PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

Volume II: 2021 COVID-related reports

Contents

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Guide to the Compilation of reports on COVID-19 Bills and Regulations

Since the advent of the COVID-19 pandemic, a number of bills have now been passed and regulations made in NSW, to respond to its health and economic impacts. In accordance with its functions under section 8A and 9 of the *Legislation Review Act 1987* (the Act), the Committee has reviewed each of these bills and regulations against the criteria set down in the Act, and in particular, for their impact on personal rights and liberties, and reported.
The Committee's reports are spread across a number of its Legislation Review Digests. Here, for ease of reference, all the Committee's reports on bills and regulations to do with COVID-19 have been compiled into the one document. Where a bill or regulation has not warranted comment from the Committee, this has also been recorded.

The Committee hopes this will improve the access and utility for members of parliament and the public. It may also prove a useful resource for researchers and commentators in the future.

The document will be updated and re-released as more bills or regulations are reported upon by the Committee.

> Volume 1 – is the compilation of the Committee's conclusions on each bill or regulation. It is a summary and a quick reference for readers.
>
> Volume 2 – is a reproduction of the Committee's full report on each bill or regulation and is much more detailed examination of the bill and regulation.

While the Committee must report on every bill, it only produces a report on regulations that attract a comment by the Committee. If the Committee determines that a report is not needed on a regulation, the regulation is placed on a "no papers" list. Appendix Two of the document lists all the regulations relating to COVID-19 that the Committee considered but did not report on (no papers) and the date of the meeting at which the Committee considered the regulation.

COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

COMMENT ON REGULATIONS

This section contains the Legislation Review Committee's reports on Regulations in accordance with section 9 of the *Legislation Review Act 1987*.

Conclusions

PART ONE – BILLS

1. COVID-19 LEGISLATION AMENDMENT (STRONGER COMMUNITIES AND HEALTH) BILL 2021

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

Matters deferred to regulations

The Bill amend a number of acts and regulations to extend the repeal clause by six months or until a later date, up to 12 months, as prescribed by the regulations. The Committee notes that this allows the regulation to amend the Act in respect of the repeal date. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.

However, the Committee notes that the Bill only seeks to extend the repeal date of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Attorney General noted that these measures are in place with the intent of protecting public health and public safety during a time where there is an ongoing risk of a COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

2. COVID-19 RECOVERY BILL 2021

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

Examination by audio-visual link, risk of arbitrary detention

The *COVID-19 Recovery Bill 2021* extends the operation of provisions in various Acts allowing certain activities, such as mandatory questioning by authorised officers, to occur by video link rather than in person. This includes the extension of provisions under the *Mental Health Act 2007* for medical practitioners to examine patients by video link, in order to help decide whether those patients should be detained in a mental health facility. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57.

Consistent with the Committee's previous comments, the extension of these provisions in the *Mental Health Act* may impact the extent to which individuals are able to fully participate in a process which could result in their involuntary detention. They also have the potential to impact upon the accuracy of the examination process, as they reduce the ability of medical practitioners to assess a patient's demeanour. In turn, this may impact on the right of individuals not to be arbitrarily detained.

However, the provisions remain an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions also contain certain safeguards, including a requirement that examination only be carried out over video link

if it is necessary, and 'can be carried out with sufficient skill or care so as to form the required opinion about the [patient]'. In these circumstances, the Committee makes no further comment.

Freedom of contract and property rights

The Bill includes amendments to schedule 1 to the *Residential Tenancies Act 2010*, which will come into force on the repeal of Part 13 of that Act on 26 March 2021. These amendments include the introduction of new provisions relating to the negotiation of repayment plans between landlords and tenants who have been financially affected by the COVID-19 pandemic. For example, clause 27 of the proposed Part 9 of schedule 1 to the *Residential Tenancies Act* prohibits a landlord from evicting a tenant for non-payment of rent, unless the tenant has failed on two occasions to comply with the terms of a repayment plan.

Further, it must be 'fair and reasonable in circumstances' for the landlord to issue a termination notice or seek a termination order in the Tribunal. If the parties have not agreed to a repayment plan, the landlord cannot terminate the lease unless they have 'participated in good faith' in a formal arrears repayment negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to seek termination.

These provisions are distinct from previous amendments to the *Rental Tenancies Act* which prevented landlords from seeking termination on the basis on non-payment of rent. The Committee has commented on those amendments, contained in Part 13 of the *Rental Tenancies Act*, in previous issues of the Committee Digest – for example, Digest No. 15/57. However, similar to the provisions in Part 13, the provisions in Part 9 of schedule 1 continue to impact on landlords' freedom of contract, specifically their ability to enforce their rights under contracts they have entered into with tenants. Further, by continuing to limit the extent to which landlords can enforce their rights under tenancy agreements – such as the right to evict tenants for non-payment of rent – the provisions in Part 9 impact on landlords' property rights.

However, the Committee notes that these provisions are an extraordinary measure that seeks to respond to the ongoing impacts of the economic crisis created by the COVID-19 pandemic. Further, they will apply for a limited time period, as they are due to be repealed in September 2021. The Committee also notes that landlords retain the right to negotiate repayment plans with tenants, and to enforce those repayment plans. In the circumstances, the Committee makes no further comment.

Retrospectivity

Section 5 of the Bill provides that, if an amendment in the Bill which extends a 'prescribed period' commences after the prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued on. This 'savings provision' may mean that the amendment to the length of certain 'prescribed periods' in various Acts and regulations will have retrospective effect. This could have the effect that individuals who may have presumed certain provisions were not in force after they were due to expire were in fact bound by those provisions.

The Committee generally comments on provisions that have retrospective effect, as they run counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee acknowledges the practical objectives of this provision, to ensure consistency within the legislative schemes affected by the Bill's amendments. Insofar as it extends 'prescribed periods' under various pieces of legislation, the Bill does not create new

provisions, but extends the operation of old provisions introduced because of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

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

Henry VIII clauses

In extending the operation of emergency provisions in various Acts and regulations, the Bill contains a number of Henry VIII clauses. For example, numerous amendments to existing Acts delay the repeal date or extend the 'prescribed period' for the operation of certain provisions for six months, or until a 'later day… prescribed by the regulations'. This is the case for the amendments made to the *Industrial Relations Act 1996* and the *Retirement Villages Act 1999*, among others. The Committee notes that these provisions allow for regulations to amend Acts in respect of the repeal date, or period of operation, of certain emergency provisions.

The Bill also amends the *Retail Leases Act 1994* to provide that certain protections will continue to apply, subject to exemptions provided for by the regulations. Again, this allows for regulations to alter the effect of provisions contained in their parent Act.

Unlike primary legislation, regulations are subordinate legislation – they are not required to be passed by Parliament, and the Parliament does not control when they commence. While either House of Parliament can pass a resolution disallowing a regulation (under section 41 of the *Interpretation Act 1987*), the regulation may operate for some time before disallowance can occur.

However, the Committee notes that, to the extent that it delegates power to regulations, the Bill only seeks to extend the operation of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Treasurer suggested in the second reading speech, in 'recognising the uncertainty of the duration of the pandemic'. In these circumstances, the Committee makes no further comment.

3. ELECTORAL LEGISLATION AMENDMENT (LOCAL GOVERNMENT ELECTIONS) BILL 2021

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

Retrospectivity

The Bill amends the *Electoral Funding Act 2018* and the *Local Government Act 1993* to provide that certain provisions are to apply to matters that occurred before the commencement of the relevant sections within the Bill. This allows these provisions to operate retrospectively.

The Committee generally comments where provisions apply retrospectively as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. However, the Committee notes that the relevant provisions are largely mechanic in nature, including savings transitional and other provisions consequent on the enactment of the provisions in the Bill, and for the facilitation of local government elections. In these circumstances, the Committee makes no further comment.

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

Rules not subject to disallowance

The Bill allows the Electoral Commissioner to publish COVID-19 safe election rules for the safe conduct of elections during the COVID-19 pandemic. Such rules are not required to be tabled in the Parliament and therefore not subject to parliamentary scrutiny. The Committee generally comments where legislation allows for the making of rules not subject to disallowance that may infringe on a person's personal rights or liberties, such as the right to vote.

However, the Committee recognises that the purpose of these COVID-safe rules is to ensure that elections are run in accordance with the relevant public health orders and health recommendations of NSW Health regarding holding public events during the COVID-19 pandemic. The section is also set to be repealed on 1 January 2022, or a later day, not later than 26 March 2022, as prescribed by the regulations. Given the public safety aspect of the provisions, and the considerable safeguards, the Committee makes no further comment.

4. APPROPRIATION BILL 2021; APPROPRIATION (PARLIAMENT) BILL 2021; ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021; ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021; NSW GENERATIONS FUNDS AMENDMENT BILL 2021

ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021

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

Extraterritorial operation of Act

Section 6 of the Bill provides that the Act is to have extraterritorial application, as far as the legislative powers of the State permit, in relation to zero or low emission vehicles registered in NSW that travel on roads in other States or Territories.

This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.

However, the Committee recognises that the intent of the provision is the ensure that vehicles registered in New South Wales that may travel on roads in other State or Territories are still subject to the zero or low emission requirements. As the vehicles subject to the laws are required to be registered in NSW, the Committee understands that it is a responsibility of the vehicle owner to be aware of the relevant laws that apply at the time and place of registration. In these circumstances, the Committee makes no further comment.

Strict liability offences

The Bill contains provisions that impose penalties for failure to comply with certain requirements regarding the registration of a relevant zero or low emissions vehicle. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a relevant factor in establishing liability for an offence. That is, the registered operator does not need to have intended to not comply with the registration requirements to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to incentive

registered owners to register their vehicle on time. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.

Penalty notice offences – Right to a fair trial

Section 26 enables offences against the proposed Act and offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In this instance, the penalty notice offences are in regards to road user charges and registration an associated requirements. In these circumstances, the Committee makes no further comment.

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

Enforcement powers

The Bill provides that Transport for NSW may require a person to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges. Where a person does not comply with this requirement, and does not have a reasonable excuse, a maximum penalty may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

This is a broad administrative power to the production of documents and information. However, the Committee recognises that these powers enable TfNSW to do carry out their functions under the Act regarding road user charges. It also recognises that the clause allows for where a person may have a reasonable excuse for not having complied with this clause and therefore allows an degree of discretion. In these circumstances, the Committee makes no further comment.

Information sharing powers

The Bill provides that TfNSW may enter into information sharing arrangements with another government sector agency, head of government sector agency, or an agency of another State or territory. The provisions does not specify what types of information can be disclosed, and does not require that TfNSW seek consent from or notify individuals who may be affected. This provisions may impact on an individual's right to privacy.

However, the Committee acknowledges that information sharing is limited to government agencies. The Committee also notes the objective of the provision, as outlined in the explanatory notes, to enable TfNSW to enter into an information sharing arrangement in relation to information relevant to road user charges or equivalent or similar charges under the law of another State or Territory. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill allows certain matters to be deferred to the regulations. This includes payment options for road user charges for registered operators of a relevant zero or low emissions vehicle (sections 15 and 16). The Bill also provides for a general regulation-making power of the Governor to make regulations under the Act, including the creation of offences punishable by a penalty notice of up to 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body corporate.

The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters. In this case, as the provisions relate to the payment options, exemptions and concessions, refunds and discounts, calculation and assessment and penalties of road user charges. In these circumstances, the Committee makes no further comment.

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021

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

Removal of community participation plan requirements

The Bill amends the Act to provide that certain planning authorities are not are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, regarding development contributions. This includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations.

The Committee notes that this may limit existing rights of community members to participate in, or object to, elements of planning agreements. The Committee refers this provision to the Parliament for its consideration of whether it impacts on the rights community members by limiting participation.

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

Ministerial powers

The Bill provides the Minister with the power to make Ministerial directions and approvals for a number of matters under the Act, including matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal. Other matters also include time at which monetary contributions or levies must be paid to existing development consents in certain circumstances, and provision for the preparation and approval of contributions plans by councils and for the making, amendment or repeal of contributions plans by the Minister.

The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. However, the Committee notes that in this case, the matters that may be subject to a Ministerial direction or approval are regarding preparation of a contributions

plan by a council, and the time at which monetary contributions or levies must be paid. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

The Bill allows a number of matters to be deferred to the regulations, including that the regulations may make provision about local infrastructure contributions and about the making of contributions plans by councils.

The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters.

5. LOCAL GOVERNMENT AMENDMENT (COVID-19— ELECTIONS SPECIAL PROVISIONS) BILL 2021

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

Henry VIII

The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic. Specifically, it inserts section 747C which allows special provisions for the local government elections regulation-making power. This includes the ability for the regulations to modify the application of one or more provisions of the Act that apply to the 2021 ordinary elections of councillors to respond to the public health emergency caused by the COVID-19 pandemic. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

The Committee notes that this amounts to a Henry VIII clause, allowing the Executive to legislate and amend an Act by way of regulation without reference to the Parliament. Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions may provide flexibility to facilitate a timely and appropriate response to conduct local government elections during a public health crisis.

The Committee also recognises that this power is somewhat limited, as the Minister may only recommend to the Governor that regulations be made under this section if the proposed regulations are in accordance with advice issued by the Electoral Commissioner, and the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic. The Committee also recognises that provisions are intended to support of the COVID-19 plan developed by the NSW Electoral Commission for the purpose of facilitating the upcoming local government elections in the current COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

6. CRIMES LEGISLATION AMENDMENT BILL 2021

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

Right to due process

The Bill amends the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence regarding unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date the offence was alleged to have been committed. This applies to offences under section 308H, which is a summary offence with a maximum penalty of 2 years imprisonment. Under the proposed section 308H(4), police will have a longer timeframe to investigate and prosecute unauthorised access and modification of restricted data offences.

The Committee notes this may impact on an accused person's right to due process by disentitling them of information adverse to them, or prolonging a prosecution and causing unfair delays. In circumstances where an offence is alleged to have been committed three years prior to an accused being charged, police could have had up to three years to investigate an accused person and subsequently become aware of further offending in the course of investigations that may otherwise have not occurred if police had charged an accused person earlier in the investigation. The increase in time between which a person commits an offence and a date on which they are charged could therefore have the unintended effect of accused persons committing further offences prior to being charged for the index offence.

However, the Committee accepts that statutory limitations are rare in the prosecution of criminal offences and that the imposition of a statutory limitation is a safeguard in itself. As such, increasing the timeframe may be appropriate to allow police greater time to conduct and prosecute these offences under the proviso that the provision is not used intentionally to further incriminate an accused person. The Committee refers the matter to Parliament to consider whether the Bill disproportionately affects an accused person's right to due process under section 308H(4).

Right to fair trial

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendments make these records protected records under the Acts, which means that no person can be compelled to produce or disclose those protected records in any proceedings.

The Committee acknowledges disclosure of deliberations of the Assessment Committee could impact the quality of advice the committee can provide and compromise the personal safety of members and persons attending in an advisory capacity, as all attendees are identified in the minutes. The Committee also acknowledges that matters relating to domestic terrorism are highly confidential and should be dealt with in a manner which protects the inadvertent disclosure of that highly confidential material.

However, the Committee notes that this may deny a person access to information on legal matters regarding their continued detention or extended supervisions. The Committee also notes that these provisions may be inconsistent with the general provisions on compellability of a witness who is competent and the admissibility of business records as an exception to the hearsay rule under the *Evidence Act 1995*.

Further, the presiding Supreme Court Justice hearing an application for the extended supervision or continued detention of a person would have the discretion to make decisions on the admissibility of these minutes, including a power to rule segments of the minutes containing

names of committee members inadmissible. This could be facilitated by rejecting the evidence on the basis of relevance under section 55 of the *Evidence Act 1995*.

Whilst the Committee notes the amendments are intended to protect the identity of members and the deliberations of the Assessment Committee, the Committee refers the matter to Parliament to consider whether the need to protect the identity of committee members is outweighed by the right of a person subject to an extended supervision order or continued detention order to have legally acquirable to them, whether under the principles of disclosure or by subpoena, all available material which may affect their continued detention or extended supervision.

7. CUSTOMER SERVICE LEGISLATION AMENDMENT BILL 2021

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

Confidentiality

Proposed sections 27D of the *Privacy and Personal Information Protection Act 1998* and schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act* 2002 outline circumstances in which personal and/or health information may be shared between organisations and public sector agencies. The ability of organisations and public sector agencies to disclose personal information could impact on the confidentiality that would otherwise be afforded to a person regarding their disclosure of personal information to an organisation. Specifically, 27D of the *Privacy and Personal Information Protection Act 1998* exempts public sector agencies from compliance with information protection principles under that statute while clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act 2002* permit 'organisations' to do the same. Under section 4 of the *Health Records and Information Privacy Act 2002* an organisation means a public sector agency or a private sector person.

The Committee notes that the amendments are safeguarded by only allowing the disclosure of personal or health information between public sector agencies and organisations in circumstances where it is necessary to assist in a stage of emergency. The provision is further safeguarded by the limitation on the information being used only where the information is reasonably necessary to assist in that emergency. In addition, the information can only be used in particular statutorily defined stages of emergency, notably prevention, preparation, response or recovery stages. As such, the sharing of information between government agencies may be essential to natural justice, the effective recovery of persons affected by an emergency, or where it is in the public interest to do so. The Committee accordingly makes no further comment.

8. PAYROLL TAX AMENDMENT (PAYROLL TAX WAIVER) BILL 2021

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

Privacy

The Bill provides that the Chief Executive Officer of Service NSW may disclose information to the Chief Commissioner of Revenue NSW regarding an employer's application for a payment under the 2021 COVID-19 JobSaver Payment or 2021 COVID-19 Business Grant schemes administered by Service NSW. This information may be shared if it is in relation to the administration of a taxation law.

The Committee notes that the Bill does not specify or limit what information may be disclosed, and does not require either agency to seek consent from or notify individuals who may be affected. Further, this provision permits the sharing of information disclosed to Service NSW for the limited purpose of applying for COVID-19 relief payments on a wider and unspecified ambit, being in relation to the administration of "taxation laws", which may include statutes beyond the *Payroll Tax Act 2007*. By allowing information sharing which may include the personal information of individuals provided for a purpose unrelated to the administration taxation laws, the Bill may impact on the privacy rights of affected persons.

However, the Committee recognises that the proposed changes would facilitate eligible employers to access the waiver by enabling the Chief Commissioner of Revenue NSW, who is responsible for administering payroll tax, to receive proof of an employer's eligibility from Service NSW. The Committee also acknowledges that information sharing is limited to government agencies, which are subject to existing privacy protection laws. In these circumstances, the Committee makes no further comment.

9. ELECTRONIC TRANSACTIONS AMENDMENT (REMOTE WITNESSING) BILL 2021

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

10. SERVICE NSW (ONE-STOP ACCESS TO GOVERNMENT SERVICES) AMENDMENT (COVID-19 INFORMATION PRIVACY) BILL 2021

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

Privacy of information

The Bill amends the *Service NSW (One-stop Access to Government Services) Act 2013* to provide additional limits on the use of information collected by Service NSW in the course of the COVID-19 pandemic. The Minister noted that this is in relation to information obtained via the Service NSW QR check in app. The release of such information may impact on the privacy of an individual to whom that information relates, particularly where it contains their personal details, location data, and potentially whether they have tested positive for COVID-19.

However, the Committee recognises that the Bill is intended to provide adequate protection for the strict use of this information. Specifically, the Bill provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates. The Committee further recognises the importance of sharing such information to aid in the contact tracing of COVID-19 positive cases and protection of public health during the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

11. ELECTORAL AMENDMENT (COVID-19) BILL 2021

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

Wide regulation-making power

The Bill amends the Electoral Act 2017 to provide that regulations may be made which modify the application of the Act's provisions to by-elections held prior to 30 June 2022, for the purpose of responding to the COVID-19 pandemic. It further provides that the regulations made under

this power are not limited by general regulation-making powers under the Act, and may override the other provisions in the Act. In doing so, the Bill may grant the Minister a broad power to modify the conduct of parliamentary elections ordinarily regulated by the statute.

The Committee notes that voters for specified by-elections may be subject to different electoral rules as modified by regulations, which may result in individuals being uncertain as to their electoral rights and responsibilities. While the Bill provides explicit limits on this regulation-making power, it also notes the provisions allow for regulations which may abrogate existing electoral protections under the Act.

The Bill may thereby include a broad regulation-making power that may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR. The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to safely conduct parliamentary by-elections held during the COVID-19 pandemic. It also acknowledges that the exercise of this power is limited for the purpose of protecting public health and safety during the COVID-19 public health emergency. Accordingly, the provisions and any regulations made under them are time limited to expire at the end of 30 June 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

The Bill inserts section 274 into the *Electoral Act 2017* which enables the making of regulations that modify the application of the Act to State parliamentary by-elections held prior to 30 June 2022. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

In its Digest No 35/57, the Committee commented on the Local Government Amendment (COVID-19 Elections Special Provisions) Bill 2021 which provided for mirror regulation-making powers in relation to the ordinary local government elections held during the COVID-19 pandemic.

Consistent with those comments, the Committee notes that these provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the Bill's provisions may provide flexibility to facilitate the safe conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It also recognises that the regulation-making power is somewhat limited to allow only those regulations reasonable and for the purpose of protecting public health and safety from risks resulting from the pandemic. In the circumstances, the Committee makes no further comment.

12. WORKERS COMPENSATION AMENDMENT BILL 2021

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

Compensation rights – workers compensation

The Bill amends the *Workers Compensation Act 1987* to remove existing presumptions under the Act which would entitle a worker in a prescribed employment who contracts COVID-19 to workers compensation. These amendments may restrict an individual's access to workers compensation for COVID-19 related injuries by requiring applicants prove their eligibility where previously they may have been automatically entitled under the presumptions. This is of particular concern as the prescribed employments are generally unable to be performed from home which may result in prescribed workers who contract COVID-19 not accessing compensation, in circumstances where they are required by authorities to self-isolate and cannot work.

However, the Committee acknowledges that these changes would not prevent an individual from applying for workers compensation due to contracting COVID-19 in the course of, and as a result of, their employment. It also recognises the Minister's statements that the statutory presumptions may have a disproportionate financial burden on small businesses in New South Wales, which the amendments are intended to alleviate as NSW moves beyond the COVID-19 public health emergency. In the circumstances, the Committee makes no further comment.

PART TWO – REGULATIONS

1. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 3) 2020

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

Penalty notice offences – right to fair trial

The Public Health (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digests No 13/57 and Digest 17/57, the Committee commented on previous regulations which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

The Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its Digests No 13/57 and Digest 17/57, the Committee commented on a previous regulation which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

2. RESIDENTIAL TENANCIES AMENDMENT (COVID-19) (NO. 2) REGULATION 2020

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

Retrospectivity and property rights

The Residential Tenancies Amendment (COVID-19) (No 2) Regulation 2020 extends, with amendments, the operation of Part 6A of the Residential Tenancies Regulation 2019 and Part 5 of the Boarding Houses Regulation 2013 until 26 March 2021.

The Regulation limits certain rights of landlords and boarding house proprietors in response to the pandemic. For example, a landlord generally cannot evict a tenant who is financially impacted by COVID-19 for non-payment of rent. An exception exists where the landlord has negotiated in good faith and the termination notice is fair and reasonable in the circumstances.

A boarding house proprietor must also generally give 6 months' notice of a proposed eviction to a resident who cannot pay their occupancy fees because of COVID-19, with some exceptions.

In retrospectively limiting landlords' and proprietors' rights, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Similarly, by limiting the ability of the landlord or proprietor to exercise their rights under an existing agreement, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. The provisions outlined above are automatically repealed on 26 March 2021. The Committee notes that the Regulation also furthers the public health objectives of ensuring citizens remain in their homes, and preventing

avoidable movement of persons. In the circumstances, the Committee makes no further comment.

3. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION 2021

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

Personal liberty

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety and is in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and greater Sydney. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Additional obligation on hospitality operators

The regulation provides that penalty notices may be issued for not complying with a public health order requiring the wearing of fitted face coverings in certain circumstances, including a wide range of retail, entertainment and hospitality venues. This may have an adverse impact on the business community that may comply with the order during trading and business hours, and may impact or restrict the way their business is conducted while the order is in place.

The Committee also notes that the regulation contains a higher penalty for operators of hospitality venues that contravene the Order than individuals, and requires that the operators ensure that all persons working at the venue comply with the Order. This places an onus on the operator of hospitality venues to ensure that their staff comply with the Order.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and Greater Sydney. The wearing of face masks may allow businesses to continue to operate in certain circumstances while also providing a safety measure to those staff and customers. The Committee also recognises that since this regulation was published that some COVID-19 restrictions have been scaled back, including the requirement for customers to wear face masks in retail venues and other businesses. In these circumstances, the Committee makes no further comment.

4. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION (NO. 2) 2020

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

Retrospectivity, property rights and freedom of contract

Like its predecessor, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an

impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The remade Regulation also goes further than the first Regulation by requiring lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualify for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 10 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 31 December 2020.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

5. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION (NO. 2) 2020

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 *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. For example, the Regulation extends the time limits for compliance with certain provisions of the *Strata Schemes Management Act 2015*, and provides that electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act. Pursuant to subsection 271A(5) of the Act, this Regulation also extends the operation of section 271A itself, delaying its repeal date from 13 November 2020 to 13 May 2021.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

6. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) REGULATION (NO 3) 2020

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

Retrospectivity, property rights and freedom of contract

Like its predecessors, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

The remade Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each.

The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualified for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 12 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 28 March 2021.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

7. PRIVATE HEALTH FACILITIES AMENDMENT (COVID-19 PRESCRIBED PERIOD) REGULATION 2021

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 inserts a new clause 23A into the *Private Health Facilities Regulation 2017*, which has the effect of deferring the repeal date of section 12A of the *Private Health Facilities Act 2007.* This is made possible by a Henry VIII clause in section 12A(3) of the Act, which provides that section 12A will be repealed on 26 March 2021, or a later date prescribed by the regulations.

The Committee generally prefers amendments to an Act, including repeal dates of certain provisions, to be made by an amending Bill rather than by subordinate legislation. This is to foster an appropriate level of parliamentary oversight. In this case, the amendment is limited to extending by another year the special conditions applicable to private health facility licences during the COVID-19 pandemic. The Committee acknowledges the public health and safety objectives of section 12A, and the benefits of having a flexible repeal date, given the ongoing challenges posed by the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

8. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 4) 2020

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

Penalty notice offences – right to a fair trial

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 4) 2020* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 4) 2020* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57 and 25/57, the Committee commented on earlier versions of this Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

Individuals retain the right to elect to have their matter heard and decided by a Court. However, individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57 and 25/57, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances, the Committee makes no further comment.

9. LIQUOR AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

New condition imposed on small bar licences

The *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new provision into the *Liquor Regulation 2018*, making it a condition of a small bar licence that licensed premises cannot be used for 'adult relaxation entertainment (including adult entertainment of a sexual nature)'. These phrases are not defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*, although they are used elsewhere in the Regulation.

Under section 11(2) of the Act, contravention of a licence condition by a licensee attracts a large maximum penalty, including possible imprisonment.

The Committee generally prefers provisions which create new offences, or expand the ambit of an existing offence, to be drafted with sufficient precision so that their scope and content is clear. This is of particular concern given that the condition applies to existing small bar licences, as well as new licences, and non-compliance attracts a significant maximum penalty. In these circumstances, the Committee refers the matter to Parliament for consideration.

10. PUBLIC HEALTH AMENDMENT (MISCELLANEOUS) REGULATION 2021

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

Penalty notice offences – Right to a fair trial

The Regulation extends the operation of certain offences under Schedule 4 of the *Public Health Regulation 2012* until 31 December 2021. This includes penalty notice offences for contraventions of COVID-related public health orders under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, with a current repeal date of 31 December 2021. In the circumstances, the Committee makes no further comment.

Appointment of Authorised Officers

The Regulation extends, until 31 December 2021, the operation of certain provisions under the *Public Health Regulation 2012* that allow the Secretary of the Ministry of Health to appoint any member, or member of staff, of the Department of Customer Service or the NSW Food Authority as an authorised officer. Such authorised officers have functions and powers under the Public Health Act, including the power to issue penalty notices for breaching public health orders and the power to require a person to answer questions.

The Committee generally prefers that provisions that may confer significant powers to be included in primary legislation rather than the subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health

regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic.

Further, the provisions are time limited to be repealed on 31 December 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

11. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION (NO 2) 2021

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

Personal liberty

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety when travelling by aircraft within NSW and is in response to the COVID-19 pandemic and the risk of recurring outbreaks across the States and Territories. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

12. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION 2021

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

Penalty notice offences – right to a fair trail

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, and 30/57 the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty

notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57, 25/57, and 30/57, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.

13. PUBLIC HEALTH AMENDMENT (COVID-19 SPITTING AND COUGHING) REGULATION (NO 2) 2021

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

Penalty notice offences – right to a fair trail

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 2) 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, 30/57 and 32/57, the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This

is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order No 2 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57, 25/57, 30/57, and 32/57 the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.

14. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION (NO 3) 2021

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

Personal liberty

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

The Regulation allows penalty notices to be issued for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021.

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

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

15. RESIDENTIAL TENANCIES (COVID-19 PANDEMIC EMERGENCY RESPONSE) AMENDMENT REGULATION 2021

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

Retrospectivity, property rights and freedom of contract

The Regulation reinstates, with amendments, Part 6A of the Residential Tenancies Regulation 2019 to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it exempts financially impacted tenants from provisions that would ordinarily terminate their residential tenancy agreement or allow the recovery of possession of the property. This exemption applies where rent or charges have not been paid, and where that tenant gives notice and continues to pay at least 25 per cent of the rent payable under the agreement.

The exemption limits landlord's rights in response to the pandemic. For example, during the moratorium period from 14 July 2021 to the end of 11 September 2021, a landlord generally cannot give a tenant who is financially impacted by COVID-19 a termination notice under the Act for non-payment of rent. A landlord may continue to seek termination in other circumstances including (without limitation) to sell the premises, for illegal use of the premises or hardship to the landlord.

By altering the terms of the existing agreement already entered into by the tenant and the landlord, this Regulation retrospectively limits landlords' rights under such tenancy agreements. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact the rule of law principle that a person is entitled to know the law to which they are subject to at any given time.

Similarly, by limiting the ability of the landlord to exercise his/her rights under an existing agreement and specifically limiting the landlord's right to terminate for breach of contract resulting from non-payment of rent or charges, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited to last for the period from 14 July 2021 to 11 September 2021. The Committee notes that the Regulation

furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

16. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION 2021

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 *Strata Schemes Management Amendment (COVID-19) Regulation 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of, and documents relating to, a strata meeting may be served by email and instruments. It also provides that documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

17. LIQUOR AND GAMING LEGISLATION AMENDMENT REGULATION 2021

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Powers of Secretary

The Regulation grants the Secretary certain powers regarding live music and performance venues. Specifically, the Secretary may compile a list of licensed premises that are live music and performance venues, the content of an application of a licensed premises under the Live Music Support Package or requirements under clause 61A(2), and either decide not to include or remove licenced premises from the list of live music and performance venues on various conditions.

The Committee notes that the Regulation does not specify the timeframe in which the Secretary must give the licensee or manager notice of removal from the list of live music and performance venues. If the obligations of the Secretary's notice are not clarified this may result in negative business outcomes for the licensee or manager relative to their eligibility for the Live Music Support Package and may disentitle them from application entirely.

Further clarification for licensees could be provided in the notice requirement by providing written reasons as to why a licensee is no longer considered a live music and performance venue for the purpose of clause 61B.

The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Pursuant to clause 4 of schedule 1 of the *Subordinate Legislation Act 1989*, a statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act. The Committee refers this provision to the Parliament for consideration of whether it calls for elucidation.

18. PUBLIC HEALTH AMENDMENT (COVID-19 MANDATORY FACE COVERINGS) REGULATION (NO 4) 2021

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

Personal liberty

The Regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the Regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

Right to fair trial – penalty notice offences

The Regulation increases the penalty amounts imposed for offences of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021* from $200 for an individual to $500. The Regulation also introduces penalties of $80 for the offences when committed by an individual who is 16 or 17 years of age, and for $40 when committed by an individual who is 15 years of age or younger.

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

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

19. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION 2021

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

Penalty Notice offences – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021* inserts an offence when an individual fails to comply with the Minister's direction prohibiting coughing or spitting on a public official or other worker. A failure to comply with the direction, without reasonable excuse, would result in a penalty notice of $5,000 issued to the individual. The offence inserted into the Regulation is the same offence that was in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

In its previous Digests 13/57, 17/57, 25/57 and 30/57, the Committee commented on the earlier versions of *Public Health (COVID-19 Spitting and Coughing Order 2020*, which provided that a penalty notice of $5,000 could be issued to a person who contravened the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that the amount of $5,000 is a significant monetary amount to be imposed on an individual by way of a penalty notice.

While individuals retain the right to elect to have their matters heard and decided by the Courts. An individual may be financially dissuaded to do so, as the maximum penalty is a significant amount.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by the COVID-19 pandemic, where public institutions, including the courts, would need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes Schedule 4 of the *Public Health Regulation 2012* by coughing or spitting on an official or other worker.

Consistent with its comments made in Digest 13/57, 17/57, 25/57 and 30/57, the Committee generally prefers significant matters to be dealt with in the primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight.

The Committee is also concerned that unlike the offences created in the *Public Health (COVID-19 Spitting and Coughing) Order 2020* and its subsequent iterations which would expire 90 days after it is published, there is no such expiry date for an offence inserted into the *Public Health Regulation 2012*.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond

quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses aren't delayed by the need to amend a Bill. Given the extraordinary circumstances, the Committee makes no further comment.

20. DISTRICT COURT CRIMINAL PRACTICE NOTE 22

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

Right to liberty and freedom from arbitrary arrest or detention

The Practice Note makes the reallocation of hearing dates for criminal trials which have vacated conditional upon the hearing and determination of pre-trial issues. This may have the effect of individuals remaining arraigned on indictable offences and potentially in the custody of the State for an undefined period of time, in circumstances where the person is presumed innocent until their matter has been tried and they have been found guilty of a charge beyond reasonable doubt. The Practice Note may thereby impact on the right to liberty and security of person contained in Article 9 of the ICCPR. The right to liberty and security of person protects the freedom of individuals not to be subjected to arbitrary arrest or detention and the entitlement of individuals arrested or detained on a criminal charge to a trial within a reasonable time, or to be released.

The Practice Note may also impact on the right to equality before the courts and tribunals contained in Article 14 of the ICCPR. The right to be equal before the courts and tribunals in the determination of a criminal trial protects the right of individuals to minimum guarantees of full equality, including the guarantee to be tried without undue delay.

