

# **Fair Trading Inspectors Bill 2013**

**Report No. 55**

**Legal Affairs and Community Safety Committee**

**February 2014**

## Legal Affairs and Community Safety Committee

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### Acknowledgements

The Committee acknowledges the assistance provided by the Department of Justice and Attorney-General.

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**Abbreviations**

Attorney-General	The Honourable Jarrod Bleijie MP, Attorney-General and Minister for Justice
Bill	Fair Trading Inspectors Bill 2013
Committee	Legal Affairs and Community Safety Committee
Department	Department of Justice and Attorney-General
QCCL	Queensland Council for Civil Liberties
SDPC	Service Delivery and Performance Commission

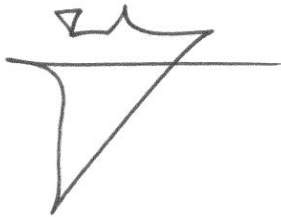
## Chair's foreword

This Report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Fair Trading Inspectors Bill 2013.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the Committee, I thank those individuals and organisations who lodged written submissions on this Bill. I also thank the Committee's Secretariat, and the Department of Justice and Attorney-General.

I commend this report to the House.

A handwritten signature in black ink, consisting of a stylized 'I' and 'B' with a horizontal line extending to the right.

Ian Berry MP

**Chair**

## Recommendations

### Recommendation 1

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The Committee recommends the Fair Trading Inspectors Bill 2013 be passed.

### Recommendation 2

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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.

### Recommendation 3

10

The Committee recommends 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 sell it to recoup money owed.

### Recommendation 4

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The Committee recommends 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 decision notice; and
- (b) if a review notice is required to be provided, the Bill be amended to clarify this intention; or
- (c) if a review notice is not required to be provided, the Bill is amended to require a notice be provided in these circumstances.

## 1. Introduction

### 1.1 Role of the Committee

The Legal Affairs and Community Safety Committee (Committee) is a portfolio committee of the Legislative Assembly which commenced on 18 May 2012 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The Committee's primary areas of responsibility include:

- Department of Justice and Attorney-General;
- Queensland Police Service; and
- Department of Community Safety.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation;
- the application of fundamental legislative principles; and
- for subordinate legislation – its lawfulness.

The Fair Trading Inspectors Bill 2013 (Bill) was introduced into the House and referred to the Committee on 20 November 2013. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the Committee to report to the Legislative Assembly by 24 February 2014.

### 1.2 Inquiry process

On 28 November 2013, the Committee wrote to the Department of Justice and Attorney-General (Department) seeking advice on the Bill, invited stakeholders and subscribers to lodge written submissions and issued a media release announcing its inquiry.

The Committee received written advice from the Department and received two submissions (see **Appendix A**).

A public briefing was held on Thursday, 12 December 2013, where the Committee received evidence from representatives from the Department. On 6 February 2014, a public hearing was held and the Committee received oral submissions from the Queensland Council for Civil Liberties (see **Appendix B**). Copies of both transcripts can be accessed on the Committee's website.

### 1.3 Policy objectives of the Fair Trading Inspectors Bill 2013

The objectives of the Bill are to:

- address inconsistencies, harmonise and consolidate inspectorate provisions contained in 14 Acts about fair trading;
- improve enforcement and compliance activities relating to fair trading legislation;
- provide a flexible legislative framework which enables additional Acts dealing with fair trading to be added to the scope of the Bill in the future; and

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<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- repeal the inspectorate provisions contained in particular Acts about fair trading and make consequential amendments.<sup>2</sup>

The 14 primary Acts for which common inspectorate provisions will apply are the:

- *Agents Financial Administration Act 2013*
- *Debt Collectors (Field Agents and Collection Agents) Act 2013*
- *Funeral Benefit Business Act 1982*
- *Introduction Agents Act 2001*
- *Land Sales Act 1984*
- *Manufactured Homes (Residential Parks) Act 2003*
- *Motor Dealers and Chattel Auctioneers Act 2013*
- *Property Occupations Act 2013*
- *Residential Services (Accreditation) Act 2002*
- *Retirement Villages Act 1999*
- *Second-hand Dealers and Pawnbrokers Act 2003*
- *Security Providers Act 1993*
- *Tourism Services Act 2003*
- *Travel Agents Act 1988*

#### 1.4 Consultation on the Bill

As set out in the Explanatory Notes, the previous Government's Service Delivery and Performance Commission (SDPC) conducted consultation on fair trading provisions during its Review of the Department of Tourism, Fair Trading and Wine Industry Development (Review).<sup>3</sup> The Review made 39 recommendations in its 2007 report. The Bill implements a key recommendation of the Review, that a single Act be introduced to consolidate and standardise fair trading enforcement powers under fair trading Acts (SDPC recommendation 18).

