is to amend the *Food Regulation 2015* as follows:

(a) with respect to requirements in the *Food Act 2003* (the **Act**) relating to food safety supervisors:

(i) amend the exemptions for certain food businesses, premises and activities from the operation of the Act, Part 8, Division 3, and

(ii) clarify that the existing exemption in relation to the sale of food for the purposes of raising funds solely for community or charitable causes extends to the handling of food for that purpose,

(b) modify the *Australian New Zealand Food Standards Code,* Standard 3.2.2A, as applied in NSW to:

(i) retain the requirements in the Act relating to food safety supervisors, and

(ii) reflect the amended exemptions outlined in paragraph (a).

The proposed commencement of the amendments provides businesses affected by the changes with a 12-month transition period.

This Regulation is made under the *Food Act 2003*, including sections 106(1) and 141(1).

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

8. Health Records and Information Privacy Amendment Regulation 2023

The object of this Regulation is to amend the *Health Records and Information Privacy Regulation 2022* to include services provided by the Centre for Health Record Linkage as a health service.

This Regulation is made under the *Health Records and Information Privacy Act 2002*.

The amendment merely includes an organisation which is managed by the NSW Ministry of Health as a new health service provider and therefore the Regulation does not extend or alter the health information regulation regime under the Act or principal Regulation.

9. Local Government (General) Amendment (Audit, Risk and Improvement Committees) Regulation 2023

The object of this Regulation is to make provision about Audit, Risk and Improvement Committees and the internal auditing functions of councils. It commences on 1 July 2024.

This Regulation is made under the *Local Government Act 1993*, including sections 428(4)(b), 428A(2)(i), 428B and 748, the general regulation-making power, and Schedule 6, clauses 8A, 13, 18 and 19B.

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

10. Motor Vehicle Legislation Amendment (Tax and Registration Charges) Regulation 2023

The objects of this Regulation are to

(c) amend the *Motor Vehicles Taxation Regulation 2016* to adjust motor vehicle tax amounts for the 2024 calendar year, and

(d) amend the *Road Transport (Vehicle Registration) Regulation 2017* to adjust the registration charge amounts for primary producer's vehicles for the 2024 calendar year.

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

11. Practice Note DC (Civil) No. 1C Attendance at Civil Proceedings by Audio Visual Link (AVL)

This Practice Note is issued under sections 56 and 57 of the *Civil Procedure Act 2005* and applies to all matters in the civil jurisdiction of the District Court, starting 29 January 2024. It is intended to facilitate the just, quick and cheap resolution of the real issues in all proceedings before the Court.

The Practice Note sets out how parties appearing in civil proceedings can make applications for attendance by audio visual link (AVL). While mandatory remote attendance in court proceedings could impact a person's rights to procedural fairness, the Practice Note requires that the consent of all parties to AVL attendance be sought before making an application and, if consent is not given by all parties, the matter must be determined by the court.

12. Road Transport (Driver Licensing) Amendment (Alternative Address) Regulation 2023

The object of this Regulation is to amend the *Road Transport (Driver Licensing) Regulation 2017* to additionally provide that Transport for NSW may issue a driver licence showing an alternative address for the following persons:

(a) a person who was previously

  (i) a judicial officer within the meaning of the Judicial Officers Act 1986, or

  (ii) a Crown Prosecutor appointed under the Crown Prosecutors Act 1986, or

  (iii) a police officer if the NSW driver licence register indicates that information relating to that officer's residential address is supressed,

(b) a person who lives at the same residential address as the person mentioned in paragraph (a).

The Regulation is made under the *Road Transport Act 2013*, including section 4, definition of driver licence and section 23, the general statutory rule-making power.

The amendment extends who is eligible to have an alternative address showing on their driver licence. Although 'alternative address' could be widely defined, Transport for NSW has the discretion to issue licences with alternate addresses under the principal Regulation.

13. Road Transport Amendment (Electric Scooter Trial and Parking) Rule 2023

The objects of this Rule are to:

(a) extend the 18-month trial for the use, on roads and related areas, of electric scooters borrow or hired through share schemes agreed to by publica authorities by a further 18 months,

(b) provide that certain inspectors appointed or authorised by SafeWork NSW are relevant government officers who are exempt from certain parking rules under the *Road Rules 2014*, rule 307-3.

This Rule is made under the *Road Transport Act 2013*, including section 23, the general statutory rule-making power.

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

14. Roads Amendment (Neighbourhood Activity) Regulation 2023

The object of this Regulation is to amend the *Roads Regulation 2018* to provide that, for the *Roads Act 1993*, an activity is a road event if

(a) the activity is

(i) a non-commercial event, including a local gathering or social activity, for which traffic may be regulated by temporary road closure, and

(ii) on an unclassified road, and

(iii) not an ineligible event, and

(b) the residential address of the applicant for the road event permit is on or near the road on which the road event will be conducted.

This Regulation is made under the *Roads Act 1993*, including section 264, the general regulation-making power, and the dictionary, definition of ***road event***.