The Committee acknowledges that the Practice Note provides for the previously allocated hearing date of the vacated trial to be reserved for the determination of pre-trial issues, which will prevent further delays to the reallocation of a new trial date that could be caused by the need to fix a hearing date for pre-trial arguments. The Committee also recognises that this measure provides for the efficient use of the Court's resources and may assist the Court in managing the backlog of criminal trials as a result of the vacations caused by the COVID-19 pandemic.

However, the Committee notes that the Criminal Practice Note 18 recognises and makes provisions for the determination of pre-trial issues which may arise in its estimation of trial length. The Committee also notes that the determination of pre-trial issues pending or the signed statement of no such issues provided at the time of the vacation of hearing dates does not preclude the need for determination of further pre-trial issues which might thereafter arise before the new trial date. Therefore, the efficiency savings intended by the restriction may be undermined at the expense of the accused person's right to have their matter set down for trial as soon as reasonable. In circumstances where the accused individual might also be held in custody on remand, the Committee refers this matter to the Parliament for consideration.

21. DISTRICT COURT CRIMINAL PRACTICE NOTE 23

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

Barrier to jury participation

The Practice Note requires that all members of a jury panel attending a new jury trial are vaccinated against COVID-19. While a court participant (including a juror) has the right to decline

to provide his or her vaccination status, it appears that doing so prevents that person from being a juror.

The Practice Note does not appear to facilitate juror participation by audio link or audio-visual link as an alternative. However, the Committee notes that in person jury trials help to uphold the right to fair trial and rule of law by allowing the jurors, among other things, full court room visibility (of other court participants present and the Judge) and access to the jury room for deliberation. It also allows juror conduct to be more closely monitored and therefore effectively managed.

The Practice Note does not make any exceptions to the requirement to be vaccinated on medical or other grounds. The requirement to be vaccinated may therefore be discriminatory against non-vaccinated people, including people who are unable to be vaccinated for medical reasons, or people who received a vaccine other than those approved by the Therapeutic Goods Administration (TGA). These include overseas vaccines 'recognised' by TGA, although it is noted that State and Territory governments or certain organisations may apply additional considerations around vaccine requirements.

The Committee notes the centrality of jury service to the criminal justice system, allowing members of the community to play an active role in the administration of justice. It also notes the intent of the requirement to manage the risk of COVID-19 and protect the safety of all court participants. The Committee refers this issue to the Parliament for its consideration.

Open justice

The Practice Note requires any person who wishes to attend Court in person for Judge alone trial apply for leave, and that such leave will not be granted unless the Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a trial in person provide evidence that they are vaccinated and consent to undergo rapid antigen testing (RAS). If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination or does not consent to undergo RAS, they have access to the virtual courtroom.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, while the Practice Note limits in person appearances and media access to the Court, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

Access to justice

Where a person declines to provide their vaccination status or evidence of such, or do not consent to rapid antigen testing, the Practice Note allows a Crown witness, a defence witness and a defence expert and/or alibi witness to give evidence in a new jury trial by audio link or audio-visual link. It also permits an accused person to appear by audio-visual link. The Court may direct an accused person to appear by audio-visual link if it is in the administration of justice and having regard to certain circumstances.

The use of audio link or audio-visual link may affect procedural fairness because the Court cannot closely monitor the conduct of a witness or expert including what material they have access to, if other persons are in the room or if they are recording the trial on their own device.

It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if an audio link or audio-visual link drops out due to technical failures. Additionally, appearance by audio-visual link may impact an accused person's access to justice, particularly if they are Indigenous or have mental health or cognitive impairment issues, as the Court does not have the benefit of observing any nuanced behavioural cues of the accused person.

The Committee acknowledges that the use of audio link or audio-visual link in trials has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of court participants. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date, although it indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as a juror, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

22. LOCAL GOVERNMENT (GENERAL) AMENDMENT REGULATION 2021

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

Strict liability offences

The *Local Government (General) Amendment Regulation 2021* creates strict liability offences. Specifically, it incorporates provisions of the *Electoral Act 2017* to create three strict liability offences regarding secrecy relating to technology assisted voting and the protection of computer hardware and software. Each offence incurs a monetary penalty or imprisonment, or both:

- disclosure of how an eligible elector, voting using technology assisted voting, votes except in accordance with approved procedures incurs a maximum penalty of 20 penalty units ($2200) or 6 months' imprisonment, or both,

- disclosure of a source code of other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or an arrangement with the Electoral Commissioner, incurs a maximum penalty of 200 penalty units ($22 000) or 2 years' imprisonment, or both, and

- destruction or interference with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting incurs a maximum penalty of 200 penalty units ($22 000) or 3 years' imprisonment.

It also expands the offence under clause 368 to make it an offence for a person to, without lawful authority, enter or remain at a polling place, or refuse to leave a polling place after being

required to leave by an election official. The Regulation places the burden on the accused person to prove they had the lawful authority to enter, remain or refuse to leave. This requirement may be interpreted as a reversal of the evidentiary principle that the burden of demonstrating the elements of an offence rests on the prosecution.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, such offences encourage compliance. Compliance is particularly vital to safeguarding the integrity of the electoral process and vote by secret ballot, which guarantees free expression of the will of electors and upholds an individual's right to partake in public affairs and elections.

The Committee also prefers that provisions which create offences are included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. In this case however the *Local Government Act 1993* contemplates the regulations creating offences by adopting provisions of the *Electoral Act* 2017.

In the circumstances, the Committee makes no further comment.

Freedom of movement

The *Local Government (General) Amendment Regulation 2021* limits the freedom of movement of a person at a polling place or a scrutineer at a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth. Specifically, the Regulation:

- makes it an offence for a person without lawful authority, proof of which lies on the person, to enter, remain or refuse to leave a polling place, and

- allows a police officer to remove a scrutineer for contravening clause 369, engages in misconduct or fails to obey a lawful direction of the election official.

An individual's freedom of movement may be limited for various reasons, including for public order or the rights and freedoms of others, and any limitation must be necessary and proportionate to protect the permissible purposes and be the least intrusive means of achieving the desired result. The Committee considers the limitations on an individual's freedom of movement in this case are for a permissible purpose, namely to maintain public order and uphold the rights of other persons to take part in public affairs and elections. It generally considers that it is necessary, proportionate and the least intrusive means to achieve this result. However, it notes that the making of a strict liability offence limiting a person's ability to enter a polling place without a lawful purpose may be considered an undue interference with an individual's freedom of movement. The Committee refers this issue to Parliament for its consideration.

Right to take part in public affairs and elections – free communication of ideas

The *Local Government (General) Amendment Regulation 2021* allows an election manager to give a direction that the display of posters and handing out tangible electoral material at, or on a relevant premises within 100 metres of, a polling place or a pre-polling office. This provision may limit free communication about candidates and the election available in the posters and electoral materials.

Free communication of information and ideas about candidates and elected representatives is an important component of the right to take part in public life and elections. The Committee is of the view that this right should not be derogated from except in extraordinary circumstances

warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

The Committee notes that that the provisions are an extraordinary measure that seek to respond to the public health crisis created by the COVID-19 pandemic, and to protect public health, safety and welfare. It also notes that safeguards are included in the Regulation, for example:

- the requirement that the direction only be given if the election manager is satisfied that it is necessary to comply with a current public health order or reduce the risk of infection,
- online notification of a direction to limit the provision of posters and tangible electoral,
- publishing of links to electoral material online, and
- time limitation of the provisions, with repeal of the clause on 31 December 2021 at the end of the day.

In the circumstances, the Committee makes no further comment.

Access to postal voting – COVID-19 related qualifications

The *Local Government (General) Amendment Regulation 2021* provides that a person is qualified for a postal vote if they are self-isolating because of COVID-19 related reasons, or reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic.

The requirement that a person apply for postal ballot-paper and postal vote certificate by 5pm on the fifth day before election day may mean that someone who is required to self-isolate in accordance with a public health order after the postal vote application deadline may not be eligible to vote by post or in person on election day. This may result in a person incurring a penalty notice for failing to vote. The Committee refers this issue to Parliament to consider whether these provisions limit access to postal voting, and whether any waiver would be considered for those who fail to vote due to complying with a public health order.

23. PRACTICE NOTE DC (CIVIL) 16

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

Open justice

The Practice Note requires persons who wish to attend Court in person for civil trials listed on or after 25 October 2021 apply for leave, and that such leave will not be granted unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a civil trial in person to provide evidence to the Civil List Judge or trial Judge that they are vaccinated. If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination, they have access to the virtual courtroom. The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny.

However, while the Practice Note limits in person appearances and media access to the Court, the Committee notes that alternative arrangements may be made for those that do not meet

the vaccination requirements to attend a virtual courtroom. The Committee also recognises that these vaccination requirements are in response to the current COVID-19 pandemic for the protection of public health and considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

The Practice Note does not include a specific end date. It also indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact on a person's rights, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in other legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

24. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 2) 2021

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

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* provides that penalty notices can be issued to an individual or corporation that contravenes clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24AC requires an employee living in temporary accommodation in Greater Sydney to work from home unless it is not reasonably practicable for the employee to work at the employee's place of residence.

The Regulation also provides that penalty notices can be issued to an individual or corporation that contravenes clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24EA requires that non-urgent construction must not to be carried out in the local government areas of Blacktown, Campbelltown, Canterbury-Bankstown, Cumberland, Fairfield, Georges River, Liverpool, Parramatta or any other local government area specified by the Chief Health Officer, unless specific circumstances are met under that clause. A maximum infringement of $2000 and $10 000 may be issued for an individual and corporation respectively for contraventions of clauses 24AC and 24EA.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have a matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that infringements of $2000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

25. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 3) 2021

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

Penalty notice offences – freedom of movement and freedom of assembly

The Regulation allows for penalty notices to be issued for offences under section 10 of the *Public Health Act 2010*, for failing to comply with directions not to gather in public under clause 23 of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; for failing to comply with directions to cooperate with contact tracers under clause 25A of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; or for failing to comply with directions to self-isolate according to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The penalties imposed by the Regulation are significant, being for amounts of $3,000 or $5,000.

However, individuals retain the right under this Regulation to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis created by the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

26. PUBLIC HEALTH AMENDMENT (COVID-19 PENALTY NOTICE OFFENCES) REGULATION (NO 4) 2021

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

Penalty notice offence – right to a fair trial

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* provides that penalty notices can be issued for a contravention of the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*. The Regulation is amended by omitting that a penalty notice is to be issued for a contravention of the previous version of the public health order, (*Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*) and instead replaces it with the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*.

Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 under clause 6, and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate under clause 7.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

27. PUBLIC HEALTH AMENDMENT (COVID-19) REGULATION 2021

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

Penalty notice offences – right to a fair trial

The Regulation extends the operation of penalty notice offences under Schedule 4 of the *Public Health Regulation 2021* until 26 March 2022, for offences under the *Public Health Act 2010* of non-compliance with a ministerial direction under section 7, an order made by the Secretary under section 11 or a public health order made by an authorised medical officer under section 62.

In its Digests No 13/57 and 31/57, the Committee commented on the *Public Health Amendment (Penalty Notices) Regulation 2020* providing for the issue of penalty notices for the aforementioned offences, and the *Public Health Amendment (Miscellaneous) Regulation 2021* which extended the operation of these penalty notice offences until 31 December 2021.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the spread of the COVID-19 Delta strain, with a current repeal date of 27 March 2022. In the circumstances, the Committee makes no further comment.

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 amends the *Public Health Act 2010* by way of a Henry VIII clause contained in the Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.

Consistent with those comments, the Committee notes that the Regulation extends the operation of existing legislative provisions contained in the *Public Health Act 2010* which are intended to protect public health and public safety in the extraordinary circumstances of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

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

Vague and ill-defined powers

The Regulation grants the Secretary a general power under clause 54 of the *Public Health Regulation 2012* that may be ill-defined and could benefit from further clarification. Clause 54, which makes it an offence for any person who is not a funeral director to retain a body after 5

days have passed since death, allows the Secretary to approve "generally" the retention of a body which would otherwise be an offence under the *Public Health Regulation 2012*.

The Committee notes that neither the Regulation or the *Public Health Regulation 2012* provides guidance on the coverage or limitations of any such general approval given by the Secretary. This may raise questions regarding who may receive such an approval, who may be covered by such an approval in the event that an employer, such as a hospital, is granted a general approval, and whether that approval is valid indefinitely, subject to conditions and/or subject to expiration. In these circumstances the Committee refers this issue to Parliament for consideration of whether the power could benefit from further clarification.

28. RESIDENTIAL TENANCIES AMENDMENT (COVID-19 PANDEMIC EMERGENCY RESPONSE) REGULATION (NO 2) 2021

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

Property rights and freedom of contract

The Regulation makes amendments to Part 6A of the *Residential Tenancies Regulation 2019* to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it:

- extends to 12 November 2021 provisions exempting a financially impacted tenant from the operations of the provisions of the *Residential Tenancies Act 2010* and regulations that would result in termination of their residential agreement or recovery of possession on the grounds of non-payment of rent or charges if the tenant continues to pay at least 25 per cent of the rent payable under the agreement, and

- exempts, from 12 November 2021 to 12 February 2022, a tenant who accrued rental arrears from the operation of provisions of the Act and regulations that would result in termination of their residential tenancy agreement or recovery of possession on a ground relating to arrears.

The exemptions limit a landlord's rights in response to the pandemic. Although, it appears that a landlord may continue to seek termination in other circumstances including for example to sell the premises, for illegal use of the premises or hardship to the landlord.

In limiting landlords' rights under tenancy agreements, the Regulation may impact on property rights. In particular, the ability of the landlord to exercise rights under an existing agreement in relation to the non-payment of rent, charges or arrears. This may also impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. Although, clause 41CA does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis and economic hardship created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited. The Committee also notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

29. RETAIL AND OTHER COMMERCIAL LEASES (COVID-19) AMENDMENT REGULATION 2021

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

Retrospectivity, property rights and freedom of contract

Like its predecessors, the *Retail and Other Commercial Leases (COVID19) Amendment Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

Specifically, the amending Regulation extends the prescribed period from 20 August 2021 until 13 January 2022, and amends the definition of impacted lessee to include lessees that are recipients of a 2021 COVID-19 Micro-business Grant, Business Grant, or JobSaver Payment.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation in 2020.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on August 2021 until 13 January 2021. The Committee understands that this is in response to the current COVID-19 pandemic and recent lockdown periods which did not experience an easing of restrictions until 11 October 2021. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

As above, the amending Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 pandemic. In doing so, the amending Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 January 2021.

However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial

mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

30. STRATA SCHEMES MANAGEMENT AMENDMENT (COVID-19) REGULATION (NO 2) 2021

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 *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of and documents relating to a strata meeting may be served by email, electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person, and instruments and documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

31. STRONGER COMMUNITIES LEGISLATION AMENDMENT (COVID-19) REGULATION 2021

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

Matters to be included in primary legislation

The Regulation amends a number of regulations to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

As previously noted by the Committee, the referral to the regulations of the repeal date of a clause allows the regulation to amend an Act in respect of the repeal date. Unlike primary legislation, regulations are not required to be passed by Parliament and the Parliament does not control when a regulation commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.

The Committee generally prefers the repeal date or operation period of a clause to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary scrutiny. However, the Committee notes that the primary legislation provisions referring these matters to the regulations were scrutinised by Parliament. Additionally, that the flexibility facilitated by allowing the repeal date to be prescribed by the regulations may be desirable as the provisions respond to the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

Part One – Bills
1. COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021

Date introduced	18 February 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—

(a) amend the following Acts and regulations to extend the operation of temporary provisions that were introduced because of the COVID-19 pandemic until 26 September 2021, and allow their further extension to a day not later than 26 March 2022 by regulation if necessary—

(i) *Child Protection (Working with Children) Act 2012*,

(ii) *Child Protection (Working with Children) Regulation 2013*,

(iii) *Children (Community Service Orders) Act 1987*,

(iv) *Children (Community Service Orders) Regulation 2020*,

(v) *Children (Detention Centres) Act 1987*,

(vi) *Children (Detention Centres) Regulation 2015*,

(vii) *Civil and Administrative Tribunal Act 2013*,

(viii) *Civil and Administrative Tribunal Regulation 2013*,

(ix) *Constitution Act 1902*,

(x) *Constitution (COVID-19 Emergency Measures Regulation 2020*,

(xi) *Court Security Act 2005*,

(xii) *Court Security Regulation 2016*,

(xiii) *Crimes (Administration of Sentences) Act 1999*,

(xiv) *Crimes (Administration of Sentences) Regulation 2014*,

(xv) *Criminal Procedure Act 1986*,

(xvi) *Criminal Procedure Regulation 2017*,

(xvii) *Evidence (Audio and Audio Visual Links) Act 1998*,

(xviii) *Evidence (Audio and Audio Visual Links) Regulation 2015*,

(xix) *Interpretation Act 1987,*

(xx) Jury Act 1977,

(xxi) *Jury Regulation 2015*,

(xxii) *Private Health Facilities Act 2007*,

(xxiii) *Public Health Act 2010*,

(xxiv) *Sheriff Act 2005*,

(xxv) *Sheriff Regulation 2016*, and

(b) repeal temporary regulation-making powers in the following Acts that were introduced because of the COVID-19 pandemic—

(i) *Civil and Administrative Tribunal Act 2013*,

(ii) *Criminal Procedure Act 1986*, and

(iii) *Interpretation Act 1987*, and

(c) amend the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (the Act) to—

(i) ensure the process for making orders relating to diversion of accused persons in the Local Court does not trigger the processes under the *Local Court Act 2007* relating to the commencement of proceedings, and

(ii) clarify that the Mental Health Review Tribunal's power to extend of a statutory review period applies only to mandatory reviews for forensic patients, mandatory reviews for correctional patients and reviews of persons in custody who are subject to community treatment orders, and

(iii) provide for the transitional arrangements for criminal proceedings in the Supreme Court and District Court in which the court had imposed a limiting term in respect of the accused person and that were commenced before the commencement of the Act, and

(iv) clarify the transitional arrangements for summary proceedings before a Magistrate and that were commenced before the commencement of the Act, and

(d) repeal the *Mental Health (Forensic Provisions) Amendment (Victims) Act 2018*.

BACKGROUND

2. The Bill amends various pieces of legislation to change the repeal clause that would otherwise expire on 26 March 2021, and to extend it for a six month period until 26 September 2021, or until 26 March 2022 if prescribed by the regulations.

3. In the second reading speech to the Bill, the Attorney General stated that the Bill seeks to temporarily extend a number of emergency measures already implemented as a result of the COVID-19 pandemic.

4. The Attorney General noted that while NSW had recorded 31 days of no transmission as at the date the Bill was introduced, the recent Northern Beaches and Greater Sydney outbreaks, as well as the Victorian outbreak, highlighted that the risk of outbreak remains and there is still a need for COVID-safe practices.

5. He further stated that:

> The COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021 seeks to extend temporarily a number of emergency measures already implemented as a result of the COVID-19 pandemic until September 2021, with an option of a further six-month extension by regulation. In particular, this is to allow court, tribunal and correctional services to continue to provide services safely during the pandemic. In March and May 2020, the New South Wales Parliament passed emergency legislation to adopt temporary measures to help manage the COVID-19 pandemic, including, in March 2020, the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020*; and later in May 2020, the *COVID-19 Legislation Amendment (Emergency Measures—Attorney General) Act 2020* and the *COVID-19 Legislation Amendment (Emergency Measures—Miscellaneous) Act 2020*. The majority of the provisions were temporary and included sunset dates to ensure they only remained operational for as long as they needed to be. Without legislative amendment to extend them, many of these measures will sunset on 26 March 2021.

6. The Committee previously reported on the Bill that initially introduced these measures, contained in the *COVID-19 Legislation Amendment (Emergency Measures) Bill 2020*, the *COVID-19 Legislation Amendment (Emergency Measures-Attorney General) Bill 2020*, and the *COVID-19 Legislation Amendment (Emergency Measures-Miscellaneous) Bill 2020*. The reports for these bills are contained in Digest No 12 /57 and Digest No 15/57.[1]

7. To the extent that the Bill seeks to extend the repeal clause of the existing provisions, and does not substantially amend the operative provisions, the Committee will not comment further on issues already reported in prior digests.

ISSUES CONSIDERED BY THE COMMITTEE

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

Matters deferred to regulations

8. Schedule 1 of the Bill amends various pieces of legislation to extend the repeal clause from 26 March 2021 until 26 September 2021, or a later day, not later than 26 March 2022, prescribed by the regulations.

[1] Legislation Review Committee, Legislation Review Digest No 12/57, 22 April 2020; Legislation Review Committee, Legislation Review Digest No 15/57, 2 June 2020.

9. In the second reading speech, the Attorney General noted that the bill does not propose any new COVID-19 measures and aligns with the timeline for the planned vaccine rollout:

> This bill proposes to extend temporarily the operation of certain COVID-19 legislative provisions for a further six months to 26 September 2021, with an option to extend by up to a further six months by regulation. This extension coincides with projected vaccination rollout time frames, incorporating some flexibility in light of the unpredictable nature of the pandemic. The bill does not extend any extraordinary regulation-making powers, colloquially known as King Henry VIII clauses, introduced as part of the COVID-19 emergency response, that allowed government to make regulations altering some legislative provisions if needed urgently due to COVID-19, for example, if Parliament were not sitting.
>
> … Parliament has continued to sit throughout the pandemic, and we are now in a different phase of our response. The bill does not propose any new COVID-19 emergency provisions. All provisions proposed for temporary extension were previously passed by Parliament.

> **The Bill amend a number of acts and regulations to extend the repeal clause by six months or until a later date, up to 12 months, as prescribed by the regulations. The Committee notes that this allows the regulation to amend the Act in respect of the repeal date. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987),* the statutory rule may have already been in operation for some time before disallowance occurs.**
>
> **However, the Committee notes that the Bill only seeks to extend the repeal date of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Attorney General noted that these measures are in place with the intent of protecting public health and public safety during a time where there is an ongoing risk of a COVID-19 outbreak. In these circumstances, the Committee makes no further comment.**

2. COVID-19 Recovery Bill 2021

Date introduced	17 March 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrottet MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of the *COVID-19 Recovery Bill 2021* is to temporarily remake or extend the operation of certain measures implemented in response to the COVID-19 pandemic.

2. Schedule 1 to the Bill amounts the following Acts and regulations –

   (a) *Annual Holidays Act 1944*,

   (b) *Annual Holidays Regulation 2016*,

   (c) *Associations Incorporation Act 2009*,

   (d) *Associations Incorporation Regulation 2016*,

   (e) *Biodiversity Conservation Act 2016*,

   (f) *Biodiversity Conservation Regulation 2017*,

   (g) *Community Land Management Act 1989*,

   (h) *Community Land Management Regulation 2018*,

   (i) *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010*,

   (j) *Crown Land Management Act 2016*,

   (k) *Crown Land Management Regulation 2018*,

   (l) *Environmental Planning and Assessment Act 1979*,

   (m) *Environmental Planning and Assessment Regulation 2000*,

   (n) *Fisheries Management Act 1994*,

   (o) *Home Building Act 1989*,

   (p) *Industrial Relations Act 1996*,

   (q) *Long Service Leave Act 1955*,

   (r) *Long Service Leave Regulation 2016*,

(s) *Mental Health Act 2007*,

(t) *Mental Health Regulation 2019*,

(u) *Mining Act 1992*,

(v) *Protection of the Environment Operations Act 1997*,

(w) *Protection of the Environment Operations (General) Regulation 2009*,

(x) *Residential Tenancies Act 2010*,

(y) *Retail Leases Act 1994*,

(z) *Retirement Villages Act 1999*,

(aa) *Retirement Villages Regulation 2017*,

(ab) *Strata Schemes Management Act 2015*,

(ac) *Strata Schemes Management Regulation 2016*,

(ad) *Waste Avoidance and Resource Recovery Act 2001*,

(ae) *Water Management Act 2000*,

(af) *Water Management (General) Regulation 2018*.

BACKGROUND

3. In his second reading speech, the Treasurer, the Hon. Dominic Perrottet MP, set out the reasons underpinning the introduction of this Bill, including the need to 'extend temporary support for those who need it' in response to the ongoing challenges presented by the COVID-19 pandemic.

4. The Treasurer referred to previous legislation introduced to address these challenges, and the need for 'existing protections [to be] coupled with new conditions to ensure that protection does not become a disincentive to recovery'.

5. Accordingly, the Treasurer highlighted proposals in the Bill to 'temporarily extend existing emergency measures by up to 12 months', in order to 'help with continued management of the pandemic as well as our longer-term economic recovery'. Those extended emergency measures include amendments to the *Associations Incorporation Act 2009, Strata Schemes Management Act 2015, Biodiversity Conservation Act 2016, Crown Land Management Act 2016*, *Mental Health Act 2007*, and others, to extend provisions for conducting meetings, medical examinations, and mandatory questioning by audio or video link.

6. Other amendments in the Bill extend emergency provisions for only six months, with a possibility of further extension by regulation – for example, certain other sections of the *Long Service Leave Act 1955* and *Annual Holidays Act 1944*, as well as the *Industrial Relations Act 1996* and *Retirement Villages Act 1999*.

7. These emergency measures were introduced in previous omnibus amendment Bills which the Committee has reported on, such as Digests No. 12/57 and No. 15/57.[2]

8. The Bill also includes provisions designed to 'support the transition back to normal commercial and residential tenancy laws' following the repeal of previous emergency measures. These include certain preserved protections for commercial tenants under the *Retail Leases Act 1994*, as well as new amendments to the *Residential Tenancies Act 2010*, outlined below.

ISSUES CONSIDERED BY THE COMMITTEE

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

Examination by audio-visual link, risk of arbitrary detention

9. As mentioned above, a number of amendments in the Bill extend the operation of provisions in various Acts which allow individuals to make decisions, answer questions, or be examined by audio visual link, rather than in person, as a result of the COVID-19 pandemic.

10. For example, schedule 1.19 to the Bill extends the operation of provisions in the *Mental Health Act 2007* from 26 March 2021 until 31 March 2022, which permit a medical practitioner to examine a person by video link to determine whether the person is a mentally ill or mentally disordered person. Such examination, as provided by sections 18 and 27 of that Act, is an essential step in the process of determining whether a person should be detained in a mental health facility.

11. As noted above, provisions relating to giving evidence or answering questions by video link are also extended in the *Crown Land Management Act 2016*, the *Environmental Planning and Assessment Act 1979,* the *Mining Act 1992*, the *Protection of Environmental Operations Act 1997*, and others.

> **The *COVID-19 Recovery Bill 2021* extends the operation of provisions in various Acts allowing certain activities, such as mandatory questioning by authorised officers, to occur by video link rather than in person. This includes the extension of provisions under the *Mental Health Act 2007* for medical practitioners to examine patients by video link, in order to help decide whether those patients should be detained in a mental health facility. The Committee previously reported on these provisions when they were first introduced, in its Digest No. 12/57.[3]**
>
> **Consistent with the Committee's previous comments, the extension of these provisions in the *Mental Health Act* may impact the extent to which individuals are able to fully participate in a process which could result in their involuntary detention. They also have the potential to impact upon the accuracy of the examination process, as they reduce the ability of medical practitioners to assess**

[2] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 12/57, 22 April 2020; Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 15/57, 2 June 2020.

[3] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 12/57, 22 April 2020.

a patient's demeanour. In turn, this may impact on the right of individuals not to be arbitrarily detained.

However, the provisions remain an extraordinary measure to ensure that mental health inquiries are conducted appropriately given the risks COVID-19 poses to persons detained in mental health facilities, Tribunal members, staff, and the public. The provisions also contain certain safeguards, including a requirement that examination only be carried out over video link if it is necessary, and 'can be carried out with sufficient skill or care so as to form the required opinion about the [patient]'. In these circumstances, the Committee makes no further comment.

Freedom of contract and property rights

12. Part 13 of the *Residential Tenancies Act 2010* was inserted into that Act in March 2020, and was amended multiple times over the course of 2020. The provisions in that Part, and the regulations made under it, were aimed at protecting tenants who were impacted by the COVID-19 pandemic from eviction during a prescribed 'moratorium period'. Pursuant to section 230 of the *Residential Tenancies Act*, Part 13 will be repealed on 26 March 2021.

13. As the Treasurer noted in his second reading speech, the provisions in this Bill relating to residential tenancies are designed to 'support the transition back to normal commercial and residential tenancy laws following emergency measures introduced at the peak of the pandemic.' Accordingly, the Bill inserts a new Part 9 into schedule 2 to the *Residential Tenancies Act*. Section 2(2) of the Bill specifically provides that the provisions in Part 9 will commence 'on the repeal of Part 13 of the *Residential Tenancies Act*'.

14. Part 9 includes a new clause 27, which provides that a landlord must not take 'prohibited action' to the extent that it relates to rental arrears accrued during the moratorium period by an impacted tenant if the tenant has agreed to a repayment plan, and complied with the terms of that plan. The tenant is taken to have complied with a repayment plan unless they have failed to make 2 consecutive payments by the times required under the plan.

15. Further, clause 27(3) provides that, even if a tenant has not complied with the terms of a repayment plan, a landlord must not take prohibited action unless it is 'fair and reasonable in the circumstances'.

16. If an impacted tenant and their landlord have not agreed to a repayment plan, clause 27(4) provides that the landlord must not take prohibited action unless the landlord has participated 'in good faith' in a formal negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to take the prohibited action.

17. Clause 27(5) sets out the matters that the Tribunal, meaning the NSW Civil and Administrative Tribunal, must have regard to in deciding whether a landlord is authorised to take prohibited action. These include the steps taken by the parties to negotiate a repayment plan, the payments made by the tenant towards the arrears, the nature of any financial hardship experienced by either party, and the availability of reasonable alternative accommodation for the tenant.

18. Similar to the definitions previously included in Part 13 of the Act, 'prohibited action' is defined in clause 27(8) as including giving a termination notice to a tenant or applying to the Tribunal for a termination order on the basis of non-payment of rent.

19. 'Arrears' are defined in clause 26(1) as including rents or charges that were payable by the tenant during the moratorium period, were not paid either with or without the agreement of the landlord, and are still owing.

20. These provisions are time-limited, as clause 27(9) stipulates that clause 27 will cease to have effect on 26 September 2021.

21. Also contained in proposed Part 9 are provisions preventing landlords from issuing a 'no grounds termination' notice (clause 28) or listing personal information about an impacted tenant in a residential tenancy database (clause 31).

> **The Bill includes amendments to schedule 1 to the *Residential Tenancies Act 2010*, which will come into force on the repeal of Part 13 of that Act on 26 March 2021. These amendments include the introduction of new provisions relating to the negotiation of repayment plans between landlords and tenants who have been financially affected by the COVID-19 pandemic. For example, clause 27 of the proposed Part 9 of schedule 1 to the *Residential Tenancies Act* prohibits a landlord from evicting a tenant for non-payment of rent, unless the tenant has failed on two occasions to comply with the terms of a repayment plan.**
>
> **Further, it must be 'fair and reasonable in circumstances' for the landlord to issue a termination notice or seek a termination order in the Tribunal. If the parties have not agreed to a repayment plan, the landlord cannot terminate the lease unless they have 'participated in good faith' in a formal arrears repayment negotiation process, and it is 'fair and reasonable in the circumstances' for the landlord to seek termination.**
>
> **These provisions are distinct from previous amendments to the *Rental Tenancies Act* which prevented landlords from seeking termination on the basis on non-payment of rent. The Committee has commented on those amendments, contained in Part 13 of the *Rental Tenancies Act*, in previous issues of the Committee Digest – for example, Digest No. 15/57.[4] However, similar to the provisions in Part 13, the provisions in Part 9 of schedule 1 continue to impact on landlords' freedom of contract, specifically their ability to enforce their rights under contracts they have entered into with tenants. Further, by continuing to limit the extent to which landlords can enforce their rights under tenancy agreements – such as the right to evict tenants for non-payment of rent – the provisions in Part 9 impact on landlords' property rights.**
>
> **However, the Committee notes that these provisions are an extraordinary measure that seeks to respond to the ongoing impacts of the economic crisis created by the COVID-19 pandemic. Further, they will apply for a limited time period, as they are due to be repealed in September 2021. The Committee also notes that landlords retain the right to negotiate repayment plans with tenants, and to enforce those repayment plans. In the circumstances, the Committee makes no further comment.**

[4] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 15/57, 2 June 2020.

Retrospectivity

22. Section 5 of the Bill provides that, if an amendment made by the Bill to extend a 'prescribed period' commences after the time when prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued as if the amendment had commenced before that time. This provision is included as a 'savings' provision.

> **Section 5 of the Bill provides that, if an amendment in the Bill which extends a 'prescribed period' commences after the prescribed period would otherwise have ended, the prescribed period is taken not to have ended at that time, but to have continued on. This 'savings provision' may mean that the amendment to the length of certain 'prescribed periods' in various Acts and regulations will have retrospective effect. This could have the effect that individuals who may have presumed certain provisions were not in force after they were due to expire were in fact bound by those provisions.**
>
> **The Committee generally comments on provisions that have retrospective effect, as they run counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. The Committee acknowledges the practical objectives of this provision, to ensure consistency within the legislative schemes affected by the Bill's amendments. Insofar as it extends 'prescribed periods' under various pieces of legislation, the Bill does not create new provisions, but extends the operation of old provisions introduced because of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.**

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

Henry VIII clauses

23. In a number of instances, the Bill provides that emergency provisions be extended by six months, or to a 'later day…. prescribed by the regulations', with a maximum of a twelve month extension.

24. For example, schedule 1.17 to the Bill amends section 15C of the *Long Service Leave Act 1955*, relating to the accrual of long service leave, so that the 'prescribed period' for which that section operates ends on 30 September 2021, or another date prescribed by the regulations, not later than 31 March 2022. This is similar to the previous iteration of section 15C, which provided that the 'prescribed period' would end on 12 September 2020, or another date prescribed by the regulations, not later than 12 March 2021.

25. The Bill similarly defers to regulations the repeal date or the 'prescribed period' of operation of certain provisions in the *Annual Holidays Act 1944*, the *Industrial Relations Act 1996*, the *Retirement Villages Act 1999*, and the *Waste Avoidance and Resource Recovery Act 2001*.

26. Separately, schedule 1.25 of the Bill amends section 88 of the *Retail Leases Act 1994* to provide that certain protections granted during the COVID-19 pandemic will continue to apply, despite their repeal. However, it also provides that 'the regulations may provide for exemptions from this section'.