The Explanatory Notes advise that Queensland Government agencies were consulted during development of the Bill, and note that '*... a draft Bill was released for public consultation.*'<sup>4</sup> The public consultation on the Bill occurred in February 2013 and the Explanatory Notes advise that no issues were identified.<sup>5</sup>

#### 1.5 Should the Bill be passed?

Standing Order 132(1) requires the Committee determine whether or not to recommend the Bill be passed.

The Committee considers the policy objectives being pursued by this Bill will bring welcome consistency to fair trading legislation across a number of industries, do not introduce significant change and are generally supported by stakeholders.

The Committee therefore makes the following recommendation.

##### **Recommendation 1**

The Committee recommends the Fair Trading Inspectors Bill 2013 be passed.

<sup>2</sup> *Explanatory Notes*, Fair Trading Inspectors Bill 2013, page 1.

<sup>3</sup> *Explanatory Notes*, Fair Trading Inspectors Bill 2013, page 8.

<sup>4</sup> *Explanatory Notes*, Fair Trading Inspectors Bill 2013, page 8.

<sup>5</sup> Letter from the Department of Justice and Attorney-General, 10 December 2013, page 5.



## 2. Examination of the Fair Trading Inspectors Bill 2013

This section discusses issues raised and considered during the Committee's examination of the Bill.

### 2.1 Background to the Bill

The Fair Trading Inspectors Bill (Bill) was originally introduced into the 53<sup>rd</sup> Parliament in 2011 and lapsed when that Parliament was dissolved in February 2012. The Bill was re-introduced to the 54<sup>th</sup> Parliament in November 2013 and referred to this Committee for examination.

The SDPC review (2007) and an earlier internal review (2002) identified that inconsistencies in primary fair trading legislation have arisen as a result of drafting styles changing over time and because legislation has been enacted and amended at different times. However, *'[i]n many instances, no substantive reasons were identified for the inconsistencies in inspectorate and enforcement provisions between fair trading Acts.'*<sup>6</sup> Both reviews of the Bill recommended that fair trading provisions be consolidated and standardised.

Other reasons why the Bill is considered necessary are provided in the Explanatory Notes and include:

*Variations in inspectorate and enforcement provisions result in inefficiency and difficulty enforcing legislation, as well as inconsistent enforcement practices. Moreover, businesses and consumers may have difficulty understanding the different enforcement powers that may be exercised by inspectors under various Acts dealing with fair trading matters.*<sup>7</sup>

At the public briefing, the Department told the Committee:

*Rather than having similar, albeit slightly inconsistent inspectorate provisions contained in each act, the Fair Trading Inspectors Bill enacts common inspectorate provisions for 14 separate Acts about fair trading and consumer protection matters. This is a more efficient approach to dealing with compliance and enforcement matters in fair trading Acts and will promote consistency in the enforcement of fair trading legislation.*<sup>8</sup>

### 2.2 Power to stop and search vehicles

Clauses 33-36 of the Bill introduce new provisions that provide for inspectors to stop or move a vehicle if they reasonably suspect, or are aware, that something in or on the vehicle may provide evidence of an offence against the Act or a primary Act.

In its submission to the Committee, the Queensland Council for Civil Liberties (QCCL) recommended that a warrant should be a pre-requisite before a vehicle can be inspected, other than in *'... circumstances making the obtaining one impractical ...'*. In the event that a warrant could not be obtained, the QCCL considered that actions should be *'... justified to a judicial officer after the event.'*<sup>9</sup>

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<sup>6</sup> Explanatory Notes, Fair Trading Inspectors Bill 2013, page 2.

<sup>7</sup> Explanatory Notes, Fair Trading Inspectors Bill 2013, page 2

<sup>8</sup> Transcript of Proceedings (Hansard), Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 3.

