



## 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

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

# Conclusions

## PART ONE – BILLS

### 1. FAIR TRADING LEGISLATION AMENDMENT (CONSUMER GUARANTEE DIRECTIONS) BILL 2018

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

*Commencement by Proclamation*

The Bill outlines that the Act is to commence by proclamation. The Committee generally prefers that legislation commence by assent or on a fixed date to afford certainty to those affected by the Act. The Committee notes that this Bill makes a number of changes to multiple Acts in relation to consumer protection and Fair Trading practices and powers. In these circumstances the Committee acknowledges the administrative convenience of such a provision and makes no further comment.

*Matters deferred to regulations*

The Bill defers several matters dealing with consumer guarantee directions to the regulations. The Committee generally prefers that substantive matters are dealt with in the principal legislation. Given that the matters deferred to the regulations includes the provision of reasons for making or refusing to make a decision in relation to a consumer guarantee direction, the Committee considers that these are matters more appropriately addressed in the principal legislation and subject to parliamentary scrutiny. The Committee refers the issue to the attention of Parliament.

### 2. PAINTBALL BILL 2018

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

*Strict liability*

The Committee notes that the Bill introduces strict liability in relation to a number of offences. The Committee generally comments where strict liability occurs as the prosecution is not required to prove intent on the part of the accused. While the Committee notes the period of imprisonment which attaches to these offences, it considers that the strict liability is designed to ensure compliance with the regulatory framework and the safe and appropriate use of paintball markers. The Committee makes no further comment.

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

*Commencement by proclamation*

The Bill provides for the Act to commence on a day or days to be appointed by proclamation. The Committee usually prefers that Acts commence on assent or a specified date so that the Executive does not have unfettered control over the commencement date and certainty is provided for the community.

However, the Committee notes that the Bill introduces a new regulatory framework for the paintball industry and flexibility as to commencement may be required to ensure all affected parties are informed of their obligations.

### 3. ROAD TRANSPORT LEGISLATION AMENDMENT (PENALTIES AND OTHER SANCTIONS) BILL 2018

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

##### *Penalty notice offence deemed first offence*

The Bill's introduction of penalty notices for low range drink and drug driving offences will lead to many first offences being dealt with by penalty notice instead of by a court. This will likely result in fewer offenders having their driving matter decided by a court, which is usually better placed to consider all relevant circumstances of an offence. However, the Committee notes that a person can still elect to take a penalty notice to court, and that the proposed change may reduce the administrative burden on the court generally.

The Committee also acknowledges that treating an offence as a second or subsequent offence may attract higher penalties. However, the Committee notes that allowing penalty notice offences to be classed as 'first offences' is consistent with the Bill's aim of targeting repeat offenders of drink and drug driving offences. As such, the Committee understands the rationale for expanding the circumstances in which an offence is considered a second or subsequent offence and the Committee makes no further comment.

#### ***Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: section 8A(1)(b)(ii)***

##### *Broad definition*

The Committee notes the expanded definition of "drug", aimed at capturing substances not currently prohibited by legislation but which have the effect of impairing a person's driving. The Committee notes the broad definition and is concerned that the wide definition may lead to inconsistencies in its application and confusion as to what the law is at a given time.

However, the Committee acknowledges the difficulties in prosecuting offences where emerging drugs, not currently prohibited for the purposes of the Act, are impairing drivers. The Committee considers the broad definition will assist in prosecuting offences in these circumstances and aid deterrence. The Committee makes no further comment.

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

##### *Commencement by proclamation*

The Bill provides for the Act to commence on a day or days to be appointed by proclamation. The Committee usually prefers that Acts commence on assent or a specified date so that the Executive does not have unfettered control over the commencement date and certainty is provided for the community.

However, the Committee notes that in the Second Reading Speech, the Minister indicated that it is anticipated that the amendments to the Act will commence in May 2019. This will allow relevant Government agencies to update their procedures and for communications to occur. As such, the Committee makes no further comment.

## Part One – Bills

# 1. Fair Trading Legislation Amendment (Consumer Guarantee Directions) Bill 2018

Date introduced	8 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

### PURPOSE AND DESCRIPTION

1. The objects of this Bill are:
  - a) to enable the Commissioner for Fair Trading to resolve certain small consumer claims disputes by way of a direction to repair or replace, or make a refund in relation to, the consumer good concerned (a consumer guarantee direction), and
  - b) to make further provision with respect to compliance and enforcement under the *Fair Trading Act 1987*, the *Plumbing and Drainage Act 2011* and the *Property, Stock and Business Agents Act 2002*.