In extending the operation of emergency provisions in various Acts and regulations, the Bill contains a number of Henry VIII clauses. For example, numerous amendments to existing Acts delay the repeal date or extend the 'prescribed period' for the operation of certain provisions for six months, or until a 'later day… prescribed by the regulations'. This is the case for the amendments made to the *Industrial Relations Act 1996* and the *Retirement Villages Act 1999*, among others. The Committee notes that these provisions allow for regulations to amend Acts in respect of the repeal date, or period of operation, of certain emergency provisions.

The Bill also amends the *Retail Leases Act 1994* to provide that certain protections will continue to apply, subject to exemptions provided for by the regulations. Again, this allows for regulations to alter the effect of provisions contained in their parent Act.

Unlike primary legislation, regulations are subordinate legislation – they are not required to be passed by Parliament, and the Parliament does not control when they commence. While either House of Parliament can pass a resolution disallowing a regulation (under section 41 of the *Interpretation Act 1987*), the regulation may operate for some time before disallowance can occur.

However, the Committee notes that, to the extent that it delegates power to regulations, the Bill only seeks to extend the operation of existing measures that are part of the Government response to the COVID-19 pandemic, and does not seek to implement new measures. The Committee also recognises that a flexible repeal date for these provisions may be desirable, as the Treasurer suggested in the second reading speech, in 'recognising the uncertainty of the duration of the pandemic'. In these circumstances, the Committee makes no further comment.

3. Electoral Legislation Amendment (Local Government Elections) Bill 2021

Date introduced	10 June 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State, and Minister for the Public Service and Employee Relations, Aboriginal Affairs, and the Arts

PURPOSE AND DESCRIPTION

1. The objects of this Bill are to—

   (a) amend the *Electoral Funding Act 2018* to enable a party agent of a registered party to elect to be the person responsible for disclosing certain political donations and electoral expenditure relating to local government, and

   (b) amend the *Local Government Act 1993* to—

      (i) clarify the relationship between the regulations under that Act and arrangements between a council and the Electoral Commissioner for administration of local council elections, and

      (ii) provide for the making of rules for the safe conduct of council elections during the COVID-19 pandemic, and

      (iii) clarify that the postponement of a council election by the Minister does not affect the validity of certain council resolutions passed and arrangements entered into by the council.

BACKGROUND

2. The Bill amends the *Electoral Funding Act 2018* and the *Local Government Act 1993* in order to facilitate the upcoming local government elections in September 2021.

3. In the second reading speech to the Bill, the Minister, the Hon. Don Harwin noted the changes the Bill made to party agents for local government elections:

> Firstly, the bill amends the Electoral Funding Act 2018 to expand the circumstances in which a party agent can choose to be responsible for electoral expenditure and donations disclosures on behalf of endorsed candidates, councillors or groups. Part 3 of the Electoral Funding Act requires electoral participants to disclose information about political donations and electoral expenditure to the NSW Electoral Commission. The rules setting out who is responsible for making those disclosures are set out in section 14 of the Act. For local government elections, the Act currently provides that candidates, councillors and groups

> are generally responsible for making their own disclosures, including those who are members of a registered political party.
>
> … These amendments will result in disclosure requirements for local government elections—or at least an option existing—being more closely aligned with State government elections, where a party agent has greater control over the disclosures of endorsed candidates. The changes are also expected to reduce administrative inefficiencies experienced by parties and candidates by allowing party agents to become responsible for an endorsed candidate, councillor or group's disclosures without the administrative burden of first negotiating an agreement. It is also important to note that being responsible for disclosures triggers other responsibilities in relation to electoral expenditure and donations under the Electoral Funding Act. For example, where a party agent is responsible for the disclosures of a candidate, the party agent also becomes responsible for accepting donations made to the candidate and paying those donations into the party's local government campaign account.
>
> As a result, the increased flexibility for party agents to take control of disclosures will in turn mean that party agents have greater scope to oversee campaign finances in local government elections. This option will be an important integrity measure to ensure that those with the ability, experience and know-how are able to run campaigns for their candidates in full compliance with the Electoral Funding Act. It will mitigate against the risk that candidates, with less experience and familiarity of obligations under the Electoral Funding Act, will fall foul of the Act's disclosure requirements.

4. The Minister also noted the changes the Bill made regarding the current precautions for the COVID-19 pandemic:

> The bill also makes changes to the Local Government Act 1993 to respond to challenges associated with the COVID-19 pandemic. This bill contains several measures to clarify the intended operation of the Local Government Act 1993 in circumstances where local government elections are postponed and to ensure the NSW Electoral Commission can conduct COVID-safe elections, if necessary, in September.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity

5. The Bill amends Schedule 2 of the *Electoral Funding Act 2018,* regarding savings transitional and other provisions. Under the proposed Part 5, Section 14 of the Act, as in force immediately before the commencement of this Bill, continues to apply to the disclosure of political donations received or made, and electoral expenditure incurred, before that commencement.

6. The Bill also amends Schedule 8 of the *Local Government Act 1993*, regarding the postponement of elections. Under the proposed section 134, section 318B(4A) extends to resolutions passed, and arrangements entered into, before the commencement of that subsection in relation to an election postponed under section 318B before the commencement.

> **The Bill amends the *Electoral Funding Act 2018* and the *Local Government Act 1993* to provide that certain provisions are to apply to matters that occurred**

before the commencement of the relevant sections within the Bill. This allows these provisions to operate retrospectively.

The Committee generally comments where provisions apply retrospectively as it runs counter to the rule of law principle that a person is entitled to know the law that applies to him or her at any given time. However, the Committee notes that the relevant provisions are largely mechanic in nature, including savings transitional and other provisions consequent on the enactment of the provisions in the Bill, and for the facilitation of local government elections. In these circumstances, the Committee makes no further comment.

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

Rules not subject to disallowance

7. The Bill amends the *Local Government Act 1993* to insert proposed section 296C, which provides that the Electoral Commissioner may, by a written order published on their website, specify COVID-19 safe election rules for the safe conduct of elections during the COVID-19 pandemic.

8. In determining COVID-19 safe election rules, the Electoral Commissioner must have regard to applicable public health orders and health recommendations by NSW Health concerning the COVID-19 pandemic and the holding of public events during the pandemic.

9. This section is to be repealed on 1 January 2022, or a later day, not later than 26 March 2022, as prescribed by the regulations.

10. In the second reading speech, the Minister noted the purpose of the provision:

> Section 296C will operate to allow the commissioner to publish COVID-19 safe election rules based on applicable public health orders concerning the COVID-19 pandemic and relevant health recommendations made by NSW Health concerning the holding of public events during the COVID-19 pandemic. The commissioner will not contravene section 296(2) in relation to an election arrangement entered into with a council for something done, or not done, for the purpose of complying with COVID-19 safe election rules. This third measure is a time-limited one and automatically expires on 1 January 2022, or no later than 26 March 2022 if extended by regulation.

The Bill allows the Electoral Commissioner to publish COVID-19 safe election rules for the safe conduct of elections during the COVID-19 pandemic. Such rules are not required to be tabled in the Parliament and therefore not subject to parliamentary scrutiny. The Committee generally comments where legislation allows for the making of rules not subject to disallowance that may infringe on a person's personal rights or liberties, such as the right to vote.

However, the Committee recognises that the purpose of these COVID-safe rules is to ensure that elections are run in accordance with the relevant public health orders and health recommendations of NSW Health regarding holding public events during the COVID-19 pandemic. The section is also set to be repealed on 1 January 2022, or a later day, not later than 26 March 2022, as prescribed by the

regulations. Given the public safety aspect of the provisions, and the considerable safeguards, the Committee makes no further comment.

4. Appropriation Bill 2021; Appropriation (Parliament) Bill 2021; Electric Vehicles (Revenue Arrangements) Bill 2021; Environmental Planning And Assessment Amendment (Infrastructure Contributions) Bill 2021; NSW Generations Funds Amendment Bill 2021

Date introduced	22 June 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Dominic Perrotet MP
Portfolio	Treasury

PURPOSE AND DESCRIPTION

Appropriation Bill 2021

1. The object of this Bill is to appropriate from the Consolidated Fund various sums of money required during the 2021–22 financial year for the services of the Government, including—

   (a) Departments of the Public Service, and

   (b) various special offices.

2. The Consolidated Fund largely comprises receipts from, and payments out of, taxes, fines, some regulatory fees, Commonwealth grants and income from Crown assets.

3. This Bill—

   (a) appropriates a single sum for the services of each agency, including recurrent services, capital works and services, and debt repayment, and

   (b) contains an additional appropriation which allocates revenue raised in connection with gaming machine taxes to the Minister for Health and Medical Research for spending on health related services, and

   (c) contains provision for transfer payments from the Commonwealth to non-government schools and local government, and

(d) provides for appropriation for the whole of the 2021–22 financial year.

Appropriation (Parliament) Bill 2021

4. The object of this Bill is to appropriate from the Consolidated Fund a sum for the services of the Legislature during the 2021–22 financial year, including recurrent services, capital works and services and debt repayment.

Electric Vehicles (Revenue Arrangements) Bill 2021

5. The objects of this Bill are to—

(a) impose a distance-related road user charge on registered operators of certain zero and low emissions vehicles, and

6. (b) exempt certain zero and low emissions vehicles from the payment of duty under the *Duties Act 1997*, Chapter 9.

Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021

7. The object of this Bill is to amend the Environmental Planning and Assessment Act 1979 and other instruments as follows—

(a) to enable a contributions plan to identify land in a land value contributions area for the purpose of requiring a land value contribution for the land,

(b) to establish a regional infrastructure contributions scheme,

(c) to make further provision for existing local infrastructure contributions,

(d) to make other consequential amendments.

NSW Generations Funds Amendment Bill 2021

8. The objects of this Bill are—

(a) to require the Treasurer to table a report in each House of Parliament whenever a payment is made out of the Debt Retirement Fund, and

(b) to require the Treasurer to include a report in the Budget Papers about activities involving the Debt Retirement Fund, and

(c) to permit the Treasurer to direct money to be paid into the Debt Retirement Fund from revenue of a class prescribed by the regulations, and

(d) to limit the purposes for which a payment may be made out of the Debt Retirement Fund, and

(e) to include savings and transitional provisions.

BACKGROUND

9. These Bills give effect to the 2021-22 NSW State Budget.

10. Although they are separate Acts when operative, the Appropriation Bill 2021, Appropriation (Parliament) Bill 2021, Electric Vehicles (Revenue Arrangements) Bill 2021, Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021, and the NSW Generations Funds Amendment Bill 2021 are cognate bills and were introduced together. Therefore, all five Bills have been considered in the one report.

11. In the second reading speech the Treasurer noted that the 2021 budget contained three core objectives; keeping NSW safe and accelerate recovery from the impacts of COVID-19, investing in people, and transforming the state.

12. The Treasurer further stated:

> These are the foundations of a future that will be brighter if we dare to do things differently. For a decade we have kept the State's finances secure and our economy strong. We have invested to build the best services in the nation, laying the groundwork for our pandemic response. This has fuelled confidence, spurred our recovery, and ignited our economy and boosted our finances. And as we look to the future, we do so from a position of strength, in control of our Budget and in control of our destiny.
>
> This Budget keeps NSW safe, and accelerates our recovery. It invests in our people. It transforms our State. Today, other governments are raising taxes and cutting wages, sacrificing growth to save their Budgets. But the future that we imagine is not built on austerity. This is a Budget for prosperity. And the next decade of delivery has already begun. This Budget gets NSW dressed for success.

13. These Bills were introduced in the Legislative Assembly on 22 June. On 24 June, the Leader of the House and Attorney General, the Hon Mark Speakman SC MP, moved to consider the Appropriation Bill 2021 and the Appropriation (Parliament) Bill 2021 bills separately. These bills were passed by the Legislative Assembly on 24 June under special arrangements to accommodate the COVID-19 restrictions on Parliament House following an announcement that a Minister had tested positive to COVID-19. The Bills were then introduced and passed without amendment in the Legislative Council that same day.

14. The Electric Vehicles (Revenue Arrangements) Bill 2021, Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021, and the NSW Generations Funds Amendment Bill 2021 remain to be debated and passed by either House.

15. However, the Committee makes no comment on the Appropriation Bill 2021 and the Appropriation (Parliament) Bill 2021 and NSW Generations Funds Amendment Bill 2021 in respect of the issues set out in section 8A of the Legislation Review Act 1987. The Committee considered issues identified in the Electric Vehicles (Revenue Arrangements) Bill 2021 and the Environmental Planning and Assessment Amendment (Infrastructure Contributions) Bill 2021 to the extent that they engage with the issues set out in section 8A of the Legislation Review Act 1987.

ISSUES CONSIDERED BY COMMITTEE

ELECTRIC VEHICLES (REVENUE ARRANGEMENTS) BILL 2021

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

Extraterritorial operation of Act

16. Proposed section 6 provides that this Act is intended to have extraterritorial application as far as the legislative powers of the State permit, including in relation to zero or low emissions vehicles registered in New South Wales that travel on roads in other States or Territories.

> **Section 6 of the Bill provides that the Act is to have extraterritorial application, as far as the legislative powers of the State permit, in relation to zero or low emission vehicles registered in NSW that travel on roads in other States or Territories.**
>
> **This extends the legislative jurisdiction of the Act beyond the State of New South Wales. The Committee generally comments where legislation may have extraterritorial effect as it may create uncertainty about what laws individuals are subject to at any one time, especially if they live in another State or Territory.**
>
> **However, the Committee recognises that the intent of the provision is the ensure that vehicles registered in New South Wales that may travel on roads in other State or Territories are still subject to the zero or low emission requirements. As the vehicles subject to the laws are required to be registered in NSW, the Committee understands that it is a responsibility of the vehicle owner to be aware of the relevant laws that apply at the time and place of registration. In these circumstances, the Committee makes no further comment.**

Strict liability offences

17. Section 17 provides that a registered operator of a relevant zero or low emissions vehicle who is using the post-paid option to pay the road user charge payable in relation to the vehicle must give Transport for NSW a current odometer reading for the vehicle at the intervals prescribed by the regulations. Failure to do so can result in a maximum penalty of 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

18. Section 18 provides that an odometer reading for a relevant zero or low emissions vehicle must be given to Transport for NSW, in the way approved by Transport for NSW at the time the vehicle is registered, renewed, or otherwise disposed. Failure to do so can result in a maximum penalty of 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

> **The Bill contains provisions that impose penalties for failure to comply with certain requirements regarding the registration of a relevant zero or low emissions vehicle. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.**
>
> **The Committee generally comments on strict liability offences as they depart from the common law principle that *mens rea*, or the mental element, is a**

relevant factor in establishing liability for an offence. That is, the registered operator does not need to have intended to not comply with the registration requirements to be held liable for a penalty.

The Committee notes that strict liability offences are not uncommon in regulatory settings to encourage compliance, and in the current case, the offence provision is designed to incentive registered owners to register their vehicle on time. Further, the maximum penalties for the offences are monetary, not custodial. In these circumstances, the Committee makes no further comment.

Penalty notice offences – Right to a fair trial

19. Section 26 allows an authorised officer to issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence against the Act or its regulations.

Section 26 enables offences against the proposed Act and offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings. Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. In this instance, the penalty notice offences are in regards to road user charges and registration an associated requirements. In these circumstances, the Committee makes no further comment.

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

Enforcement powers

20. Section 22 provides that Transport for NSW may require a person, by written notice, to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges.

21. The person must comply with the notice unless the person has a reasonable excuse. A maximum penalty for failure to comply may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

The Bill provides that Transport for NSW may require a person to provide information or documents for the purposes of calculating whether a person is liable for road user charges or the amount of the charges. Where a person does not comply with this requirement, and does not have a reasonable excuse, a maximum penalty may be applied of up to 20 penalty units ($2,200) for an individual, and 100 penalty units ($11,000) for a body corporate.

This is a broad administrative power to the production of documents and information. However, the Committee recognises that these powers enable TfNSW to do carry out their functions under the Act regarding road user charges. It also recognises that the clause allows for where a person may have a reasonable excuse for not having complied with this clause and therefore allows an degree of discretion. In these circumstances, the Committee makes no further comment.

Information sharing powers

22. Section 23 provides that Transport for NSW may enter into an arrangement with another government sector agency, head of a government sector agency, or an agency of another state to Territory, about sharing relevant information.

The Bill provides that TfNSW may enter into information sharing arrangements with another government sector agency, head of government sector agency, or an agency of another State or territory. The provisions does not specify what types of information can be disclosed, and does not require that TfNSW seek consent from or notify individuals who may be affected. This provisions may impact on an individual's right to privacy.

However, the Committee acknowledges that information sharing is limited to government agencies. The Committee also notes the objective of the provision, as outlined in the explanatory notes, to enable TfNSW to enter into an information sharing arrangement in relation to information relevant to road user charges or equivalent or similar charges under the law of another State or Territory. In these circumstances, the Committee makes no further comment.

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

Matters deferred to the regulations

23. Section 15 sets out 2 options for the payment of the road user charges by a registered operator of a relevant zero or low emissions vehicle. The registered operator may either pay the road user charge for the kilometres to be travelled by the vehicle before the vehicle travels the kilometres (the pre-paid option) or, if provided for by the regulations, pay the road user charge for the kilometres travelled after the vehicle travels the kilometres (the post-paid option).

24. Section 16 sets out the obligations of a registered operator who pays the road user charges payable for a relevant zero or low emissions vehicle by the pre-paid option. The registered operator must pay the road user charge for each 1,000 kilometres, or multiple of 1,000 kilometres, the vehicle travels before the vehicle travels the kilometres, or otherwise in accordance with the regulations. The registered operator must give TfNSW a current odometer reading for the vehicle, in the way approved by TfNSW, before paying the charge.

25. Subsection 16(6) provides that a registered operator of a relevant zero or low emissions vehicle who is using the pre-paid option to pay the road user charges payable in relation to the vehicle must ensure the vehicle does not travel a number of kilometres that is more than the number of kilometres for which the road user charge for the vehicle has been paid, unless the operator has a reasonable excuse. The maximum penalty for this offence is 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body

corporate. However, a reasonable excuse for this offence may be prescribed by the regulations.

26. Section 27 enables the Governor to make regulations for the purposes of the proposed Act and specifies matters for which the regulations may provide.

> **The Bill allows certain matters to be deferred to the regulations. This includes payment options for road user charges for registered operators of a relevant zero or low emissions vehicle (sections 15 and 16). The Bill also provides for a general regulation-making power of the Governor to make regulations under the Act, including the creation of offences punishable by a penalty notice of up to 20 penalty units ($2,200) for an individual and 100 penalty units ($11,000) for a body corporate.**
>
> **The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters. In this case, as the provisions relate to the payment options, exemptions and concessions, refunds and discounts, calculation and assessment and penalties of road user charges. In these circumstances, the Committee makes no further comment.**

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (INFRASTRUCTURE CONTRIBUTIONS) BILL 2021

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

Removal of community participation plan requirements

27. Schedule 1[3], inserts section 2.23 which provides that certain planning authorities are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, which sets out the provisions for development contributions.

28. Proposed section 2.23 provides that a planning authority, includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations to be a planning authority for the purposes of Division 7.1.

> **The Bill amends the Act to provide that certain planning authorities are not are not required to prepare a community participation plan relating to the exercise of planning agreement functions under Division 7.1 of the Act, regarding development contributions. This includes a council, a Minister, the Planning Ministerial Corporation, a development corporation within the meaning of the *Growth Centres (Development Corporations) Act 1974*, and a public authority declared by the regulations.**
>
> **The Committee notes that this may limit existing rights of community members to participate in, or object to, elements of planning agreements. The Committee refers this provision to the Parliament for its consideration of whether it impacts on the rights community members by limiting participation.**

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

Ministerial powers

29. The Bill amends the Environmental Planning and Assessment Act to provide the Minister with the power to give written directions and approval for a number of matters under the Act.

30. Proposed section 7.17 provides that the Minister may, generally or in a particular case, or class of cases, direct a consent authority in relation to various matters, including the matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal.

31. Proposed sections 7.17(1A) provides that the Minister may extend a direction to an existing development consent that was granted before the direction was given, and that is subject to a condition imposing a monetary contribution or levy that has not been paid or has not become due.

32. Proposed section 7.17(1B) provides that an existing development consent to which subsection (1A) applies is taken to be modified to make it consistent with the direction if the direction specifies a later time for payment than is specified in the consent.

33. Proposed section 7.19 provides that the Minister may give a written direction to a council to prepare, approve, amend, exhibit or repeal a contributions plan or joint contributions plan with one or more councils.

> **The Bill provides the Minister with the power to make Ministerial directions and approvals for a number of matters under the Act, including matters that must be considered when preparing a contributions plan and the circumstances in which a draft contributions plan must accompany a planning proposal. Other matters also include time at which monetary contributions or levies must be paid to existing development consents in certain circumstances, and provision for the preparation and approval of contributions plans by councils and for the making, amendment or repeal of contributions plans by the Minister.**
>
> **The Committee generally comments where there is a wide Ministerial power to give directions, as it may impact upon the rights, liberties or obligations of individuals that would be subject to those directions or approvals. However, the Committee notes that in this case, the matters that may be subject to a Ministerial direction or approval are regarding preparation of a contributions plan by a council, and the time at which monetary contributions or levies must be paid. In these circumstances, the Committee makes no further comment.**

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

Matters deferred to the regulations

34. The Bill inserts section 7.16A, which provides that the regulations may make provision about local infrastructure contributions, including:

    a) the way in which local infrastructure contributions must be determined,

b) the indexation of monetary contributions and levies,

c) when and how monetary contributions and levies must be paid,

d) reporting on contributions or levies received by consent authorities, the circumstances in which a consent authority may refuse to consider development applications for development on land for which a land value contribution has not been satisfied.

35. Proposed section 7.18A provides that the regulations may make provision about the making of contributions plans by councils, including:

a) the preparation, exhibition and approval of contributions plans,

b) the format, structure and content of contributions plans,

c) the way in which land must be identified in contributions plans,

d) the way in which a land value contribution must be calculated for a land value contributions area or part of a land value contributions area,

e) the way in which the value of land in a land value contributions area must be determined,

f) the maximum percentage of the total amount of land in a land value contributions area that may be required as a land value contribution.

The Bill allows a number of matters to be deferred to the regulations, including that the regulations may make provision about local infrastructure contributions and about the making of contributions plans by councils.

The Committee generally comments where matters are deferred to the regulations rather than include them in the primary legislation to allow sufficient parliamentary scrutiny. Unlike primary legislation, regulations are subordinate legislation and not required to be passed by Parliament and the Parliament does not control when it commences. The Committee recognises that regulations may be used in relation to certain administrative matters.

In this case, as the provisions relate to local infrastructure contributions and the making of contributions plans by councils, these are matters that may impact on local governments' and councils' ability to make certain contributions regarding public goods. The Committee refers these provisions to the Parliament for their consideration of whether they inappropriately delegates legislative powers.

5. Local Government Amendment (COVID-19— Elections Special Provisions) Bill 2021

Date introduced	13 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Shelley Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Local Government Act 1993* to make special provision for the conduct of the 2021 local government elections.

BACKGROUND

2. The Bill amends the *Local Government Act 1993*, which sets out the legislative framework for local government elections administered by the NSW Electoral Commission.

3. In the second reading speech, the Minister for Local Government, the Hon. Shelley Hancock MP stated that the Bill was intended to ensure that the local elections scheduled for 4 December 2021 are able to proceed and that the issues faced by the Electoral Commission as a result of the COVID-19 pandemic are resolved in a timely fashion.[5]

4. The Minister noted that the local election period will commence on 25 October 2021, with a close of rolls and pre-poll voting commencing on 22 November 2021, and election day scheduled for 4 December 2021. Voters will have the opportunity to cast their vote utilising traditional voting channels, namely COVID-safe attendance voting, complimented by postal and technology assisted voting.

5. The Minister further stated that the Electoral Commission had developed a COVID-safe plan for the December 2021 elections, and that regulations have been drafted to support the implementation of that plan. This includes allowing anyone to vote during the pre-poll period and additional criteria to allow voting by postal voting. Technology-assisted voting or iVote will also be made available to electors at council elections and administered by the NSW Electoral Commission for the first time. Eligibility to vote using iVote will also have the same criteria as applied at State elections.

[5] Secretariat note: Taken from second reading speech as broadcast by NSW Parliament Webcast livestream on 13 October 2021, subject to verification [if necessary] of Hansard transcription once available.

6. The amendments made in the Bill are intended to supplement the amendment already made in the Local Government Regulations to ensure the 2021 local government elections are COVID-safe.

ISSUES CONSIDERED BY THE COMMITTEE

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

Henry VIII

7. The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic.

8. The Bill inserts Part 1B, which outlines special provisions for the COVID-19 pandemic—local government elections regulation-making power. Under this Part, proposed section 747C provides that the regulations may modify the application of 1 or more provisions of this Act that apply to the 2021 ordinary elections of councillors for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

9. Subsection 747C(2) provides that the Minister may recommend to the Governor that regulations be made under this section only if –

> (a) the proposed regulations are in accordance with advice issued by the Electoral Commissioner, and
>
> (b) the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

10. Subsection 747C(3) provides that the regulations made under this section are not limited by the regulation-making power in this Act, and may override the provisions of this Act.

> **The Bill amends the *Local Government Act 1993* to provide for the conduct of the 2021 local government elections during a public health emergency caused by the COVID-19 pandemic. Specifically, it inserts section 747C which allows special provisions for the local government elections regulation-making power. This includes the ability for the regulations to modify the application of one or more provisions of the Act that apply to the 2021 ordinary elections of councillors to respond to the public health emergency caused by the COVID-19 pandemic. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.**
>
> **The Committee notes that this amounts to a Henry VIII clause, allowing the Executive to legislate and amend an Act by way of regulation without reference to the Parliament. Under ordinary circumstances, these provisions would be an inappropriate delegation of legislative powers. However, in the current extraordinary circumstances created by the COVID-19 pandemic, the provisions may provide flexibility to facilitate a timely and appropriate response to conduct local government elections during a public health crisis.**
>
> **The Committee also recognises that this power is somewhat limited, as the Minister may only recommend to the Governor that regulations be made under this section if the proposed regulations are in accordance with advice issued by**

the Electoral Commissioner, and the proposed regulations are reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic. The Committee also recognises that provisions are intended to support of the COVID-19 plan developed by the NSW Electoral Commission for the purpose of facilitating the upcoming local government elections in the current COVID-19 outbreak. In these circumstances, the Committee makes no further comment.

6. Crimes Legislation Amendment Bill 2021

Date introduced	21 October 2021
House introduced	Legislative Assembly
Member introducing	Melanie Gibbons, Parliamentary Secretary to the Attorney General
Minister responsible	The Hon. Mark Speakman, SC MP
Portfolio	Attorney General

PURPOSE AND DESCRIPTION

The objects of the *Crimes Legislation Amendment Bill 2021* (the **Bill**) are as follows—

a) to amend the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence against the Crimes Act 1900, section 308H to 3 years from the date on which the offence was alleged to have been committed.

b) to amend the *Crimes (High Risk Offenders) Act 2006* to—

provide that –

i. the minutes or deliberations of the High Risk Offenders Assessment Committee and its sub-committees are not admissible in legal proceedings, and

ii. a person cannot be compelled in any proceedings to produce that material, and

iii. classify certain offences under the *Criminal Code Act 1995* of the Commonwealth, relating to the following, as serious sex offences or offences of a sexual nature—

iv. grooming a person to make it easier to engage in sexual activity with, or procure, a child,

v. the use of electronic services for child abuse material.

2. to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to—

a) provide that an offence under the *Crimes Act 1900*, section 308H relating to the unauthorised access to or modification of restricted data held in a computer, or under

b) section 308I relating to the unauthorised impairment of data held in a computer disk, credit card or other device, is a searchable offence in relation to a search warrant, and

c) enable particular warrants to be applied for by email for a trial period of 2 years, and

d) allow any police officer to take a person who has been arrested under the *Law Enforcement (Powers and Responsibilities) Act 2002*, section 99 before an authorised officer to be dealt with according to law.

3. to amend the *Surveillance Devices Act 2007* to clarify the requirements for applying for a surveillance device warrant,

4. to amend the *Terrorism (High Risk Offenders) Act 2017* to provide that –

a) the minutes or deliberations of the High Risk Offenders Assessment Committee and its sub-committees are not admissible in legal proceedings, and

b) a person cannot be compelled in any proceedings to produce that material,

5. to amend the *Terrorism (Police Powers) Act 2002* to extend the operation of particular preventative detention orders and prohibited contact orders, and allow applications for preventative detention orders and prohibited contact orders, until 16 December 2023.

BACKGROUND

6. The Bill amends six criminal law bills, including the *Crimes Act 1900*, *Crimes (High Risk Offenders) Act 2006, Law Enforcement (Powers and Responsibilities) Act 2002, Surveillance Devices Act 2007, Terrorism (High Risk Offenders) Act 2017*, and the *Terrorism (Police Powers) Act 2002.*

7. In the second reading speech to the Bill, the Parliamentary Secretary to the Attorney General, Ms Melanie Gibbons MP, noted that the amendments contained in the Bill were aimed at improving criminal investigations:

> The bill introduces seven largely procedural proposals to amend six criminal laws to strengthen our community by improving criminal investigation, enforcement and penalties, and police response. These amendments were developed through consultation with agencies and stakeholders as part of the Government's regular program of legislative reviews and improvements.

8. The proposed amendments aim to deliver the following:

a) improve investigation of computer offences under the *Crimes Act 1900* and the *Law Enforcement (Powers and Responsibilities) Act 2002*;

b) allow non-urgent warrant applications to be made by email or in any other way prescribed by the regulations for a two-year period under the *Law Enforcement (Powers and Responsibilities) Act 2002.* This is particularly in response to situations during the COVID-19 pandemic where these warrants may only be issued in person;

c) streamline the application process for a surveillance device warrant by allowing an application to be made with a single document that includes all the required information under the *Surveillance Devices Act 2007*;

d) amend the definitions of "serious sex offence" and "offence of a sexual nature" in the *Crimes (High Risk Offenders) Act 2006* to include new Commonwealth offences;

e) provide that the minutes and deliberations of the High Risk Offender Assessment Committee and its sub-committees cannot be compelled or admitted as evidence in any proceedings, under the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017*;

f) allow a police officer other than the arresting officer to take a person arrested under the section before an authorised officer to be dealt with according to law under the *Law Enforcement (Powers and Responsibilities) Act 2002*; and

g) extend the operation of preventative detention orders and prohibited contact orders until 16 December 2023 under the *Terrorism (Police Powers) Act 2002*.

ISSUES CONSIDERED BY COMMITTEE

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

Right to due process

9. Schedule 1.1 of the Bill amends section 308H(4) of the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence relating to the unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date on which the offence was alleged to have been committed.

10. An offence under section 308H is a summary offence with a maximum penalty of 2 years imprisonment. If amended, the new provision provides that proceedings for an offence against this section must be commenced within 3 years of the date on which offence was alleged to have been committed.

11. Under section 308 of the Act data includes information in any form, or any program (or part of a program). Under section 308H(3) of the Act restricted data means data held in a computer, being data to which access is restricted by an access control system associated with a function of the computer.

> **The Bill amends the *Crimes Act 1900* to increase the time limit for commencing proceedings for an offence regarding unauthorised access to or modification of restricted data held in a computer from 12 months to 3 years from the date the offence was alleged to have been committed. This applies to offences under section 308H, which is a summary offence with a maximum penalty of 2 years imprisonment. Under the proposed section 308H(4), police will have a longer timeframe to investigate and prosecute unauthorised access and modification of restricted data offences.**
>
> **The Committee notes this may impact on an accused person's right to due process by disentitling them of information adverse to them, or prolonging a prosecution and causing unfair delays. In circumstances where an offence is alleged to have been committed three years prior to an accused being charged, police could have had up to three years to investigate an accused person and subsequently become aware of further offending in the course of investigations that may otherwise have not occurred if police had charged an accused person earlier in the investigation. The increase in time between which a person**

commits an offence and a date on which they are charged could therefore have the unintended effect of accused persons committing further offences prior to being charged for the index offence.

However, the Committee accepts that statutory limitations are rare in the prosecution of criminal offences and that the imposition of a statutory limitation is a safeguard in itself. As such, increasing the timeframe may be appropriate to allow police greater time to conduct and prosecute these offences under the proviso that the provision is not used intentionally to further incriminate an accused person. The Committee refers the matter to Parliament to consider whether the Bill disproportionately affects an accused person's right to due process under section 308H(4).

Right to fair trial

12. The Bill amends the *Crimes (High Risk Offenders) Act 2006* in relation to the Assessment Committee under the Act, which is responsible for the review of offender risk assessments and making recommendations to the Commissioner of Corrective Services NSW for the taking of action by the State under this Act in respect of those offenders.

13. Schedule 1.2[3] of the Bill inserts section 28B(1) into the Act to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. These records are considered protected records under the proposed section 28B(3) of the Act. Amendments under section 28B(2) state that no person can be compelled to produce or disclose those protected records in any proceedings. Provision 28B states:

    a) A protected record, or evidence of the contents of a protected record, is not admissible in proceedings before a court, tribunal, authority or other body or person.

    b) A person cannot be compelled in the proceedings to—

        i. produce a protected record, or a copy of or extract from a protected record, or

        ii. disclose or give evidence of the contents of a protected record.

    c) In this section protected record means any of the following—

        i. the minutes of a meeting of the Assessment Committee or a sub-committee, or a copy of or extract from the minutes,

        ii. another record of the deliberations of the Assessment Committee or a sub-committee, or a copy of or extract from the record.

    d) Sub-committee means a sub-committee formed by the Assessment Committee under section 24AD.

14. Under section 5B of the Act, the Supreme Court may make an order for the extended supervision in the community of a person (an extended supervision order) if:

a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a serious offence either in custody or under supervision in the community, and

b) the person is a supervised offender (within the meaning of section 5I), and

c) an application for the order is made in accordance with section 5I, and

d) the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing another serious offence if not kept under supervision under the order.

15. Under section 5C of the Act, the Supreme Court may make an order for the continued detention of a person (a continuing detention order) if:

a) the person is an offender who is serving (or who has served) a sentence of imprisonment for a serious offence either in custody or under supervision in the community, and

b) the person is a detained offender or supervised offender (within the meaning of section 13B), and

c) an application for the order is made in accordance with section 13B, and

d) the Supreme Court is satisfied to a high degree of probability that the person poses an unacceptable risk of committing another serious offence if not kept in detention under the order.

