LEGISLATIVE COUNCIL

REGULATION COMMITTEE

Delegated Legislation Monitor No. 9 of 2024

18 September 2024

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Regulation Committee

Delegated Legislation Monitor No. 9 of 2024

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Delegated Legislation Monitor No. 9 of 2024

'September 2024'

Chair: Hon Natasha Maclaren-Jones MLC

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Committee details

Committee members

Hon Natasha Maclaren-Jones MLC	Liberal Party	*Chair*
Ms Abigail Boyd MLC	The Greens	*Deputy Chair*
Hon Susan Carter MLC	Liberal Party	
Hon Greg Donnelly MLC	Australian Labor Party	
Hon Dr Sarah Kaine MLC	Australian Labor Party	
Hon Tania Mihailuk MLC	Pauline Hanson's One Nation	
Hon Cameron Murphy MLC	Australian Labor Party	
Hon Bob Nanva MLC	Australian Labor Party	

Contact details

Website	www.parliament.nsw.gov.au
Email	Regulation.committee@parliament.nsw.gov.au
Telephone	02 9230 3050

Hon Natasha Maclaren-Jones MLC
Committee Chair

Secretariat

Shakira Harrison, Principal Council Officer
Bethanie Patch, A/Principal Council Officer
Robin Howlett, A/Council Officer
Madeleine Dowd, Director

Overview of the Delegated Legislation Monitor

Operation of the Committee's technical scrutiny function

1.1 The Regulation Committee was first established on a trial basis on 23 November 2017 in the 56th Parliament.[1] The Committee was reappointed in the 57th Parliament on 8 May 2019 and in the 58th Parliament on 10 May 2023.[2]

1.2 On 19 October 2023, the Legislative Council amended the resolution of the House establishing the Regulation Committee to require the Committee to scrutinise delegated legislation that is subject to disallowance.[3]

1.3 Paragraph (3) of the amended resolution requires that:

> The committee, from the first sitting day in 2024:
>
> (a) is to consider all instruments of a legislative nature that are subject to disallowance while they are so subject, against the scrutiny principles set out in section 9(1)(b) of the Legislation Review Act 1987,
>
> (b) may report on such instruments as it thinks necessary, including setting out its opinion that an instrument or portion of an instrument ought to be disallowed and the grounds on which it has formed that opinion, and
>
> (c) may consider and report on an instrument after it has ceased to be subject to disallowance if the committee resolves to do so while the instrument is subject to disallowance.

1.4 In accordance with paragraph (3), the Committee will consider any instrument that is disallowable, during the period within which it may be disallowed. That includes 'statutory rules', within the meaning of the *Interpretation Act 1987*, that are disallowable by virtue of section 41 of that Act. It also includes other instruments to which section 41 applies indirectly, i.e., where the Act under which an instrument is made provides it is to be treated as if it were a statutory rule for the purposes of section 41.

1.5 A list of instruments that are subject to disallowance is published on the Parliament's website on the first Tuesday of each month and each Tuesday when the Legislative Council is sitting.

1.6 With regard to the scrutiny principles the Committee is required to assess instruments against, the *Legislation Review Act 1987*, section 9(1)(b) sets out eight grounds of scrutiny as follows:

> (i) that the regulation trespasses unduly on personal rights and liberties
>
> (ii) that the regulation may have an adverse impact on the business community

1 *Minutes,* NSW Legislative Council, 23 November 2017, pp 2327-2329.

2 *Minutes,* NSW Legislative Council, 10 May 2023, pp 37-39.

3 *Minutes,* NSW Legislative Council, 19 October 2023, pp 639-640.

(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.

1.7 The Committee has published guidelines on its webpage that provide an overview of its intended approach to its technical scrutiny function and specific guidance in respect of each of these eight grounds.

1.8 Each sitting week, the Committee will publish a Delegated Legislation Monitor setting out its progress and conclusions relating to the technical scrutiny of disallowable instruments. The monitor will set out matters where the Committee has sought further information from the responsible minister, department or other body, the Committee's conclusions in relation to instruments where concerns have been raised and a list of those instruments the Committee has reviewed which have not raised scrutiny concerns.

1.9 In addition to the regular publication of monitors the Committee may, from time to time and under paragraph (2) of the resolution establishing it, inquire into and report on:

(a) any instrument of a legislative nature regardless of its form, including the policy or substantive content of the instrument,

(b) draft delegated legislation, and

(c) trends or issues in relation to delegated legislation.

Conclusions and structure of Monitor No. 9 of 2024

1.10 For this monitor, the Committee has reviewed 23 instruments published on the NSW legislation website or in the NSW Government Gazette between 24 June 2024 and 9 August 2024. The Committee has:

- raised scrutiny concerns and sought further information in respect of three instruments, as set out in Chapter 1,
- concluded its review in respect of two instruments, as set out in Chapter 2, and
- concluded that 18 instruments raise no scrutiny concerns, as set out in Appendix 1.

1.11 A further 61 instruments notified between 29 July 2024 and 6 September 2024 remain under review, for consideration in a future monitor.

Chapter 1 New scrutiny matters for engagement

This chapter sets out statutory instruments the Committee has reviewed which raise scrutiny concerns relating to the grounds set out in the *Legislation Review Act 1987*, section 9(1)(b). In this chapter the Committee provides an overview of the instruments in question and identifies the Committee's concerns that require further engagement with the minister or body responsible for making the instrument.

Government Sector Finance Regulation 2024

SI number / GG reference	2024 No 251
Notified on NSW legislation website (LW)	28/06/2024
Tabled in Legislative Council (LC)	06/08/2024
Last date of notice for disallowance motion	22/10/2024

Overview

1.1 The *Government Sector Finance Regulation 2024* (the regulation) repeals and remakes, with minor changes, the *Government Sector Finance Regulation 2018*, which would have otherwise been repealed on 1 September 2024 by the *Subordinate Legislation Act 1989*, section 10(2).

1.2 The regulation is made under various provisions of the *Government Sector Finance Act 2018* (the Act) signposted in the heading or body of each section of the regulation. The regulation commenced on 30 June 2024.

1.3 The objects of the regulation of relevance to the Committee include:

- prescribing certain entities to be GSF agencies or separate GSF agencies for the purposes of the Act,
- providing for the Secretary of the Treasury to be treated as the accountable authority for certain GSF agencies for the purposes of the Act,
- prescribing certain persons to be government officers for the purposes of the Act,
- prescribing certain kinds of GSF agencies not to be reporting GSF agencies for the purposes of the Act, section 7.3(2),
- prescribing particular reporting GSF agencies to which the Act, Division 7.3 does not apply, and
- prescribing certain entities to be entities to whom certain delegations and subdelegations can be made under the Act.

1.4 The Committee has identified scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (vii). These scrutiny concerns were conveyed to the Treasurer in a letter dated 23 August 2024. This correspondence can be found in Appendix 4.

Scrutiny concerns

The regulation may not have been within the general objects of the legislation under which it was made

1.5 Under this ground, the Committee is required to consider the consistency of the regulation with the objects and intended effects of the Act, including whether the effect of the regulation appears to detract from the operation of the Act, as envisioned by Parliament, or whether a provision appears to be beyond the scope of the delegated legislation-making powers in the Act.

1.6 The regulation, section 4 references the Act, section 2.4(1)(l) as the relevant regulation-making power for the section. That provision enables the regulations to prescribe entities, or entities of a kind, to be GSF agencies, in addition to the entities designated as GSF agencies by section 2.4. The regulation, section 4(6) provides that the Teaching Service, universities and the council or senate for a university *are not* GSF agencies. The Committee has queried the reason for this provision and the power relied on, as it is unclear to the Committee whether the Act would otherwise have the effect of designating these entities to be GSF agencies.

The form or intention of the regulation calls for elucidation

1.7 Under this ground, the Committee is generally concerned with ambiguity and uncertainty, including potential errors in drafting that affect the meaning or interpretation of the regulation, the inclusion of inert provisions and other matters requiring clarification.

1.8 The Committee has raised several, mostly minor, matters under this ground, including:

- whether a reference to a particular provision of another Act is incorrect,
- the intended meaning of 'a member of a GSF agency' and 'a person employed within a GSF agency', both prescribed by the regulation, section 7(1) as government officers, in circumstances where the Act defines ***government officer*** to include a person employed in or by a GSF agency,
- the intended meaning of 'a non-government sector entity',
- whether the regulation, section 28, which prescribes the Electoral Commissioner as an entity to which the accountable authority for the New South Wales Electoral Commission may subdelegate an expenditure function of the Minister in relation to the Electoral Commission, is of no effect given the Act appears to provide that the accountable authority for the Commission is the Electoral Commissioner themselves,
- the rationale behind enabling the subdelegation of an expenditure function of the Minister for Planning and Public Spaces to the Secretary of the Department of Planning, Housing and Infrastructure, or a government officer of the department, in circumstances where the Minister delegated the function to a different secretary or entity, and whether a particular subdelegation is already permitted under the Act, and

- the basis on which the Jenolan Caves Reserve Trust and the Dumaresq-Barwon Border Rivers Commission satisfy the definition of a ***reporting GSF agency***.

Committee conclusion

1.9 In light of the above, the Committee has requested the advice of the Treasurer regarding the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (vii).

Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024

SI number / GG reference	2024 No 263
Notified on NSW legislation website (LW)	28/06/2024
Tabled in Legislative Council (LC)	06/08/2024
Last date of notice for disallowance motion	22/10/2024

Overview

1.10 The *Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024* (the amending regulation), as stated in the explanatory note and as relevant to the Committee, amends various instruments relating to transport to increase certain fees, charges and penalty amounts for penalty notice offences in a way that is generally consistent with the Consumer Price Index, and introduces additional fee categories for vessel registration under the *Marine Safety Regulation 2016* (the regulation).

1.11 The amending regulation commenced on 1 July 2024. As provided by the explanatory note, the amending regulation is made under the following Acts:

- the *Driving Instructors Act 1992*, including sections 11(2), 30(2)(b) and 59, the general regulation-making power,
- the *Marine Safety Act 1998*, including sections 19K(1), 37 and 137, the general regulation-making power,
- the *Photo Card Act 2005*, including sections 5(3), 34(4) and 36, the general regulation-making power,
- the *Ports and Maritime Administration Act 1995*, including sections 85G and 110, the general regulation-making power,
- the *Road Transport Act 2013*, including sections 23, the general regulation-making power, and 24 and Schedule 1,
- the *Roads Act 1993*, including sections 243 and 264, the general regulation-making power.

1.12 The Committee has identified concerns under the *Legislation Review Act 1987*, section 9(1)(b)(iii), (iv) and (vii). These scrutiny concerns were conveyed in a letter to the Minister for Roads on 23 August 2024. This correspondence can be found in Appendix 4.