### BACKGROUND

2. This Bill grants powers to the Commissioner of Fair Trading to resolve disputes involving low-cost goods. In his second reading speech, the Minister noted that a large proportion of consumer disputes are experienced in the low-value goods range. While most of these disputes can be resolved directly between the consumer and business, the Bill outlines measures that Fair Trading may now use to resolve these types of disputes without escalating it to the NSW Civil and Administrative Tribunal.

### ISSUES CONSIDERED BY COMMITTEE

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

##### *Commencement by Proclamation*

3. Section 2 of the Bill outlines that the Act is to commence by proclamation.

**The Bill outlines that the Act is to commence by proclamation. The Committee generally prefers that legislation commence by assent or on a fixed date to afford certainty to those affected by the Act. The Committee notes that this Bill makes a number of changes to multiple Acts in relation to consumer protection and Fair Trading practices and powers. In these circumstances the Committee acknowledges the administrative convenience of such a provision and makes no further comment.**



*Matters deferred to regulations*

4. Schedule 1 of the Bill defers several matters to the regulations, including reasons that permit the Secretary to decline to accept an application for a consumer guarantee direction. Under the proposed clause 7 of Schedule 3, the regulations may also make provisions relating to:
- a) the procedures to be used by the Secretary in making consumer guarantee directions,
  - b) the written and oral submissions and evidence that the consumer and supplier may provide to the Secretary before the making of a consumer guarantee direction,
  - c) the provision of reasons for making or refusing to make a decision in relation to a consumer guarantee direction,
  - d) the making and withdrawal of applications for consumer guarantee directions.

**The Bill defers several matters dealing with consumer guarantee directions to the regulations. The Committee generally prefers that substantive matters are dealt with in the principal legislation. Given that the matters deferred to the regulations includes the provision of reasons for making or refusing to make a decision in relation to a consumer guarantee direction, the Committee considers that these are matters more appropriately addressed in the principal legislation and subject to parliamentary scrutiny. The Committee refers the issue to the attention of Parliament.**

## 2. Paintball Bill 2018

Date introduced	8 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Matt Kean MP
Portfolio	Innovation and Better Regulation

### Purpose and description

1. The objects of this Bill are to recognise that paintball markers are not firearms, to remove the regulation of paintball markers from the *Firearms Act 1996* and to instead establish a separate system of permits for the regulation of paintball markers and of paintball venues.

### BACKGROUND

2. In the Second Reading Speech, the Minister indicated that this Bill seeks to establish a new regulatory framework for paintball markers and activities in order to support the safety and security of players and reduce red tape for businesses. The Minister commented:

Tens of thousands of paintball games are played in our State each year by thousands of people. The New South Wales Government recognises that the current regulation of paintball imposes unnecessary regulatory burdens on the industry, stifling its growth and prosperity.<sup>1</sup>

3. The Minister further commented that in determining to implement a new regulatory framework the Government reviewed crime statistics, hospital data, work health and safety statistics, and complaints data from the NSW Fair Trading. The Minister indicated this review demonstrated the industry is a low-risk industry with very few safety issues.<sup>2</sup>

### ISSUES CONSIDERED BY COMMITTEE

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

##### *Strict liability*

4. The Bill introduces a number of strict liability clauses in relation to offences concerning the use, possession and purchase of paintball markers. That means, in any prosecution for an offence under the Act, the Crown will not have to show the accused intended to use, possess or purchase a paintball marker in the way specified by the Act.
5. For example, under proposed section 5 a person must not use a paintball marker other than at an authorised paintball venue. In this instance, the Bill has not provided any

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<sup>1</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, Wednesday 8 August 2018, p 57(The Hon Matt Kean MP, Minister for Innovation and Better Regulation)

<sup>2</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, Wednesday 8 August 2018, p 57(The Hon Matt Kean MP, Minister for Innovation and Better Regulation)

defence for contravening the section. The maximum penalty for the offence is imprisonment for two years or 500 penalty units.

