



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

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

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# Membership

CHAIR	Mr Michael Johnsen MP, Member for Upper Hunter
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# Guide to the Digest

## COMMENT ON BILLS

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

## COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

### Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

# Conclusions

## PART ONE – BILLS

### 1. BIOFUELS AMENDMENT BILL 2016

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

#### *Matters which should be regulated by Parliament*

The Committee notes that a key element of what defines a retailer who must comply with minimum biofuel requirements will be prescribed by regulations. Matters which are central to the operation of a new regime should ideally be provided for in the Principal Act and not by regulation.

However, in this instance the Committee considers setting the threshold by regulation will allow for greater flexibility to amend the threshold when necessary and also provide an opportunity to consult relevant stakeholders through the Regulatory Impact Statement process. The Committee also notes that pursuant to section 41 of the *Interpretation Act 1987* the regulation will be subject to disallowance by either House of Parliament. The Committee makes no further comment.

#### *Commencement by proclamation*

The Committee prefers legislation to commence on assent or a fixed date. However the Committee notes that a key element for the operation of the Bill depends on the collection of data to assist with setting appropriate thresholds. The Committee makes no further comment.

### 2. CRIMES (DOMESTIC AND PERSONAL VIOLENCE) AMENDMENT (NATIONAL DOMESTIC VIOLENCE ORDERS RECOGNITION) BILL 2016

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

#### *Retrospectivity – Existing domestic violence orders made in New South Wales*

The Bill will allow an individual to apply to the court to have their existing domestic violence order declared to be subject to the national recognition scheme. The relevant domestic violence order may have existed prior to the commencement of the Bill. However, a nationally recognised order will only be enforceable against the defendant in New South Wales, according to the provisions of the Bill, when the declaration is made, which would be after the Bill commences. For this reason, and because the Bill is for the benefit of domestic violence victims across Australia, the Committee makes no further comments.

#### *Retrospectivity – Domestic violence orders made outside New South Wales*

The Bill will apply to certain domestic violence orders from participating jurisdictions that were made or varied before the commencement of the Bill. However, a domestic violence order that was not originally made in New South Wales, and any variation to it, will not be enforceable against the defendant in New South Wales until the commencement of the relevant provisions of the Bill. The Committee also notes that the Bill is for the benefit of domestic violence victims across Australia. The Committee makes no further comments.

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

*Commencement by proclamation*

The Committee generally prefers legislation to commence on a fixed date or on that assent, rather than by proclamation. However, the Attorney General advised the Parliament that the Bill will commence by proclamation to allow time to develop an interim information-sharing system for domestic violence orders that will be used by police and the courts for evidentiary purposes or to enforce orders. The Committee therefore makes no further comments.

3. LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) AMENDMENT (SNIFFER DOGS – REPEAL OF POWERS) BILL 2016\*

This Bill supports the principles and advances the human rights referenced in section 8A of the *Legislation Review Act 1987*.

4. PRIVACY AND PERSONAL INFORMATION PROTECTION AMENDMENT (STATE OWNED CORPORATIONS) BILL 2016\*

The expansion of the State's well-regarded privacy laws to state-owned corporations is consistent with the principles and objects contained in section 8A of the *Legislation Review Act 1987* with regard to human rights.

5. STEEL INDUSTRY PROTECTION BILL 2016\*

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

*Commencement by proclamation*

While the Bill provides for the Act to commence within a set timeframe after the date of assent, there is scope for the Act to commence earlier by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee makes no further comments on the basis that those affected by the Bill still have certainty that the Act will commence sometime within three months of assent.

## Part One – Bills

### 1. Biofuels Amendment Bill 2016

Date introduced	16 March 2016
House introduced	Legislative Assembly
Minister responsible	The Hon. Victor Dominello MP
Portfolio	Innovation and Regulation

#### PURPOSE AND DESCRIPTION

1. The objects of this Bill are to amend the *Biofuels Act 2007*:
  - (a) to extend the categories of retailers of petrol or diesel fuel who must comply with minimum biofuel requirements, and
  - (b) to impose additional requirements on retailers of petrol or diesel fuel to make petrol-ethanol blend available for sale, and
  - (c) to remove the obligation for wholesalers of petrol or diesel fuel to comply with minimum biofuel requirements but retain their obligation to provide returns, and
  - (d) to require retailers of petrol or diesel fuel who are not subject to the minimum biofuel requirements to provide returns in accordance with the regulations, and
  - (e) to provide IPART with power to make a determination about the reasonable wholesale price of ethanol, and
  - (f) to require all operators of service stations to provide a return principally for the purpose of setting an appropriate threshold in the regulations for compliance with the minimum biofuel requirements as proposed to be amended.