Scrutiny concerns

The regulation may not have been within the general objects of, or may not accord with the spirit of, the legislation under which it was made

1.13 Under these grounds, the Committee is required to consider the consistency of the amending regulation with the objects and intended effects of the relevant Acts under which it was made, including the imposition of fees without or beyond power and the unusual or unexpected use of a regulation-making power.

1.14 Firstly, the Committee sought information on the rationale behind, and the justification for, the chosen penalty amounts listed in the amending regulation, Schedules 3 and 8. The amending regulation, Schedule 3[4] inserts Schedule 1 (Penalty notice offences) into the *Photo Card Regulation 2014*. Of the eight penalty notice offences under the *Photo Card Act 2005* listed in the schedule, the penalty notice amount for six offences is approximately 44 per cent of the maximum penalty that would be applicable in a criminal prosecution. The amending regulation, Schedule 8 inserts Schedule 3 (Penalty notice offences) into the *Roads Regulation 2018*. The penalty notice amount for all offences listed in the schedule represents an amount that is between 28 and 40 per cent of the maximum penalty applicable in a criminal prosecution.

1.15 Secondly, the Committee sought clarification as to the relevant provision of the *Ports and Maritime Administration Act 1995* relied on for the fee for 'Inspection of a mooring or vessel by TfNSW', and the circumstances in which a mooring may be inspected by TfNSW. While the *Ports and Maritime Administration Act 1995*, section 85G(2)(g) empowers the regulations to prescribe fees payable in relation to permits, licences and bookings under a wharf booking system, there does not appear to be a specific provision providing for fees for a mooring licensing system.

The form or intention of the regulation calls for elucidation

1.16 Under this ground, the Committee is required to consider whether the form or intention of the regulation calls for elucidation and may seek clarification where a provision is ambiguous or uncertain.

1.17 The Committee requested clarification regarding the circumstances in which fees for the below matters, as inserted by the amending regulation, Schedule 2, are charged, including the relevant provision of the *Marine Safety Act 1998* or the regulation that provides the basis for the fee.

- Personal watercraft driving licence upgrade examination—the Committee requested more information on the term 'upgrade', and when this examination is required.
- Transfer of a boatcode agent authorisation—the Committee queried the process giving rise to the fee given the regulation, clause 88 (which relates to boatcode agents) is silent on whether and how an authorisation may be transferred.
- Affixing of hull identification number—the Committee sought confirmation that the regulation, clauses 87 and 88 do not require a hull identification number to be affixed by

a boatcode agent only, and that this fee is charged only if the number is affixed by an agent.

- Inspection to validate hull identification number—the Committee queried when this inspection occurs given the regulation appears to be silent on inspecting and validating hull identification numbers.
- Hull identification number certificates—pad of 50—the Committee queried when and why a hull identification number certificate may be issued to a person.
- Retrieval of domestic commercial vessel records—the Committee queried whether this fee relates to the exercise of a particular function by the National Regulator under the Commonwealth domestic commercial vessel national law.

1.18 The Committee also drew attention to a potential typographical error.

Committee conclusion

1.19 In light of the above, the Committee has requested the advice of the Minister for Roads regarding the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(iii), (iv) and (vii).

Public Notaries Appointment Amendment (Fees) Rule 2024

SI number / GG reference	NSWGG-2024-289-12
Published in Government Gazette (GG)	26/07/2024
Tabled in Legislative Council (LC)	06/08/2024
Last date of notice for disallowance motion	22/10/2024

Overview

1.20 The *Public Notaries Appointment Amendment (Fees) Rule 2024* (the amending rule) amends the *Public Notaries Appointment Rules* made under the *Public Notaries Act 1997* (the Act) to increase the fees payable for services provided by the Legal Profession Admission Board (the Board) in relation to the appointment of public notaries and certificates of appointment.

1.21 The amending rule was made by the Board under the Act, section 9 and commenced on 26 July 2024.

1.22 The Committee has identified scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv) that have been conveyed to the Presiding Member of the Board in a letter dated 23 August 2024. This correspondence can be found in Appendix 4.

Scrutiny concerns

The regulation may not have been within the general objects of, or may not accord with the spirit of, the legislation under which it was made

1.23 Under these grounds, the Committee is required to consider the consistency of the rule with the objects and intended effects of the Act, including whether the effect of the rule appears to detract from the operation of the Act, as envisioned by Parliament, and whether fees are imposed without or beyond power.

1.24 The amending rule prescribes a $110 fee for an 'Annual Notification in Form 6'. In accordance with the *Public Notaries Appointment Rules*, rule 12, each year the registrar of public notaries sends a Form 6 notice to each notary, which must be completed and returned by the notary within a month, together with the relevant fee, for the purposes of keeping the roll of public notaries up to date. The form directs a notary to indicate whether the particulars listed are correct, or are correct as amended by the notary.

1.25 The Committee has sought clarification regarding the authorisation and basis for the fee, particularly as, should the form be returned without changes, a not insignificant fee is imposed where no service appears to have been provided. For notaries who do return the form with changes, the Committee has queried whether $110 is a reasonable fee for the service provided.

1.26 Given the specified purpose of rule 12 is to allow the registrar to 'update the roll', the Committee has queried the basis on which a fee may be charged for confirming certain particulars that are not required to be included in the roll under the Act or the *Supreme Court Rules 1970*. Further, the Committee has queried whether the form being sent to notaries is the form as published in the Gazette, or the similar form published on the Board's website, in circumstances where the Committee has been unable to locate a notice in the Gazette amending the original form.

1.27 The Committee has also queried the matters for which the $110 fee for an 'Other application/certificate – Public Notary' is charged and whether the amount is reasonable.

Committee conclusion

1.28 In light of the above, the Committee has requested the advice of the Presiding Member regarding the scrutiny concerns identified under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv).

Chapter 2 Concluded scrutiny matters

This chapter details the Committee's concluding comments on statutory instruments which raise scrutiny concerns relating to the grounds set out in the *Legislation Review Act 1987*, section 9(1)(b).

Police Amendment Regulation 2024

SI number / GG reference	2024 No 258
Notified on NSW legislation website (LW)	28/06/2024
Tabled in Legislative Council (LC)	06/08/2024
Last date of notice for disallowance motion	22/10/2024

Overview

2.1 As set out in Monitor No. 8 of 2024, the *Police Amendment Regulation 2024* (the amending regulation) inserts a savings and transitional provision into the *Police Regulation 2015* (the regulation) that provides that proceedings under the *Police Act 1990* (the Act) pending before the Industrial Relations Commission of New South Wales (the Commission) immediately before the *Industrial Relations Amendment Act 2023*, Schedule 2.28 commenced on 1 July 2024 must be dealt with as if the subschedule had not commenced.

2.2 The amending regulation appears to have been made under the Act, section 221 and Schedule 4, clause 2 and commenced on publication on the NSW legislation website on 28 June 2024.

2.3 The *Industrial Relations Amendment Act 2023*, Schedule 2.28 amends the Act in connection with the re-establishment of the Industrial Court of New South Wales and related changes to the constitution of, and the conduct of hearings by, the Commission.

2.4 Schedule 2.28[1] provides, in relation to proceedings under the Act, Part 9, Division 1A, that 'the rules of evidence and other formal procedures of a superior court of record apply to and in relation to the Commission in Court Session' (otherwise known as the Industrial Court of New South Wales).

2.5 Schedule 2.28[2]–[4] provide that those proceedings, and proceedings under the Act, Part 9, Division 1C, are to be dealt with by judicial members of the Commission, being persons who hold or have held a judicial office of the State, the Commonwealth or another State or Territory, or Australian lawyers of at least 7 years standing. Previously, those proceedings were to be dealt with by any members of the Commission who are Australian lawyers.

2.6 The Committee raised scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(vii) regarding this instrument in Monitor No. 8 of 2024. The Committee's concerns related to the intended effect of Schedule 2.28, in order to understand the intended effect of the amending

regulation in suspending the amendments made by the subschedule in relation to pending proceedings under the Act.

Scrutiny concerns

The form or intention of the regulation calls for elucidation

2.7 Under this ground, the Committee may request elucidation where ambiguity or uncertainty is identified, including the perceived imposition of uncertain obligations or inclusion of inert provisions. The Committee also generally considers, in reviewing a regulation, the purpose or object, and intended effect, of the parent Act and how the regulation gives effect to those matters.

2.8 In a letter to the Minister for Police and Counter-terrorism dated 24 July 2024, the Committee sought clarification regarding the rationale behind the amending regulation insofar as it suspends the changes made by Schedule 2.28[2]–[4] in relation to pending proceedings, being changes relating to who may deal with certain proceedings under the Act, in order to understand the impact on those proceedings and case management.

2.9 The Minister responded, in a letter dated 7 August 2024, as follows:

> This Regulation was informed by advice from the NSW Police Force about several matters before the Industrial Relations Commission of NSW (IRC) for review under Part 9 of the *Police Act 1990* that were being conducted before single members of the IRC who were Australian lawyers but not judicial members. These proceedings were not likely to be completed before 1 July 2024.
>
> The Regulation was subsequently made with the intent of preserving the validity of pending decisions and proceedings of the IRC in those matters. It intends to mitigate the risk of those decisions being declared "invalid" upon the commencement of the *Industrial Relations Amendment Act 2023* on 1 July 2024, or alternatively being required to be re-heard or re-allocated and re-programmed under arrangements that aligned with the amendments included [in] the *Industrial Relations Amendment Act 2023*.
>
> The intended effect of the Regulation is to ensure that proceedings on applications for review under Division 1A of Part 9 of the *Police Act 1990* that had been made or were still being determined before 1 July 2024 could continue under the arrangements in the *Industrial Relations Act 1996* that were in place at the time the application for review was made.

2.10 The Committee also queried the circumstances in which the Commission in Court Session would hear proceedings under the Act, Part 9, Division 1A, thus engaging the Act, section 178(2), as inserted by Schedule 2.28[1], where it appears to the Committee that those proceedings are to be heard by a judicial member of the Commission, but not necessarily the Commission in Court Session.

2.11 On this point, the Minister noted:

> I am advised that proceedings on applications for review under section 174(1) are subject to detailed provisions in Division 1A of Part 9 of the *Police Act 1990*, which are expressed to omit or modify, directly or indirectly, provisions of the *Industrial Relations*

> *Act 1996* which would otherwise govern the process. Section 179(1) expressly states that section 163 of the *Industrial Relations Act 1996* does not have effect. Section 174(1) provides that a police officer in respect of whom an order for reviewable action is made under section 173 may apply to the IRC for a review.
>
> I am advised that the NSW Police Force understand there is no provision for an application to be made to or determined by the Commission in Court Session and the NSW Police Force is unaware of the rationale for the insertion of section 178(2) of the *Police Act 1990* by the *Industrial Relations Amendment Act 2023*. However, the amendment reflects the provision, in almost identical terms, as it was enacted before amendments to the *Police Act 1990* in December 2013 and also mirrors section 163(2) of the *Industrial Relations Act 1996*.

