Legislation Review Committee

PARLIAMENT OF
NEW SOUTH WALES

Correspondence received in response to the Legislation Review Committee Digest No. 40 – 22 March 2022

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The Hon. Stuart Ayres MP
Minister for Enterprise, Investment and Trade
Minister for Tourism and Sport
Minister for Western Sydney

Reference: CRML22/77
Your reference: D22/06747

Mr Dave Layzell MP
Chair
Legislation Review Committee
Parliament of New South Wales
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29 MAR 2022

Dear Mr Layzell

Thank you for your Committee's comments on the Motor Sports Bill 2022.

As an overall point, I would note that the Bill largely maintains the policy settings in the existing *Major Events Act* and the three motor sport major events Acts – *Mount Panorama Motor Racing Act*, the *Motor Racing (Sydney and Newcastle) Act* and the *Motor Sports (World Rally Championship) Act.*

The concerns raised in your correspondence therefore often apply to the existing four Acts and I am not aware of any major issues in their use. Naturally, some affected residents will always be concerned about the temporary use of public streets near their homes for major motor racing. However, the purpose of the current Acts and the Bill is to support local economies and jobs, against which any temporary impact on residents should be balanced.

The comments below draw out some of the legislative protections in the Bill, as well as noting where the operational implementation of the laws addresses some of your concerns.

Freedom of Movement

The suggestion is that residents or business owners may be excluded from their properties.

This is not how this legislation is implemented in a practical sense. I would draw your attention to the existing Motor Racing (Sydney and Newcastle) Regulation 2017. You will see that clauses 9 and 10 of the Regulation provide for Resident and Business passes which allow access to areas otherwise closed.

I would also note that provisions in the Bill relating to road closures (section 28(2)) and works (section 14) require that affected persons be consulted, which allows them to raise concerns.

I further note the works provisions allow for temporary pedestrian access works to be constructed (e.g., a pedestrian overpass) to moderate any impacts (section 17(1)(b)), so the Bill actually facilitates access.

Self-Incrimination

The Bill does facilitate questioning by authorised officers but only for an authorised purpose – that is, to administer or enforce the Act. That is, the ambit of this questioning power is small.

As noted in your correspondence, a person can object to providing information and this has a protective effect.

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Risk of arbitrary search – property

This part of the Bill is modelled on s39 of the existing *Major Events Act*.

As your analysis also notes, such a power supports issues such as security during a race.

Risk of arbitrary search – persons

The Bill facilitates a search of outer garments and possessions where persons wish to enter the racing area. This is a normal measure in our society where people are seeking ticketed entry to major events and allows weapons or alcohol to be located, which is in the public interest.

Liability of Directors and Offences by Corporations

I believe that the Bill strikes a balance, as your analysis notes, between a high mental element and a high pecuniary penalty.

I note that the way these events are run, the Government Coordinating Agency will be in daily contact with the Promoter (the Corporation) and will be able to draw breaches directly to the attention of company officers, which will aid in proving the mental element for any ongoing breach.

Freedom of contract

The provisions in the Bill you raise are modelled on section s35 and 37 of the *Motor Racing (Sydney and Newcastle) Act.*

The purpose of these provisions is to address persons putting up ad hoc signage to take advantage of high levels of media coverage where the ad hoc signage may be from competitors to race sponsors. I believe that provisions of this kind give reassurance to sponsors and thus support the delivery of large events, for which sponsorship is an important financial consideration.

Quiet use of land

I believe your analysis may have omitted to note section 16(c) of the Bill, which contrary to the statement in the first paragraph of this section of your analysis, does create a positive legal obligation on the Government Coordinating Agency not to sign off on works unless satisfied that there will be the minimum of impact on the environment, or disruption to lawful activities.

Wide and ill-defined power – conditions for event promoters

This is a critical provision and one that is modelled on the existing legislation, for instance s15 of the *Motor Racing (Sydney and Newcastle) Act.* The Bill has been developed in close consultation with key Promoters, such as Supercars, who have not raised concerns of the kind your analysis proposes.

The fundamental operating mechanism of the Bill and the existing law is that certain regulatory schemes are suspended and are replaced with permit conditions. This is essential to offering a commercial proposition to interested Promoters - we are offering a facilitated authorisation process.

To balance this, we need to be able to make a wide range of permit conditions to support the public interest. Given each race is different, the types of permit conditions must be broad.

Again, the practical implementation of these provisions is that permit conditions are negotiated with the Promoter, rather than being suddenly imposed.