16. Similarly, Schedule 1.5 of the Bill amends the *Terrorism (High Risk Offenders) Act 2017* identically to amendments under the *Crimes (High Risk Offenders) Act 2006* to make production of the minutes and deliberations of the High Risk Offenders Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendment includes a definition of a protected record under section 71B(3) to mean the minutes of a meeting of the High Risk Offenders Assessment Committee or an High Risk Offenders sub-committee, or a copy of or extract from the minutes, another record of the deliberations of the High Risk Offenders Assessment Committee or an High Risk Offenders sub-committee, or a copy of or extract from the record. Under the amendment, the provisions will state under section 71B of the Act:

a) A protected record, or evidence of the contents of a protected record, is not admissible in proceedings before a court, tribunal, authority or other body or person.

b) A person cannot be compelled in the proceedings to—

i. produce a protected record, or a copy of or extract from a protected record, or

ii. disclose or give evidence of the contents of a protected record.

c) In this section, protected record means any of the following—

i. the minutes of a meeting of the HRO Assessment Committee or an HRO sub-committee, or a copy of or extract from the minutes,

ii. another record of the deliberations of the HRO Assessment Committee or an HRO sub-committee, or a copy of or extract from the record.

d) HRO sub-committee means a sub-committee formed by the HRO Assessment Committee under the *Crimes (High Risk Offenders) Act 2006*, section 24AD.

17. Under section 63 of the Act, the High Risk Offenders Assessment Committee has the following functions:

a) to review the risk assessments of eligible offenders and make recommendations to the Commissioner of Corrective Services for the taking of action by the State under this Act in respect of those offenders,

b) to facilitate co-operation between and the co-ordination of relevant agencies in the exercise of their functions in connection with risk assessment and management of eligible offenders who could be subject to this Act (the high risk terrorism offender functions of relevant agencies),

c) to monitor and provide expert oversight of the exercise of the high risk terrorism offender functions of relevant agencies for the purpose of identifying opportunities for improved outcomes in individual cases and opportunities for systemic improvement and removal of inter-agency barriers to the effective exercise of high risk terrorism offender functions,

d) to facilitate information sharing between relevant agencies in connection with the exercise of their high risk terrorism offender functions,

e) to develop best practice standards and guidelines for the exercise by relevant agencies of their high risk terrorism offender functions,

f) to identify gaps in resourcing, service provision and training that may impact on the proper and effective exercise of high risk terrorism offender functions,

g) to conduct research into the effectiveness of this Act in ensuring the safety and protection of the community and to disseminate the results of that research,

h) such other functions in connection with the operation of this Act as the Minister may from time to time direct.

18. Under sections 20 and 34 of the Act, only the Supreme Court has jurisdiction to make an extended supervision order or continued detention order if the offender satisfies the criteria in those respective sections.

The Bill amends the *Crimes (High Risk Offenders) Act 2006* and the *Terrorism (High Risk Offenders) Act 2017* to make production of the minutes and deliberations of the Assessment Committee and its sub-committees inadmissible in proceedings before a court, tribunal, authority or other body. The amendments make these records protected records under the Acts, which means

that no person can be compelled to produce or disclose those protected records in any proceedings.

The Committee acknowledges disclosure of deliberations of the Assessment Committee could impact the quality of advice the committee can provide and compromise the personal safety of members and persons attending in an advisory capacity, as all attendees are identified in the minutes. The Committee also acknowledges that matters relating to domestic terrorism are highly confidential and should be dealt with in a manner which protects the inadvertent disclosure of that highly confidential material.

However, the Committee notes that this may deny a person access to information on legal matters regarding their continued detention or extended supervisions. The Committee also notes that these provisions may be inconsistent with the general provisions on compellability of a witness who is competent and the admissibility of business records as an exception to the hearsay rule under the *Evidence Act 1995*.

Further, the presiding Supreme Court Justice hearing an application for the extended supervision or continued detention of a person would have the discretion to make decisions on the admissibility of these minutes, including a power to rule segments of the minutes containing names of committee members inadmissible. This could be facilitated by rejecting the evidence on the basis of relevance under section 55 of the *Evidence Act 1995*.

Whilst the Committee notes the amendments are intended to protect the identity of members and the deliberations of the Assessment Committee, the Committee refers the matter to Parliament to consider whether the need to protect the identity of committee members is outweighed by the right of a person subject to an extended supervision order or continued detention order to have legally acquirable to them, whether under the principles of disclosure or by subpoena, all available material which may affect their continued detention or extended supervision.

7. Customer Service Legislation Amendment Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello, MP
Portfolio	Customer Service and Better Regulation

PURPOSE AND DESCRIPTION

1. The object of the *Customer Service Legislation Amendment Bill 2021* (the **Bill**) is to amend legislation administered by the Minister for Customer Service and other Acts for related purposes. This Bill amends the following legislation—

    a) *Betting and Racing Act 1998* No 114,

    b) *Casino Control Act 1992* No 15,

    c) *Conveyancing Act 1919* No 6,

    d) *Health Records and Information Privacy Act 2002* No 71,

    e) *Home Building Act 1989* No 147,

    f) *Independent Pricing and Regulatory Tribunal Act 1992* No 39,

    g) *Land and Environment Court Act 1979* No 204,

    h) *Liquor Act 2007* No 90,

    i) *Liquor Regulation* 2018,

    j) *Motor Accident Injuries Act 2017* No 10,

    k) *Motor Accidents Compensation Act 1999* No 41,

    l) *Music Festivals Act 2019* No 17,

    m) *Personal Injury Commission Act 2020* No 18,

    n) *Privacy and Personal Information Protection Act 1998* No 133,

    o) *Real Property Act 1900* No 25,

    p) *Registered Clubs Act 1976* No 31,

    q) *Statutory and Other Offices Remuneration Act 1975* (1976 No 4),

r) *Totalizator Act 1997* No 45,

s) *Workplace Injury Management and Workers Compensation Act 1998* No 86.

BACKGROUND

2. The Bill makes amendments to 19 Acts under the Customer Service portfolio to correct minor drafting errors, clarify clauses in existing Acts, introduce new minor amendments that support COVID-19 economic recovery and make consequential amendments following the establishment of the Personal Injury Commission.

3. In the second reading speech to the Bill, the Minister for Customer, the Hon. Victor Dominello MP, stated that the Bill intended to make various reforms that corrected minor drafting errors and deliver on Government commitments.

4. In particular, the Minister noted that the Bill amended the following Acts:

a) *Privacy and Personal Information Protection Act 1998*: to enable the sharing of personal information during emergencies and natural disasters and subsequent recovery operations (Schedule 1.14);

b) *Health Records and Information Privacy Act 2002*: to mirror the amendments to the *Privacy and Personal Information Protection Act* to ensure that health information can be shared between government agencies and emergency support services during an emergency (Schedule 1.4);

c) *Liquor Act 2007*: to exempt certain applications for temporary and permanent changes to the boundary of outdoor parts of a licensed premises from consultation and fee requirements and extends the operation of certain special provisions relating to the COVID-19 pandemic by 12 months until 11 December 2022 (Schedule 1.8);

d) *Motor Accidents Compensation Act 1999, Motor Accident Injuries Act 2017, Workplace Injury Management and Workers Compensation Act 1998* and *Personal Injury Commission Act 2020*: to make consequential amendments following the establishment of the Personal Injury Commissioner or otherwise support the commission in addressing COVID-19-related delays in settling disputes. The Bill also introduces amendments to allow for an extension of time to make an application for a review of a merit review decision, review of a medical assessment or appeal against a decision of a non-presidential member of the commission beyond 28 days, in accordance with the Personal Injury Commission Rules (Schedules 1.10, 1.11, 1.13, and 1.19);

e) *Statutory and Other Offices Remuneration Act 1975*: to clarify the remuneration arrangements of the Independent Review Officer consequent on the enactment of the *Personal Injury Commission Act 2020* (Schedule 1.17);

f) *Registered Clubs Act 1976*: to modernise governance arrangements and remove membership costs as part of a COVID-19 assistance package (Schedule 1.16);

g) *Conveyancing Act 1919*: to enable corporations to execute deeds in electronic form (Schedule 1.3);

h) *Home Building Act 1989*: to allow a licence holder or other persons, such as a developer, to enter into an agreement with NSW Fair Trading in lieu of prosecution or an order for rectification works that have adverse impacts on a licence holder going forward (Schedule 1.5);

i) *Betting and Racing Act 1998*: to explicitly enable regulations that require a sports controlling body to notify the Minister of a change in the sports controlling body's circumstances and enables the Minister to, by order, authorise the use of New South Wales race field information by a betting service provider or prescribed person (Schedule 1.1);

j) *Casino Control Act 1992*: to update the legislation to match current drafting conventions that clarifies that regulations may confer functions on the Minister or a delegate (Schedule 1.2);

k) *Independent Pricing and Regulatory Tribunal Act 1992*: to enable the Independent Pricing and Regulatory Tribunal to correct minor, obvious, clerical and administrative errors in certain pricing determinations made in relation to monopoly services and fares for public passenger services (Schedule 1.6);

l) *Land and Environment Court Act 1979*: to provide that appeals against a decision of a planning authority to refuse to amend a development contract under the *Community Land Development Act 2021* are class 2 proceedings in the Land and Environment Court (Schedule 1.7);

m) *Music Festivals Act 2019*: to protect officials administering the Act from personal liability (Schedule 1.12);

n) *Totalizator Act 1997*: to enable the Minister for Customer Service to exclude a person or a person belonging to a class of persons from the definition of a key employee and to enable the regulations to apply, adopt or incorporate the provisions of a document as in force at a particular time or as in force from time to time (Schedule 1.18).

ISSUES CONSIDERED BY COMMITTEE

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

Confidentiality

5. Schedules 1.4 and 1.14 of the Bill allow information sharing between government agencies and private organisations in emergency situations. They streamline the process for the provision of personal information of people affected by an emergency under the *Health Records and Information Privacy Act 2002* and the *Privacy and Personal Information Act 1988* respectively.

6. Schedule 1.14 amends the *Privacy and Personal Information Act 1988* by inserting section 27D(1) into the Act which provides that a public sector agency is not required to comply with the information protection principles in relation to the collection, use or disclosure of personal information if it is reasonably necessary to assist in a stage of an emergency.

7. In his second reading speech, the Minister stated this reform was in response to the New South Wales Bushfire Inquiry.

8. The Minister also commented on schedule 1.14, which exempts public sector agencies from compliance with information protection principles under the *Privacy and Personal Information Protection Act 1998* (section 27D):

> This amendment aims to enable the sharing of personal information during emergencies and natural disasters and subsequent recovery operations. This is a public commitment from the New South Wales Government response to the NSW Bushfire Inquiry and means that people will only have to tell their story once to receive assistance from a range of agencies, local councils and non-government organisations [NGOs] that support people during and after natural disasters and emergencies. This amendment will enable Government to coordinate supports effectively and efficiently. It will facilitate supports for people through evacuations and provide financial and material help and in the recovery phase help to rebuild their communities and their lives. We have seen the devastating speed at which the bushfires tore through New South Wales during the 2019 bushfire season. This amendment is critical to make sure we can provide comprehensive assistance to people immediately, when they need it. The amendment must be enacted before the commencement of the 2021 bushfire season to enable an effective disaster response.

9. Schedule 1.4 of the Bill identically amends the *Health Records and Information Privacy Act 2002* to enable the use of personal information between organisations in an emergency under schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of that Act. Proposed clause 10(1)(b)(b1) provides that an organisation that holds health information must not use the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless it is reasonably necessary to assist in a stage of an emergency.

10. Proposed clause 11(1)(b)(b1) similarly provides that an organisation that holds health information must not disclose the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless it is reasonably necessary to assist in a stage of an emergency.

11. In this context, emergency means due to an actual or imminent occurrence which endangers, or threatens to endanger, the safety or health of persons or animals in the State, or destroys or damages, or threatens to destroy or damage, property in the State, or causes a failure of, or a significant disruption to, an essential service or infrastructure, being an emergency which requires a significant and co-ordinated response.[6] For example, a fire, flood, storm, earthquake, explosion, terrorist act, accident, epidemic or warlike action.

12. Additionally, 'stage' is defined to mean a variety of processes:

    a) prevention in relation to an emergency includes the identification of hazards, the assessment of threats to life and property and the taking of measures to reduce potential loss to life or property, and

    b) preparation in relation to an emergency includes arrangements or plans to deal with an emergency or the effects of an emergency, and

[6] Note: Under the *Health Records and Information Privacy Act 2002, the* definition of 'emergency' is adopted from section 4 of the *State Emergency and Rescue Management Act 1989*.

c) response in relation to an emergency includes the process of combating an emergency and of providing immediate relief for persons affected by an emergency, and

d) recovery in relation to an emergency includes the process of returning an affected community to its proper level of functioning after an emergency.[7]

13. By way of example, the Minister stated that the reform could give government agencies and emergency support services the power to share an eligible participant's basic personal information to providers of mental health supports during the recovery phase of emergency management.

Proposed sections 27D of the *Privacy and Personal Information Protection Act 1998* and schedule 1, clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act* 2002 outline circumstances in which personal and/or health information may be shared between organisations and public sector agencies. The ability of organisations and public sector agencies to disclose personal information could impact on the confidentiality that would otherwise be afforded to a person regarding their disclosure of personal information to an organisation. Specifically, 27D of the *Privacy and Personal Information Protection Act 1998* exempts public sector agencies from compliance with information protection principles under that statute while clauses 10(1)(b)(b1) and 11(1)(b)(b1) of the *Health Records and Information Privacy Act 2002* permit 'organisations' to do the same. Under section 4 of the *Health Records and Information Privacy Act 2002* an organisation means a public sector agency or a private sector person.

The Committee notes that the amendments are safeguarded by only allowing the disclosure of personal or health information between public sector agencies and organisations in circumstances where it is necessary to assist in a stage of emergency. The provision is further safeguarded by the limitation on the information being used only where the information is reasonably necessary to assist in that emergency. In addition, the information can only be used in particular statutorily defined stages of emergency, notably prevention, preparation, response or recovery stages. As such, the sharing of information between government agencies may be essential to natural justice, the effective recovery of persons affected by an emergency, or where it is in the public interest to do so. The Committee accordingly makes no further comment.

[7] Note: As above, the definition of 'stage' has been adopted from section 5 of the *State Emergency and Rescue Management Act 1989*.

8. Payroll Tax Amendment (Payroll Tax Waiver) Bill 2021

Date introduced	20 October 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Treasurer

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Payroll Tax Act 2007* to provide for a 50% payroll tax waiver for the 2021–2022 financial year for an employer if—

   a) wages paid or payable by the employer are $10,000,000 or less, and

   b) the employer has qualified for the 2021 COVID-19 JobSaver Payment scheme or the 2021 COVID-19 Business Grant scheme administered by Service NSW or met the 30% or greater decline in turnover test set out in the schemes, whether or not the employer has applied for a payment or grant, or met other eligibility criteria for a payment or grant, under the schemes.

BACKGROUND

c) The Bill amends the *Payroll Tax Act 2007*, which provides for the imposition of payroll tax liability upon employers in respect to certain wages and for the assessment and collection of the tax. Specifically, the Bill amends the *Payroll Tax Act 2007* to enact a temporary waiver of 50 per cent of an eligible employer's payroll tax liability in the financial year commencing on 1 July 2021.

d) In his second reading speech, the Treasurer noted that the waiver was intended to assist businesses manage the economic impact of the public health measures imposed in response to the spread of the COVID-19 Delta strain in Sydney throughout mid-2021, stating that:

The additional economic support package announced on 2 September responded to the extended lockdown by increasing the payroll tax waiver to 50 per cent… as a result of the COVID-19 public health orders.

e) The Treasurer further stated that:

> The 50 per cent payroll tax waiver is an important part of the recently announced COVID-19 business support package, which will help ensure that New South Wales remains the best place to do business in Australia. The legislative amendments in the bill will deliver tax relief to help businesses around New South Wales through the challenges posed by the COVID-19 public health orders.

f) In discussing the expected benefits of the Bill, the Treasurer noted that:

> The payroll tax waiver is expected to benefit around 8,000 businesses in New South Wales and save businesses about $410 million in payroll tax in 2021-22. The average value of the payroll tax waiver is estimated at around $50,000 per business. The combined impact, along with the option provided by the Government to defer payroll tax payments until 14 January 2022, will be that businesses can start claiming the payroll tax waiver for any payments that will be due from 14 January 2022 in relation to their 2021-22 annual payroll tax liabilities. This will help businesses to manage their cash flows and increase the chances of a strong economic recovery.

g) The waiver provided under section 99B is in broadly similar terms to the payroll tax waiver provided under section 99A, which applied for wages paid or payable in the financial year commencing on 1 July 2019. However, section 99B imposes a further eligibility criterion for employers to benefit from the waiver, by requiring that, for the waiver to apply, an employer who pays or is liable to pay Australian wages of no more than $10 million in the financial year commencing on 1 July 2021 must also have either:

   (i) qualified for the 2021 COVID-19 JobSaver Payment scheme or the 2021 COVID-19 Business Grant scheme administered by Service NSW, or

   (ii) met the 30% or greater decline in turnover eligibility test for either of the schemes, whether or not the employer has applied or a payment or grant, or met other eligibility criteria for a payment or grant, under the schemes.

h) In discussing the additional eligibility criterion, the Treasurer emphasised that the waiver is intended to benefit those businesses which can demonstrate a 30 per cent or more decline in turnover as a result of the restrictions on movement imposed by the most recent public health orders. He noted that the second limb of the criterion would require further clarification, and acknowledged that:

> … not all businesses that are eligible for the payroll tax waiver will have applied for a COVID-19 grant or payment. Revenue NSW will develop a pathway for those businesses to be able to show their turnover decline. More information about that pathway will be communicated to businesses as it becomes available.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy

i) The Bill amends the *Payroll Tax Act 2007* to provide for a temporary waiver of 50 per cent of the payroll tax liability assessed for eligible employers in the financial year commencing on 1 July 2021. Specifically, the Bill inserts section 99B under Part 8, Division 2 in relation to special cases concerning the collection and recovery of payroll tax.

j) Relevantly, subsection 99B(4) entitles the Chief Executive Officer of Service NSW to disclose to the Chief Commissioner of Revenue NSW information contained in, or relating to, an employer's application for a 2021 COVID-19 JobSaver Payment or a 2021 COVID-19 Business Grant. This subsection also entitled the Chief Commissioner to receive and to use that information "in relation to the administration of a taxation law".

k) "Taxation law" is not defined in the *Payroll Tax Act 2007*, however, section 4 of the Act provides that it is to be read together with the *Taxation Administration Act 1996*, which provides for the administration and enforcement of this Act and other taxation laws.

l) Section 4 of the *Taxation Administration Act 1996* deems various statutes, including the *Payroll Tax Act 2007*, as well as regulations under those statues to be "taxation laws".

The Bill provides that the Chief Executive Officer of Service NSW may disclose information to the Chief Commissioner of Revenue NSW regarding an employer's application for a payment under the 2021 COVID-19 JobSaver Payment or 2021 COVID-19 Business Grant schemes administered by Service NSW. This information may be shared if it is in relation to the administration of a taxation law.

The Committee notes that the Bill does not specify or limit what information may be disclosed, and does not require either agency to seek consent from or notify individuals who may be affected. Further, this provision permits the sharing of information disclosed to Service NSW for the limited purpose of applying for COVID-19 relief payments on a wider and unspecified ambit, being in relation to the administration of "taxation laws", which may include statutes beyond the *Payroll Tax Act 2007*. By allowing information sharing which may include the personal information of individuals provided for a purpose unrelated to the administration taxation laws, the Bill may impact on the privacy rights of affected persons.

However, the Committee recognises that the proposed changes would facilitate eligible employers to access the waiver by enabling the Chief Commissioner of Revenue NSW, who is responsible for administering payroll tax, to receive proof of an employer's eligibility from Service NSW. The Committee also acknowledges that information sharing is limited to government agencies, which are subject to existing privacy protection laws. In these circumstances, the Committee makes no further comment.

9. Electronic Transactions Amendment (Remote Witnessing) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney-General

PURPOSE AND DESCRIPTION

1. The objects of this Bill are—

(a) to make permanent certain provisions that were introduced as a pilot scheme to enable—

(i) the remote witnessing of documents, and

(ii) oaths, declarations and affidavits to be taken or made before an Australian legal practitioner, and

(b) to identify—

(i) the document that is the original document when a document is witnessed remotely, and

(ii) the place of execution of the document, and

(c) to make clear it is not necessary for the signatory or witness to physically be in New South Wales to witness a document remotely, and

(d) to enable regulations to exclude documents that may not be witnessed remotely and to set out methods, technologies and processes for witnessing documents remotely, and

(e) to re-enact a temporary provision that expands the classes of persons before whom a statutory declaration can be made.

BACKGROUND

2. The Bill amends the *Electronic Transactions Act 2000* to make permanent certain provisions about the remote witnessing of documents.

3. The Bill also amends the *Oaths Act 1900* to expand the classes of persons before whom oaths and statutory declarations may be made.

4. In the second reading speech to the Bill, the Attorney General, the Hon. Mark Speakman SC MP, stated that the Bill followed the successful trial of remote witnessing measures as part of the emergency response to the COVID-19 pandemic:

> This bill will extend temporary measures relating to the witnessing of personal and business documents, after a successful trial period of 18 months and significant stakeholder support. In April 2020 the Government enacted provisions via the Electronic Transactions Regulation 2017, first, to enable documents to be witnessed remotely via audiovisual link; second, to enable Australian legal practitioners to take oaths, declarations or affidavits under section 26 of the Oaths Act 1900; and, third, to enable statutory declarations to be made before a person before whom a statutory declaration under the Statutory Declarations Act 1959 of the Commonwealth may be made. These measures were introduced as part of the Government's emergency response to the COVID-19 pandemic.
>
> Public health restrictions and social distancing measures made witnessing the signing of documents in person—sometimes before a limited range of qualified witnesses—difficult and, in some circumstances, unsafe. The purpose of the measures was to give individuals and businesses the ability to continue to execute important legal documents safely and in accordance with physical distancing restrictions. In September 2020, following positive stakeholder feedback about the measures' operation in practice, they were legislated in part 2B of the Electronic Transactions Act 2000 to continue to operate until 1 January 2022. The decision to extend these provisions was made following extensive consultation with those who have used the scheme, including members of the legal profession, industry groups, government departments, community advocacy organisations and heads of court jurisdictions. Stakeholders have indicated these measures have proven to be useful, even when COVID-19 restrictions have not prevented people from having documents physically witnessed.

5. The Attorney General also noted that the Bill contained specific safeguards to prevent the use of fraud or duress, in addition to existing safeguards in other legislation:

The Government listened carefully to concerns raised last year by some stakeholders about the risk that the remote witnessing pilot scheme could be used to take advantage of vulnerable community members through fraud or duress. The remote witnessing scheme contains several safeguards to promote the integrity of the document being witnessed and the integrity of the witnessing process to minimise the risk of fraud and duress. First, the witness must see the signatory signing the document in real time over audiovisual link [AVL]. Second, the witness must sign the document, or an exact copy of the document, signed by the signatory as evidence that the witness witnessed the signature. Third, the witness must be reasonably satisfied that the document they sign is the same document, or a copy of the document, signed by the signatory. Fourth, the witness must endorse the document they signed with a statement specifying the method used to witness the signatory's signature and that the document was witnessed in accordance with the Electronic Transactions Act.

In addition, existing safeguards in other legislation will continue to apply when documents are witnessed remotely under the provisions continued by the bill. Those protections include certification and verification of identity requirements, and the legal and professional obligations of particular classes of witnesses. Importantly, remote witnessing is not mandatory; it provides greater choice and flexibility for individuals and business. The bill does not do away with the ability to witness documents in person.

6. This Bill was introduced and urgently passed in the Legislative Assembly on 10 November 2021.

ISSUES CONSIDERED BY COMMITTEE

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

10. Service NSW (One-stop Access to Government Services) Amendment (COVID-19 Information Privacy) Bill 2021

Date introduced	10 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of this Bill is to ensure that personal information and health information collected by the Chief Executive Officer of Service NSW as part of the response to the COVID-19 pandemic is not used or disclosed except in very limited circumstances.

BACKGROUND

2. In the second reading speech to the Bill, the Minister for Customer Service, the Hon. Victor Dominello stated:

> The bill will limit the disclosure and use of any personal and health information collected by Service NSW under the COVID-19 public health orders. The Service NSW COVID Safe Check-in app has been central to the New South Wales Government's pandemic response. It has allowed us to quickly identify people who may have been in contact with a positive case and support efficient and effective contact tracing. Now, as New South Wales continues to reopen, the COVID Safe Check-in app provides customers with case alerts for venues they have attended. The check-in app has given people confidence that they will be notified if they come in contact with a positive case and will be able to protect their family and friends.

3. Specifically, the Bill aims to address the use of information collected via the Service NSW QR check in app that has been a mandatory requirement of entry for many venues across NSW.

4. The Minister also noted that amendments in the bill implemented advice from the NSW Privacy Commissioner:

> The Government has listened to advice from the Privacy Commissioner and decided to further strengthen privacy protections through the introduction of the COVID-19 information privacy bill. The bill takes the long-standing position that check-in data is to be used only for the purpose it was collected, or contact tracing, and enshrines it in legislation. It will ensure that information cannot be accessed for secondary purposes, including for law enforcement and by use of a warrant. It will reinforce to the people of New South Wales that the additional collection of their information during the pandemic is only to protect public health. The bill will prevent Service NSW from disclosing personal and health information collected under the public health orders for any use other than the purpose it was collected—contact tracing—

> to provide it to the person it is about, or, in limited circumstances, to investigate a breach of the public health orders.

5. The Bill was introduced and urgently passed by the Legislative Assembly on 10 November 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Privacy of information

6. The Bill inserts Part 3A into the *Service NSW (One-stop Access to Government Services) Act 2013*. Proposed Part 3A outlines additional provisions regarding information collected during the COVID-19 pandemic.

7. Section 17A outlines the objective of this Part, including to recognise that the collection of information about the location or movement of people during the COVID-19 pandemic plays a vital role in protecting people from serious illness and death, and people are generally compelled to provide the information under extraordinary powers that have been invoked because of the pandemic. It also outlines that people expect the information provided will be used only for the purposes of protecting them from the pandemic, and inappropriate use or disclosure of the information may increase the circumstances in which information is not provided and consequently increase the risk of serious illness or death.

8. Section 17B places additional limits on the use of information held by the Service NSW CEO that has been collected in the exercise of a function made under the *Public Health Act 2010*, under authority of a public health order, or for COVID-19 contact tracing and because of a Ministerial direction.

9. Specifically, subsection 17B(2) provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates.

10. Section 17C provides that the Minister must review this Part after one year since its commencement to determine whether the policy objectives of the Part remain valid and whether the terms of the Part remain appropriate for securing the objectives. A report on the outcome of the review must be tabled in each House of Parliament within 6 months after the end of the period of 1 year.

11. In the second reading speech to the Bill, the Minister stated:

> During the Delta outbreak, we asked the people of New South Wales to assist contact tracing by checking in when attending any indoor venue. We also asked the people of New South Wales to provide declarations and obtain permits for travel and other activities that would ordinarily be part of their everyday lives. Those measures work only with public buy-in. Trust and compliance is central to their effectiveness, and to our ability to reduce the spread of COVID-19. Over 7½ million people have used the Service NSW COVID Safe Check-in app, for over one billion total check-ins. That is over one billion times people in New South Wales have entrusted the Government with their personal information.

> Throughout the pandemic, we have recognised the significance of this trust and have sought to ensure that it is reflected with robust privacy protections. The public health orders state that contact details collected through the COVID Safe Check-in are to be used or disclosed only for contact tracing during the COVID-19 pandemic. Service NSW has upheld this position and has not provided any personal information collected through the COVID Safe Check-in to NSW Police Force. All contact details held by Service NSW are stored in an encrypted database that is accessible only by NSW Health through a restricted authenticated interface for the purposes of COVID-19 contact tracing. If information is not required by Health, Service NSW deletes personal check-in information it holds after 28 days.

The Bill amends the *Service NSW (One-stop Access to Government Services) Act 2013* to provide additional limits on the use of information collected by Service NSW in the course of the COVID-19 pandemic. The Minister noted that this is in relation to information obtained via the Service NSW QR check in app. The release of such information may impact on the privacy of an individual to whom that information relates, particularly where it contains their personal details, location data, and potentially whether they have tested positive for COVID-19.

However, the Committee recognises that the Bill is intended to provide adequate protection for the strict use of this information. Specifically, the Bill provides that such information held must not be used or disclosed except for the purposes for which it was collected: contact tracing in NSW or another Australian jurisdiction; to investigate or prosecute a breach of a public health order; or to provide access of that information to the individual to whom it relates. The Committee further recognises the importance of sharing such information to aid in the contact tracing of COVID-19 positive cases and protection of public health during the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

11. Electoral Amendment (COVID-19) Bill 2021

Date introduced	16 November 2021
House introduced	Legislative Council
Minister responsible	The Hon. Don Harwin MLC
Portfolio	Special Minister of State and Public Service and Employee Relations, Aboriginal Affairs, and the Arts

PURPOSE AND DESCRIPTION

1. The object of this Bill is to make special provision for by-elections held during the COVID-19 pandemic.

2. Schedule 1 inserts proposed Division 3 into the *Electoral Act 2017*, Part 10 in relation to a by-election.

3. The proposed Division provides—

   (a) all electors may apply for early voting and certain electors may apply to vote by post, and

   (b) the regulations may, in certain circumstances, modify the Electoral Act 2017 for the purposes of responding to the public health emergency caused by the COVID-19 pandemic.

4. The provisions have effect until the end of 30 June 2022.

BACKGROUND

5. The Bill amends the *Electoral Act 2017* ('the Act') by inserting proposed Division 3 in Part 10 which provides for the conduct of by-elections held in the period starting from the commencement date of the Bill (as an Act) and ending on 30 June 2022 ('the prescribed period'). It also provides that, at the end of the prescribed period on 30 June 2022, proposed Division 3 is repealed.

6. The Hon. Don Harwin MLC noted in his second reading speech to the Bill that these amendments were being introduced as:

> … there are significant uncertainties and public health risks to be managed when conducting events during the pandemic. If a State by-election is held during the pandemic, the NSW Electoral Commission will need to implement a number of measures to ensure that voting can be carried out safely and effectively and that vulnerable members of the community are not disenfranchised. While most of those measures can be implemented within the existing framework of the Act, the commission has requested amendments to support vulnerable electors and ensure that the uncertainties and public health risks of the pandemic can be managed more effectively.

7. Specifically, the Bill provides that any elector may choose to vote early in accordance with section 113 of the Act for any relevant by-election held during the prescribed period. The Minister noted that this provision was drafted in accordance with a request from the Electoral Commission, and is intended to "reduce crowding and allow for greater social distancing at voting centres on election day".

8. The Bill also provides that an elector may vote by post in accordance with section 143 of the Act if they meet one of the following criteria:

    - They are self-isolating for reasons related to COVID-19;
    - They reasonably believe attending a voting centre on election day will pose a risk to their or another person's health or safety because of the COVID-19 pandemic; or
    - They are a permanent or temporary resident in a hospital, nursing home, retirement village or similar facility.

9. In commenting on the expanded access to postal and early voting proposed by the Bill, the Minister noted that the existing regime under the Act:

> … only allows electors to access postal voting or to attend an early voting centre if they are "unable to attend at a voting centre on election day" as deemed by section 6 of the Act. The circumstances in which an elector is deemed to be unable to attend at a voting centre on election day in section 6 do not specifically include COVID-19 impacts.

10. The Minister further stated that these amendments "are also expected to increase access to voting for vulnerable electors unwilling to attend a voting centre on election day because of perceived public health risks". However, he emphasised that these provisions:

> … are drafted to only apply to by-elections and are only intended to apply during the pandemic. They will be automatically repealed on 30 June 2022. It is also worth emphasising that the changes do not expand access to iVote. The changes only affect eligibility for postal and early voting.

11. Section 274 proposed by the Bill provides that regulations may be made to modify the application of the Act on by-elections held during the prescribed period for the purposes of responding to the COVID-19 public health emergency.

ISSUES CONSIDERED BY COMMITTEE

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

Wide regulation-making power

12. The Act sets the legislative framework for the conduct of State parliamentary elections in New South Wales. Section 3 provides that the objects of the Act include:

> …
>
> (b) to promote and maintain an electoral system characterised by accessibility, integrity and fairness that provides for the election of members of Parliament of New South Wales in accordance with the *Constitution Act 1902*,

…

(e) to enable the citizens of New South Wales to participate freely in fair and transparent electoral processes,

(f) to facilitate the fair and transparent conduct of elections in New South Wales…

13. The Bill proposes section 274 which allows for the making of regulations that may modify the application of the Act for a by-election held during the prescribed period, for the purposes of responding to the COVID-19 pandemic. Subsection 274(3) provides that the regulations which may be made under this section are not limited by the general power to make regulations under the Act, and may override other provisions in the Act.

14. In his second reading speech to the Bill, the Minister stated that the regulation-making power under section 274:

> … is intended to avoid by-elections failing or voters being disenfranchised due to inflexible requirements in the Electoral Act 2017 not accommodating uncertain COVID-19 impacts. For example, a regulation could potentially be necessary to modify the requirement for a postal vote to be completed in the presence of a witness.

15. However, subsection 274(2) limits this regulation-making power. Specifically, it provides that the Minister can only recommend the Governor make such regulations under this section if the proposed regulations are both:

(a) in accordance with advice issued by the Electoral Commissioner, and

(b) reasonable to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic.

16. In addition, subsection 274(4) prohibits any regulations made under this section which would enable a by-election to be conducted exclusively by postal voting, or postal and technology assisted voting. Under section 151 of the Act, technology assisted voting means " a method of voting where an eligible elector votes by means of an electronic device (whether networked or not), such as by a telephone or by a computer".

17. Subsection 274(5) clarifies that any regulation made under this section is repealed at the end of the prescribed period, on 30 June 2022.

The Bill amends the Electoral Act 2017 to provide that regulations may be made which modify the application of the Act's provisions to by-elections held prior to 30 June 2022, for the purpose of responding to the COVID-19 pandemic. It further provides that the regulations made under this power are not limited by general regulation-making powers under the Act, and may override the other provisions in the Act. In doing so, the Bill may grant the Minister a broad power to modify the conduct of parliamentary elections ordinarily regulated by the statute.

The Committee notes that voters for specified by-elections may be subject to different electoral rules as modified by regulations, which may result in individuals being uncertain as to their electoral rights and responsibilities. While the Bill provides explicit limits on this regulation-making power, it also notes the provisions allow for regulations which may abrogate existing electoral protections under the Act.

The Bill may thereby include a broad regulation-making power that may impact an individual's right to political franchise and democratic participation contained in Article 25 of the ICCPR.8 The right to political franchise and democratic participation protects the right of individuals to vote by universal and equal suffrage.