Committee conclusion

2.12 The Committee appreciates the Minister's prompt response to the concerns raised by the Committee and the context provided, particularly in relation to the rationale behind the amending regulation insofar as it suspends the changes made by the *Industrial Relations Amendment Act 2023*, Schedule 2.28[2]–[4].

2.13 Regarding the Act, section 178(2), as inserted by Schedule 2.28[1], the Committee considers it would avoid potential confusion if the subsection were omitted in a future amendment to the Act.

2.14 Section 178(1) provides that, for proceedings under the Act, Part 9, Division 1A, the Commission is not bound to act in a formal manner and is not bound by the rules of evidence. Section 178(2), in appearing to qualify this by providing that the rules of evidence and other formal procedures of a superior court of record apply to and in relation to the Commission in Court Session, necessarily suggests the Commission in Court Session may hear Division 1A proceedings. This is in the context of surrounding provisions that deal with procedural and evidentiary matters in place of corresponding provisions of the *Industrial Relations Act 1996*, including section 163, which would otherwise apply.

2.15 The Minister's confirmation that Division 1A proceedings are heard by the Commission, and not the Industrial Court of New South Wales, makes section 178(2) an inert provision. The Committee is concerned the provision could deter a police officer from making an application for review, in suggesting that a higher degree of formality and requirements around the adducing and admissibility of evidence and proof of matters may apply. Even if that risk were low, the Committee is generally concerned with accuracy and clarity in legislation and requests the Minister give consideration to the omission of section 178(2).

2.16 Subject to the above comments, the Committee is of the view that the scrutiny concerns identified under the *Legislation Review Act*, section 9(1)(b)(vii) have been appropriately addressed. On this basis, the Committee concludes its scrutiny of the amending regulation.

Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024

SI number / GG reference	2024 No 315
Notified on NSW legislation website (LW)	26/07/2024
Tabled in Legislative Council (LC)	06/08/2024
Last date of notice for disallowance motion	22/10/2024

Overview

2.17 The *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024* (the amending regulation) prescribes the High Speed Rail Authority established under the *High Speed Rail Authority Act 2022* of the Commonwealth as a public authority, and consequently a determining authority, for the purposes of the *Environmental Planning and Assessment Act 1979* (the Act) in relation to certain development.

2.18 The *Environmental Planning and Assessment Regulation 2021* (the regulation), section 3(3) provides that, for the purposes of the Act, section 1.4(1), definition of ***public authority***, paragraph (g), the persons specified in Schedule 1 are prescribed. The amending regulation inserts the following section into Schedule 1:

> **High Speed Rail Authority**
>
> (1) The High Speed Rail Authority, but only for the following purposes—
>
> (a) to be a public authority for development for the purposes of rail and related transport facilities, including State significant infrastructure, related to the high speed rail network,
>
> (b) to be a determining authority for the following development that is permitted without consent by a public authority under *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Chapter 2—
>
> (i) development for the purposes of rail infrastructure facilities related to the high speed rail network,
>
> (ii) development on land in or adjacent to a rail corridor related to the high speed rail network,
>
> (c) to be a determining authority for the following development that is permitted without consent under another environmental planning instrument—
>
> (i) development for the purposes of rail infrastructure facilities related to the high speed rail network,
>
> (ii) development on land in or adjacent to a rail corridor related to the high speed rail network.

2.19 Subsection (2) provides that 'High Speed Rail Authority' and 'high speed rail network' have the same meaning as in the *High Speed Rail Authority Act 2022* and that 'rail corridor' and 'rail infrastructure facilities' have the same meaning as in *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Part 2.3, Division 15. Relevantly, section 2.92 of that division provides that 'development for the purpose of a railway or rail infrastructure facilities may be carried out by or on behalf of a public authority without consent on any land', with certain exceptions. Section 2.91(1), definition of ***rail infrastructure facilities*** lists various structures that fall within the definition.

Scrutiny concerns

The form or intention of the regulation calls for elucidation

2.20 Under this ground, the Committee may request elucidation where ambiguity or uncertainty is identified, including the perceived inclusion of inert provisions.

2.21 The Committee wrote to the Minister for Planning and Public Spaces on 16 August 2024 to raise scrutiny concerns under this ground in relation to the amending regulation.

2.22 Specifically, the Committee sought clarification regarding the types of development captured by the phrase 'development for the purposes of rail and related transport facilities' in the amending regulation, Schedule 1[2], subsection (1)(a). Clarification was sought as this is the only instance of this phrase in the statute book, other than in the regulation, Schedule 1, section 1, which is very similar to the section inserted by the amending regulation, and in the heading of a section in *State Environmental Planning Policy (Planning Systems) 2021* that proceeds to spell out the types of development the heading alludes to.

2.23 The Committee sought confirmation that the phrase is intended to capture different types of development to 'development for the purposes of rail infrastructure facilities', as referred to in subsections (1)(b)(i) and (c)(i) and defined.

2.24 In a letter dated 28 August 2024, the Minister provided significant background to the need for, and effect of, the amending regulation and advised that:

> The phrase 'development for the purposes of rail and related transport facilities' is deliberately broad and not defined so as to avoid inadvertently excluding the Authority from being a public authority, within the meaning of the EP&A Act, for development related to the high speed rail network.
>
> The types of development captured by [subsection (1)(a)] would include 'rail infrastructure facilities' as defined by s 2.91 of the T&I SEPP. It would also include other types of rail or transport infrastructure that may not be expressly referred to in an environmental planning instrument.
>
> To avoid a scenario where the Authority is not considered a public authority because certain works do not fall within the definition of 'rail infrastructure facilities', the broader phrase 'development for the purposes of rail and related transport facilities' was used.

2.25 Further, in relation to the inclusion of subsection (1)(b)(ii), the Committee queried which provisions of *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Chapter 2 permit development on land in or adjacent to a rail corridor to be carried out without development

consent, noting Part 2.3, Division 15, Subdivision 2 (Development in or adjacent to rail corridors and interim rail corridors—notification and other requirements) mostly stipulates requirements to be satisfied before a consent authority determines a development application for development to which the subdivision applies i.e. the subdivision does not apply to development that is permitted without consent.

2.26 The Minister responded as follows:

> … [S]ection 2.92(1) provides that development for the purposes of a railway or rail infrastructure facilities may be carried out by or on behalf of a public authority without consent **on any land**. Section 2.92(1) applies to any land, and would include land in or adjacent to a rail corridor. [emphasis in original.]
>
> …[S]ection 2.93 also permits development of certain prescribed railways or railway projects to be carried out without development consent. This… currently does not apply to the high speed rail network.
>
> Part 2.3, Division 15, Subdivision 2 of the T&I SEPP seeks to protect the existing and future rail systems and requires a development application located near or that may affect the rail network to, in certain circumstances, consult and seek concurrence of the rail authority in line with section 4.13 of the EP&A Act. The provisions in… Subdivision 2 apply to the development with consent approval pathway under Part 4 of the EP&A Act. This subdivision does not apply to the development without consent approval pathway that is permitted in sections 2.92 and 2.93 of the T&I SEPP and determined in accordance with Division 5.1 of the EP&A Act.

Committee conclusion

2.27 The Committee appreciates the Minister's prompt response to the concerns raised by the Committee and the level of detail provided.

2.28 The Committee understands the rationale behind use of the phrase 'development for the purposes of rail and related transport facilities' in subsection (1)(a). While the Committee considers it might be helpful to put beyond doubt that this includes development for the purposes of rail infrastructure facilities within the meaning of *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Part 2.3, Division 15, the Committee anticipates the risk of an issue in implementing this provision is low.

2.29 Further, as the Minister's response indicates that subsection (1)(b)(ii) is already captured by subsection (1)(b)(i), the Committee considers subparagraph (ii) may be redundant and suggests consideration be given to whether the subparagraph should be omitted for concision and to avoid potential confusion.

2.30 Nonetheless, the Committee is of the view that the scrutiny concerns identified under the *Legislation Review Act*, section 9(1)(b)(vii) have been appropriately addressed. On this basis, the Committee concludes its scrutiny of the amending regulation.

Appendix 1 Instruments with no scrutiny concerns

The Committee has reviewed the following instruments and raised no scrutiny concerns:

Instrument	SI number/ GG reference
Workers Compensation Amendment (Information Disclosure) Regulation 2024	2024 No 314
Casino Control Amendment (Manager Appointment Extension) (No 2) Regulation 2024	2024 No 324
Environmental Planning and Assessment Amendment (Consent Authority) Regulation 2024	2024 No 325
Heritage Amendment (Applications) Regulation 2024	2024 No 326
State Debt Recovery Act 2018—Referable Debt Order	2024 No 330
Transport Legislation Amendment (Laboratories) Regulation 2024 (2024-331)	2024 No 331
Water Management (General) Amendment (Specific Purpose Access Licences) Regulation 2024	2024 No 332
Crimes (Forensic Procedures) Regulation 2024	2024 No 340
Education (School Administrative and Support Staff) Regulation 2024	2024 No 341
Prisoners (Interstate Transfer) Regulation 2024	2024 No 364
Public Health Amendment (Interstate Prohibition Orders) Regulation 2024	2024 No 365
Regional Development Amendment (Advisory Council) Regulation 2024	2024 No 366
Fisheries Management Act 1994—Fisheries Management (Sharks taken in the Ocean Trap and Line Fishery Possession Limit) Order 2024	NSWGG-2024-288-1
Statutory and Other Offices Remuneration Act 1975—Court and Related Officers Group—Annual Determination	NSWGG-2024-289-5
Statutory and Other Offices Remuneration Act 1975—Public Office Holders Group—Annual Determination	NSWGG-2024-289-7
Statutory and Other Offices Remuneration Act 1975—Governor of New South Wales—Annual Determination	NSWGG-2024-289-10
Legal Profession Uniform Law Application Act 2014—NSW Admission Board Amendment (Fees) Rule 2024—Erratum	NSWGG-2024-289-11
Civil Procedure Act 2005—Supreme Court Practice Note SC GEN 17	NSWGG-2024-290-1

Appendix 2 Instruments where engagement is ongoing

The Committee is engaging with the minister or body responsible for the making of the instruments set out in the table below. The Committee will set out a further or concluding view relating to the scrutiny concerns identified for the instruments in a future monitor, having regard to that engagement.