#### BACKGROUND

2. Since 2007 the *Biofuel (Ethanol Content) Act 2007* (the Act) has been in force. The Act provides for a minimum ethanol and biodiesel content requirement in respect of petrol and diesel fuel sales in New South Wales. This Bill seeks to amend the Act to:
  - require IPART to regulate the wholesale price of ethanol;
  - extend the categories of retailers who must comply with the minimum ethanol content requirement; and
  - provide a clearer exemptions regime.
3. In the Second Reading Speech, Minister Dominello stated that the above amendments will be accompanied by an information campaign delivered by the Government on the benefits of ethanol and the creation of an online fuel board for consumers to source the best prices for fuel.



## ISSUES CONSIDERED BY COMMITTEE

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

*Matters which should be regulated by Parliament*

4. Schedule 2 of the Bill extends the categories of retailers of petrol or diesel fuel who must comply with minimum biofuel requirements. Specifically, schedule 2 [5] substitutes 'major retailers' with 'volume fuel retailers'. 'Volume fuel retailers' are defined in the Bill as:
  - a person who operates or controls the operation of a volume fuel service station (whether or not the person also operates or controls the operation of any other service station and whether or not the person is also a fuel wholesaler), or
  - a person who operates or controls the operation of 20 or more service stations, none of which are volume fuel service stations.
5. Further, a 'volume fuel service station' is defined in the Bill as a service station at which:
  - 3 or more types of petrol or diesel fuel are available for sale by retail for the fuelling of motor vehicles at the service station (for example, regular unleaded petrol, unleaded petrol that has a research octane number of not less than 95 and diesel fuel), and
  - the total volume of petrol and diesel fuel sold by retail for the fuelling of motor vehicles at the service station (calculated as set out in section 9) exceeds a threshold prescribed by the regulations.
6. As detailed above, a key component of what defines a retailer that must comply with minimum biofuel requirements is whether the total volume of petrol and diesel fuel sold by the retailer exceeds a threshold prescribed by the regulations.
7. In the Second Reading Speech to the Bill, the Minister commented:

All service stations that sell three or more types of petrol and diesel, and have sales above a prescribed threshold will need to comply with the mandate. The threshold will be prescribed in the regulation, which will be the subject of a regulatory impact statement. The regulatory impact statement process will give me an opportunity for meaningful consultation with the industry on this crucial policy setting. Making a decision on the appropriate threshold requires good data.

**The Committee notes that a key element of what defines a retailer who must comply with minimum biofuel requirements will be prescribed by regulations. Matters which are central to the operation of a new regime should ideally be provided for in the Principal Act and not by regulation.**

**However, in this instance the Committee considers setting the threshold by regulation will allow for greater flexibility to amend the threshold when necessary and also provide an opportunity to consult relevant stakeholders through the Regulatory Impact Statement process. The Committee also notes that pursuant to section 41 of the *Interpretation Act 1987* the regulation will be**

**subject to disallowance by either House of Parliament. The Committee makes no further comment.**

*Commencement by proclamation*

8. The Bill provides for Schedule 2 to commence on a day or days to be appointed by proclamation.

**The Committee prefers legislation to commence on assent or a fixed date. However the Committee notes that a key element for the operation of the Bill depends on the collection of data to assist with setting appropriate thresholds. The Committee makes no further comment.**

## 2. Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Bill 2016

Date introduced	15 March 2016
House introduced	Legislative Assembly
Member responsible	The Hon. Gabrielle Upton MP
Portfolio	Attorney General

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to give effect to the New South Wales component of a national recognition scheme for domestic violence orders.

### BACKGROUND

2. In December 2015, every State and Territory agreed to introduce laws relating to a national domestic violence order scheme to hold domestic violence perpetrators accountable throughout Australia.
3. Under the scheme, domestic violence orders will be automatically recognised and enforceable in any State or Territory. Domestic violence orders from New Zealand can also be registered as part of the scheme. New South Wales is the first State to introduce the model laws through this Bill.
4. The model provisions were considered by the Advisory Panel on Reducing Violence against Women and their Children. A number of relevant stakeholders, including Legal Aid New South Wales and the Chief Magistrate of New South Wales, were also consulted in drafting the Bill.
5. The Attorney General's Second Reading Speech highlights that one in four Australian women have experienced at least one domestic violence incident by an intimate partner and four out of ten women over the age of 15 years have experienced violence during their lifetime.