6. The Committee notes that strict liability clauses are not uncommon in regulatory settings to enable compliance and strengthen offence provisions. The Committee also notes that the common law defence of an honest and reasonable mistake of fact applies to strict liability offences.<sup>3</sup>

**The Committee notes that the Bill introduces strict liability in relation to a number of offences. The Committee generally comments where strict liability occurs as the prosecution is not required to prove intent on the part of the accused. While the Committee notes the period of imprisonment which attaches to these offences, it considers that the strict liability is designed to ensure compliance with the regulatory framework and the safe and appropriate use of paintball markers. The Committee makes no further comment.**

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

##### *Commencement by proclamation*

7. The Bill provides for the Act to commence on a day or days to be appointed by proclamation.

**The Bill provides for the Act to commence on a day or days to be appointed by proclamation. The Committee usually prefers that Acts commence on assent or a specified date so that the Executive does not have unfettered control over the commencement date and certainty is provided for the community.**

**However, the Committee notes that the Bill introduces a new regulatory framework for the paintball industry and flexibility as to commencement may be required to ensure all affected parties are informed of their obligations.**

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<sup>3</sup> *Proudman v Dayman* (1941) 67 CLR 536; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report 129, December 2015 at 287.

### 3. Road Transport Legislation Amendment (Penalties and other Sanctions) Bill 2018

Date introduced	8 August 2018
House introduced	Legislative Assembly
Minister responsible	The Hon. Melinda Pavey MP
Portfolio	Roads, Maritime and Freight

#### Purpose and description

1. The objects of this Bill are:
  - a) to allow for the issue of penalty notices in respect of certain alcohol and other drug related driving offences, while maintaining other relevant sanctions (including licence suspensions) in respect of those offences, and
  - b) to ensure that certain offences that are dealt with by way of penalty notice are included for the purposes of determining whether a new offence is a second or subsequent offence, and
  - c) to increase the maximum penalties for certain alcohol and other drug related driving offences, and
  - d) to permit Roads and Maritime Services (RMS) to require persons convicted of certain alcohol and other drug related driving offences to undertake education programs and to suspend or cancel any licence held by an offender until the offender has completed the program, and
  - e) to expand the definition of drug to include substances that can impair, or deprive a person of, normal mental or physical faculties, and
  - f) to create an offence for conduct that results in damage, disruption or obstruction and certain other conduct on the Sydney Harbour Bridge and other major bridges and tunnels.

#### BACKGROUND

2. This Bill amends road transport legislation to introduce amendments in line with the New South Wales Government's Road Safety Plan 2021. The amendments include:
  - introducing licence suspension and penalty notices for low level PCA offences and drug presence first offences;
  - expanding the mandatory alcohol interlock program to include more offences;
  - provisions requiring drink and drug driving offenders to complete and education course; and

- creating an offence relating to actions that cause damage, disruption or obstruct vehicles and pedestrians on the Sydney Harbour Bridge.
3. In the Second Reading Speech (SRS), the Minister stated that the reforms concerning issuing penalty notices for low range PCA offences are consistent with several other jurisdictions:
- Several other jurisdictions in Australia, including Victoria, South Australia, Western Australia and Tasmania already deal with low-range PCA first offences with the issuing of penalty notices. Victoria, South Australia and the Northern Territory also issue penalty notices for drug presence first offences<sup>4</sup>
4. The Minister indicated that by issuing penalty notices, coupled with roadside licence suspensions, for first offence low-range PCA and drug presence offences will allow penalties to be swiftly applied and also take dangerous drivers off the road. In the SRS, the Minister commented that for the three year period ending in June 2017, 56 per cent of low range drink driving first offences resulted in a non-conviction order in court.<sup>5</sup>
5. Other amendments in the Bill including expanding the mandatory alcohol interlock program will also bring New South Wales in line with other jurisdictions.

## ISSUES CONSIDERED BY COMMITTEE

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

#### *Penalty notice offence deemed first offence*

6. The Bill provides that a first drink or drug driving offence will be dealt with by a penalty notice. In contrast, current provisions require a conviction by a court before an offence can be considered a first offence.
7. The Bill also provides that an offence that has been dealt with by penalty notice will be considered a previous offence for the purposes of determining whether there is a second or subsequent offence. Treating an offence as a second or subsequent offence attracts higher penalties and additional sanctions.
8. Proposed section 9(2A) provides that if a person is convicted of an offence against the *Road Transport Act 2013* then that offence is a second or subsequent offence if:
- within the 5 year period before the conviction the person had committed an alcohol or other drug related driving offence; and
  - that previous offence was an equivalent offence and was dealt with by way of penalty notice.
9. Currently, an offence is a second or subsequent offence only if the person was convicted by a court of a prior equivalent offence within the applicable re-offending period. Convictions are recorded after a matter has been dealt with by a court where the

<sup>4</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, Wednesday 8 August 2018, p 19 (The Hon Melinda Pavey MP, Minister for Roads, Maritime and Freight)

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, Wednesday 8 August 2018, p 19 (The Hon Melinda Pavey MP, Minister for Roads, Maritime and Freight)

individual circumstances of the offence can be adjudicated. Offences dealt with by penalty notice are not recorded as convictions.