<sup>9</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

The Chamber of Commerce and Industry Queensland (CCIQ) also commented on the new power to stop and search vehicles, noting ‘... *this clause may have the negative effect of capturing businesses that are compliant with operating fair trading legislation.*’ The CCIQ considered there must be compelling justification for inspectors to pull over a commercial vehicle and that these actions should be targeted to prevent implementation of random compliance measures.<sup>10</sup>

In the Department’s response to submissions, it stated the powers to stop or move a vehicle are important to retain without amendment ‘... *as the Bill needs to contain a spectrum of powers to deal with the wide range of issues faced by fair trading inspectors, including traders who may operate from (or keep records in) vehicles.*’<sup>11</sup>

The Department expressed concern that a requirement to obtain a warrant in order to stop or move a vehicle could significantly detract from the effectiveness of the provision and may not be in keeping with the policy objectives of the Bill.<sup>12</sup> The provisions do not allow for random checks of vehicles, and policies, procedures and training will be developed by the Office of Fair Trading to ensure the new powers are exercised safely and lawfully.<sup>13</sup>

During the Departmental public briefing the Member for Nicklin asked how the Committee can be assured that inspectors would use the power to stop and search vehicles ‘... *infrequently and sparingly.*’<sup>14</sup> The Department advised that an action to stop and search a vehicle must be relevant to the enforcement of the 14 pieces of legislation that are covered by the Bill. In addition:

*Relatively few of those pieces of legislation, or the provisions of those, would give rise to a circumstance where an inspector would need to hold up a vehicle or to search a vehicle. So the scope for using those powers across the 14 pieces of legislation are actually relatively limited ... the powers will apply where an inspector reasonably suspects or is aware that a thing in or on a vehicle may provide evidence of the commission of an offence against the fair trading inspectors act or one of the primary acts. So there does need to be a link—a suspicion of an offence under one of those fair trading acts for the powers to apply.*<sup>15</sup>

#### Committee Comment

The Committee considers that the powers in the Bill to stop or move a vehicle that is reasonably suspected of having a thing in or on it that may provide evidence of a breach of the Act or a primary Act, are justified. Fair trading inspectors require such powers in order to effectively enforce the legislation. The Committee acknowledges there are relatively few circumstances in which these powers can be used, and considers that the use of these powers should be monitored and reported on to ensure they are not misused. The Committee does not consider that a requirement for inspectors to obtain a warrant prior to stopping or moving a vehicle is necessary or justified, and supports the development of policies, procedures and training to support the effective implementation of the new provisions.

<sup>10</sup> Chamber of Commerce and Industry Queensland, Submission No. 2, page 2.

<sup>11</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 3.

<sup>12</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 3.

<sup>13</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 7.

<sup>14</sup> *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 4.

<sup>15</sup> *Transcript of Proceedings. (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12<sup>th</sup> December 2013 page 4.

## 2.3 Penalties

Currently, penalties in primary Acts can vary for the same offence. For example, the penalty for obstructing an inspector or authorised officer varies from 20 penalty units<sup>16</sup> to 200 penalty units<sup>17</sup>, with five different levels of penalty provided in the Acts. Clause 69(1) of the Bill includes a penalty of 200 penalty units or one year imprisonment for obstructing an inspector, or someone helping an inspector, who is exercising power under the Bill. For the majority of other penalties applied to offences in the Bill, the highest penalty in the primary Act has been selected for application in the Bill.

At the public briefing the Department advised the Committee that penalties had been standardised and that:

*... in general terms, the way the Fair Trading Inspectors Bill was drafted, where there were similar provisions across the primary acts the higher penalty was applied as the penalty for that provision. So if in the primary act there was a range of penalties for failing to return your identity card, the highest penalty was chosen.*<sup>18</sup>

### Committee Comment

The Committee supports the standardisation of penalties for the same offences across fair trading legislation.

## 2.4 General power to enter places

Clause 22(1) of the Bill provides that an inspector may enter a place if an occupier consents; if it is a public place and open to the public; if the entry is authorised under warrant or if it is a place of business regulated under a primary Act.

In its submission to the Committee, the QCCL recommended that entry without consent or warrant to a place of business under clause 22(1)(d) should be limited to ‘... carrying out an audit for compliance with rules, guidelines or other statutory requirements applied to the organisation.’<sup>19</sup>

The Department considered that it was not necessary to amend clause 22(1)(d) given the Bill clearly outlines the functions of inspectors (clause 12(1)), and provides that an inspector may only exercise powers under the Act for the purpose of these functions (clause 12(2)).<sup>20</sup>

### Committee Comment

The Committee considers that safeguards surrounding the powers and purpose of inspectors to enter a place of business are adequately provided for in the Bill. Inspectors’ functions are clearly provided for and include, for example, the power to investigate, monitor and enforce compliance with the Act. The Bill further limits the powers of inspectors to carrying out these functions.