However, the Committee notes that these provisions are an emergency measure, allowing authorities the necessary flexibility to safely conduct parliamentary by-elections held during the COVID-19 pandemic. It also acknowledges that the exercise of this power is limited for the purpose of protecting public health and safety during the COVID-19 public health emergency. Accordingly, the provisions and any regulations made under them are time limited to expire at the end of 30 June 2022. In the circumstances, the Committee makes no further comment.

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

Henry VIII clause

18. As discussed earlier, the regulation-making power proposed by the Bill would enable the making of regulations which "may modify the application of [the] Act for a by-election held during the prescribed period". These regulations are not limited by general regulation-making powers under the Act and can override other provisions of the Act. However, as per subsection 274(5), any regulation is repealed at the end of 30 June 2022.

19. The Minister stated in his second reading speech that this proposed regulation-making power was recommended by the Electoral Commissioner. He further stated that the Bill's provisions mirror the recent amendments to the *Local Government Act 1993* that provided for:

> … a regulation-making power to modify the operation of the provisions in the Act that apply to the 2021 local government elections. … The Electoral Commissioner strongly advocated for this power to avoid the local government elections failing due to unexpected technical irregularities or missed deadlines because of COVID-19 impacts.

The Bill inserts section 274 into the *Electoral Act 2017* which enables the making of regulations that modify the application of the Act to State parliamentary by-elections held prior to 30 June 2022. The regulations may also override the provisions of the Act and are not limited by the regulation-making power in the Act.

In its Digest No 35/57, the Committee commented on the Local Government Amendment (COVID-19 Elections Special Provisions) Bill 2021 which provided for mirror regulation-making powers in relation to the ordinary local government elections held during the COVID-19 pandemic.

Consistent with those comments, the Committee notes that these provisions amount to a Henry VIII clause, allowing the Executive to legislate and amend any Act by way of regulation without reference to the Parliament. In ordinary

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

circumstances, these provisions would be an inappropriate delegation of legislative powers.

However, the Committee acknowledges that in the extraordinary circumstances created by the COVID-19 pandemic, the Bill's provisions may provide flexibility to facilitate the safe conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. It also recognises that the regulation-making power is somewhat limited to allow only those regulations reasonable and for the purpose of protecting public health and safety from risks resulting from the pandemic. In the circumstances, the Committee makes no further comment.

12. Workers Compensation Amendment Bill 2021

Date introduced	17 November 2021
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Customer Service and Digital

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Workers Compensation Act 1987* to abolish presumptive rights to workers compensation for certain workers who contract COVID-19.

2. The Bill also makes a consequential amendment to the *Workers Compensation Regulation 2016*.

BACKGROUND

3. This Bill amends the *Workers Compensation Act 1987* ('the Act') to remove the application of section 19B for injuries received after its commencement (as an Act). It also makes consequential amendments to the *Workers Compensation Regulation 2016* ('the Regulation').

4. The key amendment proposed by the Bill is the removal of statutory presumptions for workers compensation in relation to contracting COVID-19 in prescribed employment. However, the Bill also includes provisions that would entitle a worker to rely on those statutory presumptions under section 19B if they contracted COVID-19 prior to the commencement of the Bill as an Act.

5. The Bill also amends the Regulation to omit clauses 5B to 5D which prescribe clinical criteria, matters relating to incapacity and employment related to COVID-19 disease injuries under the Act, as well as omitting Part 2 of Schedule 2 which prescribes positive medical test results for COVID-19.

6. In his second reading speech to the Bill, the Hon. Victor Dominello MP, Minister for Customer Service, noted that the Bill revokes amendments passed in May 2020:

> … designed to provide additional assurance to workers at a time when little was known about the impacts of COVID-19 and vaccinations were simply a work in progress.

7. However, the Minister then highlighted that the State has since:

> … come a long way, with the circumstances in New South Wales markedly different. … With the further easing of restrictions on 8 November for fully vaccinated people in New South Wales, in line with the New South Wales road map for easing COVID-19 restrictions, it is now business as usual for New South Wales living with COVID-19. Our Government believes that this should extend to workers compensation matters.

ISSUES CONSIDERED BY COMMITTEE

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

Compensation rights – workers compensation

8. The Act provides the legislative framework for the payment of workers compensation by employers for workers. Under that framework, an employer is liable to pay compensation to a worker who contracts a disease in the course of their employment if their employment was the main contributing factor to contracting that disease.

9. Clause 3(1) of the Bill proposes to omit section 19B from the Act. Relevantly, subsection 19B(1) of the Act currently provides that:

> (1) If a worker, during a time when the worker is engaged in prescribed employment, contracts the disease COVID-19 (also known as Novel Coronavirus 2019), then for the purposes of this Act, it is presumed (unless the contrary is established)—
>
> (a) that the disease was contracted by the worker in the course of the employment, and
>
> (b) the employment—
>
> (i) in the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease, or
>
> (ii) in any other case—was the main contributing factor to contracting the disease.

10. Subsection 19B(9) defines "prescribed employment", as to entitle individuals employed in the following businesses to the presumptions under the section:

- the retail industry (other than businesses providing only on-line retail),
- the health care sector, including ambulance officers and public health employees,
- disability and aged care facilities,
- educational institutions, including pre-schools, schools and tertiary institutions (other than establishments providing only on-line teaching services),
- police and emergency services (including fire brigades and rural fire services),
- refuges, halfway houses and homeless shelters,
- passenger transport services,
- libraries,
- courts and tribunals,
- correctional centres and detention centres,
- restaurants, clubs and hotels,

- the construction industry,
- places of public entertainment or instruction (including cinemas, museums, galleries, cultural institutions and casinos),
- the cleaning industry,
- any other type of employment prescribed by the Regulations, which includes cafes, supermarkets, funeral homes and child care facilities.

11. By omitting section 19B from the Act, the Bill removes the existing statutory presumption that a prescribed worker who contracts COVID-19 is entitled under the Act to workers compensation payable by their employer. It also consequentially amends the Regulation to remove clauses pertaining to COVID-19 related matters.

12. However, the Bill seeks to insert into Schedule 6 of the Act provisions that limit the application of these amendments to only those injuries received after the commencement of the Bill as an Act.

13. In his second reading speech, the Minister explained that the intention of these amendments is to maintain "affordable workers compensation insurance premiums". He further stated that the Bill:

> … seeks to address some of those concerns by ensuring that workers compensation premium increases are minimised and that New South Wales businesses in frontline industries such as cafes, restaurants, and retail do not have to bear a disproportionate cost of the COVID-19 health impacts... without these legislative amendments, employers in some industries could be looking at premium increases of up to 27 per cent, which will hit small businesses hard.

14. The Minister explained that the Bill will achieve this goal as the "most significant driver of the anticipated cost" is the existing statutory presumption under section 19B of the Act. He further stated that removing the presumption may reduce the impact of workers compensation claims relying upon section 19B.

15. In remarking that it is appropriate to remove that presumption given high vaccination rates in NSW, the Minister emphasised that the Bill:

> … does not seek to remove the right of a worker to make a workers compensation claim when they have contracted COVID-19 because of their employment. Workers affected by the removal of the COVID-19 presumption will retain the right to make a workers compensation claim if they are able to demonstrate, like any other workplace injury, that they contracted COVID-19 at work.

The Bill amends the *Workers Compensation Act 1987* to remove existing presumptions under the Act which would entitle a worker in a prescribed employment who contracts COVID-19 to workers compensation. These amendments may restrict an individual's access to workers compensation for COVID-19 related injuries by requiring applicants prove their eligibility where previously they may have been automatically entitled under the presumptions. This is of particular concern as the prescribed employments are generally unable to be performed from home which may result in prescribed workers who

contract COVID-19 not accessing compensation, in circumstances where they are required by authorities to self-isolate and cannot work.

However, the Committee acknowledges that these changes would not prevent an individual from applying for workers compensation due to contracting COVID-19 in the course of, and as a result of, their employment. It also recognises the Minister's statements that the statutory presumptions may have a disproportionate financial burden on small businesses in New South Wales, which the amendments are intended to alleviate as NSW moves beyond the COVID-19 public health emergency. In the circumstances, the Committee makes no further comment.

Part Two – Regulations

1. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020* (Regulation) is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* about intentionally spitting or coughing on a public official or other worker in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The Committee has previously commented on the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020* and the *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2020* in its Digests No 13/57 and 17/57. These regulations implemented the original *Public Health (COVID-19 Spitting and Coughing) Order 2020,* which commenced on 9 April 2020 and its successor, *the Public Health (COVID-19 Spitting and Coughing) Order (No 2) 2020*, which commenced on 29 June 2020.. Both of these existing orders have been automatically repealed.

ISSUES CONSIDERED BY THE COMMITTEE

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

Penalty notice offences – right to fair trial

4. The *Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020* (Order), which commenced on 25 September 2020, directs that a person must not intentionally spit at or cough on public officials or other workers in a way that is likely to cause fear about the spread of COVID-19. The Order will be automatically repealed on 18 December 2020.

5. The Regulation provides that a breach of the Order will result in a penalty notice of $5,000. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

6. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research (the Minister) considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

7. Under subsection 7(4) of the Act, such an order must be published in the Gazette as soon as practicable after it is made but failure to do so does not invalidate the order. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, or unless an earlier day is specified in the order.

8. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction.

> ***The Public Health (COVID-19 Spitting and Coughing) Regulation (No 3) 2020*** **allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**
>
> **In its Digests No 13/57 and Digest 17/57, the Committee commented on previous regulations which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.**
>
> **Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.**
>
> **However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.**

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

Matters that should be included in primary legislation

9. As above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction under clause 5 of the Order; that is, when an individual intentionally spits or coughs on:

   - a public official or

- another worker while the worker is at the worker's place of work or travelling to or from it,

in a way that is likely to cause fear about the spread of COVID-19.

The Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 3) 2020 **allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order (No 3) 2020 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.**

In its Digests No 13/57 and Digest 17/57, the Committee commented on a previous regulation which also provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order, both of which have now expired.

Consistent with those comments, the Committee identifies that it generally prefers significant matters to be dealt with in primary rather than subordinate legislation and this includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

However, given the severe circumstances surrounding the COVID-19 pandemic, it is important that the relevant authorities have sufficient flexibility to respond quickly and appropriately to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill, which may have serious consequences. Given the extraordinary circumstances, the Committee makes no further comment.

2. Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020

Date tabled	LA: 13 October 2020 LC: 13 October 2020
Disallowance date	LA: 16 February 2021 LC: 26 November 2020
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are to—

(a) repeal and remake, with amendments, Part 6A of the *Residential Tenancies Regulation 2019* and Part 5 of the *Boarding Houses Regulation 2013* in relation to—

(i) the termination of certain residential tenancy agreements, and

(ii) the listing of certain tenants on a residential tenancy database for the non-payment of rent or charges, and

(iii) the eviction of certain residents from boarding houses, and

(b) prescribe the repeal of Part 13 of the *Residential Tenancies Act 2010* on 26 March 2021,[9] and

(c) make provisions of a savings and transitional nature consequent on the repeal of Part 6A of the *Residential Tenancies Regulation 2019*.

2. This Regulation is made under the *Residential Tenancies Act 2010*, including sections 224 (the general regulation-making power), 229(1) and 230(b).

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity and property rights

3. The Regulation repeals and remakes, with amendments, Part 6A of the *Residential Tenancies Regulation 2019* and Part 5 of the *Boarding Houses Regulation 2013*. These

[9] Schedule 1.28, item 2 of the *COVID-19 (Emergency Measures – Miscellaneous) Bill 2020* provided that Part 13 of the *Residential Tenancies Act 2010* would be repealed on a day prescribed by the regulations no later than 26 March 2021. The Committee published its report on this Bill, including some of the proposed amendments to Part 13, in Digest No 15/57 dated 2 June 2020.

Parts regulate matters such as the termination of residential tenancy agreements and boarding house tenancies.

4. In its comments on the original Parts 6A and 5 in Digest 14/57, the Committee noted that these measures would only run for 6 months. This is because section 229(4) of the *Residential Tenancies Act 2010* provides that certain regulations made under the Act and the *Boarding Houses Act 2012* for the purposes of the COVID-19 pandemic generally expire 6 months after they commence.

5. This Regulation further extends the operation of these measures out to 26 March 2021 (with amendments as outlined below).

6. Clause 41B(1) of the Regulation, for the period ending 26 March 2021 prevents a landlord under a residential tenancy agreement (other than a social housing tenancy agreement) from:

    a) giving an "impacted tenant" a termination notice under the Act for non-payment of rent or charges, or

    b) applying to NSW Civil and Administrative Tribunal (NCAT) under the Act for a termination order relating to a termination notice given to an impacted tenant for non-payment of rent or charges, or

    c) otherwise applying to NCAT for a termination order in relation to the residential tenancy agreement solely on the ground that an impacted tenant has failed to pay rent or charges .

7. However, under new clause 41B(2), a landlord may give a termination notice or apply for a termination order that the landlord is otherwise prohibited from giving or applying for under clause 41B(1) above if—

    a) the landlord has participated, in good faith, in a formal rent negotiation process with the impacted tenant, and

    b) it is fair and reasonable in the circumstances for the landlord to give the termination notice or apply for the order.

8. An "impacted tenant" is defined as a tenant who is a member of a household impacted by the COVID-19 pandemic (schedule 1, clause 41A). Section 228A of the Act provides that, broadly, a household has been impacted by COVID-19 if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working because of a COVID-19 illness. The household income must also have been reduced by at least 25%.

9. In deciding whether the landlord has participated in good faith, and that the termination notice is fair and reasonable in the circumstances, NCAT may have regard to a number of factors including whether the landlord or impacted tenant refused to make or accept reasonable rent offers; whether the impacted tenant continued to pay some rent; and the nature of any financial hardship.

10. The Regulation also covers boarding houses by amending the *Boarding Houses Regulation 2013*.

11. In Schedule 2 of the Regulation, new clause 34 provides that before 26 March 2021, the minimum period of written notice the proprietor of a boarding house must give a resident financially impacted by the COVID-19 pandemic (an “impacted resident”) of an eviction based solely on the non-payment of fees is as follows:

    a) if the proprietor and impacted resident have participated in negotiations about the fees but were not able to reach agreement because the impacted resident did not participate in good faith, 60 days, or

    b) otherwise, 6 months.

12. Under the Regulation, "impacted resident" has a similar meaning to "impacted tenant".

13. Schedule 2 of the Regulation also requires proprietors to give residents at least 90 days' written notice before eviction. There are exceptions, namely those contained in proposed clause 35 of the Boarding House Regulation. The proprietor need not give a resident 90 days written notice if the proprietor is evicting the resident on an "excluded ground," including if:

    a) the resident has not paid residency fees payable under the occupancy agreement, but only if the resident is not an impacted resident,

    b) the resident has intentionally or recklessly caused or permitted serious damage to the premises or other residents’ property,

    c) the resident is using the premises for illegal purposes,

    d) the resident has threatened, abused, intimidated or harassed other residents or the proprietor.

    The Residential Tenancies Amendment (COVID-19) (No 2) Regulation 2020 **extends, with amendments, the operation of Part 6A of the Residential Tenancies Regulation 2019 and Part 5 of the Boarding Houses Regulation 2013 until 26 March 2021.**

    The Regulation limits certain rights of landlords and boarding house proprietors in response to the pandemic. For example, a landlord generally cannot evict a tenant who is financially impacted by COVID-19 for non-payment of rent. An exception exists where the landlord has negotiated in good faith and the termination notice is fair and reasonable in the circumstances.

    A boarding house proprietor must also generally give 6 months' notice of a proposed eviction to a resident who cannot pay their occupancy fees because of COVID-19, with some exceptions.

    In retrospectively limiting landlords’ and proprietors’ rights, the Regulation may impact on property rights. The Committee generally comments on provisions drafted to have retrospective effect, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. Similarly, by limiting the ability of the landlord or proprietor to exercise their rights under an existing agreement, the Regulation may impact on

freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants and residents. The provisions outlined above are automatically repealed on 26 March 2021. The Committee notes that the Regulation also furthers the public health objectives of ensuring citizens remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

3. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation 2021

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: 13 May 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to enable a penalty notice to be issued to a person for not complying with the *Public Health (COVID-19 Mandatory Face Coverings) Order 2021*.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY THE COMMITTEE

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

Personal liberty

3. The regulation amends the *Public Health Regulation 2012* to comply with the *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* (the Order).[10] The object of the order is to require persons in Greater Sydney to wear fitted face coverings in particular circumstances, including:

    - Retail premises, entertainment facilities, licenced gaming facilities, pubs, registered clubs, casinos, premises used for places of worship or religious services, and residential aged care facilities.

    - Public transport waiting areas or in a vehicle or vessel being used to provide public transport services

    - Hospitality venues

4. The order does not apply to persons under the age of 12, person with a physical or mental illness or condition or disability that makes wearing a fitted face covering unsuitable, residents of an aged care facility.

[10] *Public Health (COVID-19 Mandatory Face Coverings) Order 2021*

5. The order also provides that a person may remove a fitted face covering in the following circumstances, and must resume wearing it as soon as practicable after the circumstance ends:

- the person is eating or drinking,
- the person is communicating with another person who is deaf or hard of hearing,
- the person is at work and the nature of the person's work—
  - (i) makes the wearing of a fitted face covering a risk to the person's, or another person's health and safety, or
  - (ii) means clear enunciation or visibility of the person's mouth is essential,
- the person is asked to remove the fitted face covering to ascertain the person's identity,
- because of an emergency,
- the removal of the fitted face covering is necessary for the proper provision of the goods or service.

6. The regulation provides that a penalty notice may be issued to persons not complying with the order. A penalty notice of $200 may be issued to a person contravening the order. A penalty notice of $1,000 may be issued to an individual for contravening the order in relation to a hospitality venue, and $5,000 for a corporation.

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety and is in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and greater Sydney. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Additional obligation on hospitality operators

7. As noted above, the regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances.

8. Clause 5(3) of the Order provides that a person working at a hospitality venue in Greater Sydney whose functions require the person to deal directly with members of the public must wear a fitted face covering at all times while carrying out the functions. The regulation provides that an offence against clause 5(3) is $200.

9. Clause 5(4) of the Order provides that the operator of a hospitality venue in Greater Sydney must ensure all persons working at the venue comply with subclause (3). The regulation provides that an offence against clause 5(4) is $1,000 for an individual and $5,000 for a corporation.

The regulation provides that penalty notices may be issued for not complying with a public health order requiring the wearing of fitted face coverings in certain circumstances, including a wide range of retail, entertainment and hospitality venues. This may have an adverse impact on the business community that may comply with the order during trading and business hours, and may impact or restrict the way their business is conducted while the order is in place.

The Committee also notes that the regulation contains a higher penalty for operators of hospitality venues that contravene the Order than individuals, and requires that the operators ensure that all persons working at the venue comply with the Order. This places an onus on the operator of hospitality venues to ensure that their staff comply with the Order.

However, the Committee recognises that the intent of the regulation is to protect public health and safety in response to the COVID-19 pandemic, particularly the recent outbreaks in the northern beaches and Greater Sydney. The wearing of face masks may allow businesses to continue to operate in certain circumstances while also providing a safety measure to those staff and customers. The Committee also recognises that since this regulation was published that some COVID-19 restrictions have been scaled back, including the requirement for customers to wear face masks in retail venues and other businesses. In these circumstances, the Committee makes no further comment.

4. Retail and Other Commercial Leases (COVID-19) Regulation (No. 2) 2020

Date tabled	23 October 2020
Disallowance date	LA: 23 March 2021 LC: 24 March 2021
Minister responsible	The Hon. Damien Tudehope, MLC
Portfolio	Minister for Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* (the remade Regulation) is made under the *Retail Leases Act 1994*, including sections 85 and 87, and under section 202 of the *Conveyancing Act 1919*.

2. The object of the remade Regulation is to repeal and remake, with amendments, the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (the first Regulation) to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until the end of 31 December 2020.

3. Accordingly, the remade Regulation will continue to give effect to the *National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19* adopted by the National Cabinet on 7 April 2020. Like the fist Regulation, the remade Regulation—

    a. prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and

    b. requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

4. The provisions of the remade Regulation are largely the same as the first Regulation, as amended in July 2020. However, there are new provisions requiring lessors to commence renegotiation of a lease within 14 days of a request by a lessee (unless another timeframe is agreed), and allowing lessees to make multiple requests for rent renegotiation during the prescribed period.

5. This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

6. When introduced in April 2020, the first Regulation applied for a 'prescribed period' of 6 months, the time limit for regulations made under section 87 of the *Retail Leases Act 1994*. The remade Regulation extends the prescribed period for just over two months, until 31 December 2020. However, the remade Regulation itself will not be repealed until 6 months after it commences, on 22 April 2021 (clause 12).

7. 'Impacted lessees' continue to be defined as those who are eligible for JobKeeper payments and who had less than $50 million in turnover in the 2018-19 financial year (clause 4).

8. During the prescribed period, a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of (clause 6):

    a. a failure to pay rent,

    b. a failure to pay outgoings, or

    c. the business operating under the lease not being open for business during the hour specified in the lease.

9. 'Prescribed actions' include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent, among other actions (clause 3).

10. Further, a lessor cannot take a prescribed action against a lessee because of a failure to pay rent unless the lessor has, if requested by the lessee, renegotiated the rent payable (and other terms) under the lease in good faith (clause 7(4)(a)). This was also a requirement under the first Regulation. However, as mentioned above, the remade Regulation contains an additional requirement that the lessor commence renegotiations within 14 days of receiving a request by an impacted lessee, unless another timeframe is agreed.

11. However, nothing in the remade Regulation prevents a lessor from taking a prescribed action against a lessee on grounds unrelated to the COVID-19 pandemic (clause 10).

12. Further, parties are not prevented from agreeing to a prescribed action, including termination of an impacted lease (clause 6(7)).

    Like its predecessor, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 2)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.

    The remade Regulation also goes further than the first Regulation by requiring lessors to commence renegotiation within 14 days of a request by the lessee.

However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualify for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 10 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

13. As noted above, the remade Regulation significantly limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

14. The remade Regulation extends the prescribed period for which these limitations are imposed, which was initially due to end on 23 October 2020, until 31 December 2020.

15. While the previous Regulation was in force, the Committee notes that financial mortgage assistance was made available for eligible lessors to defer business loan repayments for a period of 6 months.[11] Following any 6-month loan repayment deferral, lessors experiencing ongoing financial difficulty may now be able to restructure or vary their loan, or be eligible for a 4-month deferral extension.[12]

[11] Australian Banking Association, 'Commercial Landlord Relief Package', https://www.ausbanking.org.au/covid-19/the-landlord-relief-package/

[12] Australian Banking Association, 'COVID-19 support: phase two', https://www.ausbanking.org.au/covid-support-phase-two/

16. The NSW Government has also announced that commercial landlords will be able to apply for a land tax concession of up to 25% if they provide rent reductions to eligible tenants from 1 January 2021 to 28 March 2021.[13]

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 31 December 2020.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[13] Service NSW, 'Commercial lease support', https://www.service.nsw.gov.au/campaign/covid-19-help-small-businesses/commercial-lease-support

5. Strata Schemes Management Amendment (COVID-19) Regulation (No. 2) 2020

Date tabled	LA: 17 November 2020 LC: 17 November 2020
Disallowance date	LA: 4 May 2021 LC: 5 May 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* is to provide for the following matters under the *Strata Schemes Management Act 2015* for the purposes of responding to the public health emergency caused by the COVID-19 pandemic –

    a. altered arrangements for convening, and voting at, meetings of an owners corporation of a strata committee,

    b. allowing instruments, instead of being affixed with the seal of an association in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,

    c. the extension, to 6 months, of the time periods within which—

        i. the first annual general meeting of an association must be convened and held, and

        ii. a levy must be determined to reimburse an amount paid or transferred from an administrative fund or a capital works fund.

2. This Regulation also postpones the date of repeal of section 271A of the Act, which confers the special regulation-making power to provide for the above matters.

3. This Regulation is made under the *Strata Schemes Management Act 2015*, including sections 271 (the general regulation-making power) and 271A.

4. The Committee published a report on the *Strata Schemes Management Amendment (COVID-19) Regulation 2020*, the predecessor to this Regulation, in Digest 17/57.[14] That regulation commenced on 5 June 2020, and expired 6 months after its commencement, pursuant to section 271A(4) of the *Strata Schemes Management Act 2015.*

[14] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 17/57, 4 August 2020.

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

5. The *Strata Schemes Management Act 2015* (the Act) sets out legislative framework for the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.

6. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including:

    - altered arrangements for convening and voting at a relevant strata meeting,
    - an alternative to affixing the seal of the owners corporation, and
    - extension of a time period in which a thing is required to be done under the Act.

7. Subsections 271A(3) and (4) further provide that regulations made under the section:

    - can override a provision of the Act, and
    - expire on the day that is 6 months after their commencement, or the earlier day decided by Parliament by resolution of either House.

8. Subsection 271A(5) provides for section 271A to be repealed on:

    - 13 November 2020, or
    - a later day, not later than 13 May 2021, prescribed by the regulations.

9. This Regulation is made under section 271A and section 271 (the general regulation-making power) and, like its predecessor, amends the *Strata Schemes Management Regulation 2016* to:

    - provide for altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee,
    - allow instruments, instead of being affixed with an owners corporation's seal in the presence of certain persons, to be signed (and the signatures to be witnessed) by those persons,
    - extend certain time periods – for example, extending the time within which the first annual general meeting of an owners corporation must be convened and held under section 14 of the Act from 2 months to 6 months after the 'initial period'.

10. In particular, clause 71(1) of schedule 1 to this Regulation provides that certain means of voting, including voting by teleconference, videoconference or email, can be used to determine matters at a strata meeting even if the owners corporation or strata committee has not resolved to adopt those means of voting.

11. Further, clause 71(4)(a) provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person.

12. Pursuant to section 271A(5)(b) of the Act, clause 74 of schedule 1 to the Regulation also postpones the repeal date of the regulation-making power in section 271A from 13 November 2020 until 13 May 2021.

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. For example, the Regulation extends the time limits for compliance with certain provisions of the *Strata Schemes Management Act 2015*, and provides that electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act. Pursuant to subsection 271A(5) of the Act, this Regulation also extends the operation of section 271A itself, delaying its repeal date from 13 November 2020 to 13 May 2021.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

6. Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: To be determined
Minister responsible	The Hon. Damien Tudehope MP
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* (the remade Regulation) is made under the *Retail Leases Act 1994*, including sections 85 and 87, and under section 202 of the Conveyancing Act 1919.

2. The object of the remade Regulation is to repeal and remake, with amendments, the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* (the second Regulation) to extend prohibitions and requirements in relation to the exercise of certain rights of lessors during the COVID-19 pandemic period until 28 March 2021. The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (the first Regulation) was introduced in July 2020, and repealed by the second Regulation in October 2020.

3. Accordingly, the remade Regulation will continue to give effect to the National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19 adopted by the National Cabinet on 7 April 2020. Like the fist Regulation, the remade Regulation—

    a. prohibits and regulates the exercise of certain rights of lessors relating to the enforcement of certain commercial leases during the COVID-19 pandemic period, and

    b. requires, in response to the COVID-19 pandemic, that lessors and lessees renegotiate the rent and other terms of those commercial leases in good faith having regard to the leasing principles set out in the National Code of Conduct, before any legal enforcement action of the terms of those commercial leases can be commenced.

4. The provisions of the remade Regulation are largely the same as the first two Regulations, as amended in July 2020 and October 2020.

5. This Regulation is made with the agreement of the Minister for Customer Service, being the Minister administering the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY THE COMMITTEE

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

Retrospectivity, property rights and freedom of contract

6. When introduced in April 2020, the first Regulation applied for a 'prescribed period' of 6 months, the time limit for regulations made under section 87 of the Retail Leases Act 1994. The second Regulation extended the prescribed period until 31 December 2020. The remade Regulation extends this period until 28 March 2021. However, the remade Regulation itself will not be repealed until 6 months after it commences, on 18 June 2021 (clause 12).

7. 'Impacted lessees' continue to be defined as those who are eligible for JobKeeper payments, although it now applies to businesses that had less than $5 million in turnover in the 2018-19 financial year (instead of $50 million, as noted by the first and second regulation) (clause 4).

8. During the prescribed period, a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of (clause 7):

    a. a failure to pay rent,

    b. a failure to pay outgoings, or

    c. the business operating under the lease not being open for business during the hour specified in the lease.

9. 'Prescribed actions' include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent, among other actions (clause 3).

10. Further, a lessor cannot take a prescribed action against a lessee because of a failure to pay rent unless the lessor has, if requested by the lessee, renegotiated the rent payable (and other terms) under the lease in good faith (clause 7(4)(a)). This was also a requirement under the first and second Regulations. The remade regulation retains the requirement that the lessor commence renegotiations within 14 days of receiving a request by an impacted lessee, unless another timeframe is agreed.

11. However, nothing in the remade Regulation prevents a lessor from taking a prescribed action against a lessee on grounds unrelated to the COVID-19 pandemic (clause 10).

12. Further, parties are not prevented from agreeing to a prescribed action, including termination of an impacted lease (clause 6(6)).

> **Like its predecessors, the remade *Retail and Other Commercial Leases (COVID-19) Regulation (No 3)* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take account of the economic impacts of COVID-19.**

The remade Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the remade Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each.

The remade Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. The remade Regulation also has retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time.

However, the Committee recognises that the remade Regulation, like the first Regulation, only applies to cases involving 'impacted lessees' (i.e. lessees that qualified for the JobKeeper scheme and had annual turnover less than $5 million before the pandemic), and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes the relatively short period for which the provisions in the remade Regulation have been extended – approximately 12 weeks. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

13. As noted above, the remade Regulation limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

14. The remade Regulation extends the prescribed period for which these limitations are imposed, which was initially due to end on 31 December 2020 until 28 March 2021.

15. While the previous Regulation was in force, the Committee notes that financial mortgage assistance was made available for eligible lessors to defer business loan repayments for a period of 6 months.[15] Following any 6-month loan repayment deferral, lessors experiencing ongoing financial difficulty may now be able to restructure or vary their loan, or be eligible for a 4-month deferral extension.[16]

[15] Australian Banking Association, 'Commercial Landlord Relief Package', https://www.ausbanking.org.au/banks-to-help-commercial-landlords-who-help-tenants/

[16] Australian Banking Association, 'COVID-19 support: phase two', https://www.ausbanking.org.au/covid-19-support-phase-two/

16. The NSW Government has also announced that commercial landlords will be able to apply for a land tax concession of up to 25% if they provide rent reductions to eligible tenants from 1 January 2021 to 28 March 2021.[17]

As above, the remade Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 crisis. In doing so, the remade Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 28 March 2021.

However, the Committee recognises that the remade Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.

[17] Service NSW, 'Commercial lease support', https://www.service.nsw.gov.au/campaign/covid-19-help-small-businesses/commercial-lease-support

7. Private Health Facilities Amendment (COVID-19 Prescribed Period) Regulation 2021

Date tabled	LA: 23 March 2021 LC: 23 March 2021
Disallowance date	LA: 25 June 2021 LC: 10 August 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Private Health Facilities Amendment (COVID-19 Prescribed Period) Regulation 2021* is to postpone the date on which special statutory provisions enacted in response to the COVID-19 pandemic are repealed.

2. This Regulation is made under the *Private Health Facilities Act 2007*, including sections 12A and 65 (the general regulation-making power).

ISSUES CONSIDERED BY 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

3. The Regulation amends the *Private Health Facilities Regulation 2017* by inserting a new clause 23A. That clause provides that section 12A of the *Private Health Facilities Act 2007* will be repealed at the beginning of 26 March 2022.

4. Section 12A was inserted into the Act as part of a collection of measures in response to the COVID-19 pandemic contained in the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020*.

5. In the second reading speech for the introduction of that Bill, the Attorney-General noted that additional conditions on private health facility licences 'may be necessary to manage resources or coordinate health services to ensure an appropriate supply of personal protective equipment for more serious cases across the entire New South Wales health system, both public and private, during this crisis'. As an example, the Attorney-General suggested that 'additional conditions may include limiting the types of elective surgeries that can be undertaken' in a facility.

6. Accordingly, section 12A(1) provides that a licence for a private health facility may be subject to any conditions that the Secretary for the Department of Health considers necessary, having regard to the COVID-19 pandemic, to protect the health and safety of

the public, manage resources or ensure the provision of balanced and coordinated health services throughout the State.

7. Section 12A(2) provides that a condition may be imposed when a licence is issued or amended by the Secretary.

8. Section 12A(3) provides that section 12A will be repealed, and any conditions imposed revoked, on 26 March 2021 or a later day prescribed by the regulations, not later than 26 March 2022.

The Regulation inserts a new clause 23A into the *Private Health Facilities Regulation 2017*, which has the effect of deferring the repeal date of section 12A of the *Private Health Facilities Act 2007.* This is made possible by a Henry VIII clause in section 12A(3) of the Act, which provides that section 12A will be repealed on 26 March 2021, or a later date prescribed by the regulations.

The Committee generally prefers amendments to an Act, including repeal dates of certain provisions, to be made by an amending Bill rather than by subordinate legislation. This is to foster an appropriate level of parliamentary oversight. In this case, the amendment is limited to extending by another year the special conditions applicable to private health facility licences during the COVID-19 pandemic. The Committee acknowledges the public health and safety objectives of section 12A, and the benefits of having a flexible repeal date, given the ongoing challenges posed by the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.

8. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 4) 2020

Date tabled	LA: 9 February 2021 LC: 16 February 2021
Disallowance date	LA: 6 May 2021 LC: 8 June 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Minister for Health and Medical Research

PURPOSE AND DESCRIPTION

1. The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 4) 2020* is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

2. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* about intentionally spitting or coughing on:

    - a public official or
    - another worker while the worker is at the worker's place of work or travelling to or from the worker's place of work,

    in a way that is likely to cause fear about the spread of COVID-19.

3. The *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* commenced on 17 December 2020 and repeals and remakes the *Public Health (Spitting and Coughing) Order (No 3) 2020*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020* commenced on 9 April 2020, and has now been remade three times.[18] These orders are made under section 7 of the *Public Health Act 2010*, and pursuant to section 7(5), must expire after 90 days.

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ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – right to a fair trial

4. The *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020*, which commenced on 15 December 2020, directs that a person must not intentionally spit at or cough on public officials or other workers in a way that is likely to cause fear about the spread of COVID-19.

5. Under subsections 7(1) and (2) of the *Public Health Act 2010*, if the Minister for Health and Medical Research considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

6. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, unless an earlier day is specified in the order.

7. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction. The maximum penalty for doing so is –

    (a) for an individual—100 penalty units ($11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 50 penalty units ($5,500) for each day the offence continues, or

    (b) for a corporation—500 penalty units ($55,000) and, in the case of a continuing offence, a further 250 penalty units ($27,500) for each day the offence continues.