Monitor No	Instrument	SI number / GG reference
8	Gaming Machines and Liquor Amendment (Harm Minimisation Measures) Regulation 2024	2024 No 250
8	Liquor Amendment (Vibrancy Reforms) Regulation 2024	2024 No 254

Appendix 3 Minutes

Draft minutes no. 14
Monday 16 September 2024
Regulation Committee
Room 1136, Parliament House, Sydney, 11.00 am

1. Members present
Mrs Maclaren-Jones, *Chair*
Mrs Carter
Mr Donnelly
Ms Mihailuk
Mr Murphy
Mr Nanva

2. Apologies
Ms Boyd, *Deputy Chair*
Dr Kaine

3. Disclosure by Member
Mr Murphy disclosed a direct pecuniary interest in relation to the Public Notaries Appointment Amendment (Fees) Rule 2024, noting that he is a Public Notary and is therefore subject to the fee refered to in the Rule. Mr Murphy offered to be excluded from relevant deliberations should any member of the Committee wish for this to occur.

4. Previous minutes
Resolved, on the motion of Mrs Carter: That draft minutes no. 13 be confirmed.

5. Correspondence
The Committee noted the following items of correspondence:

Sent:

- 14 August 2024 – Letter from Chair to Presiding Member, Legal Profession Admission Board, the Hon. Justice Payne regarding scrutiny concerns concluded in Monitor No. 8 of 2024.
- 14 August 2024 – Letter from Chair to Minister for Industrial Relations, the Hon. Sophie Cotsis regarding scrutiny concerns concluded in Monitor No. 8 of 2024.
- 16 August 2024 – Letter from Chair to Minister for Planning and Public Spaces, the Hon. Paul Scully regarding scrutiny concerns identified in the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024*.
- 23 August 2024 – Letter from Chair to Minister for Roads, the Hon. John Graham regarding scrutiny concerns identified in the *Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024*.
- 23 August 2024 – Letter from Chair to Treasurer, the Hon. Daniel Mookhey regarding scrutiny concerns identified in the *Government Sector Finance Regulation 2024*.

- 23 August 2024 – Letter from Chair to Presiding Member, Legal Profession Admission Board, the Hon Justice Payne regarding scrutiny concerns identified in the *Public Notaries Appointment Amendment (Fees) Rule 2024*.
- 27 August 2024 – Letter from Chair to the Statutory and Other Offices Remuneration Tribunal regarding *Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination* and the *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination.*
- 5 September 2024 -Letter in reply from Chair to the Minister for Gaming and Racing, the Hon. David Harris regarding *Liquor Amendment (Vibrancy Reforms) Regulation 2024* and *Gaming Machines and Liquor Amendment (Harm Minimisation Measures) Regulation 2024*.
- 6 September 2024 – Email from Regulation Committee Secretariat confirming an extension to the Treasurer, the Hon. Daniel Mookhey to respond to the Committee's correspondence relating to the *Government Sector Finance Regulation 2024*.
- 10 September 2024 – Letter from Chair to the Statutory and Other Offices Remuneration Tribunal regarding the *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination.*

Received:

- 7 August 2024 – Letter from the Minister for Police and Counter-terrorism, the Hon. Yasmin Catley regarding scrutiny concerns identified in the *Police Amendment Regulation 2024*.
- 12 August 2024 – Letter from Minister for Gaming and Racing, the Hon. David Harris regarding scrutiny concerns identified in the *Liquor Amendment (Vibrancy Reforms) Regulation 2024* and the *Gaming Machines and Liquor Amendment (Harm Minimisation Measures) Regulation 2024*.
- 16 August 2024 – Letter from James Joseph regarding the NSW Minerals Council**.**
- 28 August 2024 – Letter from the Minister for Planning and Public Spaces, the Hon. Paul Scully regarding scrutiny concerns identified in the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024*.
- 3 September 2024 – Letter from Treasurer, the Hon. Daniel Mookhey regarding a request for an extension to the Committee's correspondence relating to the *Government Sector Finance Regulation 2024*.
- 6 September 2024 – Letter from the Presiding Member, Legal Professional Admission Board, the Hon Justice Payne regarding scrutiny concerns identified in the *Public Notaries Appointment Amendment (Fees) Rule 2024*.
- 6 September 2024 – Letter from Scrutiny of Acts and Regulations Committee to Chair regarding the purchase of tickets for the Australia-New Zealand Scrutiny of Legislation Conference.
- 11 September 2024 – Letter from Statutory and Other Offices Remuneration Tribunal regarding *Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination.*

6. Correspondence regarding minor matters

Resolved, on the motion of Mr Donnelly: That:

The Chair write to the Minister for Education and Early Learning and Minister for Building notifying them of the minor issues identified in the *Children (Education and Care Services) Supplementary Provisions Regulation 2024* and the *Home Building Amendment (Supervision Practice Standard) Regulation 2024* for consideration and potential revision.

The Chair send correspondence which identifies minor issues to responsible ministers or bodies for consideration and potential revision on an ongoing basis and that this correspondence be provided to Committee members for information.

7. Consideration of Chair's draft report

The Chair submitted her draft report entitled *Delegated Legislation Monitor No. 9 of 2024*, which having been previously circulated, was taken as being read.

Resolved, on the motion of Mr Murphy: That paragraphs 1.29-1.33, including headings, be omitted:

'Overview

This annual determination of the Statutory and Other Offices Remuneration Tribunal (the Tribunal) fixes remuneration to be paid to office holders in the Judges and Magistrates Group on and from 1 July 2024. The determination is made under the Statutory and Other Offices Remuneration Act 1975 (the Act), section 13 and is disallowable by virtue of the Act, section 19A. Section 13 provides that 'the Tribunal shall, in each year, make a determination of the remuneration to be paid to office holders as on and from 1 July in that year.' Section 10A provides that the term office holder means the holder of an office specified in Schedule 1, 2 or 3.

Scrutiny concerns

The form or intention of the regulation calls for elucidation

Firstly, the Committee queried the inclusion of the remuneration payable to the Chief Judge or another judge of the Land and Environment Court in Determination No. 1, given their remuneration appears to be established by the Land and Environmental Court Act 1979, section 9. While the Act, Schedule 2, Part 1 references various commissioners under the Land and Environment Court Act 1979, there is no reference to the Chief Judge or another judge of the Land and Environment Court in Schedules 1-3.

Secondly, the Committee sought clarification on whether the reference to the Chief Commissioner of the Industrial Relations Commission in Determination No. 2 remains necessary, and whether it should be replaced with a reference to the Senior Commissioner. Similarly, in Determination No. 5, the Committee queried whether the reference to the Chief Commissioner should be a reference to the Senior Commissioner, or, alternatively, to a Presidential Member of the Commission within the meaning of the Industrial Relations Act 1996. The Committee recognises that the Industrial Relations Amendment Act 2023, Schedule 1[113] abolished the office of Chief Commissioner of the Industrial Relations Commission and replaced it with the office of President of the Commission.

Lastly, the Committee sought further information on whether adopting the Australian Taxation Office's Taxation Determination TD2024/3 as the basis for reasonable travel allowances for judges and magistrates in Determination No.6 is consistent with the 'temporary freeze on wages' policy declared in the Statutory and Other Offices Remuneration (Judicial and Other Office Holders) Regulation 2013, clause 5A. Comparing the travel allowances in the Annual Determination—Judges and Magistrates Group published in Government Gazette No 343 of 4 August 2023, which were based on TD2023/3, it appears that there has been an increase in some of the relevant reasonable travel allowances. [FOOTNOTE: See, for example, Table 3, which provides for reasonable amounts for domestic travel expenses for employees with an annual salary of $255,671 or more.] The reference to TD2024/3 therefore seems to have the effect of awarding an increase in remuneration that takes effect before 1 July 2025, contrary to the policy set out in clause 5A.

Committee conclusion

In light of the above, the Committee has requested the advice of the Tribunal regarding the scrutiny concerns identified under the Legislation Review Act 1987, section 9(1)(b)(vii).'

Resolved, on the motion of Mrs Carter: That:

The draft report as amended be the report of the Committee and that the Committee present the report to the House;

The Committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The Committee secretariat be authorised to update the report where necessary to reflect changes to Committee conclusions or new Committee conclusions resolved by the Committee;

Correspondence sent to, and received from, relevant Ministers or bodies that is referred to in the Monitor, will be published as an appendix to the Monitor;

The report be tabled in the House on Wednesday 18 September 2024.

8. Correspondence arising from the Regulation Committee's technical scrutiny function

Resolved, on the motion of Mr Murphy: That

Correspondence identifying scrutiny concerns in disallowable instruments be sent to the Committee prior to it being circulated to ministers or bodies.

Committee members have 24 hours following receipt of the correspondence to provide any objections to the correspondence being sent to the relevant minister or body.

9. Correspondence arising from Monitor No. 9 of 2024

Resolved, on the motion of Mr Donnelly: That the Chair write to relevant ministers or bodies reflecting the conclusions of the Committee set out in Monitor No. 9 of 2024.

10. Adjournment

The Committee adjourned at 11.11 am.

11. Next Meeting

Monday 23 September 2024, 11.00 am, Room 1136 (consideration of the Committee report entitled 'Scrutiny of Delegated Legislation Monitor No. 10 of 2024').

Madeleine Dowd
Committee Clerk

Appendix 4 Correspondence

Appendix 4 contains the following items of correspondence sent to, and received from, ministers or bodies regarding instruments referred to in this monitor:

- Sent 24 July 2024 – Letter from Chair to the Minister for Police and Counter-terrorism, the Hon. Yasmin Catley regarding scrutiny concerns identified in the *Police Amendment Regulation 2024*.
- Received 7 August 2024 – Letter from Minister for Police and Counter-terrorism, the Hon. Yasmin Catley regarding scrutiny concerns identified in the *Police Amendment Regulation 2024*.
- Sent 16 August 2024 – Letter from Chair to Minister for Planning and Public Spaces, the Hon. Paul Scully regarding scrutiny concerns identified in the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024*.
- Sent 23 August 2024 – Letter from Chair to Treasurer, the Hon. Daniel Mookhey regarding scrutiny concerns identified in the *Government Sector Finance Regulation 2024*.
- Sent 23 August 2024 – Letter from Chair to Minister for Roads, the Hon. John Graham regarding scrutiny concerns identified in the *Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024*.
- Sent 23 August 2024 – Letter from Chair to Presiding Member, Legal Profession Admission Board, the Hon Justice Payne regarding scrutiny concerns identified in the *Public Notaries Appointment Amendment (Fees) Rule 2024*.
- Sent 27 August 2024 – Letter from Chair to the Statutory and Other Offices Remuneration Tribunal regarding *Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination* and the *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination.*
- Received 28 August 2024 – Letter from the Minister for Planning and Public Spaces, the Hon. Paul Scully regarding scrutiny concerns identified in the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024.*
- Sent 10 September 2024 – Letter from Chair to the Statutory and Other Offices Remuneration Tribunal regarding the *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination.*

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

24 July 2024

The Hon. Yasmin Catley
Minister for Police and Counter-terrorism
Minister for the Hunter