The Committee does not consider amendment to the general power to enter places is necessary.

<sup>16</sup> *Manufactured Homes (Residential Parks) Act 2003*, s27(1).

<sup>17</sup> *Introduction Agents Act 2001*, s81(1) and *Tourism Services Act 2003*, s67(1).

<sup>18</sup> *Transcript of Proceedings (Hansard)*, Public Briefing, Legal Affairs and Community Safety Committee, 12 December 2013, page 12.

<sup>19</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

<sup>20</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 1.

## 2.5 Acknowledgement of consent

Clause 26(1) of the Bill provides that if an occupier of a place consents to an inspector entering the place, the inspector may ask the occupier to sign an acknowledgement of the consent.

The QCCL recommended the Bill should mandate that inspectors obtain written consent or make an electronic recording of the consent. Also, that the Bill should ensure that an appropriate person authorises the consent, such as ‘... *an owner, director or manager*’ in the case of a business.<sup>21</sup>

In its response to submissions, the Department advised the Committee that although it is not mandatory for an inspector to obtain written consent from an occupier before entering a place:

*... if an issue arises in a proceeding about whether the occupier consented to the entry ... the onus of proof is on the person relying on the lawfulness of the entry to prove that the occupier consented. This provides significant incentive for inspectors to seek written acknowledgement of an occupier’s consent to entry wherever practicable.*<sup>22</sup>

The Department considered, given the range of businesses covered by the Bill, it was not necessary or desirable for the Bill to ‘... *stipulate the type of employee or company officer that can consent to an inspector’s entry to a place* ...’<sup>23</sup>

### Committee Comment

The Committee considers the Bill provides adequate safeguards regarding occupier consent (or otherwise) for an inspector to enter a place. For example, the Bill provides that an occupier is not required to consent to a request for an inspector to enter a place; that consent can be withdrawn at any time and that provisions such as these must be explained to an occupier before an inspector asks for consent to enter a place.

In addition, as the Department identified, the onus of proof is on the person relying on the lawfulness of the entry (who in this case is the inspector) to prove the occupier consented. The Committee is satisfied that the provisions in the Bill are appropriate in the current form.

## 2.6 Use of evidence

The QCCL submitted that Division 2 (entry by consent) should be qualified to state that ‘... *evidence obtained during an inspection by consent is only admissible in relation to a proceeding under the legislation pursuant to which the inspector was acting at the time of the inspection.*’<sup>24</sup>

The Department advised the Committee that the Bill provides that an inspector may only seize a thing at a place it has entered with consent, if ‘... (a) *the inspector reasonably believes the thing is evidence of an offence against [the] Act or a primary Act; and (b) seizure of the thing is consistent with the purpose of entry as explained to the occupier* ...’<sup>25</sup>

### Committee Comment

Provisions in the Bill that act as safeguards on the seizure of evidence obtained by an inspector who enters a place with an occupier’s consent, as identified by the Department, are supported by the Committee. However, these provisions do not address the issue of the admissibility of evidence.

<sup>21</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

<sup>22</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 2.

<sup>23</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 2.

<sup>24</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

<sup>25</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

## 2.7 Warrants

### Defect in relation to a warrant

Clause 31 of the Bill introduces a new provision which provides that a warrant is not invalidated due to a defect in the warrant or compliance with the subdivision 'obtaining a warrant', unless the defect affects the substance of the warrant in a material way. This type of provision is not unique to this Bill and appears in other Queensland legislation.<sup>26</sup>

The QCCL is concerned that this provision '*... narrows the test for setting aside a search warrant from that at common law.*'<sup>27</sup> The QCCL recommended that this clause be removed and that common law should be applied.

In its response to submissions, the Department advised that the intention of the provision is to '*... ensure that minor defects in warrants (that is, defects that do not affect the substance of the warrant in a material particular) do not invalidate warrants.*' Also, that the invalidation of warrants that contain minor and technical issues, and which do not impact on the substance of a warrant, is not in the interest of justice.<sup>28</sup>

### Committee Comment

The Committee notes both the views of the QCCL and the Department with regard to this provision. The Committee agrees with the intention of the provision, which is to prevent the invalidation of warrants that contain only minor defects that do not affect the warrant in a material way and are largely compliant with the Act. The Committee also notes that similar provisions are contained in other Queensland legislation and that no comment was received from the Bar Association of Queensland or the Queensland Law Society.