8. The Regulation, like its predecessors, provides that a breach of the Order, resulting in an offence under section 10 of the Act, is an offence for which a penalty notice of $5,000 may be served. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

    The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 4) 2020* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 4) 2020* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

    In its previous Digests 13/57, 17/57 and 25/57, the Committee commented on earlier versions of this Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a

significant monetary amount to be imposed on an individual by way of penalty notice.

Individuals retain the right to elect to have their matter heard and decided by a Court. However, individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

9. As noted above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction in clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57 and 25/57, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances, the Committee makes no further comment.

9. Liquor Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Victor Dominello, MP
Portfolio	Customer Service

Purpose and description

1. The objects of the *Liquor Amendment (Miscellaneous) Regulation 2021* are as follows—

    a) to provide that small bars cannot be used to operate as a facility regularly used for adult relaxation entertainment,

    b) to clarify, following certain events being rescheduled, the extended hours in which certain hotels and clubs may trade during the Australian Open,

    c) to provide that an application made during the COVID-19 pandemic to change the boundaries of licensed premises to incorporate certain outdoor areas allowed for use by a local council under section 166 of the *Liquor Act 2007* is exempt from the submission processes and fees prescribed for the making of these applications,

    d) to insert a transitional provision consequent on the commencement of the *Liquor Amendment (Night-time Economy) Act 2020*, (e) to update the lists of licensed premises that are high risk venues.

2. This Regulation is made under the *Liquor Act 2007*, including sections 6(1)(l), 11(1)(b), 13, 99(1), 116B and 159 (the general regulation-making power) and Schedule 1, clause 1(1).

Issues considered by committee

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

New condition imposed on small bar licences

3. Among other amendments, schedule 1 to the *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new clause 44B into the *Liquor Regulation 2018*. That clause provides that it is a condition of a small bar licence that the licensed premises 'cannot be used to operate as a facility regularly used for adult relaxation entertainment (including adult entertainment of a sexual nature)'.

4. This amendment is enabled by section 159(f4) of the *Liquor Act 2007*, which provides that regulations may be made about conditions of licences relating to the entertainment that may be provided, or the way in which it may be provided, on licensed premises.

5. Relevantly, section 11(2) of the *Liquor Act 2007* provides that a licensee must comply with any conditions to which its licence is subject. The maximum penalty for failure to comply with licence conditions is 100 penalty units ($11,000) or imprisonment for 12 months, or both.

6. Neither the phrase 'adult relaxation entertainment', nor 'adult entertainment of a sexual nature', nor any part thereof, is defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*. However, these phrases are used elsewhere in the Regulation – for example, clauses 96(5) and 130AA(2).

The *Liquor Amendment (Miscellaneous) Regulation 2021* inserts a new provision into the *Liquor Regulation 2018*, making it a condition of a small bar licence that licensed premises cannot be used for 'adult relaxation entertainment (including adult entertainment of a sexual nature)'. These phrases are not defined in the *Liquor Regulation 2018* or the *Liquor Act 2007*, although they are used elsewhere in the Regulation.

Under section 11(2) of the Act, contravention of a licence condition by a licensee attracts a large maximum penalty, including possible imprisonment.

The Committee generally prefers provisions which create new offences, or expand the ambit of an existing offence, to be drafted with sufficient precision so that their scope and content is clear. This is of particular concern given that the condition applies to existing small bar licences, as well as new licences, and non-compliance attracts a significant maximum penalty. In these circumstances, the Committee refers the matter to Parliament for consideration.

10. Public Health Amendment (Miscellaneous) Regulation 2021

Date tabled	LA: 23 March 2021 LC: 23 March 2021
Disallowance date	LA: 3 August 2021 LC: 11 August 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

Purpose and description

1. The objects of this Regulation are—

   (a) to allow for the issue of penalty notices for an offence occurring between 26 March 2020 and 31 December 2021 against a provision of the *Public Health Act 2010* involving a contravention of the following—

      (i) a Ministerial direction to deal with a public health risk,

      (ii) an order to close public premises on public health grounds,

      (iii) a public health order relating to COVID-19, and

   (b) to extend the operation of clause 99A of the Public Health Regulation 2012 to allow the Secretary of the Ministry of Health to appoint members and members of staff of the Department of Customer Service and the NSW Food Authority as authorised officers, either generally or in relation to particular functions exercisable by authorised officers relating to public health until 31 December 2021, and

   (c) to omit a reference to repealed legislation.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118, 126(1) and 134 (the general regulation-making power).

Issues considered by committee

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

Penalty notice offences – Right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012*, which lists penalty notice offences under the *Public Health Act 2010* and Regulation, to extend the operation of certain offences until 31 December 2021. This includes penalty notice offences under the following sections:

   - Section 10, regarding offences for not complying with a Ministerial direction

- Section 11, regarding the power to close public premises on public health grounds
- Section 70(1), regarding offences for not complying with a public health order

4. Under Schedule 4 of the *Public Health Regulation 2012,* the penalty for the above offences under the Act are:

    - Section 10, for an offence against clause 5 of the *Public Health (COVID-19 Spitting and Coughing) Order 2021*: $5000 for an individual
    - Section 10, for another offence occurring between 26 March 2020 and 31 December 2021: $1000 for an individual and $5000 for a corporation
    - Section 11, for an offence occurring between 26 March 2020 and 31 December 2021: $1000 for an individual and $5000 for a corporation
    - Section 70(1), for an offence occurring between 26 March 2020 and 31 December 2021 involving a contravention of public health order relating to COVID-19: $1000 for an individual

5. However, the ability to issue penalty notices for offences under sections 10, section 11 or 70(1) of the Act does not remove the right to elect to have such matters determined by a court.

    The Regulation extends the operation of certain offences under Schedule 4 of the *Public Health Regulation 2012* until 31 December 2021. This includes penalty notice offences for contraventions of COVID-related public health orders under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

    Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

    However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, with a current repeal date of 31 December 2021. In the circumstances, the Committee makes no further comment.

Appointment of Authorised Officers

1. The Regulation extends the operation of Clause 99A of the *Public Health Regulation 2012* from 26 March until 31 December 2021. Clause 99A operates in conjunction with section 126(1)(c) of the *Public Health Act 2010*, which gives the Secretary of the Ministry of Health

the power to appoint a member, or member of staff, of a body prescribed by the regulations, to be an authorised officer.

2. An authorised officer holds certain functions and powers under the Act. In particular, section 118 provides authorised officers with the power to issue penalty notices. Authorised officers also have the power to direct a person to answer questions, or to apply for a search warrant (see sections 41, 108 to 112, 118 and 127 of the Act).

3. Clause 99A of the *Public Health Regulation 2012* prescribes the Department of Customer Service and the NSW Food Authority for the purposes of section 126(1)(c). The practical effect is to allow the Secretary to appoint a member or employee of the Department of Customer Service or the NSW Food Authority as an authorised officer, with a range of powers including the power to issue penalty notices for offences under the *Public Health Act 2010*.

4. As noted in the Legislation Review Committee's Digest 17,[19] a person appointed as an authorised officer may have significant coercive powers. However, the Act contains safeguards to mitigate the risk of impinging unnecessarily or excessively upon personal rights and freedoms. For example, before entering premises an authorised officer must give reasonable notice where possible (subsection 108(2)(c)) and, if seeking to enter residential premises, an authorised officer must obtain the consent of the occupier, or do so under the authority of a search warrant (subsection 108(4)).

The Regulation extends, until 31 December 2021, the operation of certain provisions under the *Public Health Regulation 2012* that allow the Secretary of the Ministry of Health to appoint any member, or member of staff, of the Department of Customer Service or the NSW Food Authority as an authorised officer. Such authorised officers have functions and powers under the Public Health Act, including the power to issue penalty notices for breaching public health orders and the power to require a person to answer questions.

The Committee generally prefers that provisions that may confer significant powers to be included in primary legislation rather than the subordinate legislation, in order to foster an appropriate level of parliamentary oversight. However, the Committee acknowledges that in the current emergency situation created by COVID-19, it may be reasonable for public health regulations to include such broad provisions so that authorities can respond swiftly and flexibly to the pandemic.

Further, the provisions are time limited to be repealed on 31 December 2021. The Committee also notes safeguards in the Act, for example, authorised officers cannot enter residential premises unless they have the occupier's permission, or they have obtained a search warrant. In the circumstances, the Committee makes no further comment.

[19] Legislation Review Committee, Digest No 17/57, 4 August 2020, p40.

11. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 2) 2021

Date tabled	LA: 4 May 2021 LC: 4 May 2021 (sitting day of 24 March 2021)
Disallowance date	LA: 10 August 2021 LC: 12 August 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* to wear a fitted face covering in certain circumstances inside NSW airports and on domestic commercial aircraft.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The Committee previously reported on an earlier rendition of this regulation in Digest 27/57 in regards to the *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation 2021*.[20]

ISSUES CONSIDERED BY THE COMMITTEE

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

Personal liberty

4. The Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction. Specifically, for an offence against clause 5(1) or (5) of the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*, which repeals and remakes the *Public Health (COVID-19 Mandatory Face Coverings) Order 2021* which would have otherwise been repealed on 2 April 2021.

5. Clause 5(1) or (5) of the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021* provides that the Minister directs that persons wear a fitted face mask in certain circumstances when inside NSW airports and domestic commercial aircraft.

[20] Legislation Review Committee, Digest 27/57 – 16 March 2021, p33.

6. However, subclause 5(2) of the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2)* provides that these requirements do not apply to persons under 12 or to a person with a physical or mental health illness or condition, or disability, that makes wearing a fitted face covering unsuitable including, for example, a skin condition, an intellectual disability, autism or trauma.

7. Subclause 5(3) also provides exceptions to the requirement to wearing a fitted face mask, including when a person is eating or drinking, when communicating with another person who is deaf or hard of hearing, when it interferes with the nature of their work, where they are asked to remove it to ascertain their identity, because of an emergency or where it is necessary for the proper provision of goods or services.

8. Under the Regulation, the penalty for this offence against clause 5(1) or (5) of the order is $200 for an individual.

The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. This may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth or may impact their breathing.

However, the Committee recognises that the intent of the regulation is to protect public health and safety when travelling by aircraft within NSW and is in response to the COVID-19 pandemic and the risk of recurring outbreaks across the States and Territories. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.

12. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2021

Date tabled	LA: 16 March 2021 LC: 16 March 2021
Disallowance date	LA: 22 June 2021 LC: 24 June 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order 2021* about intentionally spitting or coughing on a public official or other worker in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The *Public Health (COVID-19 Spitting and Coughing) Order 2021* commenced on 12 March 2021 and repeals and remakes the *Public Health (Spitting and Coughing) Order (No 4) 2020*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020* commenced on 9 April 2020, and has now been remade four times. These orders are made under section 7 of the *Public Health Act 2010*, and pursuant to section 7(5), must expire after 90 days.

4. The Committee has reported on prior renditions of this regulation in Digests 13/57, 17/57, 25/57, and 30/57.[21]

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – right to a fair trail

5. The Regulation amends the Schedule 4 of the *Public Health Regulation 2012* to allow penalty notices to be issued for offences under section 10 of the *Public Health Act 2010,* regarding a contravention of the *Public Health (COVID-19 Spitting and Coughing) Order 2021*.

6. The *Public Health (COVID-19 Spitting and Coughing) Order 2021*, which commenced on 15 December 2020, directs that a person must not intentionally spit at or cough on public

[21] Legislation Review Committee Digests, 13/57 – 5 May 2020, 17/57 – 4 August 2020, 25/57 – 16 February 2021, and 30/57 – 11 May 2021.

officials or other workers in a way that is likely to cause fear about the spread of COVID-19.

7. Under subsections 7(1) and (2) of the *Public Health Act 2010*, if the Minister for Health and Medical Research considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

8. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, unless an earlier day is specified in the order.

9. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction. The maximum penalty for doing so is –

    (a) for an individual—100 penalty units ($11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 50 penalty units ($5,500) for each day the offence continues, or

    (b) for a corporation—500 penalty units ($55,000) and, in the case of a continuing offence, a further 250 penalty units ($27,500) for each day the offence continues.

10. The Regulation, like its predecessors, provides that a breach of the Order, resulting in an offence under section 10 of the Act, is an offence for which a penalty notice of $5,000 may be served. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, and 30/57 the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by

COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

1. As noted above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction in clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57, 25/57, and 30/57, the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.

13. Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction under the *Public Health (COVID-19 Spitting and Coughing) Order No 2 2021* about intentionally spitting or coughing on a public official or other worker in a way that is likely to cause fear about the spread of COVID-19.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

3. The *Public Health (COVID-19 Spitting and Coughing) Order 2021* commenced on 28 May 2021 and repeals and remakes the *Public Health (Spitting and Coughing) Order 2021*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020* commenced on 9 April 2020, and has now been remade five times. These orders are made under section 7 of the *Public Health Act 2010*, and pursuant to section 7(5), must expire after 90 days.

4. The Committee has reported on prior renditions of this regulation in Digests 13/57, 17/57, 25/57, 30/57 and 32/57.[22]

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – right to a fair trail

5. The Regulation amends the Schedule 4 of the *Public Health Regulation 2012* to allow penalty notices to be issued for offences under section 10 of the *Public Health Act 2010,* regarding a contravention of the *Public Health (COVID-19 Spitting and Coughing) Order No 2 2021*.

6. The *Public Health (COVID-19 Spitting and Coughing) Order* (*No 2) 2021*, which commenced on 28 May 2021, directs that a person must not intentionally spit at or cough on public

[22] Legislation Review Committee Digests, 13/57 – 5 May 2020, 17/57 – 4 August 2020, 25/57 – 16 February 2021, 30/57 – 11 May 2021, and 32/57 – 22 June 2021.

officials or other workers in a way that is likely to cause fear about the spread of COVID-19.

7. Under subsections 7(1) and (2) of the *Public Health Act 2010*, if the Minister for Health and Medical Research considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

8. Under subsection 7(5) of the Act, such an order expires 90 days after it is made unless earlier revoked, unless an earlier day is specified in the order.

9. Further, under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction must not, without reasonable excuse, fail to comply with the direction. The maximum penalty for doing so is –

    (c) for an individual—100 penalty units ($11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 50 penalty units ($5,500) for each day the offence continues, or

    (d) for a corporation—500 penalty units ($55,000) and, in the case of a continuing offence, a further 250 penalty units ($27,500) for each day the offence continues.

10. The Regulation, like its predecessors, provides that a breach of the Order, resulting in an offence under section 10 of the Act, is an offence for which a penalty notice of $5,000 may be served. This is consistent with the penalties which applied to previous versions of the Order, which have since expired.

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation (No 2) 2021* allows a penalty notice of $5,000 to be issued to an individual who contravenes the *Public Health (Spitting and Coughing) Order (No 2) 2021* by intentionally spitting or coughing on a public office or on another worker while the worker is at the worker's place of working or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

In its previous Digests 13/57, 17/57, 25/57, 30/57 and 32/57, the Committee commented on earlier versions of the Regulation, which similarly provided that a penalty notice of $5,000 could be issued to a person who contravened earlier versions of the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that $5,000 is a significant monetary amount to be imposed on an individual by way of penalty notice.

The Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, although individuals may be incentivised not to do so, as the maximum penalty is significantly higher, and includes imprisonment. The Committee also acknowledges that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by

COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

11. As noted above, the Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction in clause 5 of the Order, that is, when an individual intentionally spits or coughs on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes the Public Health (COVID-19 Spitting and Coughing) Order No 2 2021 by intentionally spitting or coughing on a public official or on another worker while the worker is at the worker's place of work or travelling to or from it, in a way that is likely to cause fear about the spread of COVID-19.

Consistent with its comments in Digests 13/57, 17/57, 25/57, 30/57, and 32/57 the Committee generally prefers significant matters to be dealt with in primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight concerning the provisions.

The Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses are not delayed by the need for an amending Bill. Given the extraordinary circumstances caused by the COVID-19 pandemic, the Committee makes no further comment.

14. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 3) 2021

Date published	25 June 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	To be determined
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to allow for the issue of penalty notices for an offence against section 10 of the *Public Health Act 2010* involving a contravention of a Ministerial direction to wear a face covering given in an order made under section 7 of that Act.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Personal liberty

3. The Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction.

4. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*.

5. Under that Order, the Minister may direct that persons wear a fitted face mask in certain indoor settings, such as airports and aircraft, public transport, retail premises and hospitality and business settings.

6. However, the Order provides that these requirements do not apply to persons under 12 or to a person with a physical or mental health illness or condition, or disability, that makes wearing a fitted face covering unsuitable including, for example, a skin condition, an intellectual disability, autism or trauma.

7. The Order also provides exceptions to the requirement to wearing a fitted face mask, including when a person is eating or drinking, when communicating with another person who is deaf or hard of hearing, when it interferes with the nature of their work, where

they are asked to remove it to ascertain their identity, because of an emergency or where it is necessary for the proper provision of goods or services.

8. Under the Regulation, the penalty for this offence is $200 for an individual or $1000 for a corporation.

9. The Committee notes that the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2)* has since been repealed and replaced with the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3),* due to the changing circumstances of the current COVID-19 outbreak in NSW.

10. The Committee previously commented on earlier renditions of this regulation in Digest No.27 (16 March 2021)[23] and No. 32 (22 June 2021).[24]

> **The regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.**
>
> **However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.**

Right to fair trial – penalty notice offences

11. As noted, the Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the *Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021*.

12. This public health order is made under section 7 of the *Public Health Act 2010,* which provides the Ministerial power to deal with public health risks. Under this section, public health orders may be issued by the Minister that expire after a period of 90 days unless earlier revoked.

> **The Regulation allows penalty notices to be issued for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 2) 2021.**
>
> **The Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter**

[23] Legislation Review Committee, Legislation Review Digest No.27/57, 16 March 2021

[24] Legislation Review Committee, Legislation Review Digest No. 33/27, 22 June 2021

heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

15. Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021

Date published	14 July 2021
Date tabled	LA: Not yet tabled LC: Not yet tabled
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021 (the Regulation) is to exempt tenants who are financially impacted by the COVID-19 pandemic from the operation of provisions of the *Residential Tenancies Act 2010* (the Act) or the regulations made under that Act that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of non-payment of rent or charges if the tenants continue to pay at least 25 per cent of the rent payable under the agreement. The exemption will end at the end of 11 September 2021.

2. The Regulation is made under section 12 of the Act.

3. The Committee published reports on previous versions of Part 6A of the Residential Tenancies Regulation 2010. Specifically, the Committee commented on the Residential Tenancies Amendment (COVID-19) Regulation 2020 in Digest No. 14/57[25] and the Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020 in Digest No. 25/57.[26]

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity, property rights and freedom of contract

4. Section 12 of the Act provides that the regulations may exempt any specified person, agreement or premises from the operation of the Act or regulations.

[25] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 14/57, 12 May 2020.

[26] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 25/57, 16 February 2021.

5. For the purposes of section 12, clause 41C of the Regulation amends the *Residential Tenancies Regulation 2019* to provide an exemption to a tenant if the tenant:

    I. is an 'impacted tenant', being a tenant who is a member of a household impacted by the COVID-19 pandemic,

    II. gives the landlord notice of he or she is an impacted tenant, and

    III. continues to pay the landlord at least 25 per cent of the rent payable under the residential tenancy agreement.

6. Clause 41B of the Regulation provides, broadly, that a household is impacted by the COVID-19 pandemic if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working or materially reduce work hours because of a COVID-19 illness. The household income must have, as a result of the COVID-19 illness, been reduced by at least 25 per cent compared to the average weekly household income for the four weeks immediately preceding 26 June 2021.

7. Specifically, clause 41C of the Regulation provides that during the moratorium period, the tenant is exempt from the operation of any provision of the Act or regulations that would result in the termination of the residential tenancy agreement or recovery of possession of the premises from the tenant for:

    I. a termination notice given by the landlord under section 87 (breach of agreement) for non-payment of rent or charges under section 88,

    II. an application by a landlord for a termination order under section 83(2) in relation to a termination notice given by the landlord for non-payment of rent or charges under section 88, or

    III. an application by a landlord for a termination order for non-payment of rent or charges under section 88 without the landlord having given the tenant a termination notice.

8. The 'moratorium period' means the period starting on the commencement of the Regulation, being the day on which it was published on the NSW legislation website (14 July 2021), and ending at the end of 11 September 2021.

The Regulation reinstates, with amendments, Part 6A of the Residential Tenancies Regulation 2019 to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it exempts financially impacted tenants from provisions that would ordinarily terminate their residential tenancy agreement or allow the recovery of possession of the property. This exemption applies where rent or charges have not been paid, and where that tenant gives notice and continues to pay at least 25 per cent of the rent payable under the agreement.

The exemption limits landlord's rights in response to the pandemic. For example, during the moratorium period from 14 July 2021 to the end of 11 September 2021, a landlord generally cannot give a tenant who is financially impacted by COVID-19 a termination notice under the Act for non-payment of rent. A landlord

may continue to seek termination in other circumstances including (without limitation) to sell the premises, for illegal use of the premises or hardship to the landlord.

By altering the terms of the existing agreement already entered into by the tenant and the landlord, this Regulation retrospectively limits landlords' rights under such tenancy agreements. The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact the rule of law principle that a person is entitled to know the law to which they are subject to at any given time.

Similarly, by limiting the ability of the landlord to exercise his/her rights under an existing agreement and specifically limiting the landlord's right to terminate for breach of contract resulting from non-payment of rent or charges, the Regulation may impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject.

However, the Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited to last for the period from 14 July 2021 to 11 September 2021. The Committee notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

16. Strata Schemes Management Amendment (COVID-19) Regulation 2021

Date tabled	LA: 8 June 2021 LC: 8 June 2021
Disallowance date	LA: To be determined LC: To be determined
Minister responsible	The Hon. Kevin Anderson, MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation 2021* (the **Regulation**) is to provide for the following matters in response to the public health emergency caused by the COVID-19 pandemic:

    I. altered arrangements for convening meetings of an owners corporation or a strata committee, and

    II. allowing instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

2. The Regulation is made under sections 271 (general regulation-making power) and section 271A of the *Strata Schemes Management Act 2015*.

3. The Committee has published reports on predecessors to this Regulation. Specifically, the Committee commented on the Strata Schemes Management Amendment (COVID-19) Regulation 2020 in Digest No. 17/57[27] and the Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020 in Digest No. 28/57.[28]

ISSUES CONSIDERED BY 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

4. The *Strata Schemes Management Act 2015* (the **Act**) sets out the legislative framework for the management of strata schemes and disputes related to strata schemes. The Act

[27] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 17/57, 4 August 2020.

[28] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 28/57, 23 March 2021.

and the Strata Schemes Management Regulation 2016 made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.

5. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including (without limitation) altered arrangements for convening a relevant strata meeting and an alternative to affixing the seal of the owners corporation.

6. Subsections 271A(3) and (4) of the Act further provide that regulations made under the section:

    I. can override a provision of the Act, and

    II. expire on the day that is six months after their commencement, or the earlier day decided by Parliament by resolution of either House.

7. Subsection 271A(5) provides that section 271A is repealed on 31 March 2022.

8. The Regulation is made under section 271A and section 271 (the general regulation-making power) and amends the Strata Schemes Management Regulation 2016 to insert a new Part 11, which provides for altered arrangements for certain matters set out in section 271A(1) of the Act.

9. Specifically, the Regulation provides:

    I. under clause 69, that notice of or another document in relation to a strata meeting may be served by email. Clause 71 provides that the previous Part 11 (in force immediately before the commencement of the Regulation) continues to apply if, at the commencement of the Regulation, notice of a relevant strata meeting was given in accordance with the Act but the meeting has not yet been held, and

    II. under clause 70, that an instrument or document may, instead of being affixed with the seal of an owners corporation in the presence of certain persons, may be signed, and the signatures witnessed, by those persons. Clause 70(4) provides that a signatory or witness can be present by audio visual link.

The *Strata Schemes Management Amendment (COVID-19) Regulation 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of, and documents relating to, a strata meeting may be served by email and instruments. It also provides that documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19

pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

17. Liquor and Gaming Legislation Amendment Regulation 2021

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon Victor Dominello MP
Portfolio	Customer Service

PURPOSE AND DESCRIPTION

1. The object of the *Liquor and Gaming Legislation Amendment Regulation 2021* (the **Regulation**) is to –

   a) to amend the *Gaming and Liquor Administration Regulation 2016* to remove references to repealed provisions, and

   b) to amend the Liquor Regulation 2018—

      i. to specify licensed premises that may be included on the list of live music and performance

      ii. venues to be kept by the Secretary of the Department of Customer Service, and

      iii. to provide that licensed premises on the list are eligible for certain fee concessions, and

      iv. to extend by 6 months the period within which specified temporary boundary changes to licensed premises may apply, and

      v. to provide for exemptions from consultation and fee requirements for certain permanent

      vi. boundary changes to licensed premises that are substantively identical to earlier temporary boundary changes to which the same exemptions were applicable, and

      vii. to provide that a licensee of subject premises is not required to maintain an incident register in a period during which a high-risk music festival is being held at the premises if the licensee reaches specified written agreements in advance with the music festival organiser, and

      viii. to make miscellaneous and consequential amendments.

2. This Regulation is made under the *Gaming and Liquor Administration Act 2007* and *Liquor Act 2007.*

ISSUES CONSIDERED BY COMMITTEE

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Powers of Secretary

3. Clause 61B generally gives the Secretary the power to compile a list of licenced premises that are live music and performance venues, including live music venues, live performance venues and venues that participate or are to participate, in incentivised events.

4. A benefit of a licensee being a live music or performance venue under the Regulation is that it entitles the licensee or manager to be eligible for the government's Live Music Support Package if that licensee is experiencing financial hardship. The Live Music Support Package was established by the NSW Government in 2021 in response to the COVID-19 pandemic, as defined in clause 61B(6) of this Regulation.

5. Clause 61B(4) gives the Secretary the power to remove licensed premises from the list of live music and performance venues if the criteria in clauses 61B(1)(a-c) and 61B(3)(a-c) are satisfied.

6. Clause 61B(5) broadly states that before publishing a list of live music and performance venues, if that lists omits licensed premises that were previously included in the list, the Secretary must give the licensee or manager of the premises written notice that the licensed premises are to be removed from the list.

> **The Regulation grants the Secretary certain powers regarding live music and performance venues. Specifically, the Secretary may compile a list of licensed premises that are live music and performance venues, the content of an application of a licensed premises under the Live Music Support Package or requirements under clause 61A(2), and either decide not to include or remove licenced premises from the list of live music and performance venues on various conditions.**
>
> **The Committee notes that the Regulation does not specify the timeframe in which the Secretary must give the licensee or manager notice of removal from the list of live music and performance venues. If the obligations of the Secretary's notice are not clarified this may result in negative business outcomes for the licensee or manager relative to their eligibility for the Live Music Support Package and may disentitle them from application entirely.**
>
> **Further clarification for licensees could be provided in the notice requirement by providing written reasons as to why a licensee is no longer considered a live music and performance venue for the purpose of clause 61B.**
>
> **The Committee prefers provisions that affect rights and obligations to be drafted with sufficient precision so that their scope and content is clear. Pursuant to clause 4 of schedule 1 of the *Subordinate Legislation Act 1989*, a statutory rule must be expressed plainly and unambiguously, and consistently with the**

language of the enabling Act. The Committee refers this provision to the Parliament for consideration of whether it calls for elucidation.

18. Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation (No 4) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to—

   (a) increase the penalty notice amount payable for an offence against the *Public Health Act 2010*, section 10 committed by an adult involving a contravention of a Ministerial direction to wear a face covering given in an order made under section 7 of that Act to $500,

   (b) provide for specific penalty notice amounts for a child under the age of 18 years of age who commits the offence.

2. This Regulation is made under the *Public Health Act 2010*, including sections 118 and 134 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Personal liberty

3. The Regulation increases the penalties payable for failing to comply with a direction to wear or carry a face mask given by the Health Minister in an order under section 7 of the *Public Health Act 2010*.

4. Penalty notices may be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction.

5. Under *Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021*, the Minister may direct that persons wear a fitted face mask in certain indoor settings, such as airports and aircraft, public transport, retail premises and hospitality and business settings.

6. However, the Order provides that these requirements do not apply to persons under 12 or to a person with a physical or mental health illness or condition, or disability, that

makes wearing a fitted face covering unsuitable including, for example, a skin condition, an intellectual disability, autism or trauma.

7. The Order also provides exceptions to the requirement to wearing a fitted face mask, including when a person is eating or drinking, when communicating with another person who is deaf or hard of hearing, when it interferes with the nature of their work, where they are asked to remove it to ascertain their identity, because of an emergency or where it is necessary for the proper provision of goods or services.

8. Under this Regulation, the penalty for this offence has been increased from $200 to $500 for an individual. In addition, the Regulation introduces a penalty of $80 when committed by an individual aged 16 or 17 years of age, and a penalty of $40 for the offence when committed by a child who is aged between 12 and 15 years of age.

9. The Committee previously commented on earlier renditions of the *Public Health Amendment (COVID-19 Mandatory Face Coverings) Regulation* in Digest No.27 (16 March 2021)[29] and No. 32 (22 June 2021).[30]

> **The Regulation amends the *Public Health Regulation 2012* to provide that penalty notices may be issued for contravening a public health order requiring the wearing of fitted face coverings in certain circumstances when inside NSW airports and domestic commercial aircraft. As noted by the Committee regarding earlier renditions of this regulation (in Digests 27 and 32), this may impact a person's physical bodily integrity by requiring them to wear an item of clothing that covers their nose and mouth.**
>
> **However, the Committee recognises that the intent of the regulation is to protect public health and safety in certain indoor areas within NSW and is in response to the ongoing COVID-19 pandemic. The Committee also notes that the Regulation provides exceptions to wearing fitted face coverings in circumstances where the person is under 12 years old, where it is not suitable due to a disability or physical or mental illness, or for a temporary period such as when eating or drinking or during an emergency. In these circumstances, the Committee makes no further comment.**

Right to fair trial – penalty notice offences

10. As noted, the Regulation allows penalty notices to be issued for offences under section 10 of the *Public Health Act 2010* for a contravention of a Ministerial direction. Specifically, for an offence of failing to comply with a direction to wear a face mask covering under the Public Health (COVID-19 Mandatory Face Coverings) Order (No 3) 2021.

11. This public health order is made under section 7 of the *Public Health Act 2010,* which provides the Minister with power to deal with public health risks. Under this section, public health orders may be issued by the Minister that expire after a period of 90 days unless earlier revoked.

> **The Regulation increases the penalty amounts imposed for offences of failing to comply with a direction to wear a face mask covering under the *Public Health***

[29] Legislation Review Committee, Legislation Review Digest No.27/57, 16 March 2021

[30] Legislation Review Committee, Legislation Review Digest No. 33/27, 22 June 2021

(COVID-19 Mandatory Face Coverings) Order (No 3) 2021 **from $200 for an individual to $500. The Regulation also introduces penalties of $80 for the offences when committed by an individual who is 16 or 17 years of age, and for $40 when committed by an individual who is 15 years of age or younger.**

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

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court and acknowledge that there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the penalty offence is part of the regulatory response to the COVID-19 pandemic, and of a temporary nature as it is attached to the offences under the public health orders which may be in force for a period of 90 days unless revoked or replaced. In these circumstances, the Committee makes no further comment.

19. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 201
Disallowance date	LA: 12 October 2021 LC: 12 October 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to enable penalty notices to be issued for offences relating to the following—

   (a) failing to comply with the direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, clause 23 concerning outdoor gatherings,

   (b) failing to comply with a direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, clause 25A concerning answering questions from authorised contact tracers,

   (c) failing to comply with a direction in the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

2. The Regulation inserts offences which were previously in the various remakes of the *Public Health (COVID-19 Spitting and Coughing) Order 2020*. The original *Public Health (COVID-19 Spitting and Coughing) Order 2020*, which commenced on 9 April 2020, has been remade five times. The orders were made under the *Public Health Act 2010* and pursuant to section 7(5), expired after 90 days.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty Notice offences – right to a fair trial

3. The Regulation inserts offences into the *Public Health Regulation 2012* that were previously in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

4. Under subsections 7(1) and (2) of the *Public Health Act 2010* (the Act), if the Minister for Health and Medical Research considers on reasonable grounds that there is, or is likely to be, a risk to public health, the Minister may by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences.

5. Under section 10 of the Act, a person who is subject to a direction under section 7, and who has notice of the direction, must without reasonable excuse, fail to comply with the direction. The maximum penalty for doing this is the following:

   (a) for an individual – 100 penalty units (11,000), or imprisonment for 6 months, or both, and, in the case of a continuing offence, a further 250 penalty ($27,500) units for each day the offence continues

6. Schedule 4 of the *Public Health Regulation 2012* provides that it is an offence to fail to comply with a Minister's direction prohibiting coughing or spitting on a public official or other worker given by the Minister in an order made under the *Public Health Act 2010*.

7. Similar to the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations, under section 10 of the Act, the offence has a maximum penalty of $5,000. However, the difference is that the offences inserted into the Regulation do not have an expiration date.

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation 2021* inserts an offence when an individual fails to comply with the Minister's direction prohibiting coughing or spitting on a public official or other worker. A failure to comply with the direction, without reasonable excuse, would result in a penalty notice of $5,000 issued to the individual. The offence inserted into the Regulation is the same offence that was in the *Public Health (COVID-19 Spitting and Coughing) Order (No 4) 2020* and its previous iterations.

In its previous Digests 13/57, 17/57, 25/57 and 30/57, the Committee commented on the earlier versions of *Public Health (COVID-19 Spitting and Coughing Order 2020*, which provided that a penalty notice of $5,000 could be issued to a person who contravened the Order. Consistent with its previous comments, the Committee notes that penalty notices allow an individual to pay a monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that the amount of $5,000 is a significant monetary amount to be imposed on an individual by way of a penalty notice.

While individuals retain the right to elect to have their matters heard and decided by the Courts. An individual may be financially dissuaded to do so, as the maximum penalty is a significant amount.

The Committee acknowledges there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by the COVID-19 pandemic, where public institutions, including the courts, would need to facilitate social distancing. Given these factors, the Committee makes no further comment.

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

Matters that should be included in primary legislation

8. As noted above, Schedule 4 provides that it is an offence to fail to comply with a Minister's direction prohibiting coughing or spitting on a public official. The Regulation allows for a $5,000 penalty notice to be issued for a contravention of the Ministerial direction under Schedule 4 of the Regulation.

