



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

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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. GAS AND ELECTRICITY (CONSUMER SAFETY) BILL 2017

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

Right against self-incrimination; powers of entry

The Committee notes that Part 7 of the Bill empowers authorised officers to require individuals to comply with any requirements made by those officers, and answer any questions asked by those officers. The Committee notes that this cannot take place within residential premises without agreement or a warrant. The Committee also notes that the authorised officer must outline that a failure to comply with a valid request by the officer is grounds for an offence. As these are significant safeguards, and given the safety aims of the legislation, the Committee makes no further comment.

Reversal of onus of proof

The effect of the ‘show cause’ procedure in subclause 26(2) of the Bill is to reverse the onus of proof. A certificate holder must show cause as to why the certification should not be cancelled or suspended under subclause 26(1). Whilst the Committee notes the administrative convenience of reversing the onus of proof, the Committee questions whether such a reversal is necessary in the establishment of this electricity and gas consumer safety legislation.

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

Commencement by proclamation

The Committee generally prefers legislation to commence on asset or on a specified date. However, given the administrative requirements involved in harmonising the consumer safety features of the gas and electricity sectors, the Committee considers commencement by proclamation not to be an inappropriate delegation of legislative power in this instance.

Matters in the regulations

The Committee notes a number of clauses in the Bill enable the Minister to create regulations that are contrary to the primary legislation, particularly in relation to subclause 75(3) and clause 6. The committee also notes the regulations are empowered to create offences [subclause 42(c); subclause 67(1)]. The Committee questions whether this is an appropriate use of the regulation making power.

2. PUBLIC HEALTH AMENDMENT (VACCINATIONS OF CHILDREN ATTENDING CHILD CARE FACILITIES) BILL 2017*

Penalties

Given the public policy aims of the principal Act, and this Bill, the Committee does not think it unreasonable that a principal be subject to a penalty regime in circumstances where the principal enrolls a child in the absence of a valid certificate. The Committee makes no comments on this issue.

3. SECURING NSW STEEL INDUSTRY BILL 2017*

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

While the Bill provide 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 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 TWO – REGULATIONS

1. EXPLOSIVES AMENDMENT (TEMPORARY AMNESTY) REGULATION 2017

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

Insufficiently clear terms

Given that the purpose of the Regulation is to encourage persons in possession of explosives to take advantage of this temporary amnesty and relinquish possession of the explosive, the committee is concerned that subclause 115(1)(c) may discourage such persons from participating in the amnesty because the relevant particulars that may be requested are not outlined in the Regulation. The Committee therefore highlights this lack of clarity in the Regulation.

2. PUBLIC HEALTH (TOBACCO) AMENDMENT (E-CIGARETTES) REGULATION 2017

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

Notification of the sale of e-cigarettes; printed information for tobacco and e-cigarettes

The Committee notes the potentially deleterious effect on businesses following the requirement to reprint signage in relation to the sale of tobacco and e-cigarette products in circumstances where the current signage utilises more than one font. However, given the public health aims of this Regulation, the Committee makes no further comment on this Regulation.

3. UNIVERSITY OF SYDNEY AMENDMENT (STUDENT DISCIPLINE) BY-LAW 2017

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

Lack of clarity regarding procedural fairness

The Committee remains concerned that removing the definition of 'Appeals Committee' may have potential implications in relation to an individual's right to procedural fairness. For this reason, the Committee highlights the lack of clarity.