Matters deferred to the regulations

Your analysis here raises concerns that the Regulation making power is broad, in particular that it allows offences to be created in the Regulations. As you would appreciate, it is the function of Regulations to contain a lot of operational detail and many Regulations will establish offences.

Section 43 of the *Motor Racing (Sydney and Newcastle) Act* allows offences to be created in the Regulation as well as many other operational requirements.

Again, the impact on Promoters you raise does not take account of the process by which these motor races are conducted. A lengthy planning process will occur where the Government Coordinating Agency will work with the Promoter on operational details, and in fact the Promoter will be closely consulted on the contents of the event specific Regulation, since this a key tool for them to create important operational measures, such as Residents Access Permits.

I hope you find these comments of use.

Yours sincerely

The Hon. Stuart Ayres MP
Minister for Enterprise, Investment and Trade
Minister for Tourism and Sport
Minister for Western Sydney

The Hon. James Griffin MP
Minister for Environment and Heritage

Your ref: D22/12849
Our ref: MD22/1278

Mr Dave Layzell MP
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By email: legislation.review@parliament.nsw.gov.au

Dear ~~Chair~~ Dave,

Thank you for your correspondence about the Pesticides Amendment Regulation 2021 (the Regulation). I appreciate the Legislation Review Committee's feedback and comments.

As you would be aware the Regulation was published on 26 November 2021 with some provisions commencing on that date and the remainder on 17 December 2021. Regarding the specific issues in your correspondence, I can advise the following.

Review of shorter licence term

This provision along with the introduction of the option of a one-year pesticides licence duration was included in the Regulation after approaches from members of the public and the Office of the Small Business Commissioner seeking greater flexibility in licence duration. As acknowledged by the Committee, the shorter term is intended to be applied for public interest purposes and applicants do have recourse to the NSW Civil and Administrative Appeals Tribunal. I note that the Committee has not referred this matter to Parliament for consideration.

Property rights – limitation of notice requirements

The Regulation addresses an unintended consequence introduced when the Pesticides Regulation 2009 (the Pesticides Regulation) was remade in 2017. Until that time the notice obligations of concern to the Committee applied directly to 'pest management technicians', but after 1 September 2017 the terminology was changed to persons undertaking pest management technician 'work', to also apply the requirement to holders of the newly introduced training permits for prospective licensees.

The NSW Environment Protection Authority (EPA) subsequently identified that this change inadvertently captured persons licenced under the *Home Building Act 1989* who apply waterproofing membranes, blankets and ancillary products that may also contain a pesticide. The Regulation introduced an exclusion for these persons, restoring the original intention of the notification provisions.

Meaning of 'reasonable time'

As noted by the Committee, the intention of allowing 'reasonable time' for disposal of pesticides where the registration has been ended by the Australian Pesticides and Veterinary Medicines Authority is to provide flexibility in sourcing safe and lawful disposal options.

The EPA advises that in agricultural and commercial situations disposal of pesticides often depends on the availability of industry and government collection and receival initiatives. These may only be offered periodically and in recent years their timing has been disrupted by bushfires, COVID-19 restrictions and floods.

Accordingly, the Regulation allows timing to be considered on a case-by-case basis while ensuring that pesticides awaiting disposal remain unused and are stored appropriately.

Thank you again for your considered review of the Regulation.

Yours sincerely

James Griffin MP
Minister for Environment and Heritage
4/5/22

The Hon. Anthony Roberts MP
Minister for Planning
Minister for Homes

Your ref: D22/12848
Our ref: MDPE22/448

Mr Dave Layzell MP
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Dear Chair

Thank you for your correspondence regarding the matters identified by the Legislation Review Committee (Committee), in its Legislation Review Digest No. 40/57, in relation to the *Environmental Planning and Assessment Amendment (Housing) Regulation 2021* (the Regulation).

I note the Committee's concerns regarding the Regulation in accordance with section 9 of the *Legislation Review Act 1987* (LRA) and offer the comments below:

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

I am advised it is accepted practice to set out consent conditions in the Environmental Planning and Assessment Regulation.

The consent conditions referred to by the Committee all relate to affordable housing. The NSW Affordable Housing Guidelines referred to in these consent conditions establish clear and consistent frameworks for matters relating to affordable housing. These include the setting of rents and eligibility limits, and the delivery of affordable housing across the range of very low, low and moderate income households in a manner that is economically sustainable for providers.

The regulation duplicates, overlaps or conflicts with any other regulation or Act: s 9(1)(b)(vi) of the LRA

Also, I am advised the inconsistencies identified are drafting errors which will be rectified at the earliest opportunity.

Should Committee members and staff have any further questions, they are welcome to contact Mr Luke Walton, Executive Director, Housing and Economic Policy, at the Department on [redacted].