### Report to the court

In its submission to the Committee, the QCCL recommended that '*... individuals executing search warrants should be required to report to the Court*' stating whether or not the warrant was executed and the results of the execution, or reasons why the warrant was not executed.<sup>29</sup>

The Department did not support this recommendation, noting that it would not benefit stakeholders, rather it would introduce additional and unnecessary regulatory obligations.<sup>30</sup>

### Committee Comment

The Committee agrees with the view of the Department, that amendment of the Bill is not justified in this case, given the additional regulatory obligations that would be imposed on stakeholders for negligible improvement in policy.

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<sup>26</sup> See for example, *Water Fluoridation Act 2008* s38 and the *Legal Profession Act 2007* s550.

<sup>27</sup> Queensland Council for Civil Liberties, Submission No. 1, page 2.

<sup>28</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 3.

<sup>29</sup> Queensland Council for Civil Liberties, Submission No. 1, page 3.

<sup>30</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 6.

## 2.8 Electronic devices

Clause 38(4) of the Bill introduces a new provision which provides that if an inspector takes an article from a place, or a device capable of producing a document from an electronic document, for the purpose of producing a document, the inspector must produce the document and return the article or device as soon as practicable. This provision appears in other Queensland legislation, such as the *Health Ombudsman Act 2013*, the *Electoral Act 1992* and the *Building Boost Grant Act 2011*, but not in any of the primary fair trading Acts.

The QCCL expressed concern in its submission to the Committee that there is no time limit on how long inspectors can keep a device in these circumstances, other than stipulating that it must be returned as soon as practicable. Given the important role computers play in society, and the relative ease with which a forensic image can be taken from an electronic device, the QCCL recommended that the Bill be amended to require inspectors to return devices within seven days unless a court order has been granted to extend this time.<sup>31</sup>

The Department did not support the recommendation for inspectors to be required to return a seized device within seven days, noting that it would increase costs for the Office of Fair Trading; place an unnecessary burden on inspectors; it would be impractical in many circumstances and *'... would lead to inefficiencies in investigations, monitoring and enforcement activities.'*<sup>32</sup>

In the Department's response to submissions, it also drew the Committee's attention to clause 48 (access to a seized thing) and clause 49 (return of a seized thing). The Department considers that these provisions:

*... appropriately balance the public interest in protecting the evidential value of a computer seized as part of an investigation with the interests of the owners of seized items in terms of access and return of seized property.*<sup>33</sup>

### Committee Comment

The Committee notes the concern raised by the QCCL with regard to the lack of a time limit on how long fair trading inspectors can retain articles or devices taken for the purpose of producing a document (clause 38(4)). The provisions drawn to the Committee's attention by the Department regarding access to, inspection of and return of a seized thing are also noted.

It remains unclear whether provisions that apply to seized items that are held as evidence equally apply to devices taken under clause 38(4) for the purpose of producing a document. If they do, the Committee considers the potential for an inspector to retain a device such as a computer for the sole purpose of producing a document for up to one year or more (clause 49) as excessive. While this time limit may be appropriate for items held as evidence, it is questionable whether it is necessary for the purpose of producing a document. The vast majority of businesses have a high level of dependency on devices such as computers and any action that unnecessarily withholds an essential piece of equipment from a business is not supported by the Committee.

As such, the Committee recommends that the Attorney-General clarifies whether articles or devices taken under clause 38(4) are considered seized things under the Bill. If they are, the Committee recommends that the Bill be amended to impose a more reasonable time limit on how long the items can be held before being returned.

<sup>31</sup> Queensland Council for Civil Liberties, Submission No. 1, page 3.

<sup>32</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 4.

<sup>33</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 4.

**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.

**2.9 Property subject to security**

Clause 43 of the Bill introduces a new provision that allows inspectors to seize an item and exercise powers over it, despite a lien or other security over the item claimed by another person. The seizure does not affect the person's claim to the lien or other security against a person other than the inspector or a person acting for the inspector. This provision appears in other Queensland legislation, such as the *Electoral Act 1992*, the *Health Ombudsman Act 2013* and the *Waste Reduction and Recycling Act 2011*, but not in any of the primary fair trading Acts.