D24/036128

By email

Dear Minister

Police Amendment Regulation 2024

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

The Committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instrument, notice of the making of which was published on the NSW legislation website on 28 June 2024, and will be tabled in Parliament on 6 August 2024:

- *Police Amendment Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(vii) on the basis that the form or intention of the regulation calls for elucidation. I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Scrutiny concerns

	Provision	Issue
1	Schedule 1, proposed clause 150	The Committee seeks clarification regarding the intended effect of the savings and transitional provision inserted by the *Police Amendment Regulation 2024* (the ***amending regulation***). The provision relates to the amendments to the *Police Act 1990* (***the Act***) made by the *Industrial Relations Amendment Act 2023*, Schedule 2.28. The Committee requests clarification of the Minister's views regarding the nature of the amendments effected by the subschedule in order to understand the intended effect of the amending regulation in suspending those amendments in relation to pending proceedings under the *Police Act 1990*. ***Div 1A proceedings*** The Act, Part 9, Division 1A enables a police officer to apply to the Industrial Relations Commission for a review of certain orders made under the Act, section 173 (***Div 1A proceedings***). It is the Committee's understanding that Div 1A proceedings are to be heard by the Industrial Relations Commission, rather than the Industrial Relations Commission in Court Session. Whereas other amendments in the *Industrial Relations Amendment Act 2023* expressly confer jurisdiction on the Industrial Relations Commission in Court Session for certain proceedings (see, for example, Schedule 2.21), the Act, section 174 continues to refer to the Industrial Relations Commission only. Div 1A proceedings are required to be dealt with by a judicial member of the Commission unless the President of the Commission otherwise directs (the Act, section 179). However, this does not necessarily mean jurisdiction is conferred on the Commission in Court Session (*Industrial Relations Act 1996*, section 151). It is also the Committee's understanding that an appeal against a decision of the Commission in Div 1A proceedings lies to the Full Bench of the Commission (*Industrial Relations Act 1996*, section 187) rather than the Commission in Court Session (compare, for example, an appeal under the *Industrial Relations Act 1996*, sections 153(1)(k) and 197B). The Committee also notes the Act, section 180, which provides that the *Evidence Act 1995*, section 128 applies to Div 1A proceedings "as if a reference in that section to a court were a reference to the Commission". Against this background, the Committee queries the effect of Schedule 2.28[1] and, in turn, the effect of the amending regulation in suspending that amendment for pending proceedings. Schedule 2.28[1] inserts section 178(2) into the Act, which provides that, for Div 1A proceedings, the rules of evidence and other formal procedures of a superior court of record apply to and in relation to *the Commission in Court Session*. This provision mirrors the wording of the *Industrial Relations Act 1996*, section 163. In order to consider the potential scope of the amending regulation, the Committee seeks clarification regarding the circumstances in which the Commission in Court Session would hear Div 1A proceedings so as to engage section 178(2). ***Case management of pending proceedings*** Schedule 2.28[2]–[4] relate to changes to the constitution of the Commission for the purposes of the review of certain matters under the Act. The effect is to require those matters to be dealt with by *judicial* members of the Commission (the Act, sections 179(2), 181G(1)(c) and 181K). Previously,

		those provisions provided for those matters to be dealt with by a member who is an Australian lawyer. The Committee requests clarification regarding the rationale behind the amending regulation, as it seems judicial members of the Commission, being Australian lawyers, would have been eligible to hear matters under the relevant provisions as in force immediately before the commencement of the *Industrial Relations Amendment Act 2023*, Schedule 2.28[2]–[4]. Is the intention to afford the Commission flexibility to allow non-judicial members hearing pending proceedings to continue to hear those proceedings? The Committee raises this question in order to understand the potential impact of the amending regulation on the Commission's case management functions.

Please provide a response to the issue identified as no 1 by **7 August 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Yasmin Catley MP
Minister for Police and Counter-terrorism
Minister for the Hunter

NSW GOVERNMENT

Your reference: D24/036128
Our reference: F/2024/51778

The Hon Natasha Maclaren-Jones MLC
Committee Chair, Legislative Council Regulation Committee
Parliament House
Macquarie Street
Sydney NSW 2000

Regulation.Commitee@parliament.nsw.gov.au

Dear Chair,

Police Amendment Regulation 2024

I refer to the Legislative Council Regulation Committee's request for clarification on the *Police Amendment Regulation 2024*(Regulation) on the basis that the form or intention of the Regulation calls for elucidation.

I thank the Committee for the opportunity to clarify the intention of the Regulation.

This Regulation was informed by advice from the NSW Police Force about several matters before the Industrial Relations Commission of NSW (IRC) for review under Part 9 of the *Police Act 1990* that were being conducted before single members of the IRC who were Australian lawyers but not judicial members. These proceedings were not likely to be completed before 1 July 2024.

The Regulation was subsequently made with the intent of preserving the validity of pending decisions and proceedings of the IRC in those matters. It intends to mitigate the risk of those decisions being declared "invalid" upon the commencement of the *Industrial Relations Amendment Act 2023* on 1 July 2024, or alternatively being required to be re-heard or re-allocated and re-programmed under arrangements that aligned with the amendments included the *Industrial Relations Amendment Act 2023*.

The intended effect of the Regulation is to ensure that proceedings on applications for review under Division 1A of Part 9 of the *Police Act 1990* that had been made or were still being determined before 1 July 2024 could continue under the arrangements in the *Industrial Relations Act 1996* that were in place at the time the application for review was made. I understand that any new applications for review under Part 9 of the *Police Act 1990* commenced after 1 July 2024 will be dealt with under the current provisions of the *Police Act 1990* and *Industrial Relations Amendment Act 2023*.

With regard to further specific clarifications that the Committee has requested:

52 Martin Place Sydney NSW 2000
GPO Box 5341 Sydney NSW 2001

nsw.gov.au/ministercatley

1. **The Committee seeks clarification regarding the circumstances in which the Commission in Court Session would hear Div 1A proceedings so as to engage section 178(2).**

I am advised that proceedings on applications for review under section 174 (1) are subject to detailed provisions in Division 1A of Part 9 of the *Police Act 1990*, which are expressed to omit or modify, directly or indirectly, provisions of the *Industrial Relations Act 1996* which would otherwise govern the process. Section 179 (1) expressly states that section 163 of the *Industrial Relations Act 1996* does not have effect. Section 174(1) provides that a police officer in respect of whom an order for reviewable action is made under section 173 may apply to the IRC for a review.

I am advised that the NSW Police Force understand there is no provision for an application to be made to or determined by the Commission in Court Session and the NSW Police Force is unaware of the rationale for the insertion of section 178(2) of the *Police Act 1990* by the *Industrial Relations Amendment Act 2023*. However, the amendment reflects the provision, in almost identical terms, as it was enacted before amendments to the *Police Act 1990* in December 2013 and also mirrors section 163(2) of the *Industrial Relations Act 1996*.

2. **The Committee requests clarification regarding the rationale behind the amending regulation**

As set out above, the intended effect of the Regulation is to ensure that proceedings on applications for review under Division 1A of Part 9 of the *Police Act 1990* that had been made or were still being determined before 1 July 2024 could continue under the arrangements in the *Industrial Relations Act 1996* that were in place at the time the application for review commenced.

I trust the above information is of assistance to the Committee.

Sincerely,

Yasmin Catley MP
Minister for Police and Counter-terrorism
Minister for the Hunter

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

16 August 2024

The Hon. Paul Scully
Minister for Planning and Public Spaces

D24/040879

By email

Dear Minister

Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

The Committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instrument, notice of the making of which was tabled in Parliament on 6 August 2024:

- *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(vii) on the basis that the form or intention of the regulation calls for elucidation. I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Scrutiny concerns

	Provision	Issue
1	Schedule 1[1], proposed subsection (1)(a)	The Committee seeks clarification regarding the types of development captured by the phrase 'development for the purposes of rail and related transport facilities', as this is the only instance of this descriptor in the statute book, other than in the *Environmental Planning and Assessment Regulation 2021*, Schedule 1, section 1, which the section inserted by the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024* appears to have been modelled off, and the heading of *State Environmental Planning Policy (Planning Systems) 2021*, Schedule 1, section 19, a section that proceeds to spell out the types of development the heading alludes to. The Committee seeks confirmation that the phrase is intended to capture different types of development to 'development for the purposes of rail infrastructure facilities', as referred to later in the section and defined, and queries the scope of what is intended to be included and excluded.
2	Schedule 1[1], proposed subsection (1)(b)(ii)	The Committee queries which provisions of *State Environmental Planning Policy (Transport and Infrastructure) 2021*, Chapter 2 permit development on land in or adjacent to a rail corridor to be carried out without development consent. The Committee notes that Part 2.3, Division 15, Subdivision 2 largely provides for notification and other requirements to be satisfied *before* a consent authority determines a development application for development to which the subdivision applies, suggesting development in or adjacent to rail corridors may not be permitted without consent under Chapter 2 (c.f. sections 2.92 and 2.93, which permit certain development for the purposes of rail infrastructure facilities to be carried out by a public authority without consent, as referred to in proposed subsection (1)(b)(i)).

Please provide a response to the issues identified as nos 1 and 2 by **30 August 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

23 August 2024

The Hon. Daniel Mookhey MLC
Treasurer

D24/042039

By email

Dear Minister

Government Sector Finance Regulation 2024

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987,* section 9(1)(b).

The Committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instrument, notice of the making of which was tabled in Parliament on 6 August 2024:

- *Government Sector Finance Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987,* section 9(1)(b)(iii), (iv) and (vii). I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Scrutiny concerns

	Provision	Issue
1	Section 3	The Committee notes that the term ***guarantee***, although referenced in the definitions section, does not appear in *Government Sector Finance Regulation 2024 (**the regulation**)*, section 9 as signposted.
2	Section 4(6)	Section 4(6) provides that the Teaching Service and a university or the council or senate for a university are not GSF agencies. The *Government Sector Finance Act 2018 (**the Act**)*, section 2.4(1)(l) is cited as the relevant regulation-making power for section 4(6) and provides that a GSF agency includes 'any other entity (or entity of a kind) prescribed by the regulations as a GSF agency'. The Committee considers that this provision does not appear to provide the regulation-making power to prescribe an entity which is *not* a GSF agency, and therefore is of the view that section 4(6) may not be within the general objects of the legislation under which it was made. The Committee notes that the Act, section 2.4(4) specifies entities that are not GSF agencies. The Committee seeks clarification from the Minister as to the relevant regulation-making power for section 4(6). Further, the Committee queries whether the Act provides that the entities listed in section 4(6) would otherwise be GSF agencies, were it not for section 4(6). If the Act or the regulation do not have the effect of designating the entities as GSF agencies, the Committee queries the reason these particular entities have been called out.
3	Section 6(b)(v)	The Committee queries whether the paragraph should refer to the *Electricity Network Assets (Authorised Transactions) Act 2015*, Schedule 7, clause 6, rather than clause 5. While clause 5 deals with the dissolution of certain electricity network State owned corporations, clause 6 deals with their conversion into corporations constituted as a Ministerial Holding Corporation for the purposes of that Act.
4	Section 7(1)	Section 7(1) provides that 'For the Act, section 2.9(1)(e), a person who is a member of a GSF agency or is appointed to or employed within the GSF agency, is prescribed as a government officer unless the person is referred to in the Act, section 2.9(2).' Given that those entities prescribed as GSF agencies are primarily statutory bodies and government departments and agencies, the Committee queries the reference to 'a member of a GSF agency'. The Committee considers this term calls for elucidation and requests clarification on its intended meaning. In addition, the Committee notes that 'employed within the GSF agency' appears to replicate the Act, section 2.9(1)(b) which prescribes that a ***government officer*** means 'a person employed *in or by* a GSF agency'. The Committee would appreciate confirmation as to whether a different meaning is intended by specifying persons 'employed within the GSF agency'.
5	Section 14	Section 14 provides for definitions specific to the regulation, Part 5, Division 2. The definition of ***relevant transaction*** references a 'non-government sector entity'. The Committee notes that the Act, section 3 defines the term ***General Government Sector***, however, neither the Act nor regulation define 'non-government sector entity'. The Committee considers this term calls for elucidation and seeks clarification on its intended meaning.

6	Section 28	The regulation, section 28 provides that 'For the Act, section 9.9(5), table, item 3, paragraph (b), the Electoral Commissioner is prescribed as an entity to which the accountable authority for the New South Wales Electoral Commission may subdelegate an expenditure function of the Minister in relation to the Electoral Commission.' Given the Act, section 2.7(2)(h1) provides that the accountable authority for the New South Wales Electoral Commission *is* the Electoral Commissioner, this provision appears to allow the Electoral Commissioner to subdelegate an expenditure function of the Minister to themselves. As the expenditure function has already been delegated to the Electoral Commissioner, in the Committee's view, section 28 appears to produce no legal effect. On this basis, the Committee seeks clarification on the rationale behind section 28.
7	Section 32	Section 32(1)(b) provides that for the Act, section 9.9(5), table, item 2, paragraph (c), the Planning Secretary and Planning government officers are prescribed as entities to which a delegate of the Planning Minister may subdelegate an expenditure function of the Planning Minister. For item 2, the 'kind of delegate' is the Secretary of a Department. Provided that the general delegation power in the Act, section 9.9(2) enables the Planning Minister to delegate their delegable functions to the secretary of *any* department, the Committee queries whether section 32(1)(b) is already covered by the Act, section 9.9(5), table, item 2, paragraphs (a) and (b). Further, section 32(1)(b) appears to create a situation whereby the Planning Minister may delegate an expenditure function to the secretary of a department other than the Department of Planning, Housing and Infrastructure who may, in turn, subdelegate that function to the Planning Secretary or a Planning government officer. Where the Planning Minister has reasons for delegating an expenditure function to a secretary other than the Planning Secretary, the Committee considers the fact that that secretary may then subdelegate the function to the Planning Secretary under section 32(1)(b) could appear to make unusual or unexpected use of the subdelegation power in the Act, section 9.9(5). The Committee would appreciate clarification regarding the rationale behind this, noting the Act, section 9.9(7)(a) contemplates an instrument of appointment as a delegate excluding particular subdelegations. Similarly, the Committee seeks confirmation that the intention behind section 32(1)(c) is to enable, for example, the board of the Luna Park Reserve Trust, if delegated the Planning Minister's expenditure functions as the minister administering the *Luna Park Site Act 1990*, to subdelegate those functions to the Planning Secretary or a Planning government officer.
8	Schedule 3	Schedule 3 lists the reporting GSF agencies (statutory bodies and departments and other agencies) that are transitional reporting GSF agencies for the purposes of section 21(2). The Committee queries the basis on which the Jenolan Caves Reserve Trust (***the Trust***) is a reporting GSF agency. The Act, section 7.3(1) provides that a reporting GSF agency is any GSF agency. The Act, section 2.4(1) and (2) lists those entities that are GSF agencies, of which, in the Committee's view, the Trust does not appear to qualify. Presuming the Trust is still continued under the *National Parks and Wildlife Act 1974*, Schedule 3, Part 6, the Committee seeks clarification on the categorisation of the Trust as a GSF

		agency. For example, as the Trust is subject to the control and direction of the Minister under the *National Parks and Wildlife Act 1974,* repealed section 58W, does this mean it is a 'controlled entity of a Minister' for the purpose of section 2.4(2)(b)? Further, the Committee considers that 'Western Parklands City Authority' in Schedule 3, Part 1 should read 'Western Parkland City Authority' as that is the corporate name given to the entity by the Western Parkland City Authority Act 2018, section 6. Finally, the Committee queries the basis on which the Dumaresq-Barwon Border Rivers Commission has been listed as a department or agency that is a transitional reporting GSF agency. The Committee seeks clarification on the relevant legislation which establishes the Commission as a department or agency that is a GSF agency.

Please provide a response to the issues identified as nos 2-8 by **6 September 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no 1 is for information and noting only and does not require a response.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

23 August 2024

The Hon. John Graham MLC
Special Minister of State
Minister for Roads
Minister for Arts
Minister for Music and the Night-time Economy
Minister for Jobs and Tourism

D24/042035

By email

Dear Minister

Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

The Committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instrument, notice of the making of which was tabled in Parliament on 6 August 2024:

- *Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024*

The Committee has identified issues under the *Legislation Review Act 1987,* section 9(1)(b)(iii), (iv) and (vii). I am writing to you as the responsible Minister to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Scrutiny concerns

	Provision	Issue
1	Schedule 11, as inserted by Schedule 2	While the Committee acknowledges the broad power in the *Marine Safety Act 1998* (***the Act***), section 137(1A) for the regulations to make provision for or with respect to fees and charges for services provided under the Act, the Committee requests clarification regarding the circumstances in which fees for the following matters, as inserted by the *Transport Legislation Amendment (Penalties, Fees and Charges) Regulation 2024* (***the amending regulation***), Schedule 2, are charged, including the relevant provision of the Act or the *Marine Safety Regulation 2016* (***the regulation***) that provides the basis for the fee: • Personal watercraft driving licence upgrade examination—it isn't clear to the Committee what an upgrade is and when this examination is required • Transfer of a boatcode agent authorisation—as the regulation, clause 88 is silent on whether and how an authorisation may be transferred, the Committee queries the relevant process giving rise to the fee • Affixing of hull identification number—the Committee seeks confirmation that the regulation, clauses 87 and 88 do not require a hull identification number to be affixed by a boatcode agent only, and that this fee is charged only if the number is affixed by an agent • Inspection to validate hull identification number—as the body of the regulation appears to be silent on inspecting and validating hull identification numbers, the Committee queries when this occurs • Hull identification number certificates—pad of 50—the Committee can find no reference to a hull identification number certificate in the regulation and queries when and why this may be issued to a person • Retrieval of domestic commercial vessel records—the Committee is unsure what this is referring to and queries whether this relates to the exercise of a particular function by the National Regulator under the Commonwealth domestic commercial vessel national law.
2	Schedule 1, as inserted by Schedule 3[4]	The amending regulation, Schedule 3, item 4 inserts Schedule 1 to specify penalty notice offences and the associated penalty notice amounts for certain offences under the *Photo Card Regulation 2014* and the *Photo Card Act 2005*. Of the eight penalty notice offences inserted for the *Photo Card Act 2005*, the penalty notice amount for the following six offences represents an amount that is approximately 44 per cent of the maximum penalty applicable to a criminal prosecution under that Act: • Sections 20(1)(a), 20(1)(b), 21(a), 23(a), 23(b) and 28(2). Though within power, the Committee considers these penalty notice amounts may make unusual use of the regulation-making powers under the *Photo Card Act 2005* and may detract from the operation of the Act given how high the amounts are relative to the maximum penalties. The Committee seeks information on the rationale behind, and the justification for, the chosen penalty notice amounts.

3	Schedule 3, item 3 as inserted by Schedule 4[3]	Schedule 3, items 3 and 4, as inserted by Schedule 4[3], prescribe a fee for the inspection of a mooring or vessel by Transport for NSW (TfNSW). The Committee notes that the *Ports and Maritime Administration Act 1995*, section 85G(2)(b) provides that the regulations may make provision for or with respect to 'the establishment, administration, operation and enforcement of a wharf booking system and mooring licensing system'. While section 85G(g) empowers the regulations to prescribe fees payable in relation to permits, licences and bookings under a wharf booking system, there is no specific provision providing for fees for a mooring licensing system. On this basis, the Committee seeks clarification as to the relevant provision of the *Ports and Maritime Administration Act 1995* relied on for this fee, and the circumstances in which a mooring may be inspected by TfNSW.
4	Schedule 3, Part 1, item 6, as inserted by Schedule 7[1]	The Committee could not locate another reference to a 'trailer tow truck' in the *Road Transport (Vehicle Registration) Regulation 2017* or the *Road Transport Act 2013* and queries whether this should instead be a reference to a 'tow truck trailer', as used in Part 5, items 7–9 and the corresponding item of the previous fees schedule.
5	Schedule 3, as inserted by Schedule 8	The amending regulation, Schedule 8 inserts Schedule 1, which specifies penalty notice offences and the associated penalty notice amounts for offences under the *Roads Regulation 2018*. The penalty notice amount for all offences represents an amount that is greater than 25 per cent of the maximum penalty applicable to a criminal prosecution for the offence. Specifically, a penalty notice amount of $224 is 40.7 per cent of the maximum penalty for the relevant offence, $477 is 40.6 per cent of the maximum penalty, $672 is 30.5 per cent of the maximum penalty and $930 is 28.2 per cent of the maximum penalty. Similar to issue no 2 above, the Committee seeks information on the rationale behind, and the justification for, the chosen penalty notice amounts listed in Schedule 3.

Please provide a response to the issue identified as nos 1–5 by **6 September 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

23 August 2024

The Hon. Justice Anthony Payne
Presiding Member
Legal Profession Admission Board

D24/042037

By email

Dear Judge

Public Notaries Appointment Amendment (Fees) Rule 2024

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b). The Committee thanks the Board for its prompt and considered engagement with identified scrutiny concerns to date.