Part One – Bills

1. Gas and Electricity (Consumer Safety) Bill 2017

Date introduced	6 April 2017
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Minister For Innovation and Better Regulation

PURPOSE AND DESCRIPTION

1. The *Electricity (Consumer Safety) Act 2004* (the 2004 Act) and the *Gas Supply (Consumer Safety) Regulation 2012* (the 2012 Regulation) provide the main framework for regulation of consumer safety in relation to gas appliances and electrical articles, and gas and electrical installations and related work.
2. The objects of this Bill are as follows:
 - (a) to repeal the 2004 Act and 2012 Regulation and to consolidate the provisions of the Act and the primary provisions of the Regulation into one piece of legislation,
 - (b) to provide for a consistent compliance and enforcement regime for both energy sources (including by extending certain compliance mechanisms currently available for electricity safety, to gas safety),
 - (c) to align the maximum penalties for offences relating to gas safety with those relating to electricity safety,
 - (d) to enable authorised officers to prohibit the misuse of electrical articles, gas appliances or electrical or gas installations if the misuse presents a significant risk of death or injury to any person or significant damage to property,
 - (e) to enable certain rechargeable battery articles that are declared by the Secretary to be high risk battery articles to be regulated as electrical articles under the proposed Act,
 - (f) to enable regulations to be made to provide for the issue and enforcement of notices to rectify non-compliant electrical installation work and gasfitting work,
 - (g) to make consequential amendments to various other Acts and Regulations,
 - (h) to provide for other minor, consequential and ancillary matters,
 - (i) to enact provisions of a savings or transitional nature consequent on the enactment of the proposed Act.

BACKGROUND

3. The Bill seeks to consolidate the consumer laws relating to gas and electricity into one Act to provide what was described in the second reading speech as a 'clear, consistent and strong regulatory framework'. The Bill also introduces consistent enforcement powers to 'safeguard the safety of consumers regarding both gas and electrical products and services'.

ISSUES CONSIDERED BY COMMITTEE

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

Right against self-incrimination; powers of entry

4. Part 7 of the Bill governs the enforcement aspects of the legislation. Clause 45 outlines the offences relating to investigations and inspections, requiring individuals to comply with any requirements made, and answer any questions asked, by an authorised officer.
5. The Committee notes the following safeguards:
 - that a person is not guilty of an offence of failing to comply with a requirement under this section unless the person was warned on that occasion that a failure to comply is an offence [subclause 45(5)]
 - the power to enter and inspect residential premises is restricted to when permission is granted or under a warrant [clause 47]

The Committee notes that Part 7 of the Bill empowers authorised officers to require individuals to comply with any requirements made by those officers, and answer any questions asked by those officers. The Committee notes that this cannot take place within residential premises without agreement or a warrant. The Committee also notes that the authorised officer must outline that a failure to comply with a valid request by the officer is grounds for an offence. As these are significant safeguards, and given the safety aims of the legislation, the Committee makes no further comment.

Reversal of onus of proof

6. Subclause 26(1) provides the Secretary with the power to suspend a certification authority or cancel a certification authority, with subclause 26(2) providing that a show cause notice must be provided requiring the holder of the certification authority to 'show cause' why the authority should not be cancelled on the grounds specified in the notice.

The effect of the 'show cause' procedure in subclause 26(2) of the Bill is to reverse the onus of proof. A certificate holder must show cause as to why the certification should not be cancelled or suspended under subclause 26(1). Whilst the Committee notes the administrative convenience of reversing the onus of proof, the Committee questions whether such a reversal is necessary in the establishment of this electricity and gas consumer safety legislation.

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

7. Clause 2 of the Bill provides that the Act is to commence on a day or days to be appointed by proclamation.

The Committee generally prefers legislation to commence on asset or on a specified date. However, given the administrative requirements involved in harmonising the consumer safety features of the gas and electricity sectors, the Committee considers commencement by proclamation not to be an inappropriate delegation of legislative power in this instance.

Matters in the regulations

8. The proposed legislation includes clauses that empower the regulations to provide clearer guidance on how the proposed regulation of the supply of gas and electricity will work in practice. Some of these clauses relate to subject matter that may be more appropriately outlined in the principal legislation. The Committee particularly notes:

- Subclause 4(1) which enables the regulations to define exclusions with respect to what is considered an ‘electrical installation’
- The definition of ‘gas’, ‘gas component’ [subclause 4(1)]
- The exclusion of the application of the Act to high risk battery articles [clause 6]
- Additional grounds on which a model may be suspended or cancelled [subclause 18(2)]
- The creation of a penalty offence with a maximum penalty of 250 penalty units for an individual [subclause 42(c)]
- The creation of offences that may be dealt with before the Local Court of the Supreme Court [subclause 67(1)]
- The power to exempt unconditionally or subject to conditions persons, things or classes of persons or things from any or all of the provisions of this Act [Subclause 75(3)]
- The quantum of compensation for seized articles and appliances it to be determined in the regulations [subclause 57(5)]

The Committee notes a number of clauses in the Bill enable the Minister to create regulations that are contrary to the primary legislation, particularly in relation to subclause 75(3) and clause 6. The committee also notes the regulations are empowered to create offences [subclause 42(c); subclause 67(1)]. The Committee questions whether this is an appropriate use of the regulation making power.

2. Public Health Amendment (Vaccinations of Children Attending Child Care Facilities) Bill 2017*

Date introduced	6 April 2017
House introduced	Legislative Council
Member responsible	The Hon. Walt Secord MLC
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Public Health Act 2010 to prevent unvaccinated children being enrolled at child care facilities if the only reason that they are unvaccinated is a parent's conscientious beliefs.

BACKGROUND

2. On 12 March 2017, Prime Minister Malcolm Turnbull called on the State Premiers to support a concerted national policy so that children who are not vaccinated cannot attend preschool or childcare centres without a medical exemption.¹ This would have the effect of removing the option for unvaccinated children to be enrolled in preschools or childcare centres in circumstances where their parents or guardians are 'conscientious objectors'. The next meeting of the Council of Australian Governments is scheduled for 9 June 2017.
3. In his second reading speech, the Hon. Walt Secord MLC noted the focus of the amendments is to prevent unvaccinated children being enrolled in childcare facilities if the only reason that they are unvaccinated is based on a parent's belief.
4. Mr Secord outlined that the proposed amendments were focused on protecting children who legitimately cannot be vaccinated as opposed to parents who have a conscientious belief that vaccinations are not necessary.

'The bill only affects parents who, due to their personal beliefs and opinions, deny a proven medical treatment that protects both their children and other children from preventable serious illnesses.'

5. The Bill seeks to define a medical contraindication certificate as a 'certificate in the approved form by an authorised practitioner certifying that a specified child should have an exemption for one or more vaccines for specified vaccine preventable disease due to a medical contraindication to vaccination.'

¹ Prime Minister Malcolm Turnbull MP, Doorstop with David Coleman MP, 12 March 2017, <https://www.pm.gov.au/media/2017-03-12/doorstop-david-coleman-mp>

6. The Bill also proposes to create an offence if the principal of a child care facility enrolls a child at the facility that has not provided a vaccination certificate or a medical contraindication certificate, imposing a fine not exceeding 50 penalty units.

ISSUES CONSIDERED BY COMMITTEE

Penalties

7. The Committee notes to proposed insertion at the end of subsection 87(1) a maximum penalty of 50 penalty units for a principal who enrolls a child at a child care facility in the absence of a valid certificate under the principal Act.

Given the public policy aims of the principal Act, and this Bill, the Committee does not think it unreasonable that a principal be subject to a penalty regime in circumstances where the principal enrolls a child in the absence of a valid certificate. The Committee makes no comments on this issue.

3. Securing NSW Steel Industry Bill 2017*

Date introduced	6 April 2017
House introduced	Legislative Assembly
Member responsible	Mr Ryan Park MP
	* Private Member's Bill

PURPOSE AND DESCRIPTION

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

BACKGROUND

2. Mr Ryan Park MP, in his second reading speech stated that the object of the Bill is to require that publicly funded infrastructure projects or public works use at least 90 per cent Australian-made steel.
3. Mr Park noted that the Bill would provide security to tens of thousands of jobs, small businesses and contractors who rely on the steel industry and ensure a 'strong, robust and vibrant steel industry going forward'.
4. The Bill also introduces a New South Wales Steel Industry Advocate to certify the use of Australian-made steel and monitor its use in publicly funded projects.