Thank you for taking the time to bring this matter to the NSW Government's attention.

Yours sincerely

The Hon. Anthony Roberts MP
Minister for Planning
Minister for Homes

The Hon Gabrielle Upton MP
Parliamentary Secretary to the Premier

Ref: A5358660

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Dear Mr Layzell

I refer to your correspondence to the Premier dated 23 March 2022 concerning the Legislation Review Committee Digest No. 40/57, which considered the *Electoral Amendment (COVID-19) Regulation 2021* (**COVID Regulation 2021**) and the *Electoral Amendment (COVID-19) Regulation 2022* (**COVID Regulation 2022**). The Premier has asked me to respond on his behalf.

Regulations which vary the operation of an Act

I note the Committee's preference that amendments to an Act be made by an amending Bill rather than by subordinate legislation. The COVID Regulation 2021, which was made under section 274 of the *Electoral Act 2017* (**Electoral Act**), made changes to the *Electoral Regulation 2018* which vary the operation of certain provisions in the Electoral Act in relation to postal voting at by-elections. The COVID Regulation 2022 was similarly made under s274 of the Electoral Act and made changes to allow certain "COVID-19 affected electors" (as declared by the Electoral Commissioner) to vote by post in a by-election, despite eligibility requirements in the Electoral Act.

Section 274 was introduced in response to the COVID-19 pandemic to avoid by-elections failing or voters being disenfranchised due to inflexible requirements in the Electoral Act not accommodating uncertain COVID-19 impacts.

I am advised that a regulation made under section 274 of the Electoral Act:

- Is time limited – a regulation made under section 274 automatically repeals on 30 June 2022
- Can only be made for limited purposes - responding to the public health emergency caused by the COVID-19 pandemic
- Can only be made in limited circumstances – for by-elections held during the pandemic where the Electoral Commissioner has recommended the regulation and it is reasonable to protect the health, safety and welfare of persons from the risk of harm caused by COVID-19
- Cannot be made for purposes prescribed at section 274(6) of the Electoral Act – for example, to restrict or prevent a person from displaying a poster or handing out tangible electoral material in accordance with the Electoral Act
- Is subject to a tabling precondition – a regulation can only be made after the Electoral Commissioner's advice, and any advice obtained by the Minister from the Chief Health Officer in relation to the making of the regulation, has been tabled in Parliament.

Electoral Commissioner's power to declare COVID-19 affected electors

The COVID Regulation 2022 inserts Schedule 2 into the *Electoral Regulation 2018,* which enables the Electoral Commissioner to, in limited circumstances, declare electors of a specified electoral district to be "COVID-19 affected electors" for a by-election. The declaration (which must be published on the Electoral Commission's website) entitles COVID-19 affected electors to vote by post in the by-election, despite eligibility requirements in the Electoral Act.

In its report the Committee acknowledged that, in the extraordinary circumstances created by the COVID-19 pandemic, the declaration-making power of the Commissioner may facilitate the safe and flexible conduct of parliamentary by-elections in a timely and responsive manner during the public health emergency. However, the Committee also noted its preference for such declarations to be made by subordinate legislation to foster greater parliamentary oversight.

The Electoral Commissioner's declaration power at clause 2 of Schedule 2 to the *Electoral Regulation 2018* was introduced on the advice of the NSW Electoral Commissioner to protect the health, safety and welfare of persons from risk of harm caused by the COVID-19 pandemic. This advice was tabled in Parliament before the making of the COVID Regulation 2022. As noted in the Commissioner's advice, the declaration power is consistent with an equivalent power at clause 314A of the *Local Government (General) Regulation 2021* which has not been disallowed by Parliament.

I am advised that the flexibility of identifying affected areas by declaration rather than a regulation was required due to the constantly changing circumstances of the pandemic and the need for the Electoral Commission to explore the feasibility of providing postal packs to every elector in the relevant districts before identifying electors as COVID-19 affected. The Electoral Commissioner's declaration power is time limited and will automatically repeal on 30 June 2022.

The Government will take into account the Committee's comments if considering any future proposals for regulations to be made under section 274 of the Electoral Act.

Yours sincerely

Gabrielle Upton MP
Parliamentary Secretary to the Premier

CC: Hon Mark Speakman SC MP, Attorney General

The Hon. Matt Kean MP
Treasurer
Minister for Energy

Your ref: D22/12859
Our ref: MD22/3203

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Dear Mr Layzell Dave

Thank you for the opportunity to address issues raised by the Legislation Review Committee about the Electricity Supply Amendment (Renewable Fuel Scheme) Regulation 2021 (the Regulation).

