

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Report No. 55 on the Fair Trading Inspectors Bill 2013

QUEENSLAND GOVERNMENT RESPONSE

INTRODUCTION

On 20 November 2013, the Fair Trading Inspectors Bill 2013 (the Bill) was introduced into the Legislative Assembly. The Bill was subsequently referred to the Legal Affairs and Community Safety Committee (the Committee) with a report back date of 24 February 2014. Accordingly, on 24 February 2014, the Committee issued Report No. 55 – Fair Trading Inspectors Bill (the Report).

The Government's response to the Report's recommendation is provided below.

RESPONSE TO RECOMMENDATIONS

The Government thanks the Committee for its timely and detailed consideration of the Bill.

Recommendation 1

The Committee recommends the Fair Trading Bill 2013 be passed.

Queensland Government response to Recommendation 1

Noted.

Recommendation 2

The Committee recommends the Attorney-General and Minister for Justice clarifies whether an article or device taken under clause 38(4) is considered a 'seized thing', for example for the purpose of clauses 48 and 49, and:

- (a) if an article or device is considered a 'seized thing', the Attorney-General amends the Bill to introduce a time limit on how long the article or device can be held before being returned; or
- (b) if an article or device is not considered a 'seized thing', the Attorney-General clarifies this intention.

Queensland Government response to Recommendation 2

The Government agrees with the Committee that many businesses depend on information technology devices (including computers) and that any action that unnecessarily withholds an essential piece of equipment should not be supported. However, the Government is satisfied that the existing provisions of the Bill are consistent with this policy position.

Under the Bill, there is a distinction between the power described in clause 38(4) (General powers) and the seizure powers contained in clauses 41 (Seizing evidence at a place that may

be entered without consent or warrant) and 42 (Seizing evidence at a place that may be entered only with consent or warrant).

The short answer to the Committee's enquiry is that an inspector taking an article or device under clause 38(1)(f) for the purposes of producing an image or writing from an electronic document is not the same as a seizure under clauses 41 or 42 of an item the inspector believes is evidence of an offence.

While an inspector could potentially obtain computers and other information technology under either clause 38 or the seizure powers under clauses 41 or 42, the purpose and nature of taking the computer or other item are somewhat different under the two regimes.

Clause 38 sets out the general powers of inspectors after entering a place under clauses 22(1)(a), (c) or (d). These powers include an ability to take an extract from, or copy, a document at the place (clause 38(1)(e)), which is a power that appears in existing Acts about fair trading (for example, refer to *section 71(2)(d) of the Introduction Agents Act 2001*, *section 117(3)(c) of the Manufactured Homes (Residential Parks) Act 2003* and *section 50(3)(c) of the Tourism Services Act 2003*).

The Bill recognises that at some places visited by a fair trading inspector, there may not be the facilities for the inspector to take a copy of a document. As such, under the Bill an inspector may also take a document to another place for the purposes of making a copy (clause 38(1)(e)).

In addition, the Bill recognises that contemporary uses of information technology means that many documents will be stored electronically (rather than in hard copy form, which can be copied using traditional means). As a result, the Bill allows an inspector to produce an image or writing from an electronic document while at the place entered by the inspector (clause 38(f)).

There may be circumstances where it is not practicable for the inspector to produce an image or writing of an electronic document at the place entered by the inspector (for example, the relevant business may not have facilities to produce a copy of an electronic record). Alternatively, a person may not comply with an inspector's request to produce an image of an electronic document, making it impractical for the inspector to obtain a copy of the document. In circumstance such as this, the Bill allows the inspector to take the device containing the electronic document to another place to produce an image or writing (clause 38(1)(f)).

If this power is exercised, the inspector has a clear obligation to return the device to the place as soon as practicable (clause 38(4)). It is not considered necessary to specify a timeframe for returning items under clause 38(4), given that it is clear that acquiring a device under this section is only for the purpose of producing an image or writing from an electronic document and inspectors have a clear duty to produce the document and return the device as soon as practicable.