As part of the Committee's requirement to review all statutory rules that are subject to disallowance while they are so subject, the Committee has reviewed the following instrument, notice of the making of which was tabled in Parliament on 6 August 2024:

- *Public Notaries Appointment Amendment (Fees) Rule 2024*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(iii) and (iv). I am writing to you as the Presiding Member of the Legal Profession Admission Board to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instrument in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instrument to the attention of the House or recommend to the House that the instrument, or part of the instrument be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Scrutiny concerns

	Provision	Issue
1	Rule 3, proposed Second Schedule, 'Annual Notification in Form 6' fee	The Committee is concerned this fee is beyond power, and seeks the Board's advice regarding the authorisation and basis for this fee. The *Public Notaries Act 1997* (***the Act***), section 9(f) expressly authorises the imposition of fees in relation to the 'appointment' and 'certificates of appointment' of public notaries. The Committee accepts that this authorises the setting of fees for an 'Application for Appointment as Public Notary', 'Certificate of Current Appointment' and 'Replacement original Certificate of Appointment', setting aside any consideration of the amounts imposed. The Committee does not consider that the provision expressly authorises the fee for 'Annual Notification in Form 6', and has significant reservations regarding whether the fee is authorised more generally as a fee for service. The *Public Notaries Appointment Rules*, rule 12, as inserted by notice in Government Gazette No 68 of 4 April 2003, provides for an annual process to update the roll whereby the registrar sends a Form 6 notice to each notary, which must be completed and returned by the notary within a month, together with the fee of $110 prescribed by the *Public Notaries Appointment Amendment (Fees) Rule 2024*. The Committee notes this fee was first prescribed, by notice in Government Gazette No 116 of 25 July 2003, in the amount of $30, and has gradually increased over the years. The particulars listed in Form 6 are the notary's name, address, firm name, telephone number, facsimile number and DX number. The form directs a notary to indicate whether the particulars listed are correct, or are correct as amended by the notary, to sign and date the form and to return it, with the accompanying fee, to the address specified. The Committee seeks the Board's comments on a number of concerns regarding this process and the associated fee. First, the Committee alerts the Board that Form 6 available on its website differs from Form 6 as published in the Gazette, including by listing the additional particulars of mobile number, mailing address and email, but not DX number. The Committee has not been able to locate a notice in the Gazette amending Form 6 as originally inserted. If the form being sent is Form 6 as published on the Board's website, the Committee queries the use of this form as an external document inconsistent with the form inserted into the *Public Notaries Appointment Rules*. Secondly, the Committee is concerned that, should the form be returned with the notary having indicated that 'The particulars as set out above are correct', a not insignificant fee is being imposed where no service is provided. This suggests a fee more in the nature of an annual 'licensing' fee to raise revenue, especially when compared with the $0 fee for a 'Notification of change of particulars' prescribed by the *Public Notaries Appointment Amendment (Fees) Rule 2024*, down from $105 for the previous year. That is, the fee for an actual change of particulars, outside the annual notification process, is, in effect, waived from 5 July 2024, but a notary is

		required to pay a fee of $110 for notifying the Board that their details are unchanged. On the other hand, if a notary were to return the form with changes, the Committee queries whether, in the Board's view, $110 is a reasonable fee for the service provided i.e. an amount limited to the recovery of the administrative costs involved in updating a notary's details in the roll. Finally, the Committee queries the basis on which the Board is authorised to require confirmation or amendment of some of the particulars specified in Form 6, and, in particular, to charge fees in relation to this. The Committee accepts that the Board has a valid administrative basis to collect contact details of applicants for appointment through Form 1, and a basis to make rules regarding the keeping of records concerning public notaries pursuant to the Act, section 9(e). However, the specified purpose of the notification process provided for by rule 12 is to allow the Registrar to 'update the roll'. The Act, section 7(2) requires only a notary's name, firm name and the notary's or firm's address to be entered in the roll, and the *Supreme Court Rules 1970*, Part 82, rule 5 adds that the roll must include the date of a notary's appointment, particulars of penalties resulting from disciplinary action and the date on, and provision under which, a notary is removed from the roll. Insofar as the Board is seeking to have notaries pay a fee in connection with confirming or amending other details, including their telephone number, facsimile number and DX number, the Committee queries whether this is consistent with the stated purpose of rule 12.
2	Rule 3, proposed Second Schedule, 'Other application/ certificate – Public Notary' fee	The Committee requests clarification regarding the matters that fall under this catch-all that are not captured by the other fees listed in the schedule. Noting that the fees power in the Act, section 9(f) is expressly limited to fees in relation to the examination of candidates for appointment as, and the appointment of, public notaries, and certificates of appointment, the Committee queries whether these other matters fall within those categories, and whether the $110 fee is otherwise a reasonable charge for a service provided.
3	Rule 3, proposed Second Schedule, 'Late Application – Public Notary' fee	The Committee's concerns regarding this fee are discussed in Delegated Legislation Monitor No. 7 of 2024. The Committee has concluded its scrutiny of this fee and appreciates the Board's engagement on this matter.

Please provide a response to the issues identified as nos 1 and 2 by **6 September 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no 3 is for information and noting only and does not require a response.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

27 August 2024

The Hon. Greg Pearce
Statutory and Other Offices Remuneration Tribunal

D24/042445

By email

Dear Mr Pearce

Statutory and Other Offices Remuneration Act 1975—Annual Determinations

As you are aware, on 19 October 2023, the Legislative Council adopted a resolution expanding the functions of the Regulation Committee to incorporate systematic review of delegated legislation against the scrutiny principles set out in the *Legislation Review Act 1987*, section 9(1)(b).

The Committee is now required to review all statutory rules that are subject to disallowance while they are so subject and has reviewed the following instruments, notice of the making of which was tabled in Parliament on 6 August 2024:

- *Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination*
- *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination*

The Committee has identified issues under the *Legislation Review Act 1987*, section 9(1)(b)(vii) on the basis that the form or intention of the instruments calls for elucidation. I am writing to you as the person holding office as the Statutory and Other Offices Remuneration Tribunal (***the Tribunal***) to seek clarification on the issues outlined below.

The Committee will consider your response and publish its conclusions regarding the instruments in a future Delegated Legislation Monitor. Consistent with its establishing resolution, the Committee may, if it has outstanding concerns, draw the instruments to the attention of the House or recommend to the House that the instruments, or part of the instruments, be disallowed. In certain circumstances, the Committee may seek further clarification.

Further information about the Committee's work practices and the application of the scrutiny principles is available in the *Guidelines for the operation of the Regulation Committee's technical scrutiny function,* on the NSW Parliament website.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination

	Provision	Issue
1	Determination No. 1 – Remuneration of Judges effective on and from 1 July 2024	The Committee notes that the *Statutory and Other Offices Remuneration Act 1975* (***the Act***), Schedule 2, Part 1 references various commissioners under the *Land and Environment Court Act 1979*. The Act, Schedules 1-3 do not appear to refer to the Chief Judge or another judge of the Land and Environment Court. The Committee seeks confirmation that the remuneration for these judicial officers has been included in Determination No. 1 for information only, noting that their remuneration appears to be established by the *Land and Environmental Court Act 1979*, section 9 instead.
2	Determination No. 1 – Remuneration of Judges effective on and from 1 July 2024	Determination No. 1 provides for the 'Remuneration of Judges', however, the Committee notes that not all office holders listed are necessarily judicial officers. For example, the President of the Industrial Relations Commission need only be 'an Australian lawyer of at least 7 years standing', as provided by the *Industrial Relations Act 1996*, section 149, and the reference to the Deputy President of the Industrial Relations Commission is a reference to a Deputy President who is *not* a judicial member (see the Act, Schedules 2 and 4).
3	Determination No. 2 – Remuneration of other Judicial Officers not referred to in Determination No. 1 effective on and from 1 July 2024 Determination No. 5 – Annual leave loading	The Committee notes that the *Industrial Relations Amendment Act 2023*, Schedule 1[113] abolished the office of Chief Commissioner of the Industrial Relations Commission and replaced it with the office of President of the Commission, the remuneration for which is set out in Determination No. 1. The *Industrial Relations Act 1996*, Schedule 4, clause 74(2) provides that 'A person who, immediately before the commencement day, held office as Chief Commissioner is taken to have been appointed as a Commissioner for the remainder of the person's term of appointment and is to be known as the Senior Commissioner.' On this basis, the Committee queries whether the reference to the Chief Commissioner of the Industrial Relations Commission in Determination No. 2 remains necessary, and whether it should be replaced with a reference to the Senior Commissioner. Similarly, in Determination No. 5, the Committee queries whether the reference to the Chief Commissioner should be a reference to the Senior Commissioner, or, alternatively, to a Presidential Member of the Commission within the meaning of the *Industrial Relations Act 1996*.
4	Determination No. 6 – Travel allowance for Judges and Magistrates	Determination No. 6 provides that the travel allowances for Judges and Magistrates will be based on the reasonable travel allowances as determined by the Australian Taxation Office in TD2024/3. The Committee notes that the travel allowances for Judges and Magistrates in the Annual Determination dated 26 July 2023 were based on TD2023/3. Comparing TD2024/3 and TD2023/3, it appears that there has been an increase in some of the relevant reasonable travel allowances (see, for example, Table 3, which provides for reasonable amounts for domestic travel expenses for employee's with an annual salary of $255,671 or more).

		The Committee notes that the *Statutory and Other Offices Remuneration (Judicial and Other Office Holders) Regulation 2013 (**the regulation**)*, clause 5A declares a 'temporary wages policy' whereby the Tribunal is not to make a determination that has the effect of awarding an increase in remuneration that takes effect before 1 July 2025. The Committee understands that a travel allowance, in certain circumstances, is a form of remuneration under the Act, section 10A. Given the temporary wages policy, the Committee seeks clarification on whether the reference to TD2024/3 as the basis for a travel allowance is consistent with the regulation, clause 5A.

Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executive Service—Annual Determination

	Provision	**Issue**
5	Section 1, paragraphs 2 and 4	The Act, Part 3A provides the framework for the Tribunal to determine remuneration packages for executive office holders. In the Committee's view, the former chief executives and senior executives to which this Annual Determination relates do not appear to fall within the definition of ***executive office holder***, which, under the Act, section 24A means a chief executive office holder or a senior executive office holder, in turn defined by reference to the holders of certain positions referred to in the *Public Sector Employment and Management Act 2002*. While the Chief Executive of the Ministry for Police and Emergency Services and the Director-General of the Ministry of Health, if not obsolete, appear to satisfy the definition of ***a chief executive office holder*** in the Act, section 24A, the Committee queries who else satisfies the definition of an ***executive office holder***. The Committee seeks clarification on the application of the Act, Part 3A to the former chief executives and senior executives to which this Annual Determination relates, and whether this determination can and should be made under the Act, Part 3B instead.
6	Section 1, paragraph 5	Paragraph 5 provides that 'The Tribunal has historically determined remuneration ranges which applied to certain executives in the Heath Service – the Specialist Medical Skills Determination and the General Medical Skills Determination.' The Committee seeks clarification on the legislative basis for the Tribunal to set these remuneration ranges, noting that the Act, Part 3A does not appear to apply to executives in the NSW Health Service other than potentially the Director-General of the Ministry of Health (see issue 5 above). In addition, the Committee seeks further information on the basis upon which an office is identified as requiring specialist or general medical skills.
7	Determinations No. 1 -3	The *Health Services Act 1997,* section 121G provides that 'The remuneration package of a NSW Health Service senior executive must be within the range determined under the *Statutory and Other Offices Remuneration Act 1975* for the band in which the executive is employed,

		except as provided by subsection (2)'. The Committee seeks clarification on the corresponding 'executive bands' for the remuneration packages set out in Determinations No. 1-3.