### ISSUES CONSIDERED BY COMMITTEE

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

#### *Retrospectivity – Existing domestic violence orders made in New South Wales*

6. The Bill will allow an individual to apply to the registrar of a court for a declaration that their existing domestic violence order is a recognised domestic violence order in New South Wales and therefore part of the national recognition scheme. This will give some scope for domestic violence orders made before the commencement of the scheme to be recognised nationally.

7. However, an order that has been declared to be subject to the national scheme will only be enforceable against the defendant in New South Wales on the date the declaration is made (see Schedule 1 of the Bill, proposed sections 98ZY and 98ZZA to 98ZZD).

**The Bill will allow an individual to apply to the court to have their existing domestic violence order declared to be subject to the national recognition scheme. The relevant domestic violence order may have existed prior to the commencement of the Bill. However, a nationally recognised order will only be enforceable against the defendant in New South Wales, according to the provisions of the Bill, when the declaration is made, which would be after the Bill commences. For this reason, and because the Bill is for the benefit of domestic violence victims across Australia, the Committee makes no further comments.**

*Retrospectivity – Domestic violence orders made outside New South Wales*

8. The national recognition scheme, established by the Bill, will extend to some recognised domestic violence orders in participating jurisdictions made before the commencement of the Bill, including:
- any interstate domestic violence order made in another participating jurisdiction that is a recognised domestic violence order in that jurisdiction, including any variation to, or revocation of, the order;
  - any foreign order that becomes a registered foreign order in another participating jurisdiction that is a recognised domestic violence order in that jurisdiction, including any variation to, or revocation of, the order.
9. However, a domestic violence order that was not originally made in New South Wales, and any variation to it, will not be enforceable against the defendant in New South Wales until the commencement of the relevant provisions of the Bill (see Schedule 1 of the Bill, proposed section 98ZX of the *Crimes (Domestic and Personal Violence) Act 2007*).
10. Certain domestic violence orders are also taken to be recognised domestic violence orders and therefore subject to the national scheme. This extends to orders declared by a registrar of a court of another participating jurisdiction to be a recognised domestic violence order before the commencement date of the Bill, including any variation to, or revocation of, the order. The order, and any variations to it, will not be enforceable against the defendant in New South Wales until the commencement of the relevant provisions of the Act (see Schedule 1 of the Bill, proposed sections 98ZY and 98ZZ of the *Crimes (Domestic and Personal Violence) Act 2007*).

**The Bill will apply to certain domestic violence orders from participating jurisdictions that were made or varied before the commencement of the Bill. However, a domestic violence order that was not originally made in New South Wales, and any variation to it, will not be enforceable against the defendant in New South Wales until the commencement of the relevant provisions of the Bill. The Committee also notes that the Bill is for the benefit of domestic violence victims across Australia. The Committee makes no further comments.**

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

*Commencement by proclamation*

11. Clause 2 of the Bill provides that the Act commences on a day or days to be appointed by proclamation.

**The Committee generally prefers legislation to commence on a fixed date or on that assent, rather than by proclamation. However, the Attorney General advised the Parliament that the Bill will commence by proclamation to allow time to develop an interim information-sharing system for domestic violence orders that will be used by police and the courts for evidentiary purposes or to enforce orders. The Committee therefore makes no further comments.**

### 3. Law Enforcement (Powers and Responsibilities) Amendment (Sniffer Dogs – Repeal of Powers) Bill 2016\*

Date introduced	17 March 2016
House introduced	Legislative Assembly
Member responsible	Ms Jenny Leong MP
	*Private Member's Bill

#### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to repeal provisions relating to the use of sniffer dogs in carrying out drug detection and to make consequential amendments to other legislation.

#### BACKGROUND

2. The Bill seeks to limit the use of drug detection dogs to circumstances where police officers have a warrant for their use, rather than allowing them to be used more generally such as on public transport, at festivals and in bars.
3. In her Second Reading Speech, Ms Leong says the broad use of drug detection dogs in public spaces infringes on civil liberties, discriminates against certain sectors of the community, and creates a sense of fear.
4. She also refers to evidence suggesting the drug detection dog program is ineffective:
 

In 2015 the rate of false positives given by dogs averaged 75 per cent. That means that in three out of every four cases the dogs got it wrong and members of the public were forced to undergo intrusive and humiliating public searches with no drugs found.
5. In a report from 2006, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, the NSW Ombudsman questioned the effectiveness of the drug detection dog program and recommended considering whether the program should be retained at all.
6. Ms Leong refers to various organisations which support the Bill including Redfern Legal Centre, the NSW Council for Civil Liberties and the NSW Gay and Lesbian Rights Lobby.