Clause 49 provides for the return of a seized item, which must be returned to its owner one year after the seizure or, if a proceeding for an offence involving the item commences within one year, at the end of the proceeding and any appeal from the proceeding. Despite this, an item must be returned as soon as practicable after the inspector is satisfied that the item is no longer required to be held as evidence. Nothing in this clause affects a lien or other security over a seized thing.

The QCCL considers that innocent third parties should have a right to obtain the release of seized items and to seek a court order if an inspector will not agree to an items release. The organisation recommends that provision be made for '*... innocent third parties such as financial institutions to apply to the Court to obtain the release of anything seized so they can vindicate their rights.*'<sup>34</sup>

In the Department's response to submissions, it noted that the interests of innocent third parties are protected in the following ways:

- The seizure of property does not affect the other person's claim to the lien or other security against a person other than the inspector or a person acting for the inspector (clause 43(2));
- Nothing in the provision that relates to the return of a seized item affects a lien or other security over the seized item (clause 49); and
- An obligation is imposed on inspectors to return a seized item within given timeframes, or under certain conditions (clause 49).

The Department did not support amendment to the Bill to allow third parties '*... to apply to a court for inspectors to fulfil their obligations under clause 49.*'<sup>35</sup>

<sup>34</sup> Queensland Council for Civil Liberties, Submission No. 1, page 3.

<sup>35</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 5.

### Committee Comment

The Committee considers that the Bill is clear in ensuring the seizure of an item does not affect an innocent third person's claim to the seized item. However, it is not clear what would happen in the event an innocent third party needed to, for example, sell a seized item for which they had security over due to missed payments.

To assist in clarifying this matter, the Committee recommends that the Attorney-General explains in the second reading speech the process of 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 sell it to recoup money owed.

### **Recommendation 3**

The Committee recommends 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 sell it to recoup money owed.

## **2.10 Criminal history reports**

Clause 63(1) of the Bill provides that the chief executive can request a written criminal history report from the commissioner of the police service about the criminal history of a person, if an inspector reasonably suspects the person may be present at a place the inspector enters under Part 2 (entry to places by inspectors) and may create an unacceptable level of risk to the inspector's safety. Clause 63(2) provides that a person must not disclose a report about a person's criminal history, or information contained in the report, to anyone else.

The QCCL submitted that people whose criminal histories have been accessed should be notified of the access within 12 months, unless this would compromise an ongoing investigation.

In the Department's response to submissions it advised that it considered the provision to be sufficiently limited '*... to prevent 'blanket' criminal histories being obtained for any and all persons at a place.*'<sup>36</sup> It noted that before a criminal history report can be requested, an inspector must reasonably suspect the person (a) may be present at the place the inspector plans on entering, and (b) may create an unacceptable level of risk to the inspector's safety. The Department also drew the Committee's attention to confidentiality and destruction provisions in the Bill for criminal history reports.

### Committee Comment

The Committee considers there are adequate safeguards in place to limit the circumstances in which a criminal history report can be requested, and to provide for the confidentiality and destruction of these reports.

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<sup>36</sup> Letter from the Department of Justice and Attorney-General, Attachment 7, 4 February 2014, page 5.



### 3. Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that ‘fundamental legislative principles’ (FLP) are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill.

The examination raised a number of potential FLP issues in various provisions. The Committee is satisfied the majority of the potential breaches are either minor in nature, have been sufficiently addressed in the Explanatory Notes or replicate existing provisions in primary Acts. Accordingly, the Committee has not detailed them all in this report.

The Committee brings the following significant matters to the attention of the House.

#### 3.1 Rights and liberties of individuals

The *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

##### Administrative power

Clause 76 of the Bill provides for a right of review, whereby the chief executive must, within 30 business days after receiving an application to review a decision:

- review the decision;
- decide to confirm, amend or substitute another decision for the original decision; and
- give the applicant notice of the review decision.

If the chief executive’s decision is not the one sought by the applicant, the review notice must include certain information, such as the reason for the decision and details of how the applicant can appeal. If the chief executive does not give the applicant the review notice within the 30 days, it is taken that the chief executive has confirmed the original decision. That is, rejected the applicant’s appeal. Clause 78 provides that a notice of appeal against the chief executive’s decision must be filed with the court within 28 days.