I have considered the Committee's comments in the Digest about the Regulation. The Government's response, based on advice from the Office of Energy and Climate Change, is summarised below. For additional details, please see the attached table (Response to Digest No. 40/57).

The Government notes the Committee's comments that features of the amendment to the *Electricity Supply Act 1995* unduly trespass on personal rights and liberties, and notes the concerns expressed around parliamentary scrutiny arising from the Act's delegation of specific legislative powers to regulations.

Responding to these concerns broadly, the Government highlights that section 98D of the *Electricity Supply Act 1995* provided a power for regulations to introduce new schemes to the Energy Security Safeguard within Schedule 4A of the Act. This power contained important limitations that restricted the regulatory framework for any new scheme to the framework and provisions already in place for the Energy Savings Scheme (ESS). Parliament scrutinised the regulatory framework for the ESS and determined that the provisions were appropriate for both the ESS and by extension other Energy Security Safeguard Schemes.

The Government notes the Committee's comment that the penalty notice provision of the Regulation may contravene an individual's right to a fair trial or pose a risk of double punishment. The Government considers that the application of the *Fines Act 1996* to the issuance of penalty notices appropriately preserves the rights of individuals to a fair trial and their rights regarding double punishment. The *Fines Act 1996* preserves the right of a person issued a penalty notice to either have their matter heard and decided by a court or elect to pay the penalty notice, with the associated cost and time reduction benefits to the administration of justice.

The *Fines Act 1996* also makes it clear that once a penalty notice has been paid, further proceedings cannot be brought against the recipient for the same offence (see section 22A). Clause 216 does not remove this important protection, rather it enables other regulatory steps to be taken where a penalty notice has been issued. For example, it may be appropriate for an accreditation to be suspended or cancelled where there is evidence of improper creation of certificates.

The Government notes the Committee's comment that the amendment to the *Electricity Supply Act 1995* to provide compliance officers with broad powers to enter private property without a warrant when investigating compliance in relation to the energy security safeguard scheme. The Government considers the impacts of the powers of entry in the Regulation on an individual's right to privacy and property to be proportionate to the level of compliance risk for the scheme.

The Scheme Regulator requires the power to inspect premises and gather evidence as part of its responsibility to detect non-compliance. Without these powers, it would be nearly impossible to investigate cases where it appears that Accredited Certificate Providers (ACPs) under the scheme have claimed certificates for green hydrogen production fraudulently or beyond their entitlement. There have been comparable instances within the ESS where the scheme administrator was unable to take effective compliance action.

With no explicit power to enter premises and conduct inspections it would not be possible for the Scheme Administrator to identify breaches of Renewable Fuel Scheme (RFS) requirements. Compliance officer actions are limited by requirements in the Regulation and the common law to act reasonably in the execution of their duties. The Government considers the proposed powers of entry in the Bill are proportionate to regulatory risk for the effective operation of the RFS.

The Government notes the Committee's comment that potential extraterritorial effects may arise in ensuring compliance of the RFS due to the inclusion of approved corresponding schemes in the RFS. References to approved corresponding schemes in the Regulation are limited to the creation, registration and surrender of certificates within the RFS and do not include the use of powers by compliance officers.

Compliance for approved corresponding schemes is covered in Clause 171(2) which states that the Minister may only approve a corresponding scheme from another jurisdiction if the Minister is satisfied of specific conditions, including that the monitoring and enforcement of compliance with the corresponding scheme in question is no less stringent than the RFS. The Government is satisfied these provisions negate any risk of extraterritorial operation of the RFS.

The Committee also made a comment that the Regulation provides broad information sharing powers to the Scheme Administrator, Scheme Regulator and relevant agencies. Identified non-compliance with other regulatory frameworks must be brought to the attention of the regulator so that compliance risk can be appropriately assessed and acted on. The Government considers the information sharing provisions of the Regulation are appropriate as part of an effective compliance framework, which is essential to maintaining public confidence in the RFS.

The Government notes the Committee's concerns regarding parliamentary scrutiny due to the Act's delegation of specific legislative powers to regulations. Again, the Government refers to the parliamentary scrutiny of the *Electricity Supply Act 1995*, which restricted legislative provisions for additional Safeguard schemes to those already in place for the ESS.

Thank you again for your considered review of the Regulation.