The general power to obtain documents under clause 38 (including the ability to produce images or writing from electronic documents) is particularly relevant to the role of fair trading inspectors in monitoring compliance with the Bill and primary Acts (clause 12).

The seizure powers under clause 41 and 42 are more focused on the investigation and enforcement functions of inspectors. An inspector may only seize a thing under clause 41 or 42 if the inspector reasonably believes the thing is evidence of an offence against the Bill or a primary Act.

If an inspector reasonably believed that an item (such as a computer) was itself evidence of a contravention of the Bill or a primary Act, then it is anticipated that the inspector would seize the item under clause 41 or 42, rather than using the general power under clause 38(2) for the purpose of producing an image or writing from an electronic document stored on the device. In this case, the provisions relating to the custody and return of seized items contained in the Bill would apply.

Recommendation 3

The Committee recommends that the Attorney-General and Minister for Justice clarifies the process for what would happen in the event that an innocent third party who had security over a seized item needed to take action on the item, such as to recoup money owed.

Queensland Government response to Recommendation 3

The Government agrees with the Committee that the Bill should not interfere with the right of a third party to act upon a security interest held over a seized item. However, the Government is satisfied that the existing provisions of the Bill are consistent with this policy position.

Clause 43 of the Bill relates to seizure of property subject to security. Clause 43(1) provides that ‘an inspector may seize a thing, and exercise powers relating to the thing, despite a lien or other security over the thing claimed by another person’.

Clause 43(2) provides that ‘the seizure does not affect the other person’s claim to the lien or security against a person other than the inspector or person acting for the inspector’.

Importantly, clause 49 relates to the return of a seized thing. Clause 49(2) states that ‘the inspector must return the seized thing to an owner –

- (a) generally – at the end of 1 year after the seizure; or
- (b) if a proceeding for an offence involving the thing is started within the 1 year – at the end of the proceeding and any appeal from the proceeding’.

Clause 49(3) provides, ‘despite subsection (2), if the thing was seized as evidence, the inspector must return the thing seized to an owner as soon as practicable after the inspector is satisfied –

- (a) its continued retention as evidence is no longer necessary; and
- (b) it is lawful for the owner to possess it’.

Consistent with clause 43(2), clause 49(4) states that ‘nothing in this section affects a lien or other security over the seized thing’.

It is paramount that the integrity of evidence is maintained during the investigation and prosecution of offences under fair trading legislation. As such, the Bill does not contain a process for a security holder to take possession of an item seized as evidence.

As explained above, seizure does not affect a third party's lien or other security over a seized thing. However, as also explained above, the Bill limits the period of time that seized items may be retained by an inspector. Once released (for example, because a proceeding is concluded), the security holder would be able to exercise their rights in relation to the item.

Recommendation 4

The Committee recommends that the Attorney-General and Minister for Justice:

- (a) clarifies whether a review notice is required to be provided in the event the chief executive fails to comply with the 30 day statutory timeframe for reaching a review decision, or whether the original decision would be confirmed and the applicant not given a review notice; and
- (b) if the review notice is required to be provided, the Bill be amended to clarify this intention; or
- (c) if a review notice is not required, the Bill is amended to require a notice be provided in these circumstances.

Queensland Government response to Recommendation 4

The Queensland Government notes the Committee's recommendation, but does not support inclusion of an additional clause requiring the chief executive to provide an additional review notice where clause 76(3) applies.

Clause 76(3) provides a safeguard in that if the chief executive fails to decide an internal review application within the 30 days (as required by clause 76(1)), then the applicant is able to make an appeal directly to the Magistrate's Court against the original decision without having to wait for a further notice or decision from the chief executive. Adding a further notification process where the chief executive fails to make a decision within 30 days would present a risk of unnecessarily delaying a person's right to appeal to the court if the chief executive fails to decide an internal review within the legislated timeframes.

However, the Committee's consideration of this issue has highlighted that the Bill would benefit from a clarification of the time for making an appeal where clause 76(3) applies. The Attorney-General and Minister for Justice intends to move a minor amendment for this purpose, during the consideration in detail stage of the debate of the Bill.