#### ISSUES CONSIDERED BY COMMITTEE

**This Bill supports the principles and advances the human rights referenced in section 8A of the *Legislation Review Act 1987*.**

## 4. Privacy and Personal Information Protection Amendment (State Owned Corporations) Bill 2016\*

Date introduced	17 March 2016
House introduced	Legislative Assembly
Member responsible	Mr Paul Lynch MP
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Privacy and Personal Information Protection Act 1998* to remove the exclusion of State owned corporations from that Act and to extend that Act to State owned corporations that are not subject to the *Privacy Act 1988* of the Commonwealth. The amendment has been recommended by the Privacy Commissioner in a report to Parliament under section 61B of the *Privacy and Personal Information Protection Act 1998*.

### BACKGROUND

2. The Bill adopts a recommendation made by the NSW Privacy Commissioner in her *Report under section 61B of the Privacy Personal Information Protection Act 1998*, dated February 2015, that State Owned Corporations (SOCs) which are not already subject to the Cth *Privacy Act 1988* should be made subject to the NSW privacy legislation.
3. At present, three NSW SOC's are prescribed as subject to the Cth *Privacy Act 1988*. However, the remaining SOC's in NSW are currently not covered by the federal or state privacy legislation.
4. The NSW Privacy Commissioner recently told a parliamentary inquiry that the privacy exemption for SOC's was originally intended to ensure they were on a level playing field with commercial organisations. However, a statutory review of the NSW privacy legislation in 2003-2004 recommended SOC's be included in the legislation. The NSW Law Reform Commission has also made a similar recommendation.
5. In his Second Reading Speech, Mr Lynch notes that public concerns relating to privacy issues are increasing, particularly in relation to 'big data'.

### ISSUES CONSIDERED BY COMMITTEE

**The expansion of the State's well-regarded privacy laws to state-owned corporations is consistent with the principles and objects contained in section 8A of the *Legislation Review Act 1987* with regard to human rights.**

## 5. Steel Industry Protection Bill 2016\*

Date introduced	17 March 2016
House introduced	Legislative Council
Member responsible	Mr David Shoebridge MLC
	*Private Member's Bill

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to ensure, as far as practicable, that all steel used in public works or infrastructure constructed by or on behalf of public authorities is manufactured in Australia.

### BACKGROUND

2. Mr David Shoebridge, in his Second Reading Speech, says the Bill will secure a future for steelmaking at Port Kembla and in Whyalla as there is a serious risk the blast furnaces will close because of a downturn in international steel prices and dumping by overseas competitors and manufacturers. He notes the Australian Senate Standing Committee on Economics is currently holding hearings about the future of the nation's steel industry.
3. Mr Shoebridge highlights a recent report by BIS Shrapnel, which estimates less than 50 per cent of steel used in Australian public sector construction is produced domestically, a figure which is forecast to fall further. The report identifies a target of 90 per cent local steel use in infrastructure projects.
4. He also refers to overseas governments pursuing policies to protect their local steel industries. For example, he notes recent public works programs in the United States in which American steel must be used. In addition, Mr Shoebridge says the European Union is pursuing a program of import tariffs and anti-dumping legal challenges in response to a decline in steel prices.

### ISSUES CONSIDERED BY COMMITTEE

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

*Commencement by proclamation*

5. Clause 2 of the Bill provides that the Act commences three months after the date of assent, unless commenced sooner by proclamation.

**While the Bill provides for the Act to commence within a set timeframe after the date of assent, there is scope for the Act to commence earlier by proclamation. The Committee generally prefers legislation to commence on a fixed date or on assent, rather than by proclamation. However, the Committee makes no further comments on the basis that those affected by the Bill still have certainty that the Act will commence sometime within three months of assent.**



# Appendix One – Functions of the Committee

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

## **8A Functions with respect to Bills**

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

## **9 Functions with respect to Regulations**

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

- v that the objective of the regulation could have been achieved by alternative and more effective means,
  - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
  - vii that the form or intention of the regulation calls for elucidation, or
  - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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