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

Commencement by proclamation

5. Part 1 (2) of the Bill provides the Act would commence three months after the date of assent of this Act, unless commenced sooner by proclamation.

While the Bill provide 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 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 Two – Regulations

1. Explosives Amendment (Temporary Amnesty) Regulation 2017

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide for an amnesty from certain requirements relating to the possession and storage of an explosive. Under the proposed amnesty, a person who is in possession of an explosive is exempt from the requirement to hold a security clearance, or a licence, to possess or store the explosive if, during a 6-month period commencing on 15 March 2017, the person notifies a member of the NSW Police Force in relation to the explosive. The person is also exempt from certain offences against the Explosives Regulation 2013 (the 2013 Regulation) relating to the possession or storage of the notified explosive.
2. This Regulation is made under the Explosives Act 2003, including sections 6, 6A and 36 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Insufficiently clear terms

3. Schedule 1 of the Regulation provides for the insertion of a new clause 115 in the 2013 Regulation. Subclause 115(1) provides the requirements for the application of the clause as follows:
 - (a) that the person is in possession of the explosive
 - (b) that the person agrees to the surrender of the explosive to a police officer
 - (c) any other relevant particulars requested by the member of the NSW Police Force
4. Subclause 115(1)(c) does not provide sufficient certainty to potential persons who may wish to avail themselves of the new clause 115 as to what may be expected of them in order to qualify for the amnesty.

Given that the purpose of the Regulation is to encourage persons in possession of explosives to take advantage of this temporary amnesty and relinquish possession of the explosive, the committee is concerned that subclause 115(1)(c) may discourage such persons from participating in the amnesty because the relevant particulars that may be requested are not outlined in the Regulation. The Committee therefore highlights this lack of clarity in the Regulation.

2. Public Health (Tobacco) Amendment (E-Cigarettes) Regulation 2017

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are to:
 - (a) extend to e-cigarette retailers a provision that requires tobacco product retailers to display warning notices relating to the sale of tobacco products to minors, and
 - (b) modify an exemption from a prohibition on tobacco advertising under the *Public Health (Tobacco) Act 2008* by requiring price tickets and price boards to use only one font when displaying retail prices and product names for tobacco products and e-cigarettes.
2. This Regulation is made under the *Public Health (Tobacco) Act 2008*, including sections 16 (3) (e) and 58 (the general regulation-making power).

ISSUES CONSIDERED BY COMMITTEE

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

Notification of the sale of e-cigarettes; printed information for tobacco and e-cigarettes

3. The regulation further regulates e-cigarettes at the point of sale. This includes warning notices in relation to the sale of products to minors and placing an additional requirement in relation to price tickets and price boards to use only one font when displaying retail prices and product names for tobacco products and e-cigarettes.

The Committee notes the potentially deleterious effect on businesses following the requirement to reprint signage in relation to the sale of tobacco and e-cigarette products in circumstances where the current signage utilises more than one font. However, given the public health aims of this Regulation, the Committee makes no further comment on this Regulation.

3. University of Sydney Amendment (Student Discipline) By-law 2017

PURPOSE AND DESCRIPTION

1. The object of this By-law is to remove from the *University of Sydney By-law 1999* the procedures for disciplining students so that the matter can be dealt with in the University's rules. This By-law is made under the *University of Sydney Act 1989*, including section 36 (the general power to make by-laws).
2. This Regulation is made under the *University of Sydney Act 1989*, including section 36 (the general power to make by-laws)

ISSUES CONSIDERED BY COMMITTEE

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

Lack of clarity regarding procedural fairness

3. Schedule 3 of the Regulation omits the definition of the term 'Appeals Committee' from clause 3(1).
4. It is not clear to the Committee whether removing the definition of the 'Appeals Committee' may result in a trespass on an individual's appeal rights.

The Committee remains concerned that removing the definition of 'Appeals Committee' may have potential implications in relation to an individual's right to procedural fairness. For this reason, the Committee highlights the lack of clarity.

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,

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FUNCTIONS OF THE COMMITTEE

- 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.