The amendment merely updates the definitions of 'a road event' and 'a neighbourhood activity', to clarify the circumstances in which people may need to apply for a road event permit from their local councils. Therefore, the Regulation does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987.*

15. Security Industry Amendment Regulation 2023

The object of this Regulation is to amend the *Security Industry Regulation 2016*, following recent amendments to the *Security Industry Act 1997*, including:

(a) updating a number of cross-references to the Act

(b) updating provisions specifying the classes of immigration visa that a person applying for a licence may hold

(c) providing that penalty notices may be issued for new offences in the Act

(d) clarifying maximum amounts for penalty notices issued to holders of security industry master licences.

This Regulation is made under the Act, including sections 45A and 48, the general regulation-making power.

Besides other administrative changes, the amendment varies the penalties for offences and prescribes a set of penalties for the new tiered penalty system introduced by the recent *Security Industry Amendment Act 2022*. The Committee previously reviewed the Bill which enacted the amendment Act in its Digest No. 48/57.The Regulation mainly gives effect to the Act and therefore it does not appear to engage with the issues set out in section 9 of the *Legislation Review Act 1987*.

Appendices

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

(1) The functions of the Committee with respect to Bills are:

(a) to consider any Bill introduced into Parliament, and

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

(i) trespasses unduly on personal rights and liberties, or

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

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

(iv) inappropriately delegates legislative powers, or

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

(2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to regulations

(1) The functions of the Committee with respect to regulations are:

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

(b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:

(i) that the regulation trespasses unduly on personal rights and liberties,

(ii) that the regulation may have an adverse impact on the business community,

(iii) that the regulation may not have been within the general objects of the legislation under which it was made,

(iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

(v) that the objective of the regulation could have been achieved by alternative and more effective means,

(vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,

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

(viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and

(c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

(1A) The Committee is not precluded from exercising its functions under subsection (1) in relation to a regulation after it has ceased to be subject to disallowance if, while it is subject to disallowance, the Committee resolves to review and report to Parliament on the regulation.

(2) Further functions of the Committee are:

(a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and

(b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

(3) The functions of the Committee with respect to regulations do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

Appendix Two – Unconfirmed extracts of minutes

Meeting no. 11

TIME & DATE: 3.02PM, 11 MARCH 2024 LOCATION: 1254 AND VIA WEBEX

MEMBERS PRESENT

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

APOLOGIES

Dave Layzell.

OFFICERS PRESENT

Rohan Tyler, Anna Tran, Kate McCorquodale, Alex Read, Mengyuan Chen, Alice Zwar, Nicolle Gill and Caitlin Bailey.

AGENDA ITEM

1. **Confirmation of minutes**

   Resolved, on the motion of Mr Murphy: That the minutes of the meeting of 5 February 2024 be confirmed.

2. ***

3. **Consideration of Bills with comment for Legislation Review Digest 10/58**

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

   a. Combat Sports Amendment Bill 2024
   b. Environmental Legislation Amendment (Hazardous Chemicals) Bill 2024
   c. Environmental Planning and Assessment Amendment (Sea Bed Mining and Exploration) Bill 2024
   d. Independent Commission Against Corruption Amendment Bill 2024
   e. Local Government Amendment (De-amalgamations) Bill 2024
   f. Residential Tenancies Amendment (Prohibiting No Grounds Evictions) Bill 2023.

4. **Consideration of Bills without comment for Legislation Review Digest 10/58**

   Resolved, on the motion of Mr Hagarty: That the Committee adopts the draft bill reports *in globo*:

   a. Electoral Funding Amendment (Local Government Electoral Expenditure Caps) Bill 2024
   b. Prevention of Cruelty to Animals Amendment (Virtual Stock Fencing) Bill 2023.

5. Consideration of Regulations for Legislation Review Digest 10/58

Resolved, on the motion of Ms Stuart: That the Committee adopts the draft regulation reports *in globo*:

a. Biosecurity Order (Permitted Activities) Amendment Order (No 2) 2023
b. Childcare and Economic Opportunity Fund Regulation 2023
c. Health Practitioner Regulation (Adoption of National Law) Regulation 2023
d. Motor Accidents (Lifetime Care and Support) Act 2006 - The Lifetime Care and Support Guidelines
e. Transport Administration (General) Amendment (Northern Rivers Rail Trail—Bentley to Lismore) Regulation 2023
f. Water Management (General) Amendment (Floodplain Harvesting Access Licences) Regulation (No 2) 2023.

6. Regulations without comment for Legislation Review Digest 10/58

Resolved, on the motion of Ms Munro: That the Committee adopts the regulations without comment as Part 3 to Digest 10/58.

7. Legislation Review Digest 10/58

Resolved, on the motion of Ms Higginson:

- That appropriate minute extracts of this meeting be published as Appendix Two to the Digest.
- That the Committee adopts the Legislation Review Digest 10/58 and that it be signed by the Chair and presented to the House.

8. Regulations to be reviewed

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

9. ***

10. Next Meeting

The meeting adjourned at 3.07pm until 19 March 2024 at 3.00pm.