Yours sincerely

Matt Kean MP
Treasurer
Minister for Energy

10.8.22

Encl: Table, Response to Digest No. 40/57

Office of Energy and Climate Change's Response to Digest No. 40/57

Issue	Office of Energy and Climate Change comment/Response
The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA	
Right to a fair trial and double punishment – penalty notice offences	The comments of the Committee are noted. The Office does not consider the penalty notice provision to contravene an individual's right to a fair trial or pose a risk of double punishment. The Office considers that the application of the *Fines Act 1996* to the issuance of penalty notice appropriately preserves the rights of individuals to a fair trial and their rights regarding double punishment. The Office notes: • Clause 216(3) of the Regulation provides that the *Fines Act 1996* applies to a penalty notice issued under the clause. • The *Fines Act 1996* allows a person issued a penalty notice to pay the amount if they do not wish to the have matter heard in court (see section 23A, *Fines Act 1996*). This preserves the right of an individual to elect to have their matter heard and decided by a court, or elect to pay the penalty notice, with the associated cost and time reduction benefits to the administration of justice. • The *Fines Act 1996* also makes it clear that once a penalty notice has been paid, further proceedings cannot be brought against the recipient for the same offence (see section 22A). Clause 216 does not remove this important protection, rather it enables other regulatory steps to be taken where a penalty notice has been issued, for example, it may be appropriate for an accreditation to be suspended or cancelled where there is evidence of improper creation of certificates.
Real property rights – power of compliance officers to enter premises	The comments of the Committee are noted. The Scheme Regulator- IPART (Independent Pricing and Regulatory Tribunal)- requires the power to inspect premises and gather evidence as part of its responsibility to detect non-compliance. After considerable consultation on nine options for enhanced compliance powers, the Government determined that a compliance officer should have the power to enter premises to ensure action can be taken to control serious non-compliance. With no explicit power to enter premises and investigate it would not be possible for the Scheme Regulator to identify breaches of Regulation requirements by accredited certificate providers, posing a risk to public trust.

	Comparable regulators in NSW and the Victorian Essential Services Commission have significant statutory powers to address these issues. Further, compliance officer actions are limited by requirements in Act, such as Clause 215(2), that ensures compliance officers enter at a "reasonable time" and (3), requiring that owner permission be sought to enter premises used only for residential purposes. The common law also implies a duty to act reasonably. The Office considers that the powers of entry in the Act strike the right balance and are proportionate to the need for entry of compliance officers.
Extraterritorial operation of scheme	The Office acknowledges that the Legislation Review Committee generally comments on legislation with potential extraterritorial effects that may cause possible confusion about its application and the Committee has raised this issue regarding the Renewable Fuel Scheme. The Act states approved corresponding schemes only pertains to creation, registration and surrender of certificates within the Scheme. Activities included within an approved corresponding scheme from another jurisdiction are included in the Scheme to that extent only. The Regulation does not seek to allow compliance officers to enter premises in other jurisdictions. Compliance for approved corresponding schemes is covered in Clause 171(2) which states that the Minister may only approve a corresponding scheme from another jurisdiction if the Minister is satisfied of specific conditions, including that the monitoring and enforcement of compliance with the corresponding scheme in question is no less stringent than the renewable fuel scheme established by the Regulation.
Right to privacy	The comments of the Committee are noted. However, the Office does not consider the information sharing arrangements described in the Regulation to unjustly impede on an individual's right to privacy. It is important for identified non-compliance with other regulatory frameworks be brought to the attention of the regulator so that the Scheme Regulator and Administrative can assess compliance risk and take any appropriate action. The Office considers the information sharing arrangements described in the Regulation to be appropriate and necessary for compliance and Scheme administration.
The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA	
Henry VIII clause	The comments of the Committee are noted.

Matters to be included in primary legislation	The *Electricity Supply Act 1995* provided a power for regulations to introduce new scheme under the Energy Security Safeguard under Schedule 4A of the Act. This power contained important limitations that restricted provisions for any new scheme to those already in place for the energy savings scheme (ESS). Parliament scrutinised the regulatory framework for the ESS and determined that the provisions were appropriate for both the ESS, and by extension, any new schemes introduced under the Energy Security Safeguard. To the extent that legislative powers are delegated to the Minister and to the regulations, these are powers likewise delegated under the ESS and are clearly defined and limited to matters deemed necessary for the operation of the Scheme. This flexibility is necessary to manage any unforeseen issues that can arise suddenly, which is particularly important in emerging industries like green hydrogen and renewable fuels. Failure to make timely adjustments to scheme administration and compliance that respond to emergent issues could threaten failure of the scheme, impose additional costs on industry and undermine public trust. The Office also notes that parliamentary oversight remains in place for these delegated powers as a resolution disallowing a statutory rule may be launched by either House of Parliament.