> **As noted above, the Regulation allows a penalty notice of $5,000 to be issued to an individual who contravenes Schedule 4 of the *Public Health Regulation 2012* by coughing or spitting on an official or other worker.**
>
> **Consistent with its comments made in Digest 13/57, 17/57, 25/57 and 30/57, the Committee generally prefers significant matters to be dealt with in the primary rather than subordinate legislation. This includes provisions that set down large on-the-spot penalties for offending. This would foster a greater level of parliamentary oversight.**
>
> **The Committee is also concerned that unlike the offences created in the *Public Health (COVID-19 Spitting and Coughing) Order 2020* and its subsequent iterations which would expire 90 days after it is published, there is no such expiry date for an offence inserted into the *Public Health Regulation 2012*.**
>
> **Given the severe circumstances surrounding the COVID-19 pandemic, the Committee acknowledges the importance of relevant authorities having sufficient flexibility to respond quickly to emerging public health issues. Being able to include significant matters in subordinate legislation may further this objective, meaning that responses aren't delayed by the need to amend a Bill. Given the extraordinary circumstances, the Committee makes no further comment.**

20. District Court Criminal Practice Note 22

Date tabled	LA: 12 Oct 2021 LC: 12 Oct 2021
Disallowance date	LA: 24 Nov 2021 LC: 24 Nov 2021
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The purpose of this Practice Note is to ensure that, due to the large number of criminal trials being vacated because of COVID-19, jury trials proceed as efficiently as possible when they resume.

ISSUES CONSIDERED BY COMMITTEE

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

Right to liberty and freedom from arbitrary arrest or detention

2. The Practice Note provides that, in the event a criminal trial is to be vacated, the trial will not be reallocated a new hearing date until all pre-trial issues are argued and determined. In order to resolve all pre-trial issues, the Practice Note further provides that the date allocated for the trial will be utilised for the hearing of pre-trial arguments.

3. In the event that the parties consider there are no pre-trial issues, the Practice Note annexes a form which must be completed and signed by the solicitor instructing counsel who are briefed to appear at the trial which is to be vacated. This form is effectively a signed statement from the solicitor advising the Court that there are no pre-trial issues for the Court's resolution in the matter.

4. The District Court's Criminal Practice Note 18 sets out the general case management and pre-trial procedures for the conduct of matters under the Court's criminal jurisdiction. Items 16 to 18 of the Criminal Practice Note 18 sets out the Court's practice for trial management.

5. Item 16 provides that the accused's arraignment date will serve as the first trial management listing and, if the accused enters a plea of not guilty to any of the charges, the Court will fix dates for both the trial and the Readiness Hearing (being a hearing a week prior to trial where parties make relevant disclosures and the Court may exercise its powers as appropriate for the efficient management and conduct of the trial). In fixing a date for the trial, item 17(b) of the Criminal Practice Note 18 states that the prosecutor and the legal representative for the accused are to provide the Court with:

> an accurate estimate of the length of the trial… The estimate of the trial is to include allowance for pre-trial argument…

6. Likewise, at the Readiness Hearing fixed before trial, item 28(j) of the Criminal Practice Note 18 states the prosecutor and the legal representative for the accused are to inform the Court of the accurate estimate of the trial length "which must include an allowance for any pre-trial argument that has been identified by the parties".

The Practice Note makes the reallocation of hearing dates for criminal trials which have vacated conditional upon the hearing and determination of pre-trial issues. This may have the effect of individuals remaining arraigned on indictable offences and potentially in the custody of the State for an undefined period of time, in circumstances where the person is presumed innocent until their matter has been tried and they have been found guilty of a charge beyond reasonable doubt. The Practice Note may thereby impact on the right to liberty and security of person contained in Article 9 of the ICCPR.[31] The right to liberty and security of person protects the freedom of individuals not to be subjected to arbitrary arrest or detention and the entitlement of individuals arrested or detained on a criminal charge to a trial within a reasonable time, or to be released.

The Practice Note may also impact on the right to equality before the courts and tribunals contained in Article 14 of the ICCPR. The right to be equal before the courts and tribunals in the determination of a criminal trial protects the right of individuals to minimum guarantees of full equality, including the guarantee to be tried without undue delay.

The Committee acknowledges that the Practice Note provides for the previously allocated hearing date of the vacated trial to be reserved for the determination of pre-trial issues, which will prevent further delays to the reallocation of a new trial date that could be caused by the need to fix a hearing date for pre-trial arguments. The Committee also recognises that this measure provides for the efficient use of the Court's resources and may assist the Court in managing the backlog of criminal trials as a result of the vacations caused by the COVID-19 pandemic.

However, the Committee notes that the Criminal Practice Note 18 recognises and makes provisions for the determination of pre-trial issues which may arise in its estimation of trial length. The Committee also notes that the determination of pre-trial issues pending or the signed statement of no such issues provided at the time of the vacation of hearing dates does not preclude the need for determination of further pre-trial issues which might thereafter arise before the new trial date. Therefore, the efficiency savings intended by the restriction may be undermined at the expense of the accused person's right to have their matter set down for trial as soon as reasonable. In circumstances where the accused individual might also be held in custody on remand, the Committee refers this matter to the Parliament for consideration.

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

21. District Court Criminal Practice Note 23

Date tabled	LA: 19 October 2021 LC: 19 October 2021
Disallowance date	LA: To be confirmed (to be confirmed on publication of 2022 sitting calendar) LC: To be confirmed (to be confirmed on publication of 2022 sitting calendar)
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The District Court Criminal Practice Note 23 titled 'Resumption of Jury Trials and in person appearances in Judge Alone Trials' (the **Practice Note**) was published in NSW Government Gazette No 527 of 15 October 2021.

2. The Practice Note is made under the *District Court Act 1973.*

3. The introduction of the Practice Note provides:

> 3. The commencement of new jury trials at the Court venues identified in paragraph 10 were temporarily suspended due to COVID-19. With the easing of restrictions under Public Health Orders and increased vaccination rates, the temporary suspension of jury trials at these venues will be lifted on 25 October 2021.
>
> 4. The steps that the Court will take to enable the return of jury trials in a way that is in the interests of the health and wellbeing of all court participants will build on the measures implemented last year…
>
> 5. The additional steps that the Court will take to facilitate the safe resumption of jury trials include:
>
> a. all jurors being vaccinated against COVID-19; and
>
> b. all court participants undergoing rapid antigen screening (**RAS**) at least twice-weekly or as otherwise required by the Sheriff of NSW.
>
> 6. In person appearances will only be allowed for new jury trials from 25 October 2021. All other matters in the Court will continue to be conducted by use of the virtual courtroom, subject to any leave granted by application to the trial Judge in judge alone trials.

4. The Practice Note applies to the resumption of jury trials at the following Court venues: the Downing Centre, John Maddison Tower, Campbelltown, Dubbo, Gosford, Katoomba, Newcastle, Parramatta, Penrith and Wollongong. Risk assessments will be conducted by the Sheriff of NSW and the application of the Practice Note may be extended to other Court venues, in accordance with paragraph 11.

ISSUES CONSIDERED BY COMMITTEE

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

Barrier to jury participation

5. The Practice Note requires all members of a jury panel to be vaccinated in order to attend a new jury trial. Specifically, paragraph 14 states that the NSW Sheriff will ensure that all members of the jury panel are vaccinated, consent to undergoing rapid antigen testing (RAS) as required and have undergone RAS.

6. 'Vaccinated' means that a person:

   i. has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and

   ii. at least 14 days has elapsed since completing their vaccination schedule.

7. Paragraph 17 states that any court participant (which includes a juror) has the right to decline to provide his or her vaccination status. However, it appears that doing so prevents the person from being a juror. Unlike for other court participants (specifically, witnesses, defence experts or accused persons) the Practice Note does not facilitate jurors partaking in a trial by audio link or audio-visual link where they decline to provide their vaccination status or evidence of such, or undergo RAS.

8. Paragraph 19 provides the rationale for the provision of a court participant's vaccination status, stating that it will assist the Court to manage the risk of COVID-19 and facilitate the safety of all court participants under the *Court Security Act 2005* (NSW), the *Work Health and Safety Act 2011* (NSW) and NSW Public Health Orders.

> **The Practice Note requires that all members of a jury panel attending a new jury trial are vaccinated against COVID-19. While a court participant (including a juror) has the right to decline to provide his or her vaccination status, it appears that doing so prevents that person from being a juror.**
>
> **The Practice Note does not appear to facilitate juror participation by audio link or audio-visual link as an alternative. However, the Committee notes that in person jury trials help to uphold the right to fair trial and rule of law by allowing the jurors, among other things, full court room visibility (of other court participants present and the Judge) and access to the jury room for deliberation. It also allows juror conduct to be more closely monitored and therefore effectively managed.**
>
> **The Practice Note does not make any exceptions to the requirement to be vaccinated on medical or other grounds. The requirement to be vaccinated may therefore be discriminatory against non-vaccinated people, including people who are unable to be vaccinated for medical reasons, or people who received a vaccine other than those approved by the Therapeutic Goods Administration (TGA). These include overseas vaccines 'recognised' by TGA, although it is noted**

that State and Territory governments or certain organisations may apply additional considerations around vaccine requirements.[32]

The Committee notes the centrality of jury service to the criminal justice system, allowing members of the community to play an active role in the administration of justice. It also notes the intent of the requirement to manage the risk of COVID-19 and protect the safety of all court participants. The Committee refers this issue to the Parliament for its consideration.

Open justice

9. The Practice Note requires that other persons (besides jurors) attending the Court in person are vaccinated.

10. Leave will not be granted to any person to attend the Court in person for a Judge alone trial unless the trial Judge is satisfied that he or she is vaccinated. Leave is granted by application to the trial Judge. All other matters will continue to be heard by use of the virtual courtroom.

11. A member of the media who wishes to attend a civil trial in person must also provide evidence that he or she is vaccinated and consents to undergo RAS. Where a member of the media declines to do so, attendance will be permitted by the use of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial.

12. As noted above, 'vaccinated' means that a person has either received the full dosage of a TGA-recognised vaccine and at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires any person who wishes to attend Court in person for Judge alone trial apply for leave, and that such leave will not be granted unless the Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a trial in person provide evidence that they are vaccinated and consent to undergo rapid antigen testing (RAS). If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination or does not consent to undergo RAS, they have access to the virtual courtroom.

The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny. However, while the Practice Note limits in person appearances and media access to the Court, the Committee acknowledges that such requirements are in response to the current COVID-19 pandemic with the intention of broader public health. The Committee also considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

[32] Australian Government Department of Health, Therapeutic Goods Administration, *COVID-19 vaccines not registered in Australia but in current international use – TGA advice on "recognition"*, 22 October 2021.

Access to justice

13. The Practice Note facilitates the giving of evidence or appearance of certain court participants by audio link or audio-visual link where they decline to provide their vaccination status or evidence of such, or do not consent to an RAS. Specifically:

    i. a Crown witness to give evidence by audio link or audio-visual link,

    ii. a defence witness to give evidence by audio link or audio-visual link,

    iii. defence expert and/or alibi witness to give evidence by audio link or audio-visual link and

    iv. an accused person to appear by audio-visual link.

14. In accordance with paragraph 40, where an accused person declines to provide their vaccination status or evidence of such, or does not consent to RAS, the Court may vacate the trial or, on its own motion or with the parties to the proceedings' consent, make a direction that an accused person appear by audio-visual link. The parties will have an opportunity to make submissions to the Court as to whether such a direction should be made and the Court will have regard to the accused person's vaccination status and sections 22C(6) and (7) of the *Evidence (Audio and Audio Visual Links) Act 1998,* being COVID-19 pandemic special provisions which are in force until 26 March 2022. These sections provide that:

    i. the court is to make a direction under this section only if it is in the interest of justice, having regard to the public health risk posed by the COVID-19 pandemic, the efficient use of available judicial and administrative resources, relevant matters raised by a party and other matters the court considers relevant, and

    ii. if an audio-visual link is used, the court must be satisfied that a party is able to have private communication with their legal representative and has had a reasonable opportunity to do so.

    Where a person declines to provide their vaccination status or evidence of such, or do not consent to rapid antigen testing, the Practice Note allows a Crown witness, a defence witness and a defence expert and/or alibi witness to give evidence in a new jury trial by audio link or audio-visual link. It also permits an accused person to appear by audio-visual link. The Court may direct an accused person to appear by audio-visual link if it is in the administration of justice and having regard to certain circumstances.

    The use of audio link or audio-visual link may affect procedural fairness because the Court cannot closely monitor the conduct of a witness or expert including what material they have access to, if other persons are in the room or if they are recording the trial on their own device. It may also affect consistency in the quality of evidence between witnesses who appear in person or remotely, particularly if an audio link or audio-visual link drops out due to technical failures. Additionally, appearance by audio-visual link may impact an accused person's access to justice, particularly if they are Indigenous or have mental health or cognitive impairment issues, as the Court does not have the benefit of observing any nuanced behavioural cues of the accused person.

The Committee acknowledges that the use of audio link or audio-visual link in trials has practical benefits in the circumstances, specifically to protect against the risk of COVID-19 and protect the safety of court participants. In the circumstances, the Committee makes no further comment.

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

Period of application and review date

15. The Practice Note commences on 13 October 2021.

16. Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

The Practice Note does not include a specific end date, although it indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential effect of the Practice Note on a person's rights, including their right to participate in the administration of justice as a juror, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

22. Local Government (General) Amendment Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Shelly Hancock MP
Portfolio	Local Government

PURPOSE AND DESCRIPTION

1. The object of the *Local Government (General) Amendment Regulation 2021* (the **Regulation**) is to make amendments to the *Local Government (General) Regulation 2005* as follows:

   i. to prescribe the information to be included on the roll of electors that is to be kept by the Electoral Commissioner,

   ii. to provide that the election manager may make arrangements for inspection of a list of names of persons proposed for nomination,

   iii. to provide for the forms, and the approval of the forms, to be used for the purposes of a claim for the grouping of candidates and the withdrawal of the claim for grouping of candidates,

   iv. to prescribe additional classes of persons who are qualified for postal voting,

   v. to change the time that an envelope on which a postal vote certificate is printed must be received by the returning officer,

   vi. to provide that a person qualified to vote in the election of councillors to be held in September 2021 is qualified to vote before election day,

   vii. to reassign the functions relating to mobile booths for pre-poll voting in remote local government areas to the election manager,

   viii. to make arrangements for the COVID-19 pandemic in relation to polling places, scrutineers being present, and providing certain information be available on the election manager's website,

   ix. to allow the election manager to make a direction about the display of a poster or the handing out of tangible election material, in or on particular premises, if the direction is intended to comply with a public health order and to reduce the risk of infection from COVID-19,

x. to make provision for technology assisted voting,

xi. to update the questions to be put to an elector,

xii. to clarify the process for the preliminary scrutiny of postal voting envelopes,

xiii. to provide that, for an attendance election, an election manager may direct that a ballot-box be moved from a polling place to a ballot counting place,

xiv. to provide for the process required for the scrutiny and counting of votes at a ballot counting place,

xv. to provide for certain ballot-papers in sealed envelopes to be counted if the elector was not entitled to be enrolled on a residential roll for a ward but was entitled to be enrolled for another ward in the area,

xvi. to make it an offence for a person to enter or remain at a polling place unlawfully, or refuse to leave a polling place after being required to leave by an election official,

xvii. to align provisions relating to the suspension or adjournment of polling at an attendance election with the *Electoral Act 2017*,

xviii. to provide that a policy under the Act, section 252 must provide for the making of payment of expenses associated with carer responsibilities that are adequate or reasonable,

xix. to provide for when an election for chairperson of a county council is to be held,

xx. to prescribe the process for the receipt and scrutiny of postal votes, including the rejection of informal votes,

xxi. to update a form,

xxii. to make other minor and consequential amendments.

2. This Regulation is made under the *Local Government Act 1993* (the **Act**), including sections 252(5), 305, 310A and 748 (the general regulation-making power) and Schedule 6.

ISSUES CONSIDERED BY COMMITTEE

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

Strict liability offences

3. Sections 748(3) and (4) of the Act provide that the regulations may create offences in connection with elections and polls by adopting, with modifications as are necessary, any provision of the *Electoral Act 2017*, and for the penalty for an offence not to exceed the penalty for the corresponding offence in the *Electoral Act 2017*.

4. The Regulation inserts provisions into the *Local Government (General) Regulation 2005* regarding technology assisted voting by adopting the provisions of Part 7, Division 11 of the *Electoral Act 2017*. Two of these adopted provisions create strict liability offences.

5. Section 333J adopts section 159 of the *Electoral Act 2017*, providing that:

   i. a person who becomes aware of how an eligible elector, voting in accordance with the approved procedures, voted is not to disclose that information to another person except in accordance with the approved procedures. Contravention of this provision results in a maximum penalty of 20 penalty units ($2200) or imprisonment for 6 months, or both, and

   ii. a person must not disclose to another a source code or other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or in accordance with an arrangement entered into by the person with the Electoral Commissioner. Contravention of this provision results in maximum penalty of 200 penalty units ($22 000) or imprisonment for 2 years, or both.

6. Section 333K adopts section 160 of the *Electoral Act 2017*, providing that a person must not, without reasonable excuse, destroy or interfere with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting. Contravention of this provision results in a maximum penalty of 200 penalty units ($22 000) or imprisonment for 3 years, or both. It is an indictable offence.

7. The Regulation also amends clause 368(2) of the *Local Government (General) Regulation 2005*, which included an offence for remaining at a polling place after being requested by an election official to leave. The amendment makes it an offence for a person to, without lawful authority (proof of which lies on the person):

   i. enter or remain at a polling place, or

   ii. refuse to leave the polling place on being required to leave by an election official, or by the police officer acting under the direction or authority of an election official.

   This offence incurs a maximum penalty of 5 penalty units ($550).

The *Local Government (General) Amendment Regulation 2021* creates strict liability offences. Specifically, it incorporates provisions of the *Electoral Act 2017* to create three strict liability offences regarding secrecy relating to technology assisted voting and the protection of computer hardware and software. Each offence incurs a monetary penalty or imprisonment, or both:

- **disclosure of how an eligible elector, voting using technology assisted voting, votes except in accordance with approved procedures incurs a maximum penalty of 20 penalty units ($2200) or 6 months' imprisonment, or both,**

- **disclosure of a source code of other computer software that relates to technology assisted voting under the approved procedures, except in accordance with the approved procedures or an arrangement with the Electoral Commissioner, incurs a maximum penalty of 200 penalty units ($22 000) or 2 years' imprisonment, or both, and**

- **destruction or interference with a computer program, data file or electronic device used, or intended to be used, by the Electoral Commissioner for or in connection with technology assisted voting incurs a maximum penalty of 200 penalty units ($22 000) or 3 years' imprisonment.**

It also expands the offence under clause 368 to make it an offence for a person to, without lawful authority, enter or remain at a polling place, or refuse to leave a polling place after being required to leave by an election official. The Regulation places the burden on the accused person to prove they had the lawful authority to enter, remain or refuse to leave. This requirement may be interpreted as a reversal of the evidentiary principle that the burden of demonstrating the elements of an offence rests on the prosecution.

The Committee generally comments on strict liability offences as they depart from the common law principle that the mental element of an offence is relevant to the imposition of liability. However, such offences encourage compliance. Compliance is particularly vital to safeguarding the integrity of the electoral process and vote by secret ballot, which guarantees free expression of the will of electors and upholds an individual's right to partake in public affairs and elections.

The Committee also prefers that provisions which create offences are included in the primary rather than subordinate legislation to facilitate an appropriate level of parliamentary oversight. In this case however the *Local Government Act 1993* contemplates the regulations creating offences by adopting provisions of the *Electoral Act* 2017.

In the circumstances, the Committee makes no further comment.

Freedom of movement

8. The Regulation regulates the freedom of movement of persons at polling places and other locations.

9. As noted above, the Regulation amends clause 368(2) of the *Local Government (General) Regulation 2005* to state that a person must not, without lawful authority (proof of which lies on the person):

   i. enter or remain at a polling place, or

   ii. refuse to leave the polling place on being required to leave by an election official, or by the police officer acting under the direction or authority of an election official.

   This is a strict liability offence incurring a maximum penalty of 5 penalty units ($550).

10. The Regulation also amends clause 369 of the *Local Government (General) Regulation 2005* to insert a new subclause which states that, without limiting clause 356SA, a scrutineer who, within a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth, does any of the following, may be removed from the place by a police officer on the request of an election official:

i. contravenes this clause (by interfering with or influencing an elector or communicating with any person except as necessary to carry out the scrutineer's functions, or does not obey the lawful direction of an election official),

ii. engages in misconduct,

iii. fails to obey the lawful direction of the election official.

11. Under clause 356SA of the *Local Government (General) Regulation 2005*, a police officer may remove a person from a polling place or the immediate vicinity of a polling place if the police officer has reasonable grounds to believe the person is committing, has committed or is attempting to commit an offence under the Act or this Regulation at that polling place or in the immediate vicinity of that polling place.

The *Local Government (General) Amendment Regulation 2021* limits the freedom of movement of a person at a polling place or a scrutineer at a polling place, pre-poll voting office, ballot counting place or declared institution or mobile booth. Specifically, the Regulation:

- **makes it an offence for a person without lawful authority, proof of which lies on the person, to enter, remain or refuse to leave a polling place, and**
- **allows a police officer to remove a scrutineer for contravening clause 369, engages in misconduct or fails to obey a lawful direction of the election official.**

An individual's freedom of movement may be limited for various reasons, including for public order or the rights and freedoms of others, and any limitation must be necessary and proportionate to protect the permissible purposes and be the least intrusive means of achieving the desired result. The Committee considers the limitations on an individual's freedom of movement in this case are for a permissible purpose, namely to maintain public order and uphold the rights of other persons to take part in public affairs and elections. It generally considers that it is necessary, proportionate and the least intrusive means to achieve this result. However, it notes that the making of a strict liability offence limiting a person's ability to enter a polling place without a lawful purpose may be considered an undue interference with an individual's freedom of movement. The Committee refers this issue to Parliament for its consideration.

Right to take part in public affairs and elections – free communication of ideas

12. The Regulation makes clauses 356TA and 356TB which provide (respectively) for the election manager to direct that posters must not be displayed, or tangible electoral material handed out, in or on a relevant premises within 100 metres of a polling place or pre-polling office if the election manager is satisfied that the direction is necessary to:

i. comply with a public health order that is in force at the time of the election, or

ii. reduce the risk of infection from COVID-19 where the poster would be displayed or material would be handed out.

13. Clauses 356TA and 356TB also each provide that:

i. a notice of the direction must be published on the election manager's website,

ii. the election manager may publish links to election material and electoral material (respectively) published by the political participants on the election manager's website, and

iii. the clause is repealed on 31 December 2021 at the end of the day.

The *Local Government (General) Amendment Regulation 2021* allows an election manager to give a direction that the display of posters and handing out tangible electoral material at, or on a relevant premises within 100 metres of, a polling place or a pre-polling office. This provision may limit free communication about candidates and the election available in the posters and electoral materials.

Free communication of information and ideas about candidates and elected representatives is an important component of the right to take part in public life and elections. The Committee is of the view that this right should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives.

The Committee notes that that the provisions are an extraordinary measure that seek to respond to the public health crisis created by the COVID-19 pandemic, and to protect public health, safety and welfare. It also notes that safeguards are included in the Regulation, for example:

- **the requirement that the direction only be given if the election manager is satisfied that it is necessary to comply with a current public health order or reduce the risk of infection,**
- **online notification of a direction to limit the provision of posters and tangible electoral,**
- **publishing of links to electoral material online, and**
- **time limitation of the provisions, with repeal of the clause on 31 December 2021 at the end of the day.**

In the circumstances, the Committee makes no further comment.

Access to postal voting – COVID-19 related qualifications

14. Clause 313 sets out when a person is qualified for a postal vote.

15. The Regulation provides additional qualifications for when a person is qualified for a postal vote under clause 313, including when a person:

i. is self-isolating because of COVID-19 related reasons, or

ii. reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic,

16. Section 314 of the *Local Government (General) Regulation 2005* states that an application for a postal ballot-paper and postal vote certificate envelope must be received by the election manager before 5pm on the fifth day before election day.

17. A penalty notice may be served under the Act for a failure to vote. The form of the penalty notice at Schedule 11 of the Act allows a person who failed to vote, if they think they have a sufficient reason for not voting, to provide that reason or otherwise dispose of the matter by paying a penalty or having the matter dealt with in court.

> **The *Local Government (General) Amendment Regulation 2021* provides that a person is qualified for a postal vote if they are self-isolating because of COVID-19 related reasons, or reasonably believes that attending a polling place on election day will pose a risk to the health or safety of the person, or of another person, because of the COVID-19 pandemic.**
>
> **The requirement that a person apply for postal ballot-paper and postal vote certificate by 5pm on the fifth day before election day may mean that someone who is required to self-isolate in accordance with a public health order after the postal vote application deadline may not be eligible to vote by post or in person on election day. This may result in a person incurring a penalty notice for failing to vote. The Committee refers this issue to Parliament to consider whether these provisions limit access to postal voting, and whether any waiver would be considered for those who fail to vote due to complying with a public health order.**

23.Practice Note DC (Civil) 16

Date tabled	LA: 19 October 2021 LC: 19 October 2021
Disallowance date	LA: To be confirmed (upon publication of 2022 sitting calendar) LC: To be confirmed (upon publication of 2022 sitting calendar)
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Violence

PURPOSE AND DESCRIPTION

1. The Practice Note DC (Civil) No 16 titled 'Applications for leave for in persona appearances in Civil Trials' (the **Practice Note**) was published in the NSW Government Gazette No 527 of 15 October 2021.

2. The Practice Note is made under the *District Court Act 1973.*

3. The introduction of the Practice Note provides:

    i. In person appearances have been temporarily suspended due to COVID-19. With the easing of restrictions and increased vaccination rates, applications may be made for leave to be granted for in person appearances in civil trials which are listed for hearing on or after 25 October 2021.

    ii. All other matters will continue to be heard by use of the virtual courtroom.

ISSUES CONSIDERED BY COMMITTEE

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

Open justice

4. The Practice Note requires that persons attending the Court in person are vaccinated. Specifically:

    i. leave will not be granted to any person to attend the Court in person unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. An application for leave must be made to the Civil List Judge (where a trial Judge has not been allocated) or to the trial Judge (where allocated).

    ii. all other matters will continue to be heard by use of the virtual courtroom.

5. A member of the media who wishes to attend a civil trial in person must also provide evidence to the Civil List Judge or trial Judge (where allocated) that he or she is vaccinated. Where a member of the media declines to do so, attendance will be permitted by the use

of the virtual courtroom, on request and subject to orders made by the trial Judge concerning the conduct of the trial.

6. 'Vaccinated' means that a person:

   i. has either completed a two-dose schedule of Pfizer Australia Pty Ltd, AstraZeneca Pty Ltd or Moderna Australia Pty Ltd, or received a single dose of Janssen-Cilag Pty Ltd; and

   ii. at least 14 days has elapsed since completing their vaccination schedule.

The Practice Note requires persons who wish to attend Court in person for civil trials listed on or after 25 October 2021 apply for leave, and that such leave will not be granted unless the Civil List Judge or trial Judge is satisfied that he or she is vaccinated. It also requires members of the media who wish to attend a civil trial in person to provide evidence to the Civil List Judge or trial Judge that they are vaccinated. If a person does not apply for leave to attend Court in person or a member of the media declines to provide evidence of vaccination, they have access to the virtual courtroom. The Committee notes that this may create a barrier to the principles of open justice. That is, that the administration of justice take place in open court subjected to public and professional scrutiny.

However, while the Practice Note limits in person appearances and media access to the Court, the Committee notes that alternative arrangements may be made for those that do not meet the vaccination requirements to attend a virtual courtroom. The Committee also recognises that these vaccination requirements are in response to the current COVID-19 pandemic for the protection of public health and considers the alternative arrangements of a virtual courtroom adequate in the circumstances. The Committee makes no further comment.

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

Period of application and review date

7. The Practice Note commences on 13 October 2021.

8. Paragraph 2 states that the Practice Note will be reviewed in mid-November 2021 or as otherwise may be necessary.

The Practice Note does not include a specific end date. It also indicates that it will be reviewed in mid-November 2021 or as otherwise may be necessary. The Committee would prefer that the Practice Note include a fixed date for review to provide sufficient clarity to persons implementing it and those whose rights may be affected. Given the potential impact on a person's rights, the Practice Note may also benefit from including an end date. The Committee notes repeal or end dates have been included in other legislation responding to COVID-19. The Committee refers this issue to the Parliament for its consideration.

24. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021

Date tabled	LA: 12 October 2021 LA: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* (the **Regulation**) is to enable a penalty notice to be issued for the offence of failing to comply with a direction of the Minister for Health and Medical Research under the *Public Health Act 2010*, section 7 that applies to an occupier of a construction site in certain areas of Greater Sydney.

2. Amendments under the Regulation are to take effect from the date on which the Regulation was published, on 11 August 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offence – right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for two public health order offences relating to construction employees and employers. The amendments apply to the offences of failing to comply with directions under clauses 24AC and 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.*

4. A amendment to schedule 4 states that the penalty notice infringement value for an individual or corporation in breach of clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* is $2000 and $10 000 respectively. Clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* states:

    i. This clause applies to an employee—

        a) whose place of residence is in Greater Sydney, or

        b) who is staying in temporary accommodation in Greater Sydney.

ii. The Minister directs that an employer must require an employee to work at the employee's place of residence.

iii. Subclause (2) does not apply if it is not reasonably practicable for the employee to work at the employee's place of residence.

5. A further amendment to schedule 4 states that the penalty notice infringement value for an individual or corporation in breach of clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* is $2000 and $10 000 respectively. Clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021* states:

i. Work must not be carried out on a construction site in a local government area to which this Division applies, unless the work is urgently required for the following purposes—

a) to ensure the safety or security of the construction site,

b) to deal with environmental risks,

c) to maintain and ensure the integrity of critical plant, equipment or assets, including partially completed works, that would otherwise deteriorate,

d) to receive deliveries of supplies that would otherwise deteriorate,

e) to maintain public utilities,

f) to ensure the safe operation of existing transport infrastructure,

g) by or on behalf of NSW Health in response to the COVID-19 pandemic,

h) because of an emergency.

ii. An employee or other person must not enter or remain on a construction site in a local government area to which this Division applies, other than to carry out work required under subclause (1).

The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 2) 2021* provides that penalty notices can be issued to an individual or corporation that contravenes clause 24AC of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24AC requires an employee living in temporary accommodation in Greater Sydney to work from home unless it is not reasonably practicable for the employee to work at the employee's place of residence.

The Regulation also provides that penalty notices can be issued to an individual or corporation that contravenes clause 24EA of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021.* Clause 24EA requires that non-urgent construction must not to be carried out in the local government areas of Blacktown, Campbelltown, Canterbury-Bankstown, Cumberland, Fairfield, Georges River, Liverpool, Parramatta or any other local government area specified by the Chief Health Officer,

unless specific circumstances are met under that clause. A maximum infringement of $2000 and $10 000 may be issued for an individual and corporation respectively for contraventions of clauses 24AC and 24EA.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have a matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The Committee also notes that infringements of $2000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

However, individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. This is particularly the case given the extraordinary conditions created by COVID-19, where public institutions, including courts, need to facilitate social distancing. Given these factors, the Committee makes no further comment.

25. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 3) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 3) 2021* (the **Regulation**) is to enable penalty notices to be issued for offences relating to the following—

   i. failing to comply with the direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, Clause 23 concerning outdoor gatherings,

   ii. failing to comply with a direction in the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*, Clause 25A concerning answering questions from authorised contact tracers,

   iii. failing to comply with a direction in the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – freedom of movement and freedom of assembly

2. The Regulation allows for the issuing of penalty notices for offences committed under section 10 of the *Public Health Act 2010* for failing to comply with directions under the *Public Health (COVID-19) Additional Restrictions for Delta Outbreak) Order 2021* (Clause 23 or Clause 25A) or the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

3. The *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021* seeks to address the problem of community transmission of COVID-19 in Greater Sydney by placing temporary restrictions on freedom of movement and freedom of assembly. The Order also mandates the wearing of face coverings.

4. Clause 23 of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*:

23 Direction of Minister concerning outdoor public gatherings

(1) The Minister directs that a person must not participate in an outdoor public gathering in Greater Sydney of more than 2 persons.

(2) This clause does not apply to a person who is—

(a) engaged in work, or

(b) providing care or assistance to vulnerable persons.

(3) This clause does not apply to the following—

(a) an exempted gathering,

(b) a gathering of persons all of whom are members of the same household,

(c), (d) (Repealed)

(e) a gathering to provide emergency assistance to a person or persons,

(f) a gathering necessary to allow a person to fulfil a legal obligation,

(g) a gathering to facilitate a move to a new place of residence, including a business moving to new premises.

5. Clause 25A of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*:

25A Directions about answering questions from contact tracers

(1) The Minister directs that a person, at the request of an authorised contact tracer, must answer questions or provide other information about the person's movements.

(2) The Minister directs that a person, at the request of an authorised contact tracer, must provide the person's contact details to the authorised contact tracer.

(3) The Minister directs that a person who provides information under this clause must ensure the information is true and accurate.

(4) In this clause—

authorised contact tracer means a person engaged by NSW Health whose duties include—

(a) identifying persons who may have come into contact with a person with COVID-19, or

(b) notifying a person that the person has been identified as a close contact, being a person—

(i) likely to have come into contact with a person with COVID-19, and

(ii) at risk of developing COVID-19.

contact details, of a person, means—

(c) the person's name, and

(d) the person's telephone number or email address.

6. Clause 5 of the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021* directs that a person diagnosed of COVID-19 must travel to a suitable residence or hospital or place

determined by a designated health practitioner to be suitable and reside at that location until medically cleared. Clause 5(3) directs that such a person must not leave the location except to obtain medical care or medical supplies or in an emergency.

7. The amounts for the penalties imposed by the Regulation are significant, being $3,000 for failing to complying with Clause 23 of the *Public Health (COVID-19) (Additional Restrictions for Delta Outbreak) Order 2021*; $5,000 for failing to comply with Clause 25A and $5,000 for failing to comply with the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

8. The Committee notes that the restrictions imposed by the Public Health Orders referred to in the Regulation make severe limitations on the rights and freedom of people subject to the orders.

9. However, the Committee acknowledges that the Orders are only a temporary measure intended to address the emergency situation created by the outbreak of the Delta variant of the COVID-19 infection.

10. The ability to issue penalty notices for offences under section 10 of the Act does not remove the right to elect to have such matters determined by a court.

The Regulation allows for penalty notices to be issued for offences under section 10 of the *Public Health Act 2010*, for failing to comply with directions not to gather in public under clause 23 of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; for failing to comply with directions to cooperate with contact tracers under clause 25A of the *Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order 2021*; or for failing to comply with directions to self-isolate according to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021*.

Penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker. The penalties imposed by the Regulation are significant, being for amounts of $3,000 or $5,000.

However, individuals retain the right under this Regulation to elect to have their matter heard and decided by a Court. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis created by the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

26. Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard, MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of the *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* (the **Regulation**) is to update, for the purpose of penalty notice offences, the reference to the *Public Health (COVID-19 Self-Isolation) Order (No 2) 2021* to a reference to the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*; and to include a penalty notice amount of $10 000 for an offence by a corporation under that Order.

2. The Regulation is made under the delegation of the *Public Health Act 2010* and is to take effect from the date on which the Regulation was published; 6 September 2021.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offence – right to a fair trial

3. The Regulation amends Schedule 4 of the *Public Health Regulation 2012* to enable a penalty notice to be issued for a contravention of a direction under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021.* Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate.

4. The penalties for a contravention of the public health orders under the amendment are $5 000 and $10 000 for an individual and corporation respectively.

> **The *Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 4) 2021* provides that penalty notices can be issued for a contravention of the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*. The Regulation is amended by omitting that a penalty notice is to be issued for a contravention of the previous version of the public health order, (*Public Health (COVID-19 Self-***

***Isolation) Order (No 2) 2021*) and instead replaces it with the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021*.**

Orders under the *Public Health (COVID-19 Self-Isolation) Order (No 3) 2021* include, but are not limited to, self-isolation after a person receives a positive diagnosis of COVID-19 under clause 6, and a requirement for close contacts of a person diagnosed with COVID-19 to self-isolate under clause 7.

As the Committee has previously noted, penalty notices allow an individual to pay a specified monetary amount, and in some circumstances may elect to have the matter heard by a court. The Committee also notes that penalty notices of $5 000 for an individual and $10 000 for a corporation are significant monetary amounts to be imposed by way of penalty notice.

The Committee notes there is evidence that most people issued with a penalty notice will not contest it in court. The Regulation may thereby impact on a person's right to a fair trial – that is, to have the matter heard by an impartial decision maker in public, and to put forward their side of the case. However, as the Regulation does not remove a person's right to elect to have the matter heard by a court, and given the practical benefits of penalty notices particularly in the extraordinary context of COVID-19, the Committee makes no further comment.

27. Public Health Amendment (COVID-19) Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Brad Hazzard MP
Portfolio	Health and Medical Research

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *Public Health Regulation 2012* as follows—

   i. to enable the Secretary of the Ministry of Health to generally approve, rather than on a case-by-case basis only, the retention of bodies for longer than 5 days by persons who are not funeral directors,

   ii. to extend the period during which the Secretary of the Ministry of Health may appoint members and members of staff of the Department of Customer Service and the NSW Food Authority to be authorised officers, either generally or in relation to a particular function exercisable by authorised officers relating to public health, until 26 March 2022,

   iii. to prescribe 26 March 2022 as the day on which the COVID-19 emergency measures provisions contained in the Public Health Act 2010, as defined by the Act, section 135(2), are repealed,

   iv. to allow penalty notices to be served for offences occurring between 26 March 2020 and 26 March 2022 against certain provisions of the Public Health Act 2010 that involve contravening—

      a) a Ministerial direction that deals with a public health risk, or

      b) an order to close public premises on public health grounds, or

      c) a public health order relating to COVID-19.

ISSUES CONSIDERED BY COMMITTEE

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

Penalty notice offences – right to a fair trial

2. The Regulation amends the penalty notice offences set out in Schedule 4 of the *Public Health Regulation 2012*. Specifically, it extends the relevant time period to cover acts

occurring from 1 January to 26 March 2022 that constitute offences under sections 10, 11 and 70(1) of the *Public Health Act 2010*.

3. Section 7 of the *Public Health Act 2010* empowers the Minister to give such direction by order as they consider necessary to deal with a situation giving rise to a risk to public health, with that order to expire at the end of 90 days after it was made unless an earlier expiry date is specified or the order is earlier revoked. Section 10 provides that a person who is subject to, and has notice of, such a ministerial direction and fails to comply without reasonable excuse is guilty of an offence.

4. Section 11 empowers the Secretary to direct the restriction or prohibition of access to a premises on which the public are required, permitted or accustomed to congregate, where the Secretary considers the order should be made to protect public health. Sub-section (3) provides that any person who controls or is involved in the control of premises that fails to take reasonably practicable action to comply with such a secretarial direction that they have notice of, is guilty of an offence.

5. Section 62 empowers an authorised medical practitioner to make a public health order in respect of a person with certain medical conditions if they are satisfied there are reasonable grounds to believe that the behaviour of that person may be a risk to public health. Sub-section 70(1) provides that a person who fails to comply with the requirements of such a public health order is guilty of an offence.

The Regulation extends the operation of penalty notice offences under Schedule 4 of the *Public Health Regulation 2021* until 26 March 2022, for offences under the *Public Health Act 2010* of non-compliance with a ministerial direction under section 7, an order made by the Secretary under section 11 or a public health order made by an authorised medical officer under section 62.

In its Digests No 13/57 and 31/57, the Committee commented on the *Public Health Amendment (Penalty Notices) Regulation 2020* providing for the issue of penalty notices for the aforementioned offences, and the *Public Health Amendment (Miscellaneous) Regulation 2021* which extended the operation of these penalty notice offences until 31 December 2021.

Consistent with those comments, the Committee notes that penalty notices allow an individual to pay a specified monetary amount, instead of appearing before a Court to have their matter heard. This may impact on a person's right to a fair trial, specifically any automatic right to have their matter heard by an impartial decision maker.

However, the Committee recognises that individuals retain the right to elect to have their matter heard and decided by a Court, as the Regulation does not remove this right. Additionally, there are a range of practical benefits in allowing matters to be dealt with by way of penalty notice, including reducing the costs and time associated with the administration of justice. The Committee also notes that the Regulation is an extraordinary measure that seeks to respond to the public health and economic crisis created by the spread of the COVID-19 Delta strain, with a current repeal date of 27 March 2022. In the circumstances, the Committee makes no further comment.

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. The Regulation inserts clause 99B into the *Public Health Regulation 2012* which prescribes 26 March 2022 for the purposes of sub-section 135(1)(b) of the *Public Health Act 2010.*

7. Sub-section 135(1) relevantly provides that the 'COVID-19 emergency measures' provisions of the Act are repealed on 26 September 2021 or a later date not later than 26 March 2022 as prescribed by the regulations.

> **The Regulation amends the *Public Health Act 2010* by way of a Henry VIII clause contained in the Act. The Committee generally prefers amendments to an Act to be effected by an amending Bill rather than subordinate legislation. This is to foster a greater level of parliamentary oversight over the changes.**
>
> **Consistent with those comments, the Committee notes that the Regulation extends the operation of existing legislative provisions contained in the *Public Health Act 2010* which are intended to protect public health and public safety in the extraordinary circumstances of the COVID-19 pandemic. In these circumstances, the Committee makes no further comment.**

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

Vague and ill-defined powers

8. The Regulation amends clause of 54(2) of the *Public Health Regulation 2012* to expand the existing power of the Secretary to approve of the retention of a deceased person's body for longer than 5 days by a person who is not a funeral director. The Amendment permits the Secretary to give general approval for such a retention, in addition to the pre-existing power of the Secretary to approve retention of a body for longer than 5 days on a case-by-case basis.

9. Sub-clause 54(1) makes it an offence for a person who is not a funeral director to retain a body of a deceased person if more than 5 days have passed since their death. Clause 54 of the *Public Health Regulation 2012* applies to those persons who are not funeral directors, however, may be required to handle the body of a deceased person in the course of their profession. In particular, the offence would apply to hospital staff and medical practitioners who regularly are required in the course of their duties to handle bodies.

> **The Regulation grants the Secretary a general power under clause 54 of the *Public Health Regulation 2012* that may be ill-defined and could benefit from further clarification. Clause 54, which makes it an offence for any person who is not a funeral director to retain a body after 5 days have passed since death, allows the Secretary to approve "generally" the retention of a body which would otherwise be an offence under the *Public Health Regulation 2012*.**
>
> **The Committee notes that neither the Regulation or the *Public Health Regulation 2012* provides guidance on the coverage or limitations of any such general approval given by the Secretary. This may raise questions regarding who may receive such an approval, who may be covered by such an approval in the event**

that an employer, such as a hospital, is granted a general approval, and whether that approval is valid indefinitely, subject to conditions and/or subject to expiration. In these circumstances the Committee refers this issue to Parliament for consideration of whether the power could benefit from further clarification.

28. Residential Tenancies Amendment (COVID-19 Pandemic Emergency Response) Regulation (No 2) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of *Residential Tenancies Amendment (COVID-19 Pandemic Emergency Response) Regulation (No 2) 2021* (the **Regulation**) is to—

   i. extend provisions exempting tenants who are financially impacted by the COVID-19 pandemic from the operation of provisions of the *Residential Tenancies Act 2010* (the **Act**) or the regulations made under that Act (the regulations) that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of non-payment of rent or charges if the tenants continue to pay at least 25% of the rent payable under the agreement until 12 November 2021, and

   ii. from 12 November 2021 until 12 February 2022, exempt those tenants who accrued rental arrears from the operation of provisions of the Act or the regulations that would result in the termination of residential tenancy agreements or the recovery of possession of premises on the grounds of those arrears unless—

      a) if the landlord and the tenant have an agreement for the repayment of the arrears—the tenant has failed to comply with the agreement on at least 2 occasions and it is otherwise fair and reasonable for the provisions to apply to the tenant, or

      b) if the landlord and the tenant do not have an agreement for the repayment of the arrears—the landlord and tenant have participated in good faith in a formal arrears repayment negotiation process and it is otherwise fair and reasonable for the provisions to apply to the tenant.

2. The Committee has previously commented on Part 6A of the *Residential Tenancies Regulation 2019*. Specifically, the Committee commented on the:

i. *Residential Tenancies Amendment (COVID-19) Regulation 2020* in Digest No. 14/57,[33]

ii. *Residential Tenancies Amendment (COVID-19) (No. 2) Regulation 2020* in Digest No. 25/57,[34] and

iii. *Residential Tenancies (COVID-19 Pandemic Emergency Response) Amendment Regulation 2021* in Digest No. 34/57.[35]

ISSUES CONSIDERED BY COMMITTEE

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

Property rights and freedom of contract

3. Section 12 of the Act provides that regulations made under the *Residential Tenancies Act 2010* may exempt any specified person, agreement or premises from the operation of the Act or regulations.

4. The Regulation:

i. extends the moratorium period applicable to Part 6A of the *Residential Tenancies Regulation 2019*, from the end of 11 September 2021 to the beginning of 12 November 2021. This extends the period during which the exemption from the provisions of the Act and regulations under clause 41C applies, and

ii. provides an additional exemption to the provisions of the Act and regulations under clause 41CA.

5. For the purposes of section 12, clause 41C of the *Residential Tenancies Regulation 2019* provides an exemption to a tenant during the moratorium period from the operation of any provision of the Act or regulations that would result in the termination of their residential tenancy agreement or recovery of possession of the premises on the grounds of non-payment of rent or charges, if the tenant:

i. is an 'impacted tenant', being a tenant who is a member of a household impacted by the COVID-19 pandemic,

ii. gives the landlord notice of he or she is an impacted tenant, and

iii. continues to pay the landlord at least 25 per cent of the rent payable under the residential tenancy agreement.

6. Clause 41B of the Regulation provides, broadly, that a household is impacted by the COVID-19 pandemic if one or more rent-paying members of the household have lost employment or income, had reduced work hours, or had to stop working or materially

[33] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 14/57, 12 May 2020.

[34] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 25/57, 16 February 2021.

[35] Parliament of New South Wales, Legislations Review Committee, Legislation Review Digest No. 34/57, 12 November 2021.

reduce work hours because of a COVID-19 illness. The household income must have, as a result of the COVID-19 illness, been reduced by at least 25 per cent compared to the average weekly household income for the four weeks immediately preceding 26 June 2021.

7. For the purposes of section 12, clause 41CA of the Regulation amends the *Residential Tenancies Regulation 2019* to create an exemption which applies to a tenant who was an impacted tenant during the moratorium period.

8. Specifically, clause 41CA provides that during the moratorium transitional period (from the beginning of 12 November 2021 until the end of 12 February 2022), a tenant is exempt from the operation of the provisions of the Act or regulations that would result in termination of residential tenancy agreements or recovery of possession of the premises on a ground relating to "arrears accrued during the moratorium period", being rent or charges that:

    i. were payable by the tenant during the moratorium period, and

    ii. were not paid, either with or without the agreement of the landlord, and

    iii. are still owing.

9. This exemption does not apply:

    i. if the landlord and tenant agreed to a repayment plan for the arrears – the tenant failed to make payments at the times and in the amounts required by the plan on two or more consecutive occasions, and it is otherwise fair and reasonable in the circumstances for the tenant not to be exempt, or

    ii. if the landlord and the tenant have not agreed to a repayment plan for the arrears – the landlord has participated in good faith in a formal arrears repayment negotiation process with the tenant about a repayment plan, and it is otherwise fair and reasonable in the circumstances for the tenant not to be exempt.

10. "Formal arrears repayment negotiation process" means a dispute resolution process between a landlord and a tenant, facilitated by NSW Fair Trading, to negotiate a repayment plan for arrears accrued during the moratorium period having regard to the specific circumstances of the landlord and the tenant.

11. Clause 41CA also sets out matters the Tribunal must have regard to when deciding whether it is fair and reasonable in the circumstances for the tenant not to be exempt, without limitation. These matters include:

    i. the steps taken by the landlord and tenant to negotiate a repayment plan, including any advice provided by NSW Fair Trading relating to the participation of the parties in a formal arrears payment negotiation process and including whether the landlord or tenant refused, or refused to make, a reasonable offer,

    ii. any payments made by the impacted tenant towards the arrears,

    iii. the nature of any financial hardship experienced by the landlord or tenant, including the general financial position of each party,

iv. the availability and affordability of reasonable alternative accommodation for the tenant,

v. whether the landlord has applied for and, if so, received any financial assistance or land tax rebates, and

vi. any special vulnerability of the tenant.

12. Clause 41CA provides that it does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Regulation makes amendments to Part 6A of the *Residential Tenancies Regulation 2019* to respond to financial hardship experienced by tenants as a result of the COVID-19 pandemic. Specifically, it:

- **extends to 12 November 2021 provisions exempting a financially impacted tenant from the operations of the provisions of the *Residential Tenancies Act 2010* and regulations that would result in termination of their residential agreement or recovery of possession on the grounds of non-payment of rent or charges if the tenant continues to pay at least 25 per cent of the rent payable under the agreement, and**

- **exempts, from 12 November 2021 to 12 February 2022, a tenant who accrued rental arrears from the operation of provisions of the Act and regulations that would result in termination of their residential tenancy agreement or recovery of possession on a ground relating to arrears.**

The exemptions limit a landlord's rights in response to the pandemic. Although, it appears that a landlord may continue to seek termination in other circumstances including for example to sell the premises, for illegal use of the premises or hardship to the landlord.

In limiting landlords' rights under tenancy agreements, the Regulation may impact on property rights. In particular, the ability of the landlord to exercise rights under an existing agreement in relation to the non-payment of rent, charges or arrears. This may also impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. Although, clause 41CA does not affect any agreement between the landlord or tenant to waive or defer any rent or charges payable by the tenant.

The Committee notes that the Regulation is an extraordinary measure that seeks to respond to the public health crisis and economic hardship created by the COVID-19 pandemic, and to protect the health, safety and welfare of tenants. It is accordingly time limited. The Committee also notes that the Regulation furthers the public health objectives of ensuring residents remain in their homes, and preventing avoidable movement of persons. In the circumstances, the Committee makes no further comment.

29. Retail and Other Commercial Leases (COVID-19) Amendment Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Damien Tudehope MLC
Portfolio	Finance and Small Business

PURPOSE AND DESCRIPTION

1. The *Retail and Other Commercial Leases (COVID-19) Regulation 2021* and the *Conveyancing (General) Regulation 2018*, Schedule 5 provide protections for certain commercial lessees (impacted lessees) where related businesses have had a fall in turnover due to lockdowns in New South Wales.

2. The object of this Regulation is to extend those protections as follows—

   i. to extend the prescribed period, which began on 13 July 2021, until 13 January 2022,

   ii. to prohibit a lessor increasing rent during the prescribed period if the lessee is an impacted lessee,

   iii. to require an impacted lessee to give the lessor evidence that the lessee is an impacted lessee,

   iv. to require lessors and impacted lessees to renegotiate rent and other terms of the lease if 1 party requests the renegotiation,

   v. to require a renegotiation to be conducted in good faith with consideration being given to the leasing principles set out in the National Cabinet Mandatory Code of Conduct—SME Commercial Leasing Principles During COVID-19 (the National Principles),

   vi. to require a lessor to do the following before taking action in relation to certain breaches of the lease occurring during the prescribed period—

      a) to attempt to mediate the dispute with the impacted lessee, and

      b) to engage in a renegotiation if required,

   vii. to provide that actions an impacted lessee takes to comply with a law are not breaches of a commercial lease,

viii. to require a court or tribunal to consider the National Principles when considering whether to make certain orders or decisions relating to commercial leases.

3. This Regulation is made under—

i. the *Retail Leases Act 1994*, including sections 85, the general regulation-making power, and 87, and

ii. the *Conveyancing Act 1919*, section 202, the general regulation-making power.

4. This Regulation is made with the agreement of the Minister for Customer Service who administers the *Conveyancing Act 1919*.

ISSUES CONSIDERED BY COMMITTEE

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

Retrospectivity, property rights and freedom of contract

5. The Regulation amends the *Retail and Other Commercial Leases (COVID-19) Regulation 2021*, which provides that during the prescribed period a lessor is prohibited from taking 'prescribed action' against an impacted lessee because of:

i. a failure to pay rent,

ii. a failure to pay outgoings, or

iii. the business operating under the lease not being open for business during the hour specified in the lease.

6. The Regulation amends the definition of 'impacted lessee' (clause 4) to include where the lessee qualifies for one or more of the following:

i. 2021 COVID-19 Micro-business Grant,

ii. 2021 COVID-19 Business Grant,

iii. 2021 JobSaver Payment.

7. 'Prescribed actions' continue to include evicting the lessee, terminating the lease, or charging interest or fees for unpaid rent, among other actions (clause 3).

8. Further, the amending regulation continues to place certain obligations on lessors, including an obligation not to increase rent payable for an impacted lessee (clause 6B), compulsory mediation (clause 6C), and the obligation to renegotiate the rent payable under the impacted lease (clause 6D). It also specifies that an act or omission of an impacted lessee required under a law of the Commonwealth or the State in response to the COVID-19 pandemic does not amount to a breach of the impacted lease and does not constitute grounds for termination or the taking of any prescribed action by the lessor against the impacted lessee (clause 6E).

9. This Regulation also extends the prescribed period from 20 August 2021 until 13 January 2022.

Like its predecessors, the *Retail and Other Commercial Leases (COVID19) Amendment Regulation 2021* significantly limits lessors from taking any 'prescribed action', such as eviction, against an impacted lessee including on the grounds of a failure to pay rent. It also imposes certain obligations on lessors to renegotiate the terms of commercial leases with lessees to take into account the economic impacts of COVID-19.

Specifically, the amending Regulation extends the prescribed period from 20 August 2021 until 13 January 2022, and amends the definition of impacted lessee to include lessees that are recipients of a 2021 COVID-19 Micro-business Grant, Business Grant, or JobSaver Payment.

The Regulation continues to require lessors to commence renegotiation within 14 days of a request by the lessee. However, the parties may agree to a different time period. Further, the Regulation provides that an impacted lessee may make multiple requests for rent reduction during the prescribed period, and that the lessor is required to renegotiate with the lessee in respect of each. The Regulation may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms and obligations to which they are subject. These changes also have retrospective effect, in that the 'prescribed period' to which it applies extends back to the commencement of the first Regulation in 2020.

The Committee generally comments on provisions drafted to have retrospective effect, especially where they retrospectively limit rights, because they impact on the rule of law principle that a person is entitled to know the law to which they are subject at any given time. However, the Committee recognises that the amending Regulation, like the first Regulation, only applies to cases involving 'impacted lessees', and does not stop lessors from taking prescribed actions in cases not related to the economic impacts of COVID-19. The Committee also notes that the prescribed period has again been extended from ending on August 2021 until 13 January 2021. The Committee understands that this is in response to the current COVID-19 pandemic and recent lockdown periods which did not experience an easing of restrictions until 11 October 2021. Given the ongoing economic consequences of the COVID-19 pandemic, the Committee makes no further comment.

The regulation may have an adverse impact on the business community: s 9(1)(b)(ii) of the LRA

Government regulation of private business contracts – businesses required to incur a loss

10. As noted above, the amending Regulation significantly limits lessors from taking any prescribed action, such as eviction, against an impacted lessee on the grounds of breach of a commercial lease for a failure to pay rent, outgoings or not opening the business during specified hours.

11. The amending Regulation extends the prescribed period for which these limitations are imposed from 20 August 2021 until 13 January 2022.

12. The Committee notes that financial mortgage assistance is available for eligible lessors to defer business loan repayments for a period of 3 months.[36] Following any 3-month loan repayment deferral, lessors experiencing ongoing financial difficulty may be able to negotiate with their bank to restructure or vary their loan, or be eligible for a deferral extension.[37]

13. The NSW Government is also providing that commercial landlords will be able to apply for a land tax concession if they provide rent reductions to eligible tenants from 1 July 2021 to 31 December 2021.[38]

> **As above, the amending Regulation extends the period in which commercial lessors are prohibited from taking prescribed actions against a commercial lessees where lessees are unable to meet their obligations due to economic hardship resulting from the COVID-19 pandemic. In doing so, the amending Regulation may adversely affect the business of lessors by prohibiting them from recovering lost rent, or from evicting current tenants in order to seek new tenants who can afford to pay more rent. This may force lessors to incur further losses for an extended period, up to 13 January 2021.**
>
> **However, the Committee recognises that the amending Regulation is in response to the ongoing public health emergency and remains in line with the National Cabinet's decision to provide rental relief to commercial tenants and lessen the economic impacts of COVID-19. While lessors are prevented from taking prescribed action for failure to pay rent or outgoings, the Committee understands that lessors may be eligible for a land tax concession, and/or may seek financial mortgage assistance in the form of deferred business loan repayments, or restructuring or varying their loans. In the circumstances, the Committee makes no further comment.**

[36] Australian Banking Association, Support during COVID-19, current as at 8 November 2021.

[37] Australian Banking Association, COVID-19 support: phase two, current as at 8 November 2021.

[38] Services NSW, COVID-19 assistance for commercial and residential landlords, current as at 8 November 2021.

30. Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Kevin Anderson MP
Portfolio	Better Regulation and Innovation

PURPOSE AND DESCRIPTION

1. The object of the *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* (the **Regulation**) is to provide for the following matters in response to the public health emergency caused by the COVID-19 pandemic:

    i. altered arrangements for convening, and voting at, meetings of an owners corporation or a strata committee, and

    ii. allowing instruments and documents, instead of being affixed with the seal of an owners corporation in the presence of certain persons, to be signed, and the signatures to be witnessed, by those persons.

2. The Regulation is made under sections 271 (general regulation-making power) and section 271A of the *Strata Schemes Management Act 2015*.

3. The Committee has published reports on predecessors to this Regulation. Specifically, the Committee commented on the *Strata Schemes Management Amendment (COVID-19) Regulation 2020* in Digest No. 17/57,[39] *the Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2020* in Digest No. 28/57[40] and the *Strata Schemes Management Amendment (COVID-19) Regulation 2021* in Digest No. 34/57.[41]

[39] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 17/57, 4 August 2020.

[40] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 28/57, 23 March 2021.

[41] Parliament of New South Wales, Legislation Review Committee, Legislation Review Digest No. 34/57, 12 October 2021.

ISSUES CONSIDERED BY 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

4. The *Strata Schemes Management Act 2015* (the **Act**) sets out the legislative framework for the management of strata schemes and disputes related to strata schemes. The Act and the *Strata Schemes Management Regulation 2016* made under it detail how strata schemes should be run, providing for the roles and responsibilities of owners corporations and strata committees, matters such as how they meet and vote, and time periods within which certain steps must be taken.

5. Section 271A of the Act authorises regulations to be made to respond to the public health emergency caused by COVID-19. These regulations can provide for the matters set out in subsection 271A(1), including (without limitation) altered arrangements for convening and voting at a relevant strata meeting, and an alternative to affixing the seal of the owners corporation.

6. Subsections 271A(3) and (4) of the Act further provide that regulations made under the section:

    i. can override a provision of the Act, and

    ii. expire on the day that is six months after their commencement, or the earlier day decided by Parliament by resolution of either House.

7. Subsection 271A(5) provides that section 271A is repealed on 31 March 2022.

8. The Regulation is made under section 271A and section 271 (the general regulation-making power) and amends the *Strata Schemes Management Regulation 2016* to insert a new Part 11, which provides for altered arrangements for certain matters set out in section 271A(1) of the Act.

9. Specifically, the Regulation provides:

    i. under clause 69, that notice of or another document in relation to a strata meeting may be served by email,

    ii. under clause 70, that certain means of voting, including teleconference, videoconference or email, may be used to determine certain matters at a strata meeting even if the owners corporation or strata committee has not resolved to adopt those means of voting. Further, clause 70(4)(a) provides that these arrangements are to apply despite any requirements in the Act for a vote to be exercised in person, and

    iii. under clause 71, that an instrument or document may, instead of being affixed with the seal of an owners corporation in the presence of certain persons, may be signed, and the signatures witnessed, by those persons. Clause 71(4) provides that a signatory or witness can be present by audio visual link.

10. Clause 72 of the Regulation provides that Part 11 is repealed at the end of 20 January 2022.

The *Strata Schemes Management Amendment (COVID-19) Regulation (No 2) 2021* amends the *Strata Schemes Management Regulation 2016* to make various arrangements for the management of owners corporations and strata committees during the COVID-19 pandemic. Broadly, the Regulation provides that notice of and documents relating to a strata meeting may be served by email, electronic voting may be used for strata meetings despite any requirements in the Act for votes to be exercised in person, and instruments and documents, instead of being affixed with the seal of an owners corporation, may be signed and witnessed in accordance with the Regulation.

The Regulation is made under section 271A of the *Strata Schemes Management Act 2015*, which authorises regulations to be made to respond to the COVID-19 pandemic. Subsection 271A(3) provides that regulations so made can override the provisions of the Act.

As noted in the Committee's Digest No 15/57, the regulation-making power in section 271A is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Section 271A, and the regulations made under it which amend the operation of the parent Act, would ordinarily involve an inappropriate delegation of legislative powers. The Committee generally prefers provisions which amend or affect the operation of an Act to be included in a Bill rather than in subordinate legislation, to foster an appropriate level of parliamentary oversight.

However, given the ongoing risk posed by the COVID-19 pandemic, the delegation of legislative power is a reasonable measure to allow a flexible and timely response to the pandemic and minimise disruption to strata schemes. Further, there is a limited time during which regulations made under section 271A can apply, and either House of Parliament can pass a resolution causing their expiry. In the circumstances, the Committee makes no further comment.

31. Stronger Communities Legislation Amendment (COVID-19) Regulation 2021

Date tabled	LA: 12 October 2021 LC: 12 October 2021
Disallowance date	LA: 24 November 2021 LC: 24 November 2021
Minister responsible	The Hon. Mark Speakman SC MP
Portfolio	Attorney General and Prevention of Domestic and Sexual Abuse

PURPOSE AND DESCRIPTION

1. The objects of the *Stronger Communities Legislation Amendment (COVID-19) Regulation 2021* (the **Regulation**) are—

   i. to postpone the dates on which special statutory provisions enacted in response to the COVID-19 pandemic are repealed, and

   ii. to extend the periods during which special statutory provisions enacted in response to the COVID-19 pandemic have effect.

2. This Regulation is made under the following provisions—

   i. *Child Protection (Working with Children) Act 2012*, including sections 13(4)(b) and 54(2)(b),

   ii. *Children (Community Service Orders) Act 1987*, including section 9A(3), definition of prescribed period and section 14A(3), definition of "prescribed period",

   iii. *Children (Detention Centres) Act 1987*, including section 110(5), definition of "prescribed period",

   iv. *Civil and Administrative Tribunal Act 2013*, including Schedule 1, clause 22, definition of "prescribed period",

   v. *Court Security Act 2005*, including section 12H(b),

   vi. *Crimes (Administration of Sentences) Act 1999*, including section 274, definition of "prescribed period",

   vii. *Criminal Procedure Act 1986*, including section 367(b),

   viii. *Evidence (Audio and Audio Visual Links) Act 1998*, including section 22C(9), definition of "prescribed period",

   ix. *Jury Act 1977*, including section 25(6)(b),

x. *Sheriff Act 2005*, including section 7C(14), definition of "prescribed period".

3. This Regulation is made with the agreement of—

i. the Minister for Counter Terrorism and Corrections, being the Minister administering the *Crimes (Administration of Sentences) Act 1999*, and

ii. the Minister for Families, Communities and Disability Services, being the Minister administering the following Acts—

a) *Child Protection (Working with Children) Act 2012*,

b) *Children (Community Service Orders) Act 1987*,

c) *Children (Detention Centres) Act 1987*.

ISSUES CONSIDERED BY COMMITTEE

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

Matters to be included in primary legislation

4. The Regulation amends various legislation to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

5. The special statutory provisions relate to, for example:

i. the prohibition or restriction on visitors to detention centres or correctional centres,

ii. appearance of an accused person in bail proceedings via audiovisual link, and

iii. the power of a sheriff to exempt a person from selection to be summon for trials or coronial inquest.

6. The Committee previously commented on the introduction of the special statutory provisions in Digest No. 12/57[42] and Digest No. 15/57,[43] including in relation to trespass of certain provisions on personal rights and liberties.

7. The Committee also commented in Digest No. 27/57[44] on the *COVID-19 Legislation Amendment (Stronger Communities and Health) Bill 2021*, which changed the repeal clauses in various legislation which would otherwise expire on 26 March 2021. Specifically, it extended the repeal clauses for a six month period until 26 September 2021 or until a later date, not later than 26 March 2022, prescribed by the regulations.

[42] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 12/57, 22 April 2020.

[43] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 15/57, 2 June 2020.

[44] Parliament of New South Wales, Legislation Review Committee, Legislation Review Committee Digest No. 27/57, 22 April 2020.

The Regulation amends a number of regulations to prescribe the beginning of 26 March 2022 as the date on which special statutory provisions enacted to respond to the COVID-19 pandemic are repealed or cease to have effect.

As previously noted by the Committee, the referral to the regulations of the repeal date of a clause allows the regulation to amend an Act in respect of the repeal date. Unlike primary legislation, regulations are not required to be passed by Parliament and the Parliament does not control when a regulation commences. This means that while either House of Parliament can pass a resolution disallowing a statutory rule (under section 41 of the *Interpretation Act 1987*), the statutory rule may have already been in operation for some time before disallowance occurs.

The Committee generally prefers the repeal date or operation period of a clause to be included in primary rather than subordinate legislation to facilitate an appropriate level of parliamentary scrutiny. However, the Committee notes that the primary legislation provisions referring these matters to the regulations were scrutinised by Parliament. Additionally, that the flexibility facilitated by allowing the repeal date to be prescribed by the regulations may be desirable as the provisions respond to the COVID-19 pandemic. In the circumstances, the Committee makes no further comment.

Appendix One – Functions of the Committee

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

8A Functions with respect to Bills

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

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

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

i trespasses unduly on personal rights and liberties, or

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

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

iv inappropriately delegates legislative powers, or

v insufficiently subjects the exercise of legislative power to parliamentary scrutiny

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

9 Functions with respect to Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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.

The functions of the Committee 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 – COVID-19 RELATED REGULATIONS (NOT REPORTED ON)

	Regulations	Meeting No.	Date
1	Community Land Management Amendment (COVID-19) Regulation (No 2) 2020	24	16 February 2021
2	Community Land Management Amendment (COVID-19) Regulation (No 2) 2020	24	16 February 2021
3	Water Management (General) Amendment (COVID-19) Regulation 2020	24	16 February 2021
4	Water Management (General) Amendment (COVID-19) Regulation 2020	24	16 February 2021
5	Protection of the Environment Operations (General) Amendment (COVID-19 Audio and Audio Visual Links) Regulation 2020	25	16 March 2021
6	Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020	25	16 March 2021
7	Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020	25	16 March 2021
8	Biodiversity Conservation Amendment (COVID-19) Regulation 2020	27	4 May 2021
9	Planning and Environment Legislation Amendment (COVID-19) Regulation 2020	27	4 May 2021
10	Child Protection (Working with Children) Amendment (COVID-19 Proof of Identity) Regulation 2021	28	11 May 2021
11	Poisons and Therapeutic Goods Amendment (COVID-19 Vaccine) Regulation 2021	28	11 May 2021
12	Community Land Management Amendment (COVID-19) Regulation 2021	29	8 June 2021
13	Poisons and Therapeutic Goods Amendment (Restricted Substances) Regulation 2021	29	8 June 2021
14	Strata Schemes Management Amendment (COVID-19) Regulation 2021	31	7 September 2021
15	State Debt Recovery Act 2018 — Referable Debt Order (2021-421)	32	12 October 2021
16	Annual Holidays Amendment (COVID-19 Prescribed Period) Regulation 2021	33	19 October 2021

	Regulations	Meeting No.	Date
17	Community Land Management Amendment (COVID-19) Regulation (No 2) 2021	33	19 October 2021
18	Constitution (COVID-19 Emergency Measures) Amendment (Prescribed Period) Regulation 2021	33	19 October 2021
19	Court Security Amendment Regulation 2021	33	19 October 2021
20	Industrial Relations (General) Amendment (COVID-19 Prescribed Period) Regulation 2021	33	19 October 2021
21	Interpretation (COVID-19 Emergency Measures) Regulation 2021	33	19 October 2021
22	Long Service Leave Amendment (COVID-19 Prescribed Period) Regulation 2021	33	19 October 2021
23	Poisons and Therapeutic Goods Amendment (Restricted Substances) Regulation (No 2) 2021	33	19 October 2021
24	Private Health Facilities Amendment (COVID-19 Prescribed Period) Regulation (No 2) 2021	34	9 November 2021
25	Public Health Amendment (COVID-19 Delta Outbreak) Regulation 2021	34	9 November 2021
26	Public Health Amendment (COVID-19 Penalty Notice Offences) Regulation (No 5) 2021	34	9 November 2021
27	Retail and Other Commercial Leases (COVID-19) Amendment (Eligibility) Regulation 2021	34	9 November 2021