Although there are statutory requirements on the chief executive to, for example, review a decision and give notice of the chief executive’s decision, it is unclear why it is considered necessary to provide for circumstances where the chief executive fails to comply with the statutory requirement. Having put in place a statutory timeframe within which the chief executive must give a review notice, making provision for when the chief executive does not comply raises potential FLP issues, especially given that the provisions appear to automatically disadvantage the applicant by upholding the original decision.

It is arguable that this clause may provide an incentive for the chief executive to not comply with the statutory timeframe for reaching a review decision or, in the most extreme cases, to not undertake a review at all. This is because inaction by the chief executive would result in the inspector’s original decision being confirmed and the applicant’s appeal being rejected.

It is also unclear from the current drafting of the Bill whether the chief executive would still be required to provide a review decision notice if he or she failed to comply with the 30 day statutory timeframe, or whether the original decision would be confirmed and the applicant not given a review decision notice.

If the latter is the case, it would be difficult for a person to lodge an appeal against the original decision with a Magistrates Court, as they would not have received a review decision notice, which is required to specify the review notice day and the reasons for the chief executive's decision. Without knowing why the chief executive reached a decision, other than it took the chief executive more than 30 days, it would be difficult for a person to appeal.

#### Committee Comment

The Committee is concerned about the lack of clarity in the Bill regarding whether the chief executive would be required to provide a review decision notice if he or she failed to comply with the statutory timeframe, or whether the original decision would be confirmed and the applicant not given a review decision notice. Such lack of clarity could result in additional red tape with court appeals, which would not be in line with the intention of the Bill.

The difficulty this could create in lodging an appeal against a chief executive's decision is also noted by the Committee. The Committee considers that inaction by a chief executive should not be incentivised, and given the importance of review processes for people affected by decisions made under the Bill, that this policy should be unambiguous.

#### **Recommendation 4**

The Committee recommends 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 decision notice; and
- (b) if a review notice is required to be provided, the Bill be amended to clarify this intention; or
- (c) if a review notice is not required to be provided, the Bill is amended to require a notice be provided in these circumstances.

### **3.2 Institution of Parliament**

The *Legislative Standards Act 1992* requires that legislation has sufficient regard to the institution of Parliament.

Clause 67 of the Bill provides that a person may claim compensation from the State if they incur loss because of the exercise, or purported exercise of a power by or for an inspector. In considering whether it is just to order compensation, the court must have regard to any relevant offence committed by the claimant. The Bill provides that a regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.

*Independence of judiciary*

It is arguable that this provision, by specifying the matters to which a court must have regard, fetters the discretion of the court and therefore may prejudice the independence of the judiciary. It is noted, however, that this approach is not unusual. A significant amount of other legislation specifies matters to which the courts may, or must, have regard when reaching decisions and set guidelines for the courts.<sup>37</sup>

*Delegation of power from the Legislative Assembly*

The same provision also represents a delegation of legislative power from the Legislative Assembly to the Governor in Council, as it provides that a regulation may prescribe other matters that may or must be taken into account by the court. It may be considered that the court would be qualified to decide whether it is just to order compensation, without any direction from a regulation.

Committee Comment

The Committee notes that the Bill provides that a regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation if the person incurred loss because of the exercise of a power by an inspector. Although this type of provision is generally considered poor practice given the independence of the judiciary and the delegation of power away from the Legislative Assembly, the Committee considers it is not a unique provision and that no amendment to the Bill is required. However, the Committee also considers that justification for a provision such as this would be appropriate for inclusion in the Explanatory Notes.

**3.3 Explanatory Notes**

Part 4 of the *Legislative Standards Act 1992* relates to Explanatory Notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

The Explanatory Notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origin. However, as noted in Part 2.7 and 3.2 of this report, the Committee considers that additional justification for clause 31 (defect in relation to a warrant) and clause 67 (compensation) would have benefited interpretation of these provisions.

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<sup>37</sup> See for example, the *Workplace Health and Safety Act 2011*, *Hospital and Health Boards Act 2011* and *Transport Operations Road Use Management Act 1995*.

**Appendix A – List of submissions**

<b>Sub #</b>	<b>Submitter</b>
001	Queensland Council for Civil Liberties
002	Chamber of Commerce and Industry Queensland

## **Appendix B – Schedule of Witnesses at the Public Hearing**

<b>Queensland Council for Civil Liberties</b>
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| <ul style="list-style-type: none"><li>• Mr Michael Cope, President</li></ul> |
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