Please provide a response to the issues identified as nos 1 and 3-7 by **10 September 2024**, noting a copy of your return correspondence will be annexed to a future Delegated Legislation Monitor.

The issue identified as no 2 is for information and noting only and does not require a response.

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair

The Hon Paul Scully MP
Minister for Planning and Public Spaces

NSW GOVERNMENT

Ref: MDPE24/2639
Your Ref: D24/040879

The Hon Natasha Maclaren-Jones MLC
Chair, NSW Legislative Council Regulation Committee
Parliament House
Macquarie Street
Sydney NSW 2000
Regulation.Committee@parliament.nsw.gov.au

Dear Ms Maclaren-Jones Natasha

Thank you for your correspondence on behalf of the Regulation Committee about the *Environmental Planning and Assessment Amendment (High Speed Rail Authority) Regulation 2024* (Regulation).

I acknowledge the Committee's request for clarification of issues it has identified with the Regulation and provide the following information for further consideration.

Object of Regulation

The object of the Regulation is to prescribe the High Speed Rail Authority (Authority) established under the *High Speed Rail Authority Act 2022* (HSRA Act) of the Commonwealth as a public authority for the purposes of the *Environmental Planning and Assessment Act 1979* (EP&A Act). The Regulation also prescribes the Authority as a 'determining authority' for the purposes of the EP&A Act in limited circumstances. The Regulation amends the *Environmental Planning and Assessment Regulation 2021* (EP&A Regulation) to achieve those purposes.

Functions and powers of Authority

It is a function of the Authority to 'lead and coordinate policy development and planning' and 'undertake evaluations and research and gather information' in relation to the 'high speed rail network, the high speed rail corridor a faster rails network, and additional rail corridors for a faster rail network' (HSRA Act, section 8(1)(a)(i) and (iii)). Planning by the Authority may include transport and land use planning.

It is also a function of the Authority to 'construct or extend [a] railway in the State' for the high speed rail network or a faster rail network, where the Commonwealth has obtained the consent of the State, in line with paragraph 51 (xxxiv) of the Australian Constitution, to undertake that work (HSRA Act, s 8(1)(b)).

The Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions (HSRA Act, section 9(1)). The Authority's powers include, but are not limited to, the power to enter into contracts and agreements (HSRA Act, section 9(2)).

In the exercise of a function or power, it is important to note that the Authority does not have the privileges and immunities of the Crown in right of the Commonwealth (HSRA Act, section 10).

Factors giving rise to legislative reform in New South Wales are provided below.

Status as public authority

Various environmental planning instruments, including the *State Environmental Planning Policy (Transport and Infrastructure) 2021* (T&I SEPP), streamline the process for obtaining development consent depending on the type of development that is proposed to be carried out, and the person responsible for carrying out that development.

Chapter 2, Part 2.3 Division 15, Subdivision 1 of the T&I SEPP provides that development for the purposes of 'rail or rail related infrastructure facilities may be carried out by or on behalf of a public authority without consent on any land' (T&I SEPP, section 2.92(1)). Relevantly, a reference to development for the purpose of a railway or rail infrastructure facilities includes, among other things, the operation of a railway, construction works, track support earthworks, and the erection of temporary buildings or facilities, where that development is in connection with a railway or rail infrastructure facilities (T&I SEPP, section 2.92(2)).

As noted, the development approval pathway is only available in the circumstance where the development is carried out by, or on behalf of, a public authority. The phrase 'public authority' is defined in section 1.4 of the EP&A Act and does not include entitles established by Commonwealth legislation. This meant that the Authority was not a public authority within the meaning of the EP&A Act and, therefore, could not use the development approval pathways under Chapter 2, Part 2.3, Division 15, Subdivision 1 of the T&I SEPP.

In the absence of legislative reform, the Authority would need to prepare and lodge a development application seeking approval to carry out development for the purposes of a railway or rail related infrastructure. This applies to preliminary works such as investigations (geotechnical and other technical testing, surveying and the placement of survey marks, and sampling) (T&I SEPP, section 2.3(3)). The need to obtain development consent imposes an undue burden on the Authority and has potential to cause unnecessary delay in its operations.

Given the significance of the Authority's work, it was appropriate to extend the development approval pathways in the T&I SEPP (Chapter 2, Part 2.3, Division 15, Subdivision 1) to the Authority. This will ensure the Authority is able to carry out its important work without undue burden or delay.

I note that similar arrangements exist with respect to the Australian Rail Track Corporation Ltd – a corporation wholly owned by the Commonwealth Government (EP&A Regulation, Schedule 1, Section 1).

Status as determining authority

As a determining authority under Division 5.1 of the EP&A Act, the Authority would still be required to consider environmental impacts in relation to any activity, including preparing a review of environmental factors (or the preparation of environmental impact statement depending on the significance of impacts), and abide by the provisions of the EP&A Act and EP&A Regulation that apply to other public authorities. The Authority's determining authority functions extend to development for the purposes of rail infrastructure facilities related to the

high speed rail network and development on land in or adjacent to a rail corridor related to the high speed rail network.

I note that similar arrangements exist with respect to the Australian Rail Track Corporation Ltd (EP&A Regulation, Schedule 1, Section 1).

Response to scrutiny concerns

1. Schedule 1[2], proposed subsection (1)(a)

The phrase 'development for the purposes of rail and related transport facilities' is deliberately broad and not defined so as to avoid inadvertently excluding the Authority from being a public authority, within the meaning of the EP&A Act, for development related to the high speed rail network.

The types of development captured by the provision would include 'rail infrastructure facilities' as defined by s 2.91 of the T&I SEPP. It would also include other types of rail or transport infrastructure that may not be expressly referred to in an environmental planning instrument.

To avoid a scenario where the Authority is not considered a public authority because certain works do not fall within the definition of 'rail infrastructure facilities', the broader phrase 'development for the purposes of rail and related transport facilities' was used.

It is noted that proposed subsection (1)(a) does not authorise the Authority to carry out development. Rather, it prescribes the Authority as a public authority, under the EP&A Act, in limited circumstances. To carry out development, the Authority is still required to comply with the usual provisions of the EP&A Act, including the provisions of an applicable environmental planning instrument.

Furthermore, and perhaps more importantly, the Authority is prescribed to be a public authority, for the purposes of the EP&A Act, where development for the purposes of 'rail and related transport facilities' is related to the high speed rail network. The Authority is not a public authority within the meaning of the EP&A Act for any other purpose.

Schedule 1, s19 of the State Environmental Planning Policy (Planning Systems) 2021 designates development listed in this provision, which has an estimated development cost of $30 million or more as state significant development. Schedule 1, s19 of this SEPP does not authorise any development to be carried out, but it designates the planning approval pathway.

2. Schedule 1[2], proposed subsection (1)(b)(ii)

Chapter 2, Part 2.3, Division 15, Subdivision 1, section 2.92(1) provides that development for the purposes of a railway or rail infrastructure facilities may be carried out by or on behalf of a public authority without consent **on any land**. Section 2.92(1) applies to any land, and would include land in or adjacent to a rail corridor.

Chapter 2, Part 2.3, Division 15, Subdivision 1, section 2.93 also permits development of certain prescribed railways or railway projects to be carried out without development consent. This includes, for example, the Parramatta Rail Link, the Sydney Airport Rail Link and the Southern Sydney Freight Line, and currently does not apply to the high speed rail network.

Part 2.3, Division 15, Subdivision 2 of the T&I SEPP seeks to protect the existing and future rail systems and requires a development application located near or that may affect the rail network to, in certain circumstances, consult and seek concurrence of the rail authority in line

with section 4.13 of the EP&A Act. The provisions in Part 2.3, Division 15, Subdivision 2 apply to the development with consent approval pathway under Part 4 of the EP&A Act. This subdivision does not apply to the development without consent approval pathway that is permitted in sections 2.92 and 2.93 of the T&I SEPP and determined in accordance with Division 5.1 of the EP&A Act.

I trust that the above information is of assistance and provides clarification to the satisfaction of the Regulation Committee.

Should the Committee have any questions, Ben Sharpe, A/Director, Economic and Social Policy at the Department of Planning, Housing and Infrastructure can be contacted on or .

Thank you for bringing this to my attention.

Yours sincerely

Paul Scully MP
Minister for Planning and Public Spaces

28/8/24

52 Martin Place Sydney NSW 2000
GPO Box 5341 Sydney NSW 2001

02 7225 6080
nsw.gov.au/ministerscully

LEGISLATIVE COUNCIL

REGULATION COMMITTEE

10 September 2024

The Hon. Greg Pearce
Statutory and Other Offices Remuneration Tribunal

D24/045184

By email

Dear Mr Pearce

Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination

I write to you regarding the letter of 27 August 2024 in which the Regulation Committee sought clarification regarding scrutiny concerns under the *Legislation Review Act 1987*, section 9(1)(b)(vii) identified for the following instruments:

- *Statutory and Other Offices Remuneration Act 1975—Judges and Magistrates Group—Annual Determination*
- *Statutory and Other Offices Remuneration Act 1975—Former Chief and Senior Executives—Annual Determination*

As mentioned, the Committee is required to consider all instruments of a legislative nature that are subject to disallowance while they are so subject.

While the Committee appreciates the Tribunal's correspondence dated 10 September 2024 regarding the above instruments, it has come to our attention that the annual determination for Former Chief and Senior Executives is not subject to disallowance. Therefore, the Committee does not require a response from the Tribunal in relation to that annual determination.

Given that the Committee publishes in its Delegated Legislation Monitor all correspondence relevant to the scrutiny concerns identified by the Committee, the Tribunal may wish to send an updated copy of its correspondence without reference to the annual determination for Former Chief and Senior Executives. If the Tribunal chooses to do so, the Committee advises that only that version of the correspondence will be published in the monitor.

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA

Regulation.Committee@parliament.nsw.gov.au

If you have any questions about this correspondence, please contact Madeleine Dowd, Director – Regulation Committee, on or Regulation.Committee@parliament.nsw.gov.au.

Kind regards

The Hon Natasha Maclaren-Jones MLC
Committee Chair