10. The effect of the Bill will be to make an offence dealt with by a penalty notice a first offence for any future offending. Although a person can still elect to take a penalty notice to court, generally a conviction will be recorded without the Court having the opportunity to consider the individual circumstances of an offence.
11. There will be no requirement for a conviction to be recorded by a court where the individual circumstances of the offence can be adjudicated.
12. The Committee notes that the Bill allows for drink and drug driving offences dealt with by penalty notice to be regarded as a first offence for the purposes of any future offending.

**The Bill's introduction of penalty notices for low range drink and drug driving offences will lead to many first offences being dealt with by penalty notice instead of by a court.<sup>6</sup> This will likely result in fewer offenders having their driving matter decided by a court, which is usually better placed to consider all relevant circumstances of an offence. However, the Committee notes that a person can still elect to take a penalty notice to court, and that the proposed change may reduce the administrative burden on the court generally.**

**The Committee also acknowledges that treating an offence as a second or subsequent offence may attract higher penalties. However, the Committee notes that allowing penalty notice offences to be classed as 'first offences' is consistent with the Bill's aim of targeting repeat offenders of drink and drug driving offences. As such, the Committee understands the rationale for expanding the circumstances in which an offence is considered a second or subsequent offence and the Committee makes no further comment.**

**Makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers: section 8A(1)(b)(ii)**

*Broad definition*

13. The Bill amends the definition of "drug" in the *Road Transport Act 2013* to include any substance that when taken by an ordinary person may deprive the person of, or impair, their normal or physical faculties.
14. In the SRS, the Minister commented that this amendment aims to assist drug-driving prosecutions.<sup>7</sup> The amendment means that if a driver is detected driving while under the influence of a new type of illegal or pharmaceutical substance, and the prosecution can establish that a substance meets this description, then this will be considered a drug for the purposes of the Act. Currently, only drugs prohibited by the *Drug Misuse and Trafficking Act 1985* and related regulations fall within the definition. Additionally, in any prosecution, evidence will still be required to prove that the person's driving was impaired by the substance. The Minister further commented:

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<sup>6</sup> NSW Law Reform Commission, Report 132 – *Penalty Notices*, February 2012 at p 4

<sup>7</sup> New South Wales, Parliamentary Debates, Legislative Assembly, Wednesday 8 August 2018, p 22 (The Hon Melinda Pavey MP, Minister for Roads, Maritime and Freight)

Importantly, this does not ban the use of medication and driving; it simply reinforces that if a driver is under the influence of any substance, we expect that person not to drive.

**The Committee notes the expanded definition of "drug", aimed at capturing substances not currently prohibited by legislation but which have the effect of impairing a person's driving. The Committee notes the broad definition and is concerned that the wide definition may lead to inconsistencies in its application and confusion as to what the law is at a given time.**

**However, the Committee acknowledges the difficulties in prosecuting offences where emerging drugs, not currently prohibited for the purposes of the Act, are impairing drivers. The Committee considers the broad definition will assist in prosecuting offences in these circumstances and aid deterrence. The Committee makes no further comment.**

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

*Commencement by proclamation*

15. The Bill provides for the Act to commence on a day or days to be appointed by proclamation.

**The Bill provides for the Act to commence on a day or days to be appointed by proclamation. The Committee usually prefers that Acts commence on assent or a specified date so that the Executive does not have unfettered control over the commencement date and certainty is provided for the community.**

**However, the Committee notes that in the Second Reading Speech, the Minister indicated that it is anticipated that the amendments to the Act will commence in May 2019. This will allow relevant Government agencies to update their procedures and for communications to occur. As such, the Committee makes no further comment.**

## Appendix One – Functions of the Committee

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

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

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

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

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



- v that the objective of the regulation could have been achieved by alternative and more effective means,
  - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
  - vii that the form or intention of the regulation calls for elucidation, or
  - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- 2 Further functions of the Committee are:
- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
  - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

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